

ICO Hearing 11 – 02410  
**Decision**  
Ministry of Finance, Tourism & Development

Jennifer Dilbert MBE, JP  
Information Commissioner for the Cayman Islands  
4 May 2011

**Summary:**

An Applicant was refused access by the Ministry of Finance, Tourism & Development to “a report of an independent review of the Fire Services Department that was done in response to complaints by a female officer relating to indecent assaults by [a work colleague]... ”

The Information Commissioner found that the responsive record was not exempt from disclosure under the *Freedom of Information Law, 2007*, and ordered the Ministry of Finance, Tourism & Development to grant the Applicant partial access to the responsive record.

**Statutes Considered:**

*Freedom of Information Law, 2007*  
*Freedom of Information (General) Regulations, 2008*

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## **A. INTRODUCTION**

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- [1] On 3 June 2010, the Applicant made an Freedom of Information (FOI) request to the Ministry of Finance, Tourism & Development (the Public Authority or the PA) for:

*[A] report of an independent review of the Fire Services Department that was done in response to complaints by a female officer relating to indecent assaults by [a] colleague...I believe the review began in July 2009 and was completed in December last year.*

*I would also like details of any new procedures put in place by the Fire Services Department in response to (a) this report and (b) matters arising from the court case involving [a work colleague].*

- [2] In early December 2010, following a complaint received by the ICO, the Commissioner launched an investigation into the procedural handling of the request. As a result of that investigation, on 9 December 2010, the Acting Information Commissioner ordered that the Public Authority process the Applicant's request as required under the FOI Law within 10 days.
- [3] On 16 December 2010, the PA provided the Applicant with a response to the second part of the request, listing nine measures/actions taken as a result of the review, but withheld disclosure of the responsive record under section 17(a) of the FOI Law on the ground of legal professional privilege. This initial decision was signed by the Chief Officer, and therefore no internal review could take place.
- [4] On 21 December 2010, the Applicant appealed to the ICO and the matter was set for a formal Hearing before me, commencing on 10 February 2011.

## **B. PARALLEL LEGAL PROCEEDINGS**

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- [5] In February 2007, the Cayman Islands Fire Service (CIFS) received a complaint from a female fire officer alleging sexual misconduct towards her by two male colleagues. In March 2007, the Chief Fire Officer commenced investigations into the allegations, but suspended the investigations in May 2007 as the Royal Cayman Islands Police Service (RCIPS) had begun a criminal investigation into the matter. In January 2009, a male fire officer was convicted in the Grand Court of indecent assault of the female officer. The PA has advised that in October 2009, the victim filed a civil suit (Cause 540 of 2009) seeking damages from the Government. I understand that this civil case is still pending and settlement discussions between the parties are ongoing.

## **C. PROCEDURAL MATTERS**

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- [6] A number of serious procedural issues associated with the initial handling of this request by the Ministry of Finance, Tourism & Development have already been addressed in ICO

Investigation 7–00610.<sup>1</sup> At this point it is important to note two further issues that came to light after the investigation concluded.

- [7] The first issue was raised in early February 2011 during the commencement of this Hearing. Following the Notice of Hearing, sent on 10 February 2011, the PA passed the case file to the Cayman Islands Legal Department who, not having been involved or aware of the matter prior to that time, immediately requested that the Hearing be delayed until May 2011. The request for a delay was denied by the ICO for several reasons including the fact that the Public Authority had had ample time prior to the commencement of the Hearing to retain legal counsel, and chose only at this late stage to exercise that right. The Commissioner surmised that the Applicant in the matter had already been disadvantaged by the time delays in the handling of the request, and the ICO was already burdened with a several other hearings and commitments which made a time extension in this case unmanageable.
- [8] The second issue relates to the addition of late exemptions. The initial decision in this request, which was made by the Chief Officer, relied solely on the exemption in section 17(a) which provides protection from disclosure on the ground of legal professional privilege.
- [9] Following the ICO policies and procedures, at the start of a formal Hearing, a Notice of Hearing and Fact Report are issued to all parties. At this time, an invitation is extended to the participants to state any objections they may have to the factual content of these documents. Formal Submissions are then submitted and exchanged according to strict timelines. It was not until this submission stage that the Public Authority in this matter (upon the instruction of the Legal Department) sought to submit two further exemptions. These late exemptions were section 20(1)(d) and, alternatively, section 11(2)(c).
- [10] The exemption in section 20(1)(d) protects records, the disclosure of which “*would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs*”. The FOI Law sets out in section 20(2) that the initial decision regarding the use of the exemption in 20(1)(d) shall be made not by the Information Manager (IM) but by the Minister or Chief Officer concerned. However, in the present case, the initial decision not to release the responsive record was made by the Chief Officer who relied on a different exemption altogether, namely the exemption in section 17(a), claiming legal professional privilege.
- [11] Alternatively, the Public Authority belatedly sought to apply the provision in section 11(2)(c), which states that a public authority may defer access to a record “*if the premature release of the record would be contrary to the public interest, until the occurrence of any event after which or the expiration of any period beyond which, the release of the record would not be contrary to the public interest*”. While the PA’s submission claims that the public interest supporting disclosure of the responsive record does not outweigh the public interest in favour of the maintenance of the exemption, it does not provide any further arguments to sustain this position.
- [12] As I stated in ICO Hearing Decision 9-02210, “*there is no provision in the FOI Law which would allow a [public authority] to communicate a decision, or the reasons for refusing or*

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<sup>1</sup> Information Commissioner’s Office *Decision Investigation 7-00610* 9 December 2010 available at: [http://www.infocomm.ky/pubdocs/file/January2011/ICO%20Investigation%207%20-%20Section%2044%20\\_FINAL\\_.pdf](http://www.infocomm.ky/pubdocs/file/January2011/ICO%20Investigation%207%20-%20Section%2044%20_FINAL_.pdf)

*partially refusing access, in a piecemeal manner... Neither does the Law provide that the Information Commissioner is required to consider exemptions thus raised, although it would remain within her discretion to do so, depending on the circumstances.” The Law defines clear procedural timelines for decisions, and the late application of exemptions undermines “the timeliness, credibility and fairness of the process, and risks delaying even further the Applicant’s fundamental right to access as established by the FOI Law.”<sup>2</sup>*

- [13] The PA has not put forward any arguments to indicate why the late exemptions should apply, and it has not clarified any circumstances that would reasonably justify why the two late exemptions should be allowed. I am therefore not prepared to allow the PA to claim these exemptions belatedly.
- [14] However, if I believe upon hearing this matter, that any exemption should apply then I am at liberty to do so. Section 42(4)(a) of the Law permits the Information Commissioner to “*make any decision which could have been made on the original application*”, but does not require me to do so. Section 47(2) clearly places the burden of proof on the public authority to show that it acted in accordance with the Law. A fundamental premise of the FOI Law is that it provides a right to access government records. Therefore, the focus of a PA response should never be to seek out reasons to deny access *per se*. This right is balanced against the legitimate need for government, in specific and narrow circumstances, to exempt certain records from release.

#### **D. ISSUES UNDER REVIEW IN THIS HEARING**

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- [15] **Section 17(a)** – Is the responsive record exempt from disclosure because it would be privileged from production in legal proceedings on the ground of legal professional privilege?

#### **E. CONSIDERATION OF ISSUES UNDER REVIEW**

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##### **The position of the Ministry of Finance, Tourism & Development:**

- [16] The Public Authority submits that the responsive record falls into both categories of legal professional privilege – litigation privilege and legal advice privilege.

##### **Litigation Privilege**

- [17] The Public Authority quotes from *National Insurance Co. Ltd. V. Whirlybird Holdings Ltd* where it is stated that “*when litigation is in progress or is reasonably apprehended a report or other document obtained by a party or his legal advisor should be privileged from inspection or production in evidence if the dominant purpose of its preparation was to enable the legal advisor to conduct or advise regarding the litigation*”.<sup>3</sup> The PA contends that at the time the report was prepared litigation was reasonably apprehended, anticipated or contemplated. It states that it was after the criminal conviction of the fire officer that the report was commissioned (5 March 2009), and that the civil proceedings

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<sup>2</sup> Information Commissioner’s Office *Decision Hearing 9-02210* 24 March 2011 available at: [http://www.infocomm.ky/pubdocs/file/March%202011/ICO%20Decision%209-02210%20CINICO%](http://www.infocomm.ky/pubdocs/file/March%202011/ICO%20Decision%209-02210%20CINICO%20)

<sup>3</sup> *National Insurance Co. Ltd. V. Whirlybird Holdings Ltd* [1984] 2 NZLR 513

had not yet been instituted. However, it sets out reasons why one could conclude that civil litigation was likely or reasonably probable, including the serious criminal nature of the allegations, the arrest by police of the accused, and the criminal conviction of the accused. The PA submits that the report was therefore created (in September 2009) when litigation was reasonably anticipated or contemplated.

- [18] The Public Authority also contends that the dominant purpose for which the report was created was for use in the anticipated litigation. It argues, based on *Specialty Steels v Suncor Inc* that “*the law recognizes that even where the dominant purpose of a document at the point of commission was not for use in litigation, this purpose may mature into the dominant purpose as the investigation progresses and external events change*”.<sup>4</sup>

#### Legal Advice Privilege

- [19] Based on the above submissions the Public Authority also contends and further argues that legal advice privilege would apply to the report as well, as the report would have been created for the dominant purpose of obtaining legal advice in the litigation that was reasonably anticipated or contemplated.
- [20] The Public Authority finally submits that “*the attorney representing the complainant had been denied access to the report on the ground of legal professional privilege. To grant access to a third party under the FOI Law would result in a breach of a well settled legal principle and allow the other side discovery to a document they may not otherwise have been able to access...*”. No further evidence or argument is presented with respect to this issue.

#### The position of the Applicant

- [21] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.
- [22] The Applicant submits that the investigation which is the subject of the report requested was “resumed after the police investigation and the court hearing were completed, ...[and] if it is now being used for some other legal action, then the department and ministry should disclose what that legal action is”. The Applicant also states that “I understand that a civil suit in this case was not lodged until after the report was completed, so I question whether the report was drawn up for the purposes of internal review or in contemplation of litigation.”
- [23] The Applicant also states that:

The object of the FOI Law is [to] bring governmental accountability and transparency. The victim of the attack talked of her efforts to complain to her supervisors about the behavior of the officer who was eventually jailed for sexually assaulting her and those appear to have been ignored. I think it is in the public interest to know if anyone within the department has been disciplined for failing to address her concerns. The “public interest” definition under the FOI Regulations

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<sup>4</sup> *Specialty Steels v Suncor Inc* [1998] 3 W.W.R. 216

includes promoting accountability and “to deter or reveal wrongdoing or maladministration”. The report was paid for by the public purse and I believe the public deserves to know the findings and what action was taken against those individuals who failed to take action within the Fire services Department following the victim’s complaints.

## Discussion

- [24] Before I can discuss the relative merits of the positions taken above, it is necessary to look at the content of the Report, inasmuch as I am able to disclose in this discussion. The timelines are confusing, due to a number of external developments and factors, so I summarize these below.

### The Report

- [25] A “FINAL REPORT”, dated September 2009 and entitled “Work Environment Review of the C.I. Fire Services”, was submitted by Premier HR Management Solutions (Premier HR) to the Portfolio of Internal & External Affairs and the Ministry of Finance, Tourism & Development. The Report was commissioned on 5 March by the Portfolio of Internal & External Affairs.

- [26] The Report’s Table of Contents is as follows:

Executive Summary  
Part 1 – Introduction & Background  
Part 2 – Sexual Harassment Inquiry  
Part 3 – Workplace Environment Review  
Part 4 – Summary of all Recommendations  
Part 5 – Appendices 1-7

- [27] According to the Executive Summary contained in the Report, “*the Scope of the project was to continue and conclude the Internal Investigation into allegations of inappropriate behavior in the Fire Service ... AND [sic] conduct a Workplace Environment Review of the Service*”. These two aspects of the Report are kept quite separate in the Terms of Reference and throughout the Report, with no significant overlap between the two focal points.

- [28] The consultant’s first task consisted of the investigation into allegations of inappropriate behavior, and is described as follows in the Terms of Reference:

1. *Continue and conclude the internal investigation previously started by the Chief Fire Officer. That investigation should include but not be limited to:*
  - *Investigating the allegations against the other officers mentioned in the court case and media;*
  - *Preparing a comparative analysis to determine if there were statements made to the RCIP that contradict what the officer(s) gave to the Chief Fire Officer in his investigation.*

*The Chief Fire officer will expect to determine from that report and its supporting evidence if there should be any disciplinary action taken against any other officer*

*employed at the Fire Service in accordance with Public Service Management Law, 2005.*

[29] The consultant's second task, the workplace environment review, concerned itself with matters relating to Human Resources management, and is identified as:

2. *A review of the Fire Service working environment with respect to its ability to acclimatize and assimilate the female gender into a predominantly male environment:*

- *Investigate the allegations about the work environment;*
- *Interview each female officer in the fire Service to get their opinion of the work environment and how, if any, the environment could be improved to better accommodate female officers;*
- *Identify what, if any, formal policies need to be developed or what existing policies require change to complement the overall objective.*
- *Review should consider female sensitivity in the following areas – orientation programme, existence of diversity training and awareness, sexual harassment policies, training policies, recruitment process etc.<sup>5</sup>*

*That review should include but not be limited to discussing physical surroundings, facilities, opportunities for growth and development, changes to training formats etc. The objective is to ensure that the environment is conducive to creating a level playing field within the fire Service. However, we need to ensure that the facilities are appropriate and does [sic] not compromise the modesty of the female gender.<sup>6</sup>*

*The Chief Officer will expect to receive a summary statement of those surveyed and a list of prioritized recommendations in order that we can create a proper working environment for all female workers at the fire Service.*

[30] The body of the Report mirrors this strict duality, with Part 2 entitled "Sexual Harassment Inquiry", and Part 3 entitled "Workplace Environment Review". Even the common areas, such as the Executive Summary, Introduction and Background, and Summary of Recommendations, strictly pertain to one or the other of the subjects.

[31] Timelines

February 2007	Chief Fire Officer receives complaint from female officer
March 2007	Chief Fire Officer commences investigations into allegations
May 2007	Internal investigation suspended due to start of RCIPS criminal investigation
September 2007	Male fire officer arrested by RCIPS
January 2009	Male fire officer convicted and jailed
March 2009	Report commissioned from Premier HR by the Chief Officer of the Portfolio
May-June 2009	Responsibility for CIFS transferred from Portfolio to Ministry
July 2009	CIFS notified that victim had retained legal counsel to seek damages
September 2009	Report completed and submitted by Premier HR
October 2009	Victim files a civil suit (Cause 540 of 2009)

<sup>5</sup> This paragraph was included in the Terms of Reference which the Ministry provided upon my request in the context of this Hearing, but was absent from the Terms of Reference quoted in the Report itself. The reasons for this omission are not clear.

<sup>6</sup> This last sentence was also missing from the Terms of Reference in the Report.

### Legal professional privilege

[31] With respect to the PA's submission that "*the attorney representing the complainant had been denied access to the report on the ground of legal professional privilege...*" - no further details to substantiate this position are given. In this respect, it must be noted that the Report in question was not commissioned until after the criminal proceedings had concluded but before any indication that a civil suit would be filed. Based on the information provided, the claimed privileged nature of this document has not been settled and could still be challenged by the claimant in the civil court. It can therefore not be considered a given in this present Decision. I understand that the PA is proposing that the responsive record would be likely to be privileged should these matters be brought before a court, and the Applicant does not agree. In accordance with my powers under the Law, my role is to consider whether the exemption in section 17(a) of the FOI Law applies, and decide whether or not to support the claim that the responsive record would be privileged from production in legal proceedings on the ground of legal professional privilege.

- Litigation Privilege

[32] With respect to litigation privilege, I accept that it is possible that even if the dominant purpose of the Report was not originally in contemplation of litigation, as the investigation progressed and external factors changed, litigation could, conceivably, have become a focus of the investigation by the time it was completed. The PA quotes *Specialty Steels v Suncor Inc* in support of this position. However, in the present case, I note that, unlike in the *Specialty Steels* case proceedings had in fact not yet commenced before the Report was completed, but were merely considered likely.

[33] While the PA submits that the correspondence from the complainant's attorney was forwarded to the relevant Public Authorities, there is no evidence that Premier HR was shown this correspondence, or that the instructions or Terms of Reference under which Premier HR was preparing the Report were changed in any way to reflect anticipated litigation or otherwise to serve the purposes of legal action. Neither the Terms of Reference, nor the Report itself, make mention of such a change of focus, even though the Report was not completed until September 2009, two months after the Public Authority became aware that the complainant had retained legal counsel. Nor have I been presented with any other documentary evidence that would demonstrate that the dominant purpose of the consultancy report was changed mid-stream, and that the objective of the Report became something other than what was clearly and unambiguously stated in the Terms of Reference.

[34] In addition to the workplace review, of which the dominant purpose clearly relates to Human Resources management and not to legal matters, the Terms of Reference explicitly state that the "Sexual Harassment Inquiry" in Part 2 is intended "*to determine... if there should be any disciplinary action taken against any other officer employed at the Fire Service in accordance with Public Service Management Law, 2005*", as quoted more fully above. It is clear that the "inquiry" in Part 2 is part of a report of facts and opinions of an HR expert relating to an internal disciplinary process that is intended to measure the role of the other fire officers against the statements made to the RCIPS, and against the provisions of the Government's HR legislation.

[35] In *Waugh v British Railways Board* the House of Lords rejected a claim for legal professional privilege relating to a report on a railway accident, prepared "for... railway

operation and safety purposes and for the purpose of obtaining legal advice in anticipation of litigation”, on the basis that the privilege “extended only if the latter purpose was the dominant one”.<sup>7</sup> I believe this clearly indicates that it is not sufficient for a third-party report merely to have a potential bearing upon anticipated litigation for it to be privileged, particularly where such a report is not written or commissioned by a legal professional. I do not consider that the connection between the present Report and its actual use in litigation by the Government’s lawyers has been sufficiently established for litigation privilege to apply to this document.

[36] For the avoidance of doubt, I have also considered whether litigation privilege might apply to part of the responsive record. This would be allowed under the circumstances of the case – particularly given the strict duality of the Report described above - following *Great Atlantic Insurance Co v Home Insurance Co*,<sup>8</sup> *GE Capital Corporate Finance v Bankers Trust Company*,<sup>9</sup> and considering *Curlex Manufacturing v Carlingford Australia General Insurance*<sup>10</sup> and the relevant findings of the UK’s Information Tribunal.<sup>11</sup> However, I have concluded that the PA has presented no convincing argument that litigation privilege should apply to the responsive record in its entirety, or to any part of it.

[37] **For these reasons, I do not find that litigation privilege applies to the responsive record.**

- Legal advice privilege

[38] The PA contends that legal advice privilege applies to the report, as the report would have been created for the dominant purpose of obtaining legal advice in the litigation that was reasonably anticipated or contemplated.

[39] With respect to whether legal advice privilege attaches to the responsive record, third party communications are only protected where they are communications which “*come into existence after litigation commenced or is in contemplation*”.<sup>12</sup>

[40] In *Buttes Oil and Gas Co v Hammer* the Court of Appeal found that “[r]eports made by employees to their employers or by agents to their principals are not privileged unless ... they [are] reports made for the purpose of being laid before the party’s legal adviser for the purpose of obtaining his advice in connection with the anticipated or pending litigation”<sup>13</sup>.

[41] In *Re L (a minor)(Police Investigation: Privilege)* the House of Lords confirmed that “[t]here is... a clear distinction between the privilege attaching to communications between

<sup>7</sup> *Waugh v. British Railways Board* [1980] A.C. 521, 533B, 537G, 544B, as quoted in: *Three Rivers District Council and others v Governor and Company of the Bank of England (No.5)* [2004] UKHL 48 para 100

<sup>8</sup> *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLP 529

<sup>9</sup> *GE Capital Corporate Finance v Bankers Trust Company* [1995] 1 WLP 172; see also: *The Good Luck* [1992] 2 Lloyd’s Rep 540

<sup>10</sup> *Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd* [1987] 2 Qd R 335

<sup>11</sup> Information Tribunal *AJ Maiden and the Information Commissioner v Borough Council of King’s Lynn and West Norfolk* 15 December 2008 EA/2008/0013 available at: [http://www.informationtribunal.gov.uk/DBFiles/Decision/i278/Maiden%20v%20IC%20&%20BCKL&WN%20\(0013\)%20Decision%2015-12-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i278/Maiden%20v%20IC%20&%20BCKL&WN%20(0013)%20Decision%2015-12-08.pdf)

<sup>12</sup> *Wheeler v Le Marchant* (1881) 17 Ch D 675, 682, 683, 685 CA; *Re Higgrade Traders* [1984] BCLC 151, 161, 164

<sup>13</sup> *Buttes Oil and Gas Co v Hammer* [1981] 1 QB 223

*solicitor and client and that attaching to reports by third parties prepared on the instructions of a client for the purposes of litigation. In the former case the privilege attaches to all communications whether related to litigation or not, but in the latter case it attaches only to documents or other written communications prepared with a view to litigation”.*<sup>14</sup>

- [42] I have been presented with no evidence to show that either Premier HR or the Fire Service employees interviewed were advised, or had the expectation that the Report would be used for the purpose of obtaining advice in litigation. To the contrary, as described above, the actual purposes of the Report were clearly defined in the Terms of Reference, which were included in unmodified form into the Report several months after the Public Authority had become aware that the complainant had retained legal counsel, and which made no reference whatsoever to litigation.
- [43] **Given the above, I find that legal advice privilege does not attach to the responsive record.**

Section 20(1)(d) - The effective conduct of public affairs

- [44] Although I am not prepared to accept the PA's late submissions, as explained under the procedural matters heading above, I do feel it prudent to use my discretion and examine the exemption in section 20(1)(d).
- [45] The Law recognizes that there are instances where a public authority must be able to conduct sensitive investigations, or seek testimony from employees and others, in the secure knowledge that the specifics of the investigation or testimony provided will remain confidential. Failing this, individuals may refuse to participate in any such exercise. If a PA is not able to fully investigate issues or problems, and seek the free and frank opinions of those concerned, the effective conduct of its affairs would indeed be compromised. In these circumstances it is my view that the FOI Law must protect Government's ability to conduct investigations and obtain the free and frank testimony of relevant individuals, even where this may deny the general public access to the ensuing records, or to information contained in them.
- [46] In the present case, parts of the responsive record contain detailed and verbatim comments from those interviewed. Release of these comments would likely undermine Government's ability to conduct a similar exercise in the future. As a result, disclosure of some parts of the responsive record would be likely to prejudice the effective conduct of public affairs, thereby rendering those parts exempt from disclosure under section 20(1)(d) of the FOI Law.
- [47] While I do not seek to promote the denial of access to information, it is disappointing that the Public Authority did not see it fit to argue this exemption, which I find applies to parts of the responsive record, in their initial decision. Instead, it was left to the Legal Department to raise this exemption belatedly in the Hearing Submission, which, as indicated under above, is not acceptable and undermines the fairness and effectiveness of the appeals process.

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<sup>14</sup> *Waugh v. British Railways Board* [1980] A.C. 521, 533B, 537G, 544B, as quoted in: *Re L (a minor)(Police Investigation: Privilege)* [1997] 2 All ER 78

- [48] This approach demonstrates the need for ongoing training and the raising of awareness, as Information Managers and Chief Officers must fully appreciate their responsibilities and obligations under the FOI Law, correctly understand the meaning and usage of exemptions, and remain actively involved in any appeal. It is not effective to simply pass the file on to the Legal Department or another representative, who may then feel compelled to change the course of action once the Hearing has already commenced. Doing so delays the resolution of an appeal, which is unfair to the applicant, cumbersome and wasteful of resources.
- [49] **I find that parts of the report are protected from disclosure by virtue of section 20(1)(d) of the FOI Law.**

#### Section 23 (1) - Personal Information

- [50] For the same reasons, and with the same caveats, as stated above, I feel compelled to consider whether the exemption in section 23(1), which protects personal information, also relates to parts of the responsive record.
- [51] I have identified parts of the Report which contain personal information as defined in regulation 2 of the *Freedom of Information (General) Regulations 2008*, and should be protected under section 23 of the Law. Given the specific circumstances of this case, and considering that much of the personal information is of a somewhat sensitive nature, it would not be reasonable to disclose this information. Since the meaning of the Report can perfectly be understood without releasing the personal information, and there are no particular factors in favor of disclosure, the public interest in disclosure does not outweigh the public interest in maintaining the exemption.
- [52] Again, I am disappointed that no attempt was made by the PA to protect this information and the persons to whom it relates by way of section 23(1).
- [53] It should be noted that it is possible to release a record while still protecting some of the information it contains, such as personal information, by redacting the record as per section 12 of the Law. This leads to the general comment that I am still finding that many public authorities have a predisposition towards withholding records *carte blanche*, rather than trying to promote transparency and accountability within Government, as intended by the FOI Law, even if some parts of a record need to be legitimately withheld.
- [54] **I find that disclosure of personal information in the some parts of the Report would be unreasonable under section 23(1) of the FOI Law.**

### **E. FINDINGS AND DECISION**

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Under section 43(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

#### **Findings:**

1. Legal professional privilege does not attach to the Report, as submitted by the Ministry of Finance, Tourism & Development, and the responsive record is

therefore not exempted by virtue of section 17(a) of the *Freedom of Information Law, 2007*.

2. Parts of the responsive record are exempt from disclosure by virtue of sections 20(1)(d) of the Law as disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs.
3. The Public Authority shall not grant access to parts of the responsive record that would involve the unreasonable disclosure of personal information under section 23(1) of the Law.
4. Specifically, **Part 2** of the responsive record is exempt from disclosure by virtue of section 20(1)(d) and section 23(1) of the *Freedom of Information Law 2007* as its disclosure would prejudice, or be likely to prejudice, the effective conduct of public affairs; and it also contains personal information that would be unreasonable to disclose.
5. **Appendices 5 and 6** of the Report (contained in Part 5) are also exempt from disclosure in their entirety for the same reasons stated above.
6. The **Executive Summary, Part 1, Part 3 and Part 4** of the Report are not exempted from disclosure under the *Freedom of Information Law, 2007* except for minimal redactions made under section 12 relating to the effective conduct of public affairs and personal information.
7. **Appendices 1 – 4** are not exempted from disclosure under the FOI Law except for minimal redactions as per the above.
8. **Appendix 7** in its entirety is not exempt from disclosure under the FOI Law.

**Decision:**

I overturn the decision of the Ministry of Finance, Tourism & Development to withhold the responsive record in its entirety under section 17(a) of the *Freedom of Information Law, 2007* and require the Public Authority to provide the Applicant with partial access to a copy of the “FINAL REPORT” of the “Work Environment Review of the C.I. Fire Services Department” dated September 2009.

Some parts of the Report, as detailed in the attached Schedule, should be redacted or withheld as permitted under section 12 of the FOI Law. As per section 12(b) of the Law, the Applicant shall be informed of the statutory provision by virtue of which such deleted matter is exempt matter.

Concurrently, the Ministry of Finance, Tourism & Development is required to forward me a copy of the cover letter to the Applicant as well as a copy of the record it supplies to the Applicant.

As per section 47 of the *Freedom of Information Law, 2007* the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to the Information Commissioner's Office immediately upon submission to the Court.

As per section 48, if judicial review has not been sought on or before 17 June 2011 and should the Ministry of Finance, Tourism & Development fail to provide the Applicant with the responsive record (redacted as instructed) in this matter, I will certify in writing to the Grand Court the failure to comply with this Decision and the Court may consider such failure under the rules relating to contempt of court.



Jennifer Dilbert  
Information Commissioner  
4 May 2011

## F. SCHEDULE



### ICO Decision 11 – 02410

The following sets out the Information Commissioner's ordered redactions for the responsive record in this matter. Section 12 of the Freedom of Information Law, 2007 allows for the granting of partial access to a record where parts or portions of the record are exempt from disclosure under the Law. The Commissioner has required that the Public Authority redact words or portions of the document that are exempt under sections 20(1)(d) and 23(1) of the FOI Law. The table below sets out the sections to be redacted by section, page, paragraph/point and part. The applicable exemption has been listed in the end column at the end of each line, and should be indicated in each case on the responsive record.

Page(s)	Paragraph (Point)	Part to be redacted	Section(s) of the Law
<b>EXECUTIVE SUMMARY</b>			
3	2	Redact victim name and title	23 (1)
4	6(9)	Redact all thirty two (32) words of the second sentence	23(1)
<b>PART 1 – INTRODUCTION AND BACKGROUND</b>			
9	8 (2)	Redact last four (4) words	23(1)
11	10(20)	Redact first three(3) words	23(1)
11	10(26)	Redact last eleven (11) words	23(1)
<b>PART 2 – SEXUAL HARASSMENT INQUIRY</b>			
12 - 28	All	Redact entire part	20(1)(d) & 23(1)
<b>PART 4 – SUMMARY OF RECOMMENDATIONS</b>			
45	1(1)	Redact first four (4) words	20(1)(d) & 23(1)
45	1(2)	Redact first four (4) words	20(1)(d) & 23(1)
45	1(3)	Redact first six (6) words	20(1)(d) & 23(1)
45	1(4)	Redact first four (4) words	20(1)(d) & 23(1)
<b>PART 5 – APPENDICES</b>			
<b>Appendix 2:</b>			
53	2	Redact names of all participants	20(1)(d)
<b>Appendix 3:</b>			
55	2	Redact entire participant's table	20(1)(d) & 23(1)
56	6(2)	Redact first two (2) words	20(1)(d)
56	7(1)	Redact words twelve (12) and thirteen (13)	23(1)
57	7(4)	Redact entire point	23(1)
<b>Appendix 4:</b>			
59	1	Redact entire participant's table	20(1)(d)
59	2(2)	Redact initials at the end of the point	23(1)
60	3	Redact entire paragraph (points 1-7) including heading	20(1)(d) & 23(1)
<b>Appendix 5:</b>			
63 – 86	All	Redact entire appendix	20(1)(d) & 23(1)
<b>Appendix 6:</b>			
87 - 100	All	Redact entire appendix	20(1)(d) & 23(1)