

Hearing 66 - 201800206

Decision

Department of Labour and Pensions

Sandy Hermiston
Ombudsman

7 February 2019

Summary:

The Applicant made a request to the Department of Labour and Pensions for access to records relating to amendments to a pension plan trust deed made in 2016 and 2017.

The Department refused to disclose any records. During the appeal process, the Department referred the request to the Pension Plan Administrator, who is required under the *National Pensions Law* to provide certain information to members of the pension plan. As a result, the Applicant received some 900 pages of records from the Pension Plan Administrator.

The Department also held records relating to the amendment of the trust deed but refused to disclose them to the Applicant, arguing that some of those records were exempt on the basis that they were privileged legal advice and section 17(1)(a) of the *Freedom of Information Law (2018 Revision)* (FOI Law) applied to them. The Department claimed that other records were internal communications, the disclosure of which would prejudice the conduct of public affairs under section 20(1)(d) of the FOI Law.

The Ombudsman decided that the legal advice was exempt as claimed. However, the Ombudsman decided that the internal communications were inconsequential and/or dealt with matters already known to the Applicant, and therefore were not exempt under the FOI Law as claimed.

The Ombudsman also found that the Department had not properly responded to two points in the initial request and directed them to do so.

The Ombudsman expressed concerns regarding the Department's record keeping practices and recommended that all future internal discussions on amendments to pension plan trust deeds, as well as the Department's other business and affairs, be recorded fully and accurately as required by law.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision) (FOI Law)
Freedom of Information (General) Regulations 2008 (FOI Regulations)
National Pensions (Amendment) Law 2016 (NPL)
National Pensions (General) (Amendment) Regulations 2017 (NPR)

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A. INTRODUCTION

[1] On 24 October 2017 the Applicant requested the following records from the Department of Labour and Pensions (the Department):

the entire records in any way related to the Cayman Islands Chamber of Commerce Trust Deed and all proposed amendments thereof held by the Pension Minister, Pension Ministry, Superintendent of Pensions/National Pension Office and the National Pension Board.

[2] On 7 December 2017 the Applicant repeated the request and also asked for records covering the time since the initial request had been made.

[3] The request named a wide variety of records, including correspondence, reports, legal opinions, payments, memoranda, agendas and minutes of meetings, phone logs and conversation records, investigations, court actions, entities consulted, and records relied on by the Superintendent of Pensions in ensuring legal compliance and approving pension plan amendments.

[4] The request excluded certain records, including specific records relating to the Trust Deed and records released in response to a previous FOI request.

¹ In this decision all references to “sections” are to sections of *the Freedom of Information Law (2018 Revision)*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

- [5] On 5 January 2018 the Department denied access, relying on the exemptions in sections 17(1)(a) (legal professional privilege), 20(1)(c) (legal advice provided by the Attorney General), 21(1) (commercial interests), and 23(1) (personal information).
- [6] An internal review was conducted and on 3 February 2018 and the Chief Policy Officer of the responsible Ministry confirmed the denial of access. The Applicant then appealed to the Office of the Ombudsman.
- [7] During the appeal process, the Department forwarded the Applicant's request to the Chamber Pension Plan Administrators (PPA) who, in accordance with the *National Pensions (Amendment) Law 2016 (NPL)* and the *National Pensions (General) Regulations (2011 Revision) (NPR)*, released a large number of records (some 900 pages) to the Applicant. Included in that disclosure was legal advice received from their own lawyers.
- [8] During the informal resolution process stage of the appeal there were numerous communications and meetings between Ombudsman staff and the Department. Upon completion of a review of the responsive records, Ombudsman staff asked the Department to look for additional records including records relating to the step-by-step process to amend the Trust Deed. Eventually all of its correspondence with the Chamber was made available, but this process was not completed until well after commencement of the hearing.
- [9] The present hearing considers the ongoing dispute over access to:
- records purporting to contain legal advice provided to the Department; and
 - internal communications not already provided to the Applicant by the PPA.

B. ISSUES

- (a) Whether the documents purporting to contain legal advice are exempt under sections 17(1)(a) and 20(1)(c) of the Law.
- (b) Whether the additional internal communications within the DPL are exempt under section 20(1)(d) of the Law.

C. CONSIDERATION OF ISSUES

(a) Are the documents purporting to contain legal advice to the Department exempt under section 17(1)(a)?

[10] While reviewing proposed amendments to the Trust Deed of the Chamber Pension Plan, the Department's Deputy Director – Pensions exchanged correspondence with legal counsel in the Attorney General's Chambers, requesting and obtaining legal advice in a number of emails and attachments between 14 June 2016 and 30 October 2017.

[11] Citing *Balabel and Another v Air India [1988] 1 Ch. 317*, the Department argued that these communications constituted "confidential communication[s] between a lawyer and his or her client made for the dominant purpose of seeking or giving legal advice or professional assistance". Therefore, the Department argued that these communications are privileged from production in legal proceedings, which renders them exempt under section 17(1)(a).

[12] The Applicant does not deny that the records under consideration are legal advice but argues that they should nonetheless be disclosed in the public interest.

[13] There is a four-step test for legal advice in common law. For legal advice privilege to attach to all or part of a document:

(i) there must be a communication, whether oral or written:

(ii) the communication must be of a confidential character;

*(iii) the communication must be between a client (or his agent) and a legal advisor;
and*

(iv) the communication must be directly related to the seeking, formulating, or giving of legal advice.²

[14] I find that the responsive records consist of confidential communications between the Deputy Director – Pensions (the client) and their professional legal advisor. The communications relate to the seeking and receiving of advice of a confidential legal nature.

[15] **Therefore, I am satisfied that the communications between the Department and their legal advisors would be privileged from production in legal proceedings on the grounds of legal professional privilege, and the exemption in section 17(1)(a) is engaged.**

[16] The exemption in section 17(1)(a) is not subject to a public interest test.

² *B v Canada, [1995] 5 W.W.R. 374 (B.C.S.C.)*

[17] Since I have found that the records identified as communications between the Department and their professional legal advisor are exempted, there is no need to consider whether any other exemption applies to the same records.

(b) Are the “internal communications within the DLP, not already provided to the Applicant by the PPA” exempt under section 20(1)(d) (prejudice to the effective conduct of public affairs)?

[18] The FOI Law assigns the responsibility for receiving requests, assisting applicants with identifying responsive records, conducting searches for records, analyzing those records for possible exemption, and responding to the application, to Information Managers (IMs). In order to accomplish these tasks within the timelines set out in the Law, IMs rely on the support and cooperation of all staff, including senior management, within their public authority.

[19] In this case, the Deputy Director closely controlled the determination of what was considered responsive to the request by personally examining and vetting them. While this may have been appropriate given the complexity of the records, this course of action effectively excluded the IM from the FOI process, and prevented her from fully executing her role as intended under the Law. This also resulted in increased delays in the process.

[20] As further discussed below, when a significant number of records were released by the PPA, the Department took this to mean that the request was narrowed down to only those records not yet disclosed. The Deputy Director conducted a comparison between the PPA records and the records held by the Department. However, the full extent of her assessment of the responsive records remained unclear to the IM and the OMB. The IM received verbal assurances from the Deputy Director that no further responsive records existed, but written confirmation that all records had been identified and disclosed to my Office was not received until very late in these proceedings.

[21] Because of a lack of certainty regarding the extent of the responsive records in dispute, my Office spent a considerable amount of time conducting a detailed analysis, leading to a further search and additional records being located while this decision was being written.

[22] In the end, 20 emails were found between the Director and the Deputy Director – Pensions, which had not been disclosed to the Applicant:

- 14 June 2016 (2 emails),
- 31-May to 2 June 2016 (3 emails),
- 28 June 2016 (1 email),
- 5 to 6 July 2016 (3 emails),
- 14 to 18 July 2016 (2 emails),
- 26 July 2017 (1 email),
- 6 to 21 September 2017 (3 emails), and

- 19 to 30 October 2017 (5 emails).

[23] The Department argued that these records should not be disclosed because:

It is critical importance that the staff of DLP are able to confer and discuss issues in order to fulfil their regulatory functions. This ability to exchange communication is paramount to ensure they are properly able to complete the responsibilities of their offices. If the exemption is not upheld, it would inhibit the ability for the staff members to exchange ideas and perspectives in an open and candid manner and overall impede their ability to fulfil the department's regulatory responsibilities.

[24] The Applicant did not address the application of this exemption, rather he argued that they ought to be disclosed in the public interest.

[25] The Department made a blanket claim of exemption of all internal communications not already provided to the Applicant by the PPA. The Department's failure to examine each record to determine whether partial access could be provided ignored the requirement in section 12(1) to provide partial access where possible.

[26] I have examined the responsive records and find that they are either inconsequential or repeat information that is already known within the context of the communications with the PPA and which have already been disclosed.

[27] Therefore, the disclosure of these records would not prejudice, or would not be likely to prejudice, the effective conduct of public affairs and the claimed exemption is not applicable.

[28] **Consequently, I find that the exemption in section 20(1)(d) does not apply to the internal communications which have not yet been disclosed.**

[29] Since I have found that the exemption is not engaged, there is no need to conduct a public interest test under section 26(1).

D. ADDITIONAL ISSUES

a) Records relating to the Deputy Director's legal authority

[30] The Applicant also requested the sources of authority the Superintendent (now known as the Deputy Director) relied on to approve the amendments to the trust deed, as indicated in the Notice of Hearing. I am satisfied that there are no additional responsive records to be considered in this regard.

b) Disclosure - sections 6(4) and 3(7) of the FOI Law

[31] The Applicant believes all of the records should have been provided by the Department itself under the FOI Law, not by the PPA under the NPL. I disagree.

- [32] Section 6(4) of the FOI Law provides that where a record is open to access pursuant to any other enactment then access to that record shall be obtained in accordance with the provisions of that enactment.
- [33] The NPL and NPR provide for disclosure of extensive information to members or persons who are eligible to become members of pension plans. The Applicant made a verbal request for information, however, the PPA initially did not provide the requested information. The Applicant only received disclosure after the Department reminded the PPA of their obligations under the law to provide information to members of the pension plan.
- [34] The Department takes the position that the release of records by the PPA means that the FOI request was narrowed down to the records held only by the Department (non-overlapping records). The Department argues that it is not required to provide access to the same records that have already been disclosed by the PPA. I agree.
- [35] In my opinion, the spirit of this provision is to avoid duplicating disclosure efforts. In this case the Applicant had access to the records as a member of the pension plan and the PPA released the records to the Applicant. I see no point in requiring the exact same records to be released by the Department under the FOI Law.
- [36] My staff have diligently verified that the records released by the PPA are identical to the responsive records held by the Department, with the exception of the records considered in the sections above.
- [37] The Department also argued that section 3(7) of the FOI Law, which provides that “Nothing in this Law shall be read as abrogating the provisions of any other Law that restricts access to records”, applies to the provisions of the NPL and NPR and means that disclosure to individuals who are not members or eligible to become members is not allowed. I disagree. This provision recognises that other laws may specifically restrict access to certain records. In the case of the NPL, the provisions grant access rights to members or individuals eligible to become members.

c) Failure to address part of the request

- [38] In points 13 and 14 of the request, the Applicant asked for:

13. Investigations into violations of the Chamber Pension Plan operating under the provisions of unregistered Trust Deed amendment(s).

14. Court action resulting from violations of the NPL and Regulations regarding administration of the Chamber Pension Plan under the terms of unregistered Trust Deed amendment(s).

- [39] These questions remained unanswered until the Department, in their Reply Submission, stated that “13... there are no ongoing investigations being conducted into violations” and “14... there are no ongoing court action[s], resulting from violations”.

[40] I note that the Applicant's request was for any investigations or court actions in relation to the relevant trust deed amendments. It was not restricted to "ongoing investigations". The Applicant is entitled to know whether any records are held in relation to investigations or court actions, whether ongoing or not. If any such records are held, the Department must grant access to them unless an FOI exemption is applicable.

[41] **Therefore, I direct the Department to provide the Applicant with its decision as required under section 7(5).**

d) Record Keeping Practices

[42] The Department did not provide us with any records (other than the privileged communications discussed above) related to the Department's internal analysis of the proposed amendments. There were no meeting notes and only a few internal communications between the Director and Deputy Director – Pensions, and/or any other DLP staff, as listed above. The Deputy Director explained that the internal process is largely verbal, and internal emails appear to have been sent only occasionally. This accounts for the small number of internal records under consideration in this matter, which stands in sharp contrast to the much larger number of communications between the Department and the PPA, and the Department and their legal advisors.

[43] In my view, the practice of conducting business verbally renders the internal decision-making process opaque, unaccountable, and contradicts the requirements of section 6 of the *National Archive and Public Records Law (2015 Revision)*, which demands that "Every public agency shall make and maintain full and accurate public records of its business and affairs...".

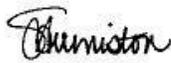
[44] The amendment of a pension plan trust deed has the potential to have significant impact on the members of the plan. It is a complex process in which the Department plays a key role in the review and approval of the requested amendments.

[45] **As I am authorized to do under section 44(1)(b), I therefore recommend that all internal discussions on current or future amendments to pension plan trust deeds as well as the Department's other business and affairs be recorded fully and accurately.**

E. FINDINGS AND DECISION

[46] Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following recommendations, findings and decisions:

- (1) The communications between the Department and their legal advisors are privileged from production in legal proceedings on the ground of legal professional privilege and are therefore exempted under section 17(1)(a).
- (2) The exemption in section 20(1)(d) does not apply to the internal communications not already disclosed by the Pension Plan Administrators, and the Department is required to disclose those records.
- (3) I direct the Department to respond to the Applicant's request for records relating to investigations and court actions within 10 days. The Applicant may then appeal that decision directly to me under section 42.
- (4) Under section 44(2)(b), I recommend that all internal discussions on current or future amendments to pension plan trust deeds, as well as the Department's other business and affairs, be recorded fully and accurately going forward.



Sandy Hermiston
Ombudsman