

ICO Hearing 16 - 00811
Decision
National Pensions Office

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
25 October 2011

Summary:

An Applicant was refused access by the National Pensions Office to audited accounts and records of correspondence relating to Multiple and Single Employer pension plans from July 2006 to June 2010.

The Information Commissioner did not make a ruling on the release of the responsive records, and instead required the Chief Officer of the National Pensions Office to re-examine the request and the responsive records and to take such steps as may be necessary to bring the National Pensions Office into compliance with its obligations under the Law.

Statutes¹ Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
National Pensions Law (2010 Revision)
The Interpretation Law

Exclusions and Exemptions Considered:

Sections 3(7), 20(1)(d), and 21(1)(b) and 23(1) of the *Freedom of Information Law, 2007*

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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 12 October 2010, the Applicant made an FOI request to the National Pensions Office (“NPO”) for the following records:
1. *The period for which the following information is requested is from July 2006 to June 2010.*
 2. *In this request for information correspondence includes but is not limited to all (i.e. within Government, individuals and private sector) letters, faxes, reports, emails, memos, minutes of meetings, meeting notes, phone logs, phone conversation records, etc.*
 3. *In this request for information correspondence does not include the information requested in FOI Request 37373 - MEPP & SEPP Audited Accounts. However, if the NPO wishes to consolidate FOI Request 37373 - MEPP & SEPP Audited Accounts with this current FOI Request then that is acceptable.*
 4. *Copies of all correspondence from:*
 - 4.1 *The auditors of all Multi Employer Pension Plans (MEPP) and all Single Employer Pension Plans (SEPP) sent to the respective plans and a copy of this correspondence is held by the National Pension Office (NPO).*
 - 4.2 *The NPO to all MEPPs’ and SEPPs’ auditors.*
 - 4.3 *The NPO to MEPPs’ and SEPPs’ as a result of or in connection with correspondence received from auditors and referencing an MEPP or SEPP.*
- [2] On 25 January 2011, the NPO responded to the Applicant denying access to the records citing section 3(7) of the FOI Law, on the ground that to grant access to the records would be abrogating the provisions of section 24 (which references section 23) of the *National Pensions Law, 2010*.
- [3] On 2 February 2011, the Applicant requested an Internal Review, and on 23 February the Chief Officer of the NPO responded to the Applicant upholding the decision to refuse access to the records under section 3(7) of the FOI Law. On 28 February 2011, the Applicant appealed to the Information Commissioner’s Office (“ICO”), and an attempt was made to resolve the matter through mediation.
- [4] On 10 June 2011, the Chief Officer of the NPO advised the Applicant that in addition to section 3(7), the Public Authority would also be relying on the exemptions set out in sections 20(1)(d), 21(1)(b) and 23(1). These exemptions relate to the effective conduct of public affairs, commercial interests and personal information respectively. As the issues were not settled through mediation, the matter proceeded to a formal Hearing before the Information Commissioner which commenced on 13 July 2011.

B. BACKGROUND

- [5] The National Pensions Office (NPO) is the regulatory body for private pension plans in the Cayman Islands. Its mission is to ensure the effective and efficient administration,

implementation and evolution of the National Pensions Law and Regulations (NPL). The NPO's functions are governed by the NPL, and the National Pensions Board, which is a statutory Board appointed by the Governor in Cabinet under section 78 of the NPL.

C. PROCEDURAL MATTERS

- [6] After the Fact Report and the Notice of Hearing had been issued in this case, and during their initial submission the NPO sought to rely on further exemptions, specifically sections 17(b)(i) and 21(1)(a)(ii). These exemptions cover actionable breach of confidence and commercial value.
- [7] In several instances in the past (see Decisions 1 and 13) I have allowed the public authority to rely on new exemptions, where there was sound reason for these late submissions, and where it ensured fairness to all parties. In previous Hearings I have also refused to consider exemptions raised late in the process (see Decisions 9 and 11).
- [8] In this instance, I am declining to allow the reliance on new exemptions. I do not accept the reasoning put forward by the NPO that the Information Commissioner is statutorily obligated to consider all other relevant exemptions even when not raised by a public authority. As previously set out in Hearing 11:
- 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.”
- [9] In addition, the NPO has not provided any reasons for allowing the new exemptions, or explanations as to why these exemptions were not put forward at either the original response or internal review stages.
- [10] Another very relevant factor in this hearing is that the responsive records have actually not been produced. I am unsure as to whether the Chief Officer had sight of the responsive records prior to issuing the internal review decision. This is understandable if the public authority is relying on section 3(7) and submitting that the FOI Law does not apply to the responsive records generally. However, in order to rely on specific exemptions, an inspection of the responsive records is necessary. Along with the Registrar of Hearings, I visited the NPO to get insight into the content and volume of records requested. The records covered by the request are numerous, and filed in a number of different places. They had not been identified and pulled from their respective files, and it appeared as if to do so would have involved a significant amount of time and effort on the part of the Information Manager. I requested and have been provided with a sample of documents that constitute the responsive record.

D. ISSUES UNDER REVIEW IN THIS HEARING

[11] The issues to be decided in this Hearing are:

1. **Section 3(7)** - Are the responsive records exempt from disclosure because to grant access to the records would be abrogating the provisions of the National Pensions Law?
2. **Section 23(1)** - Are the responsive records exempt from disclosure because their disclosure would involve the unreasonable disclosure of personal information of any person, whether living or dead?
3. **Section 21(1)(b)** - Are the responsive records exempt from disclosure because they contains information...concerning the commercial interests of any person or organization...and the disclosure of that information would prejudice those interests?
4. **Section 20(1)(d)** – Are the responsive records exempt from disclosure because their disclosure would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs?

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Section 3(7)

[12] The NPO has denied access to the responsive records on the grounds that section 3(7) pertains, which states:

3(7) Nothing in this Law shall be read as abrogating the provisions of any other Law that restricts access to records.

The position of the National Pensions Office

[13] The NPO points out that section 23 of the National Pensions Law (2010 Revision) specifies the persons who may be granted access by an administrator to prescribed documents and information regarding a pension plan and pension fund. In addition, section 24 of the NPL provides for the administrator of a pension plan and the person mentioned in section 23(1) to inspect certain documents at the offices of the Superintendent (of Pensions).

[14] Section 23 of the NPL states:

- 23. (1) On written request, an administrator shall make available the prescribed documents and information in respect of a pension plan and the pension fund for inspection without charge to-*
- (a) a member;*
 - (b) a former member;*
 - (c) the spouse or former spouse of a member or former member;*
 - (d) a claimant;*
 - (e) any other person entitled to pension benefits under the pension plan;*

- (f) *an agent authorised in writing by a person mentioned in paragraph (a), (b), (c), (d) or (e);*
 - (g) *an employer who is or was required to make contributions to the pension plan;*
 - (h) *a receiver or trustee in bankruptcy of an employer referred to in paragraph (g); and*
 - (i) *such other person as may be prescribed.*
- (2) *The prescribed documents and information may be inspected at the premises of the employer of a member or former member or at such other location agreed upon by the administrator and the person making the request.*
- (3) *A person inspecting the documents may copy the documents or purchase from the administrator, at a reasonable fee, copies of the documents.*
- (4) *A person described in paragraphs (a) to (g) of subsection (1), may not make a request under this section more than once in any calendar year unless the documents have been changed or amended during the course of the year.*

[15] Section 24 of the NPL states:

24. The administrator of a pension plan and the persons mentioned in section 23(1) may inspect at the offices of the Superintendent during normal business hours, the copies of the documents that constitute the pension plan and the pension fund and such other prescribed documents as are filed in respect of the pension plan and the pension fund and may obtain copies of the documents upon payment of the prescribed fee.

[16] Auditors of a pension plan normally correspond with an administrator concerning the audit of a plan. At the completion of an audit, the administrator forwards a copy of the audited financial statements of a fund to the Superintendent. However, in the event that the auditors find some contravention of the Pensions Law or Regulations, the NPL requires the auditor to immediately send a copy of the report on this breach directly to the Superintendent.

[17] The NPO considers that it is this type of correspondence, from the auditors of a fund to the Superintendent, as well as copies of the audited accounts of all the pension plans in existence for the period requested, that falls into the scope of this request.

[18] The NPO submits that section 24 of the NPL, read in conjunction with section 23(1) shows a clear intent on the part of the legislator to restrict the persons who may have access to documents which contain information in respect to pension plans and pension funds. It contends that the Applicant does not fall into the category of "such other persons as may be prescribed" under section 23(1)(i) of the NPL. The NPO submits that to grant access under the FOI Law to persons not prescribed under the NPL would be in violation of the NPL. The NPO contends therefore that section 3(7) of the FOI Law applies, and it is not required to grant access to a record requested under the FOI Law where the provisions of other applicable laws restrict such access.

The position of the Applicant

[19] The Applicant does not comment on the application of section 3(7) of the FOI Law.

Discussion

- [20] Section 3(7) speaks to other laws which restrict access to records. In the case of the NPL, circumstances are set out which ensure that the administrator of a fund provides access to certain persons. It should also be noted that section 23(1) of the NPL refers to the administrator of a fund, and not the Superintendent of Pensions. Administrators of pension plans and funds are normally private sector companies which are not subject to the FOI Law. It is therefore necessary to set out in Law requirements for the administrator to provide access to certain documents to specific persons. This is done in the NPL, but section 23(1) of the NPL legislates access, and does not restrict access, as required in order for section 3(7) of the FOI Law to apply.
- [21] Section 24 of the NPL refers to the Superintendent of Pensions and it further provides that the administrator of a pension plan and the persons mentioned in section 23(1) may inspect at the offices of the Superintendent copies of the documents that constitute the pension plan or fund, and may obtain copies upon payment of a prescribed fee. Again, this section of the NPL speaks to providing access, and not to restricting access as required for section 3(7) of the FOI Law to apply.
- [22] This results in an unusual situation where information held by the NPO is accessible to those persons which the NPL has defined as having the right of access (for a prescribed fee) but the general public can request this information under the FOI Law (potentially at no charge, or at the cost of the fee under the FOI Law if applicable). This illustrates an inconsistency between the NPL and the FOI Law, which I would recommend that the Legislature address.
- [23] Consequently, it is my view that the NPL sets out circumstances to provide access to records, and I do not consider that this naturally means that all other access is restricted or denied. As the FOI Law refers to any other Law that restricts access to records, I do not find that section 3(7) can be applied to this request, and the NPO is required to treat the request as an FOI request and provide access to the Applicant, unless a legal exemption can be applied, and the public interest in withholding the records outweighs the public interest in disclosing the responsive records.

2. Section 23(1)

- [24] In the alternative, the NPO denied access to the responsive records on the ground that they are subject to section 23(1). This section 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.

The position of the National Pensions Office

- [25] The NPO submits that in accordance with section 3 of the Interpretation Law “person” includes any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons. Consequently, they argue that the administrators of a pension plan include corporations and bodies of trustees and would be considered persons for the purposes of the FOI Law. The NPO goes on to discuss various information contained in the financial

statements and why this can be seen to constitute “personal information”. They submit that a redaction of this personal information in accordance with section 12 would result in the record being rendered useless.

The position of the Applicant

[26] The Applicant contends that no personal information has been requested.

Discussion

[27] I reject the argument of the NPO that the administrators of a pension plan, being corporations and bodies of trustees, are considered persons for the purposes of the FOI Law and that information held by the administrators would be “personal information” under the Law. In the definition of personal information, the FOI Regulations clearly stipulate that it is “information about an individual whose identity is apparent”.

[28] To attempt to apply the definition of a “person” under the Interpretation Law to this case is contrary to both the letter and spirit of the FOI Law. I am disappointed that a public authority would try to withhold information on such spurious grounds, especially given that the FOI Law presumes disclosure, and the public authority is expected to release records unless an exemption or exception can be legally applied, and even then, still release the responsive record if it would be in the public interest to do so.

[29] Therefore, I find that section 23(1) does not apply to the audited accounts of the pension plans, nor to correspondence that I have seen between the auditors and administrators of pension plans and the NPO.

[30] Having said this, some of the records that the NPO considers a part of the responsive record, for example any correspondence relating to a specific member of a plan, may contain personal information that it would be unreasonable to disclose. This personal information could however be identified and redacted under section 12.

3. Section 21(1)(b)

[31] The NPO also seeks to deny access to the responsive records on the ground that they are subject to section 21(1)(b). This section states that a record is exempt from disclosure if:

it contains information...concerning the commercial interests of any person or organization... and the disclosure of that information would prejudice those interests.

The position of the National Pensions Office

[32] The NPO quotes the definition of “commercial interest” from the UK Department of Justice: “‘Commercial’ relates to an activity in the way of a business, trade or profession. A commercial interest relates to a persons’ ability to successfully participate in a commercial activity”.

[33] Their full submission on the use of this exemption is self explanatory and worth repeating:

The record requested as stated includes both the multiemployer and single employer pension plans. The multiemployer pension plans compete against each other for a larger membership. The release of this information would result in the administrators of the pension plans being placed at a competitive disadvantage as investments [sic] strategies of an administrator may be adopted by other administrators and remove the competitive edge and investment returns of a pension plan to the detriment of the contributors.

It is the submission of the NPO that the audited financial statements of a pension plan and a pension fund contain detailed information regarding the exact investment assets of that plan. Those assets have a specific value to the pension plan and the pension fund and as such, the release of the records would provide competitors with access to information on the specific assets held by each pension plan as well as their investment strategy. The statements would reveal the unique composition of the investment portfolio of a pension plan.

The disclosure of that information would make available sensitive information which is of commercial interest to the administrators of the pension plan. It is more probable than not that this would negatively impact the competitive advantage of the respective pension plan and the pension fund. It is also more probable than not that the administrator would be prejudiced by the disclosure as this could result in the transfer of a pension plan to other participants in the market. The record is therefore exempt from disclosure pursuant to section 21(1)(b) of the FOI Law.

The position of the Applicant

- [34] The Applicant accepts that the NPL provides for members of pension plans to have the right to obtain information on their pension plans, including the audited accounts. However, the Applicant's argument seems to be that everyone should have the right to see all details (other than personal information) of all pension plans, financial statements and correspondence with the NPO which might show non-compliance or poor performance of any fund.
- [35] The Applicant submits that "the public interest to know the quality of the operation of pension plans overrides the secret protection of any...commercial interests..."

Discussion

- [36] There is arguably information of commercial interest to the plan administrators in some documents I have seen. However, any one individual, who is a prescribed person under the NPL, would have access to the prescribed records pertaining to their plan, and could potentially share this information if they so wished. These prescribed records include the audited accounts of their fund, as well as correspondence such as that sought by the Applicant. Similarly, a group of persons, who between them have access to all of the plans by virtue of the NPL, could possibly obtain, share, and compare such information. This fact diminishes the argument that the information contained in the responsive records needs to be withheld from this Applicant in order to protect commercial interests.
- [37] In addition, it is the case that some of the records being requested pertain to pension funds that are no longer in existence, thus the records would be historical and their disclosure would not

affect the competitiveness or investment returns as argued above. Thus, disclosure would not necessarily result in harm in respect of all the responsive records.

[38] At best, I have not been presented with evidence that all of the records requested are exempt under section 21(1)(b).

4. Section 20(1)(d)

[39] The NPO finally seeks to deny access to the responsive records under section 20(1)(d) which states:

A record is exempt from disclosure if...its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

[40] The NPO takes the position, with which I agree, that this exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption. They cite the ruling of the UK Information Tribunal in McIntyre v Information Commissioner and Ministry of Defence EA 2007/0068 to support this approach.

[41] Given that I have not found it possible to determine categorically if the above exemptions apply to all the responsive records, I will not at this point consider this exemption.

F. DISCUSSION

The Public Interest Test

[42] As set out below, I have not been able to reach a conclusion as to the proper application of all the exemptions cited by the NPO. I will therefore not at this point consider whether in any event factors supporting disclosure in the public interest outweigh those in favour of denying access.

Procedural matters

[43] I have had tremendous difficulty in obtaining and considering the views of the parties in this Hearing. First, the request itself is very broad and comprises a large number of different types of records, for the four years from July 2006 to June 2010. A sampling of records I have obtained from the NPO indicate that in June of 2011 there were a total of 19 Single and Multi Employer Pension Plans, each with a file for every year. However, dating back to July of 2006 there were other plans that have opened and closed, so the number of files over four years would be increased. In discussion with the NPO I have estimated that the request would cover over 100 separate files.

[44] Second, there seems to be some confusion between the parties as to exactly what is being sought by the Applicant. I regret that during the investigation stage of this appeal the request could not have been clarified, and possibly reduced in scope to a more clear and manageable

request. As it stands, the responsive records have not all been identified and produced, nor have they all been carefully examined to determine what information could be released.

- [45] A possible solution may have been for the Applicant to reduce the scope of the request, and for the NPO to release at least some of the records requested. A carte blanche application of the exemptions cited by the NPO to all of the records is not acceptable.

The initial decision by the Information Manager

- [46] In coming to a decision to plead the exclusion in section 3(7), it was not necessary for the Information Manager to identify and examine every record pertaining to the request. Her methodology was correct in that she advised the applicant that she was applying section 3(7) as she did not consider that the FOI Law applied. She also correctly advised the applicant that an appeal could be made to the Chief Officer for an Internal Review.

The Internal Review

- [47] It appears that an Internal Review was carried out by the Chief Officer, and additional exemptions applied, without examination of all the responsive records. Issues of exactly what and how many records constituted the responsive record should have been sorted out at this stage, and consideration given to what records or parts of records could be released.

- [48] In order to rule that an exemption applies to some responsive records (e.g. that they contain personal or commercially sensitive information), the Chief Officer would need to identify and meaningfully examine the responsive records in order to make a credible assessment as to what information could be released and which records could be legally withheld.

- [49] Regulation 21(k) of the *Freedom of Information (General) Regulations 2008* (the "Regulations") provides that an Information Manager ("IM") is obliged to:

examine records to which access has been applied for to determine whether-

- (i) the record is exempt in its entirety;*
- (ii) the record contains exempt matter;*
- (iii) access should be granted; or*
- (iv) the grant of access should be deferred under section 11 of the Law*

- [50] The Law does not specify in detail what steps a Chief Officer must take while conducting an internal review, but section 34(3)(a) provides that:

A person who conducts an internal review-

- (a) may take any decision in relation to the application which could have been taken on an original application;*

- [51] I consider that, in order to conduct an internal review, a Chief Officer must examine the responsive records closely, as specified for the IM in Regulation 21(k).

Burden of Proof

[52] Pursuant to section 43(2), the burden of proof is on the public authority to show that it acted in accordance with its obligations under the Law. If a public authority has not done this, it is within my power to order all records released. However, in this case I am inclined to give the National Pensions Office another opportunity to examine the records and respond to the applicant as set out below.

G. FINDINGS AND DECISION

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

Findings:

I find that section 3(7) does not apply and the request must be dealt with under the *Freedom of Information Law, 2007*.

I reject the argument of the National Pensions Office that the administrators of a pension plan, being corporations and bodies of trustees, are considered persons for the purposes of the *Freedom of Information Law, 2007* and that information held by them is therefore personal information under section 23(1).

Adequate evidence has not been provided to me to show that all responsive records are fully exempt under section 21(1)(b) in that they contain information concerning the commercial interests of any person or organization and the disclosure of that information would prejudice those interests.

Because I am requiring the National Pensions Office to re-examine whether the other exemptions being argued have been properly applied, I am not in this Decision addressing the issue of whether the disclosure of the responsive records would otherwise prejudice, or be likely to prejudice the effective conduct of public affairs pursuant to section 20(1)(d). Neither am I considering the public interest test as it relates to the exemptions being sought.

Under section 43(3)(b), I find that the Chief Officer of the National Pensions Office did not conduct an adequate Internal Review of the request under review.

Decision:

Under section 43(3)(b) of the *Freedom of Information Law, 2007* I require the Chief Officer of the National Pensions Office to review her decisions of 23 February 2011, ensuring that she complies with the requirements under the Law, and advise the Applicant of her decision within 14 calendar days of the date of this order. If dissatisfied with the review decision, the Applicant will have the right to appeal to me, as set out in section 42(1).

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 my Office immediately upon submission to the Court.



Jennifer P Dilbert
Information Commissioner
25 October 2011