

ICO Hearing 22 - 00712
Preliminary Decision

Cabinet Office

Jan Liebaers MA CA LLM
Information Commissioner for the Cayman Islands (Acting)

24 August 2012

Summary:

Hearing 22-00712 requires the Information Commissioner to decide a preliminary issue, namely whether “Cabinet papers” which were requested by the Applicant but withheld by the Cabinet Office, are in fact “held” under section 2 of the Freedom of Information Law 2007.

The Acting Information Commissioner considered this matter, and decided that “Cabinet papers” are “held” under the Law, and required that the Cabinet Office consider the records under the Law.

Statutes¹ Considered:

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

Contents:

A.	INTRODUCTION	2
B.	BACKGROUND	3
C.	PROCEDURAL MATTERS	3
D.	ISSUES UNDER REVIEW IN THIS HEARING	3
E.	CONSIDERATION OF ISSUES UNDER REVIEW	5
F.	FINDINGS AND DECISION	9

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 9 November 2011 the Applicant made a Freedom of Information (“FOI”) request to the Cabinet Office for:

All documents relating to:

1. *Cayman Islands Estates Ltd.*
2. *Section: West Bay Beach North, Block: 10 A, Parcel: 43*
3. *Section: West Bay Beach North, Block: 10 A, Parcel: 43 Rem 2*
4. *Section: West Bay Beach North, Block 10 A, Parcel: 192*

1. This request for information, documents and correspondence includes but is not limited to all (i.e. within Government, individuals and private sector) in relation to the subject FOI Request:

1. *Letters*
2. *Faxes*
3. *Reports*
4. *Drawings*
5. *Maps*
6. *Emails*
7. *Memos*
8. *Minutes of meetings*
9. *Meeting notes*
10. *Phone logs*
11. *Phone conversation records*
12. *Dredging proposals*
13. *List of all Government agencies contacted / consulted in reference to any planning applications / approvals / refusals / complaints / revocations of planning, development permission, dredging proposals or any other matter connected with on the subject company or parcel of land.*
14. *Government agencies reports / comments / correspondence.*
15. *Comments from civil society.*
16. *If any documents are not released then list those documents, showing the originator, addressee, date, subject, copy addressees and reason for withholding the document.*
17. *Any other information relevant to the subject FOI requests.*

[2] The Cabinet Office reached an initial decision on 29 December 2011, and the Chief Officer conducted an internal review on 1 February 2012.

[3] During the pre-hearing investigation the Cabinet Office disclosed a number of extracts of Cabinet minutes, some of which were redacted. In the disclosed minutes a number of related documents (“Cabinet papers”) were mentioned, but these additional documents were not disclosed since Cabinet Office argued that they were not “held” under section 2.

[4] Also in the pre-hearing investigation, the Applicant refined the objections that formed the basis

of the appeal. The Applicant:

1. disagreed with the redactions of the minute extracts;
2. was not satisfied with receiving extracts as opposed to copies of cabinet minutes; and,
3. believed that the Cabinet Office should have considered the Cabinet papers “held” under the Law, and should have disclosed them.

[5] For clarity, the first and second questions will be addressed in the substantive Hearing Decision, not in this Preliminary Decision.

[6] This Preliminary Decision only seeks to address the first part of the third question, namely whether the “Cabinet papers” are “held” under the Law. Since the “Cabinet papers” were not considered in the Cabinet Office’s initial decision or in the Cabinet Secretary’s internal review, it would be inappropriate for me to decide whether they should be disclosed without giving the Cabinet Office a chance to express its views on their disclosure.

B. BACKGROUND

[7] The Cabinet Office is responsible for a number of cross-governmental policy areas, as reflected in its internal structure which includes a number of sections and departments whose work has cross-governmental scope.

[8] The Cabinet Office also coordinates the weekly meetings of Government ministers and is responsible for the records of Cabinet and Cabinet Working Committees. The Cabinet Secretary attends Cabinet meetings as a non-voting member.

[9] Before Cabinet became known by its present name it was called “Executive Council” or “EXCO” until 2003. For the purposes of this Decision these two names are taken as entirely interchangeable.

C. PROCEDURAL MATTERS

[10] Any procedural matters will be addressed in the substantive Hearing Decision, not in this Preliminary Decision.

D. ISSUES UNDER REVIEW IN THIS HEARING

[11] During the appeal, as further records were considered by Cabinet Office, the Applicant clarified that they were questioning whether it is correct for Cabinet Office to deny access to “Cabinet papers” on the basis that these records are not “held” by Cabinet under the Law.

[12] This question was incorporated into the Fact Report which was agreed between the parties, for consideration in Hearing 22-00712 under the heading “Preliminary Issues Under Review”:

The Information Commissioner will consider and decide whether the Cabinet Office “holds” the “records” requested by the Applicant as defined under Section 2 of the FOI

Law.

- [13] As there is no dispute whether the Cabinet minutes themselves are “held” by Cabinet Office, since they have already been considered under the Law and have been partially disclosed, the Preliminary Issue clearly pertains only to the “other” records, not to the minutes.
- [14] Both parties agree that there are additional records which are comprised of various record types which were submitted for consideration by Cabinet, or were otherwise relevant to the Cabinet minutes which have themselves already been partially disclosed. For ease of use I will continue to refer to these “other records” as “Cabinet papers” as this is what they are called in the Fact Report agreed by both parties.
- [15] The Applicant put together a listing of “Cabinet papers” which are mentioned in the partially disclosed minutes, but which have not been disclosed by Cabinet Office. This listing was included in the Fact Report. Please note that it may very well be incomplete, given that it was the Applicant who put it together from the limited available information, and not the IM as is the norm. If these records are found to be “held”, a more thorough search will have to be conducted to capture all records relevant to the request. For the purposes of this discussion it is assumed that these records exist. Whether this is true would have to be confirmed in the new search.
- [16] According to the listing compiled by the Applicant on the basis of the partially disclosed minutes, the relevant “Cabinet Papers” may be comprised of a wide variety of types of records including:
- Executive Council “agenda documents” relating to specific minutes;
 - “financial details documents”;
 - Attorney General’s reports and memoranda to EXCO on specific matters being considered, as well as Attorney General’s press release;
 - Attorney General’s draft letters and letters to third parties;
 - a “Crown Counsel chronology”;
 - “background information from the referenced female”;
 - “details of the nature/reason of the declared interest by the Hon. T.M. Bodden”
 - correspondence from the Private Secretary [to the Secretary of State –item 64/90];
 - letters from the Financial Secretary and the Minister for Communications; [item 69/90]
 - land valuation documents;
 - a “full review” [item 74/90];
 - a “requested valuation” [item 76/90];
 - a valuation of U[S]\$650,000” [item 77/90];
 - “another set of papers”[item 93/91];
 - “a newspaper article” [item 94/91];
 - “the government’s response in connection with this case” [item 95/91];
 - “a copy of the document prepared by Sidley and Austin” [item 97/91];
 - “the Hon Attorney General’s draft document and the comment from one [EXCO] Member on the Hon. Attorney General’s draft document” [item 98/91];
 - “the draft document in its final form” [item99/91];
 - “the letter from the person with the redacted name” [item 110/91];
 - draft letters “to the person with the redacted name” [item 111/91 and 112/91];
 - a letter “to the person with the redacted name” [item 113/91];
 - a letter to the Attorney General [item 117/91]
- [17] Given that this Preliminary Decision is about whether these “Cabinet papers” are “held” under the Law, and not about whether they should be disclosed, I am satisfied that it is appropriate for

me to consider this question in aggregate, and not consider whether each record is “held” as a separate issue.

[18] Therefore, given these considerations, the single issue under review in this Preliminary Decision is this:

Are the “Cabinet papers”, which were submitted for consideration by Cabinet, or were otherwise relevant to the Cabinet minutes, “held” under section 2 of the FOI Law?

[19] Judging from the respective submissions, I am satisfied that this question is clear to both parties. Both parties have had an opportunity to provide their views on this question in writing, and have done so in their respective submissions, as discussed below.

[20] Whether any record is “held” is important, as the FOI Law only applies to records that are “held”.

E. CONSIDERATION OF ISSUES UNDER REVIEW

[21] Section 2 defines the term “hold”:

“hold”, in relation to a record that is liable to production under this Law, means in a public authority’s possession, custody or control;

Section 2 also defines what is a “record” under the Law:

“record” means information held in any form including-

- (a) a record in writing;*
- (b) a map, plan, graph or drawing;*
- (c) a photograph;*
- (d) a disc, tape, sound track or other device in which sounds or other data are embodied, whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;*
- (e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom,*

held by a public authority in connection with its functions as such, whether or not it was created by that authority or before the commencement of this Law;

[22] There is no doubt that all the “Cabinet papers” are, indeed, “records” under this definition, as each of the listed documents is a “record in writing”. Similarly, other records that match the same broad definition as “records submitted for consideration by Cabinet, or otherwise relevant to the Cabinet minutes that have themselves already been partially disclosed” will also be “records” under the definition in the Law.

[23] Section 43(2) (also repeated in section 47(2)) provides that:

(2) *In any appeal under section 42, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Law.*

[24] Therefore, it is not up to the Applicant to prove that the “Cabinet papers” are “held”, but to the Cabinet Office to prove that they are not.

The position of the Cabinet Office:

[25] Surprisingly, the Cabinet Office does not argue its case on this question, except by quoting from two documents which apparently are meant to speak for themselves.

[26] The first quote is from a document entitled “Guidance Manual on the FOI Law”, which our own research identified as having been prepared in June 2008 by the Freedom of Information Unit, a unit of the Cabinet Office:

“Possession” in this context means an authority’s own document, “custody”; means someone else’s document which the authority is looking after and “control” means a document held by someone else, but where the authority can decide what happens to it. In most cases, records are considered to be “held” by the authority who: “(a) created the record; or (b) retained the record; or (c) succeeded to the functions of the authority who created or retained the record. Records stored off-sight [sic], but which are still under the “control” of a public authority, are considered to be “held” by that public authority.

[27] The second quote is from the Chief Secretary’s “Code of Practice on Records Management”, established under section 52, and issued in January 2008:

The public authority retains responsibility for providing access to records that are stored in off-sight [sic] accommodation or in the Government Records Centre. The National Archive is responsible for providing access to public records that have been transferred to the national archive collection under an authorized disposal schedule... Where a public authority receives a request for a public records that has been transferred to another authority or to the national archive collection, the request may be transferred in accordance with section 8 of the FOI Law.

The position of the Applicant

[28] The Applicant raises these points:

In regards to all of the requested documents it is the responsibility of the Council / Cabinet Secretary in the normal process of business of Council / Cabinet to insure they receive and retain a copy of all documents distributed to Council / Cabinet members, and as recorded in the Council Minutes, were discussed by Cabinet.

Therefore Council / Cabinet at one time had the documents in their “possession”, they were in their “custody” and under their “control”.

If Cabinet does not now have the documents in their “possession”, “custody” and “control” then Cabinet is obligated by the FOI Law to identify each record that has been transferred to the “possession”, “custody” and “control” of the other government entity. To date Cabinet has not identified the documents transferred, the government entity to

which the identified documents were transferred under the provisions of Freedom of Information Law, Section 52: Maintenance of records.

The Freedom of Information Law, Section 8: Transfer of Request applies to the situation where the requested documents never were in the “possession”, “custody” or “control” of the government entity to which an FOI Request has been submitted.

Cabinet is therefore incorrectly relying on Freedom of Information Law, Section 8: Transfer of Request, because this is not the situation in this FOI Request, the documents were in the “possession”, “custody” and “control” of Council / Cabinet when they were presented, discussed in Council / Cabinet and decisions made based on those documents.

Discussion

- [29] I find it very poor on the part of the Cabinet Office that they have simply relied on two quotes, without further argumentation, while at the same time withholding the records in question from the Applicant. If the point they are trying to make is important enough to delay the Applicant's legitimate rights under the Law, the least I would expect from a public authority is a properly argued case. Instead, I am left to try and unravel the meaning of the Cabinet Office's case. This is not satisfactory.
- [30] I am concerned that the Cabinet Office relies heavily on a Guidance Manual which has not been endorsed by the Information Commissioner, rather than on a straightforward interpretation of the FOI Law which seems sufficiently clear on the question of what is “held” and what is not. It is good to have additional guidance when necessary, but firstly Information Managers should look at the Law itself.
- [31] The terms “possession”, “custody” and “control”, are not defined in the Law, and must therefore be given their normal, everyday meaning.
- [32] Since the definition in section 2 states “possession, custody or control” (my emphasis), the records will be considered “held” if one or more of the three conditions is met. However, for clarity I will examine all three conditions.

1. Possession

- [33] According to the quote provided by the Cabinet Office this term “in this context means an authority's own document”.
- [34] This interpretation is incomplete. The Oxford Online Dictionary explains the meaning of “possession” as “the state of having, owning, or controlling something... an item of property; something belonging to one...”²
- [35] There is no logic to saying that a document is in the possession of someone only if it was written or created by that person, as the Cabinet Office seems to suggest. A person who receives a letter is the owner of that letter, just like a public authority that receives a land valuation report or a financial statement from another party, is now in possession of that report or statement. This is particularly true where the report or statement is subsequently used in the decision making

2 http://oxforddictionaries.com/definition/american_english/possession?region=us&q=possession

process of the public authority and becomes intertwined with the other records of the authority such as the Cabinet minutes.

- [36] The “Cabinet papers” are clearly owned by the Cabinet Office, they are their property, and they belong to them. Therefore the Cabinet papers are in the possession of the Cabinet Office, and they are “held” under the FOI Law.

2. Custody

- [37] According to the Cabinet Office, again quoting from the Guidance Manual, in the relevant context “custody” means “someone else's document which the authority is looking after”.

- [38] I find this interpretation lacking as well. The Oxford Online Dictionary defines “custody” as “the protective care or guardianship of someone or something”³ The quote from the Manual is correct to the extent that a record that has been received from someone else can indeed be in the custody of a public authority. However, I fail to see how this demonstrates that the “Cabinet papers” are not in the custody of the Cabinet Office. In fact, the reverse is true: since the “Cabinet papers” were received by Cabinet Office from a third party, whether within Government or not, they are now in the custody of the Cabinet Office, and are therefore “held” under the Law.

- [39] On this count as well the “Cabinet papers” are “held” under the Law, and should have been considered under its provisions.

3. Control

- [40] Cabinet Office quotes from the Manual:

“control” means a document held by someone else, but where the authority can decide what happens to it. In most cases, records are considered to be “held” by the authority who (a) created the record; or (b) retained the record; or (c) succeeded to the functions of the authority who created or retained the record. Records stored off-sight [sic], but which are still under the “control” of a public authority, are considered to be “held” by that public authority.

- [41] It is puzzling to note that Cabinet Office's submission again provides strong arguments in support of the Applicant's case.

- [42] Following the logic of this quote, while the listed “Cabinet papers” are for the most part not created by Cabinet Office (with the exception of the agendas), there is no doubt that the Cabinet Office retains them, and has succeeded to the functions of the Clerk of the Executive Council who previously created or retained them.

- [43] The reference in this quote, and also in the quote from the Code of Practice on Records Management cited above, to records that are stored off-site contradicts the argument Cabinet Office is trying to make. The quote from the Code of Practice states:

The public authority retains responsibility for providing access to records that are stored in off-sight [sic] accommodation or in the Government Records Centre.

3 http://oxforddictionaries.com/definition/american_english/custody?region=us&q=custody

- [44] The Code of Practice continues to state that these rules do not apply to records that have become part of the historical collections of the National Archive.
- [45] No argument has been made or evidence presented to me that the Cabinet papers are historical records that form part of the collections of the National Archive. If they were, the request should have been transferred there under section 8, as the Code of Practice and the Law provides. Alternatively, if the Cabinet Office were to store its records in off-site records storage accommodation or in the Government Records Centre, the Cabinet Office would still “retain responsibility for providing access” to their records.
- [46] The storage arrangements discussed in the Code of Practice are unique to the National Archive, and do not apply to any other public authority. In other words, the Cabinet Office cannot use the quote from the Code of Practice to claim that it is only storing the “Cabinet papers” on behalf of other public authorities who submitted these records to Cabinet, and that these other public authorities are actually in control of these records. The Cabinet Office is not a records storage accommodation or a records centre.
- [47] The minutes of Cabinet meetings, being the records that show the topics discussed and the decisions taken by Cabinet, can only be fully understood in the context of the supporting records that Cabinet had at its disposal at the time the meetings took place. Records do not exist in isolation, but must instead be appreciated in the context within which they came to be. As the Applicant points out, the ancillary documents “form part of the decision making process” for which Cabinet is accountable. One cannot judge whether a public authority made the right decision, without knowing what information the decision was based on.
- [48] As the minutes are inseparably linked to the supporting documentation, it is not acceptable to consider the former “held” under the FOI Law, but the latter not ‘held’. Instead, the Cabinet Office should have conducted a full search for any relevant records, and should have considered all of them under the Law. Not doing so impedes the transparency and accountability required by the FOI Law.
- [49] **For these reasons, I find that the “Cabinet papers” are in the possession, custody and control of the Cabinet Office, and are therefore “held” under section 2 of the FOI Law.**

F. FINDINGS AND DECISION

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

Finding

I find that the “Cabinet papers”, i.e. the records which were provided to Cabinet for consideration, or are otherwise relevant to the Cabinet minutes, are “held” under section 2 of the *Freedom of Information Law 2007*.

Decision

As I have found that the “Cabinet papers”, i.e. the records which were provided to Cabinet for consideration, or are otherwise relevant to the Cabinet minutes, are “held” under the Law, the

Cabinet Office has a duty to apply the provisions of the *Freedom of Information Law 2007* to these records in response to the request made on 9 November 2011.

In the first instance I require that the Cabinet Office conduct a thorough search for all records relevant to the request, including any records submitted to Cabinet or otherwise relevant to the Cabinet minutes that have themselves already been identified. In their search the Cabinet Office should also make sure that no additional relevant minutes exist.

Given the significant passage of time since the request was made, through no fault of the Applicant, I require that the Cabinet Office communicates a Revised Submission in the present Hearing 22-00712 to the ICO, in which it explains whether it intends to disclose the Cabinet papers at issue, and, if not, provide reasons for not doing so.

The Revised Submission should be provided to the ICO Registrar of Hearings no later than end of business on 10 September 2012. At the same time the Cabinet Office must provide the Registrar of Hearings with an un-redacted copy of any additional responsive records.

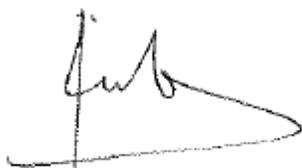
These requirements should not be misunderstood to mean that the records must be disclosed to the Applicant.

Once the Revised Submission has been received, the Registrar of Hearings will share it with the Applicant and afford the Applicant an opportunity for a Reply Submission which will be shared with the Cabinet Office. The Registrar of Hearings will revise the remaining schedule for the substantive Hearing accordingly.

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 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.

If judicial review has not been sought on or before 8 October 2012, and should the Cabinet Office fail to provide the Information Commissioner's Office with their Revised Submission in this matter, the Information Commissioner may 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.



Jan Liebaers MA CA LLM
Information Commissioner (Acting)
24 August 2012