
ICO Hearing 13 – 00511
Decision
Ministry of Finance, Tourism and Development

Jennifer Dilbert
Information Commissioner for the Cayman Islands
29 July 2011

Summary:

An Applicant was refused access by the Ministry of Finance, Tourism and Development to the Legal Aid Review Committee's report on Legal Aid dated March 2010.

The Information Commissioner found that some parts of the responsive record could be withheld under sections 9(d), 20(1)(b) and 23(1) of the *Freedom of Information Law, 2007*. However the remainder was not exempt and the Ministry of Finance, Development and Tourism was ordered to disclose these parts of the responsive record to the Applicant.

Statutes¹ Considered:

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

Exemptions Considered:

Sections 9(d), 11(2)(b), 19(1)(a), 20(1)(b) and 23(1) of the *Freedom of Information Law, 2007*

Contents:

A.	INTRODUCTION	2
B.	LEGAL AID REVIEW COMMITTEE REPORT	2
C.	PROCEDURAL MATTERS	3
D.	ISSUES UNDER REVIEW IN THIS HEARING	4
E.	CONSIDERATION OF ISSUES UNDER REVIEW	5
F.	FINDINGS AND DECISION	16

¹ In this Decision all references to sections are to sections under the Freedom of Information Law, 2007 unless otherwise specified.

A. INTRODUCTION

- [1] On 4 March 2010, the Applicant submitted a request to the Ministry of Finance, Tourism & Development (“the Ministry”) for “*A copy of the Legal Aid Review Committee’s report (“the Report”) on Legal Aid dated March 2010*”.
- [2] On 9 April 2010, the Ministry denied access to the Report under sections 11(2)(b) and 19(1)(b) of the *Freedom of information Law, 2007* (“FOI Law”).
- [3] On 18 May 2010, the Applicant contacted the Ministry to make another request for the Report and inquired whether the matter could proceed directly to the internal review stage if the Ministry sought to withhold the Report as previously advised.
- [4] On the same day, the Information Manager (“IM”) advised the Applicant that the matter could go straight to the internal review stage, but that the Ministry would provide further confirmation.
- [5] Between 13 July and 2 August 2010, the Applicant made contact with the Ministry three times to find out whether the Report could be provided. The last correspondence (on 2 August 2010) was copied to the Information Commissioner’s Office (“ICO”).
- [6] The ICO advised the Applicant they would investigate the matter. After several attempts to contact the Ministry to ascertain whether an internal review would be conducted, the Ministry advised on 23 August 2010 that the matter would be considered as a priority and that the Applicant would be provided with a prompt response. The Applicant was advised accordingly.
- [7] On 3 January 2011, the Applicant advised the ICO that the Ministry had still not provided a response. The ICO again contacted the Ministry on 12 January 2011 to inquire as to the status of the request.
- [8] On 25 January 2011, the Ministry’s Chief Officer responded to the Applicant deferring and exempting the release of the Report under sections 11(2)(b) and 19(1)(b).
- [9] On 11 February 2011, the Applicant appealed the matter to the ICO.
- [10] An attempt was made to resolve the matter through mediation, but an amicable resolution was not found, and the matter proceeded to a formal Hearing on 10 May, 2011.

B. LEGAL AID REVIEW COMMITTEE REPORT

- [11] The primary purpose of a legal aid system is to provide the services of an attorney-at-law to a person who is unable to afford one. The legal aid system should promote justice on the basis of equal opportunity for all its citizens. The Cayman Islands have had a legal aid system in place for the past 32 years.
- [12] The Legal Aid Review Committee (“LARC”) was appointed on 3 December 2009 by the Minister for Finance, Tourism and Development. The preamble to the Terms of Reference for this Committee states:

“In response to the Law Reform Commission Review of the system of free legal aid in September 2005 and final report in July 2008 local attorneys A. Steve McField and Theresa Pitcairn made a proposal to the Government to set up an independent Legal Services Office to provide legal aid. The Government accepted that proposal which was further approved by the Finance committee on the 12 October 2009.”

- [13] The Report created by the LARC is dated 1 March 2010, and is entitled:

THE LEGAL AID REVIEW COMMITTEE

FINAL REPORT OF THE LEGAL AID REVIEW COMMITTEE ON THE LEGAL AID PROPOSAL SUBMITTED BY MRS. T. PITCAIRN AND MR. A.S. MCFIELD

- [14] This Report is the subject of the Applicant’s request and is the responsive record to be considered in this Decision. It comprises a Table of Contents, a Final Report, and eleven Appendices numbered ‘A’ through ‘K’ which contain minutes of meetings, reports from individuals and copies of various other relevant documents.

C. PROCEDURAL MATTERS

- [15] The timeline of events in this appeal, as set out in the Fact Report dated 10 May 2011, indicates that it took a considerable time for this matter to come before me. This was due to repeated delays by the Ministry in dealing with the request, as discussed below.
- [16] The initial request was submitted to the Ministry by the Applicant via email on 4 March 2010. The Ministry noted in its initial response that the request was received on 22 March 2010. No explanation has been given for this delay of over 2 weeks, and so it appears that the Ministry failed to acknowledge the request within ten calendar days as specified in regulation 7(3) of the *Freedom of Information (General) Regulations 2008* (“Regulations”).
- [17] The Ministry provided an initial response to the Applicant on 9 April 2010, which was 36 days after the date of the request. The Ministry thereby failed to comply with section 7(4)(a) which requires a response within 30 calendar days.
- [18] In total it took 250 days, three reminders from the Applicant and two separate interventions of the ICO for the Chief Officer to conduct an internal review and issue it to the Applicant. In this instance the Ministry failed to comply with the legal timescale in section 34(3)(b) which requires that an internal review response be issued within 30 calendar days of receipt of a request for internal review.
- [19] In particular, it is unclear why the internal review process should have taken this long, given that neither the initial decision, nor the internal review provide any detailed explanation as to why the Report was being withheld and cite only the relevant sections of the FOI Law without further explanation.
- [20] It should also be noted that it was not until the initial submission stage of this Hearing that the Ministry sought to change its reliance on the exemption in section 19(1)(b) to 19(1)(a).

[21] The severity of the procedural failures in this case lead me to question, as on a number of previous occasions, the seriousness with which the Ministry executes its duties and obligations under the FOI Law. While understandable delays will sometimes occur, the extreme length of the delays in this case, and the apparent unwillingness of the Ministry to act in a responsible way under the Law, testify to an unacceptably negligent attitude towards legal compliance with the FOI Law that can only be condemned in the gravest terms.

D. ISSUES UNDER REVIEW IN THIS HEARING

[22] The Ministry has put forward arguments as to why the exemptions it has belatedly raised after the commencement of the Hearing process, should apply. Having considered these arguments, I will accept the late change in exemptions from section 19(1)(b) to 19(1)(a). However, I do so reluctantly, especially as the Ministry took over eight months to issue an internal review response and only raised the new exemption in the Hearing stage of the appeal.

[23] 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 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 FOI 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.*"²

[24] Public authorities have a legal duty to consider whether any of exceptions or exemptions specified in the Law apply to the responsive record or parts thereof. Such consideration must be nuanced and precise, and should avoid a carte blanche approach whereby an exemption is automatically applied to an entire record without proper consideration of its applicability to the entire record, or without consideration of whether another exemption may apply more appropriately. I am particularly disturbed by the fact that the Report contains quite sensitive personal information, yet the Ministry did not comment on this fact.

[25] Although I am not required to consider the application of exemptions which have not been cited by a public authority, in this instance I am concerned that some sections of the Report may be covered by additional provisions of the Law. Therefore, I feel it necessary to consider the exception in section 9(d), as well as the additional exemptions set out in sections 20(1)(b) and 23(1), and apply these to the responsive record³.

² 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)

³ The application of exemptions not cited by a public authority is allowed under section 42(4)(a) of the FOI Law.

[26] Therefore, the issues to be decided in this Hearing are:

1. **Section 11(2)(b)** – Was the Report prepared for presentation to the Legislative Assembly or for the purpose of being made available to a particular person or body, and could access therefore be deferred until the expiration of a reasonable period after its preparation for it to be presented or made available to that person or body?
2. **Section 19(1)(a)** – Is the Report exempt as it contains opinions, advice or recommendations prepared for the proceedings of the Cabinet or of a committee thereof?
3. **Section 9(d)** – Is the Report (or sections of the Report) already in the public domain?
4. **Section 20(1)(b)** – Would disclosure of the Report inhibit, or be likely to inhibit, the free and frank exchange of views for the purposes of deliberation?
5. **Section 23(1)** – Would disclosure of the Report result in the unreasonable disclosure of personal information of any person, whether living or dead?
6. **Section 26(1)** – If any of the above exemptions apply, then the public interest will be considered in relation to sections 19(1)(a), 20(1)(b) and 23(1).

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Section 11(2)(b)

[27] The Ministry has denied access to the Report on the grounds that it is subject to section 11(2)(b). This section states:

“11. ...

(2) *A public authority may defer the grant of access to a record-*

...

(b) *if the record was prepared for presentation to the Legislative Assembly or for the purpose of being made available to a particular person or body, until the expiration of a reasonable period after its preparation for it to be so presented or made available to that person or body;”*

[28] The Ministry’s submission states that this exception should apply since “*the record was prepared for presentation to the Legislative Assembly.*”

[29] However, according to another part of the Ministry’s submission, the members of LARC were appointed by the Minister for Finance, Tourism and Development, and the Report was “*submitted to the Finance Minister to inform Cabinet discussions regarding the accepted proposals*”. No evidence has been provided in the Ministry’s submission to support its claim that the Report was created for presentation to the Legislative Assembly, or indeed to Cabinet, and the terms of reference do not offer any further clarification on this point.

- [30] Whether or not the Report was intended for presentation to the Legislative Assembly, the second part of the exception in section 11(2)(b) provides that deferment may apply “*until the expiration of a reasonable period after its preparation for it to be so presented*”. In this regard, the Ministry’s submission only states that “*the record has not yet been presented to the Assembly. It is the Ministry’s contention that a reasonably [sic] period of time has not yet expired*”, without further details or explanation relating to the proposed time period during which the Ministry seeks to apply the exception.
- [31] The Report is dated 1 March 2010, and the Applicant requested a copy on 4 March 2010, and again on 18 May, 2010, but it was not until 25 January 2011 that the Ministry provided an internal review response. Given that it is now almost a year and a half since the date of the Report, I consider that a reasonable period of time has long since passed for the Report to be reviewed and considered by whatever body it was intended for. As a result, I am not satisfied that the Ministry has provided sufficient evidence that the exception in section 11(2)(b) should apply to the Report.
- [32] **I find that the exception in section 11(2)(b) does not apply to the responsive record.**

2. Section 19(1)(a)

- [33] The Ministry denied access to the requested record on the ground that it is subject to section 19(1)(a). This section states:
- “19. (1) Subject to subsection (2), a record is exempt from disclosure if it contains-*
- (a) opinions, advice or recommendations, prepared for; ...*
- proceedings of the Cabinet or of a committee thereof.*
- (2) Subsection (1) does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature.”*
- [34] As stated above, according to the Ministry’s submission, the Report was created by the LARC which was appointed by the Minister for Finance, Tourism and Development. The Ministry states that the Report “*is to be tabled before the Legislative Assembly and has been submitted to the Finance Minister to inform Cabinet discussions regarding the accepted proposals*”. However, in the Ministry’s scant submission there is no documentation attesting to its claim that the Report was prepared to “inform Cabinet discussions”.
- [35] The exemption in section 19(1)(a) is intended to protect records which would reveal the Government’s deliberative processes. While it may be important to protect these types of records from disclosure to the general public, this exemption should not be used broadly and should instead be limited to the parameters set by the legislators. Simply because a record is eventually viewed by Cabinet does mean that it was “prepared” for that purpose.
- [36] I have previously been informed by the Cabinet Office that a “Committee of Cabinet” should be considered in narrow terms and refers specifically to committees made up of Cabinet members and not groups or committees that may be providing a report for Cabinet.” In this instance, the Report could be considered a recommendation but, in the

absence of any substantiating evidence, I do not find that it was prepared for the proceedings of the Cabinet, or a committee thereof.

[37] **I am satisfied that the Report is not exempt under section 19(1)(a) of the FOI Law.**

3. Section 9(d)

[38] Section 9 of the FOI Law states that:

“9. A public authority is not required to comply with a request where-
...
... (d) if the information requested is already in the public domain.”

[39] I note that Appendices B, C (up to and including the Legal Aid Application form), F (except the final page) and K of the Report are publicly available on the internet.

[40] **The Ministry is therefore not required to comply with the request with respect to Appendices B, C (up to and including the Legal Aid Application form), F and K of the Report, as these are publicly available.**

[41] However, pursuant to section 49 (1)(b) the Ministry should have assisted the Applicant by advising that these sections of the Report are otherwise available, and where they could be obtained, or by providing a copy.

4. Section 20(1)(b)

[42] I shall consider the application of section 20(1)(b) to the remaining sections of the Report: i.e. the Table of Contents, Final Report and Appendices A, C (after the Legal Aid Application form), D, E, G, H, I, and J.

[43] Section 20(1)(b) provides that:

“20. (1) A record is exempt from disclosure if-
...
... (b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;”

[44] The exemption under section 20(1)(b) is a qualified exemption, which means that where a public authority finds that certain information falls within the scope of the exemption it is then required to go on to consider the application of the public interest test, as laid down in section 26(1).

[45] In order for this exemption to apply, it would need to be demonstrated that the disclosure of the remaining sections of the Report would inhibit, or be likely to inhibit, the free and frank exchange of views for the purposes of deliberation.

[46] I refer to the detailed consideration of the exemption in section 20(1)(b) in paragraphs 33-55 of my Hearing Decision 9-02210. From this it is clear that “*the exemption... intends to protect against disclosure which would result, with a certain degree of probability, in*

restraining the unimpeded, open and honest exchange of views expressed for the purpose of evaluating competing arguments or considerations with a view to making a decision of an issue before the public authority.”⁴

- **Do the below sections of the Report contain views freely and frankly expressed for the purposes of deliberation? What is the probability that disclosure of the redacted section would restrain the unimpeded, open and honest exchange of views?**

Table of Contents

- [47] The Table of Contents contains no views or comments and is not exempt under section 20(1)(b).

Final Report

- [48] The Final Report is the culmination of all the research and findings of the LARC’s review of the proposed Legal Services Office. This Report has been prepared by the Committee after consideration of the evidence, and reviewed before being finalized. In addition, in one of the Appendices of the Report, reference is made to the establishment of the New Zealand’s Public Defenders’ Office and having looked at this website I note that their final report has been published online.⁵
- [49] However, I note that in paragraph 94 of the Final Report an excerpt of an individual’s submissions on the Legal Aid Review has been included, as discussed in more detail below, I consider such submissions to be freely and frankly expressed and the individual had no expectation that such submissions would be publicly disclosed. Therefore I consider that this entire paragraph (but this paragraph solely) does contain free and frank views which would be inhibited by disclosure.
- [50] Considering the remainder of the Final Report, and in particular the fact that it was presented to the Ministry as the Committee’s findings, I am satisfied that the remainder of the Final Report, does not contain views freely and frankly expressed.
- [51] Again, as considerable time has passed since the Final Report was submitted to the Ministry I consider that enough time has passed in this case to sufficiently degrade the sensitivity of the Final Report to the extent that harm envisaged by disclosure has subsided.
- [52] **I conclude that the Final Report, with the exception of paragraph 94, does not contain free and frank deliberations and that inhibition would not result, or would not likely result, from its disclosure. Therefore, the exemption in section 20(1)(b) of the FOI Law is not engaged.**

⁴ Information Commissioner *ICO Hearing 9-02210 Decision. Cayman Islands National Insurance Company (CINICO)* 24 March 2011 para 39 <http://www.infocomm.ky/appeals.php>

⁵ <http://www.lsa.govt.nz/about-us/legal-services/public-defence-service.php>

Appendix A – Meeting Minutes

- [53] Appendix A contains the meeting minutes from the LARC; the minutes contain a detailed account of each meeting and include comments and views of each of the members of the Committee. The comments and views at these meetings are expressed frankly and openly. Reference is made to these meetings in the Final Report but in a considered form and from the viewpoint of the Committee rather than a specific individual. I consider in relation to this part of the Report that the members of the Committee should be allowed some private space to develop their thinking and arrive at a settled view without their discussions or incomplete lines of thought being released into the public domain with the risk that this would inhibit open exchanges of views in the future. I consider that the Final Report provides a fair representation of the conclusion of these meetings. If these minutes were disclosed then it would set a precedent and might result in similar committees finding it impossible to recruit individuals or have open and honest discussions.
- [54] **I consider that disclosure of Appendix A would inhibit views freely and frankly expressed for the purposes of deliberation and that their disclosure would likely inhibit future participation in similar discussions. Therefore, Appendix A is exempt under section 20(1)(b) of the FOI Law.**

Appendix C (after the Legal Aid Application form)

- [55] Appendix C (after the Legal Aid Application form) contains a list of Legal Aid Attorneys and examples of legal aid cases. It is therefore a factual report rather than one containing comments or views.
- [56] **I am satisfied that this part of Appendix C does not contain views freely and frankly expressed, as it is factual information. Therefore I do not consider inhibition would result from its disclosure and it is therefore not exempt under section 20(1)(b) of the FOI Law. It may however be exempt under another section of the FOI Law which will be considered below.**

Appendix D – Legal Aid contributions

- [57] Appendix D is a factual listing of the legal aid contributions for a specific year. It does not contain any views or comments.
- [58] **Consequently, Appendix D cannot be considered exempt under section 20(1)(b) of the FOI Law, but it may be exempt under another section of the FOI Law which will be considered below.**

Appendix E – Public Input

- [59] Appendix E contains responses to the Committee following an invitation to the public to submit comments on any aspect of the regulation of legal aid in the Cayman Islands⁶. These submissions reflect the parties' views and were submitted in an open and candid manner. A public authority might find it impossible to secure such views in the future if this Appendix was released. In addition, these submissions will also have been

⁶ http://www.gov.ky/portal/page?_pageid=1142.3506620&_dad=portal&_schema=PORTAL

considered for the Final Report. One such submission has been erroneously included in Appendix F.

- [60] **Therefore, I have concluded that Appendix E (and the last page of Appendix F) is exempt under section 20(1)(b) of the FOI Law as disclosure would inhibit those individuals who provided their views and other individuals from providing such views in the future.**

Appendix G contains 2 distinct parts which will be considered separately.

Appendix G – Draft proposals and discussions

- [61] Parts of Appendix G contain early drafts of the Final Report, which can be withheld under section 20(1)(b), parallel to my consideration of Appendix A, above. Individuals should be allowed private space to develop their thinking and arrive at a settled view without their incomplete lines of thought being released into the public domain with the risk that this would undermine future participation or inhibit free and frank deliberations.
- [62] **Therefore, I find that the draft proposal and discussions in Appendix G are protected under section 20(1)(b).**

Appendix G – Proposed Legal Service Office set up

- [63] **This section of Appendix G contains records relating to the physical set-up of the Legal Services Office, and cannot be exempted under 20(1)(b).**

Appendix H – Proposal submitted by a commercial company

- [64] This Appendix contains a commercial proposition to the Committee to assist in the Legal Aid process. It is a sales document, and it does not contain views or advice.
- [65] **I do not find that Appendix H is exempt under section 20(1)(b) of the FOI Law.**

Appendix I – Correspondence

- [66] Similar to Appendix E, Appendix I contains inputs from third parties on the Legal Aid Review, as well as individuals' views and comments. I believe that such input was freely and frankly provided for the purpose of deliberation, and that disclosure would be likely to restrain the open and honest exchange of such views in the future.
- [67] **I find that Appendix I is exempt under section 20(1)(b) of the FOI Law as disclosure would inhibit those individuals who provided their views and other individuals in the future providing such views.**

Appendix J – Review of public defenders office in other jurisdictions

- [68] Appendix J provides a summary of the public defenders offices in other jurisdictions and proposes how the Cayman Government should take forward such an office in the Cayman Islands. Having noted that a large proportion of this Appendix is taken from publicly available documents on the internet, in my opinion any reasonable person with access to the internet could find out the same or similar information.

[69] I do not find anything new or unique in Appendix J, and conclude that the exemption in section 20(1)(b) of the FOI Law does not apply to this Appendix as it contains no views and I cannot identify any inhibition that would be caused by the disclosure of this Appendix.

- **Conclusion on whether disclosure would inhibit the free and frank exchange of views for the purposes of deliberation.**

[70] Having considered the Final Report and its Appendices in detail, I accept that disclosure of the following parts would make it less likely that individuals would engage in discussions of this type in future with the same degree of openness and frankness. I find that the exemption in section 20(1)(b) applies to the following parts of the responsive record:

- **Paragraph 94 of the Final Report section**
- **Appendix A**
- **Appendix E and the last page of Appendix F**
- **Appendix G (Draft Proposals and Discussions)**
- **Appendix I.**

[71] The remainder of the responsive record is not exempt from disclosure under section 20(1)(b).

- **Consideration of the public interest test in relation to section 20(1)(b)**

[72] As I am satisfied that the exemption in section 20(1)(b) applies to the parts of the Report identified above, I am required to go on to consider the application of the public interest test in section 26(1) in relation to these parts. I must therefore consider whether, in all the circumstances of the case, the public interest in disclosing these parts of the responsive record is outweighed by the public interest in maintaining the exemption.

[73] As noted above, I decided to consider the application of the exemption in section 20(1)(b) on my own volition. Consequently, the Applicant and the Ministry have not provided submissions on the basis of this exemption. However, the general public interest factors listed in both their submissions are also relevant in the application of section 20(1)(b) and I am therefore applying these here.

[74] The Applicant's submission commented that the Report is a public document, paid for by public money and designed to influence public policy. As such, the Applicant considers that the public has the right to know its content. In addition, the Applicant commented that the Legal Aid review was suggested by the then Governor Stuart Jack in 2009, in order to inform the public debate on the consistently thorny issue of Legal Aid, and to examine the current situation and future options.

[75] I acknowledge that there is a general public interest in the disclosure of the Report, which would allow the public to see for itself the full background to the Legal Aid review, and learn about the matters discussed and the points raised. I also acknowledge the public

interest in being able to demonstrate that decisions are made after a full and thorough consultation.

[76] The Ministry provided comments on the public interest for and against the disclosure of the Report. The factors for disclosure which they identify are:

- The promotion of greater public understanding of the process and decision to establish the Legal Services Office.
- The provision of reasons for any decision taken by the Government to establish the Legal Services Office.
- The promotion of accountability of and within the Government in relation to the establishment of the Legal Services Office.
- To facilitate public participation in decision making by the Government.

[77] The Ministry also identified the following factors against disclosure:

- The Report was prepared in confidence in order to inform policy development and there is a strong public interest in Ministers being able to discuss and debate the pros and cons of particular policy options in private before their final decisions come under scrutiny.
- Disclosure would significantly inhibit the Government's ability to commission advice and would eradicate the "free space" that those at the highest level of Government should have in order to use imagination and consider radical policy options, without concern that every detail of their consideration will be publicly discussed.
- Independent experts would be reluctant to be frank and candid in their advice in future if they realized that their views, provided on a confidential basis would be disclosed.
- The ability of the Government to arrive at fully informed decisions would be adversely affected in the absence of significant and meaningful input to policy issues from experienced and qualified persons.
- Governance is enhanced or improved where advisers as well as Ministers are encouraged to provide an input to policy formulation without the fear of castigation or mockery from the public.

[78] Having considered these public interest arguments, I regard that the Final Report, by itself, provides a clear indication of the decision-making process, and that the disclosure of further information would add little or no instructional value for the Applicant. Specifically, the disclosure of the parts of the responsive record to which I have determined the exemption in section 20(1)(b) applies would not significantly provide additional insights into the basis upon which the Report's conclusions are founded. Nor would they significantly demonstrate further reasons why any decision was taken, or increase Government accountability or public participation in decision making in respect of the Legal Aid review exercise. If these records were disclosed, I find that the circumspection that would inevitably follow would not be in the public interest, and would

unduly inhibit that due consideration be given to all opinions before arriving at an agreed position in the future.

- [79] **Therefore, in relation to paragraph 94 of the Report and Appendices A, E, G (Draft Proposals and Discussions), and I, I find that the public interest in ensuring that officials continue to have a private space within which to deliberate and formulate an appropriate response to contentious issues, outweighs the public interest in disclosing these parts of the responsive record. Therefore, the exemption in section 20(1)(b) of the FOI Law applies, and these parts of the responsive record may be withheld.**

5. Section 23(1)

- [80] As I have already found that the Appendices A, B, C (up to, and including, the Legal Aid Application form), E, F, G (Draft Proposals and Discussions), I, J and K are exempt under sections 9(d) or 20(1)(b), I will not consider whether these Appendices are exempt under section 23(1).

- [81] This leaves the consideration of whether section 23(1) applies to the Table of Contents, Final Report, Appendix C (after the Legal Aid Application form), Appendix D, Appendix G (Proposed Legal Service Office set up) and Appendix H.

- [82] Personal information must first be about an identifiable individual. Most of the time, this means that the name of the individual is contained in the record but, in other cases, it may be possible to identify an individual through some other information in the record. In any situation where the identity of the individual can be ascertained or deduced by the information in the record, that information is personal information for the purposes of the FOI Law, unless it is excluded from the definition of personal information in the Regulations.⁷

- [83] Considering the sections of the responsive record referred to in paragraph [81], I am satisfied that these sections contain some personal information.

- [84] Having found that the above sections of the responsive record contain personal information, I must now decide whether disclosure of that information would be unreasonable. Section 23(1) of the FOI Law states:

“Subject to the provisions of this section, a public authority shall not grant access to a record if it would involve the unreasonable disclosure of personal information of any person, whether living or dead.”

- [85] Public authorities cannot automatically assume that the FOI Law protects all personal information from disclosure by virtue of section 23(1). The only personal information protected is that which would be unreasonable to disclose.

⁷ Guidance on the definition of “Personal Information” is set out in regulation 2 of the *Freedom of Information (General) Regulations, 2008*

[86] As I found in Hearing Decision 8-01610⁸, in determining what is unreasonable, it is important to consider all of the circumstances relevant to the request, including:

- (a) Is the information sensitive?
- (b) Would disclosure prejudice the privacy of the individual?
- (c) Has the information “expired”?
- (d) Is the information required for the fair determination of someone’s rights?
- (e) Does the social context render disclosure reasonable?
- (f) Is there any suggestion of procedural irregularities?

(a) Is the information sensitive?

[87] It is my view that the examples of legal aid cases in Appendix C, and the whole of Appendix D contain sensitive personal information, including details of individual cases. However I do not find that the personal information in the remaining parts under consideration is particularly sensitive.

(b) Would disclosure prejudice the privacy of the individual?

[88] Taking each of the remaining sections of the Report:

Table of Contents

[89] Items 5 and 6 of the Table of contents contain names of private individuals the disclosure of which would prejudice the privacy of the individuals. Item 11 also contains the name of a private individual. However this is in relation to a report which is publicly available and therefore would not prejudice the rights of the said individual.

Final Report

[90] Although the Final Report contains some personal information, the majority of it is in the form of names of individuals in relation to the organizations they represent. This information is already in the public domain, and in any event does not include details relating to their personal lives, and the disclosure of this personal information would not prejudice the privacy of the individuals.

[91] However, paragraphs 42 and 43 refer to specific individuals and their comments on the legal aid review, and I consider that their names (and their names solely) should be withheld. (Paragraph 94 of the Final Report also contains submissions from an identifiable individual, and I have already upheld the withholding of this paragraph for different reasons).

⁸ *Campbell v MGN Ltd* [2004] 2 All ER 995 para 99.; these, or similar considerations are standard in many Freedom of Information and Privacy laws, including the British Columbia, Alberta and Ontario Freedom of Information and Protection of Privacy Acts; Information Commissioner’s Office *ICO Hearing 8-01610 Decision Health Regulatory Services (HRS)* 4 March 2011 p.10
[http://www.infocomm.ky/pubdocs/file/March%202011/ICO%20Decision%208-01610%20HRS%20\(FINAL\).pdf](http://www.infocomm.ky/pubdocs/file/March%202011/ICO%20Decision%208-01610%20HRS%20(FINAL).pdf)

Appendix C (Legal Aid Attorneys)

- [92] Although the names of individuals in this section of Appendix C do not constitute sensitive personal information, disclosure could nonetheless prejudice the individuals concerned since the record contains additional personal information. The named attorneys provide a public service when they take up a legal aid case but are not employed directly by a public authority and the attorneys' private employing firms are not subject to the FOI Law. I have therefore concluded that it would prejudice the individuals concerned if the information was disclosed.

Appendix C (Legal Aid applications) and Appendix D (Legal Aid case financial information)

- [93] These parts of the responsive record contain sensitive personal information that is not in the public domain. I consider that disclosure of this information would substantially prejudice the privacy of the individuals concerned.

Appendix G (Proposed Legal Service Office set up)

- [94] Although this part of Appendix G contains some names of individuals in relation to the organizations they represent, this information is already in the public domain, and in any event does not include details relating to their personal lives, and the disclosure of this personal information would not prejudice the privacy of the individuals.

Appendix H (Commercial offering)

- [95] This record contains some personal information on an employee of a private company. However, the information relates to the individual's career rather than to their home or family life. I do not find that disclosure would prejudice the individual concerned.

(c) Has the information "expired"?

- [96] The personal information in the Table of Contents and Final Report has not expired and is still relevant and it is therefore not appropriate to disclose.
- [97] The records within Appendices C and D date from a few years ago, but the information has not expired, especially as it relates to the individuals' personal rather than their professional life. Also, the list of Legal Aid attorneys, although old, it is not expired as it contains information on individuals who are still active as attorneys. As such, I cannot find that the age of the record is a factor in favor of finding its disclosure more reasonable.

(d) Is the information required for the fair determination of someone's rights?

- [98] As further explained below, the personal information could not be used by the Applicant in any form to further their needs or assist individuals applying for legal aid. Therefore, the withholding of the parts of the responsive record under consideration here will not affect the Applicant's rights.

(e) Does the social context render disclosure reasonable?

- [99] Within the context of the issues surrounding the responsive record, I believe that disclosure of the parts of the Report which I have determined to be protected by section 23(1), without the consent of the individuals concerned, would be an unreasonable invasion of their privacy.

(f) Is there any suggestion of procedural irregularities?

[100] I have found no procedural irregularities relating directly to the content or context of the responsive records. Procedural matters relating to the handling of the FOI request are addressed above.

[101] **On balance, I conclude that the disclosure of names of individuals in items 5 and 6 of the Table of Contents and in paragraphs 42 and 43 of the Final Report would be an unreasonable disclosure of personal information under section 23(1). In addition, it would be unreasonable to disclose the personal information which constitutes Appendices C (Legal Aid Attorneys and Legal Aid Applications) and Appendix D.**

▪ **Consideration of the public interest test in relation to section 23(1)**

[102] Having found that disclosure of the information as set out in paragraph [101] above would be unreasonable, I am now required to apply the public interest test as per section 26(1).

[103] Applying the public interest factors as discussed earlier, I do not find that the public interest in disclosing the information under consideration outweighs the public interest in maintaining the exemption under section 23(1).

[104] **I therefore conclude that the disclosure of names of individuals items 5 and 6 of the Table of Contents and in paragraphs 42 and 43 of the Final Report would be an unreasonable disclosure of personal information and their disclosure would not be in the public interest. In addition, it would be unreasonable to disclose the personal information which constitutes Appendices C (Legal Aid Attorneys and Legal Aid Applications) and Appendix D, and the disclosure of this information would not be in the public interest.**

F. FINDINGS AND DECISION

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

Findings:

1. Sections 11(2)(b) and 19(1)(a) do not apply to the responsive record.
2. The Table of Contents is not exempt and should be disclosed except for the names of individuals in items 5 and 6 which are exempt from disclosure under section 23(1).
3. The Final Report is not exempt and should be disclosed except for the names of individuals in paragraph 42 and 43 which are exempt under section 23(1), and paragraph 94 in its entirety which is exempt under section 20(1)(b).
4. Appendix A is exempt under section 20(1)(b).

5. Appendix B is publicly available and should be disclosed to the Applicant as per section 49(1)(b).
6. Appendix C (up to and including the Legal Aid Application Form) is publicly available and should be disclosed to the Applicant.
7. Appendix C (Legal Aid Attorneys and Legal Aid Applications) is exempt under section 23(1).
8. Appendix D is exempt under section 23(1).
9. Appendix E is exempt under section 20(1)(b).
10. Appendix F is publicly available and should be disclosed to the Applicant, with the exception of an email on the last page which it appears should have been included in Appendix E and is exempt under section 20(1)(b).
11. Appendix G (Draft proposals and discussions) is exempt under section 20(1)(b).
12. Appendix G (Proposed Legal Service Office set up) is not exempt and should be disclosed to the Applicant.
13. Appendix H is not exempt and should be disclosed to the Applicant.
14. Appendix I is exempt under section 20(1)(b).
15. Appendix J is not exempt and should be disclosed to the Applicant.
16. Appendix K is publicly available and should be disclosed to the Applicant.

Decision:

I overturn the decision of the Ministry of Finance, Tourism and Development to withhold a copy of the Legal Aid Review Committee's Report on Legal Aid dated March, under sections 11(2)(b) and 19(1)(a) of the *Freedom of Information Law 2007*. However, in considering additional exemptions I find that certain sections of the Report can be withheld and disclosed as detailed in my findings above.

Some parts of the Report, as detailed in my findings above, should be redacted or withheld as permitted under section 12(1) of the FOI Law. As per section 12(2)(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 Applicant or the Public Authority 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 12 September 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
29 July 2011