



ICO Hearing 28 – 02112
Decision

The Governor's Office

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands

5 March 2013

Summary:

An Applicant was refused access to documents relating to the 2012 Cayman Islands Government Budget negotiations.

The Information Commissioner upheld the decision of the Governor's Office to withhold the responsive records under section 20(1)(b) of *The Freedom of Information Law, 2007*.

Statutes¹ Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
National Archive and Public Records Law, 2010 Revision
Public Management and Finance Law, 2012 Revision
Public Management and Finance (Amendment) Law, 2012

Contents:

A.	INTRODUCTION	2
B.	BACKGROUND	4
C.	PROCEDURAL MATTERS	4
D.	ISSUES UNDER REVIEW IN THIS HEARING	5
E.	CONSIDERATION OF ISSUES UNDER REVIEW	5
F.	FINDINGS AND DECISION	11

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 30 August 2012 the Applicant made an FOI request to the Governor's Office and the Ministry of Finance for:

Copies of all emails, letters or other communications – whether electronic or printed – that pertain to the Cayman Islands 2011/12 and 2012/13 budgets that were sent between the United Kingdom Government, the UK Foreign and Commonwealth Office, the Cayman Islands Governor's Office, the Premier's Office and the Ministry of Finance sent from 1 December, 2011 through the present date of this request.

- [2] On 14 September the Governor's Office proposed that the Applicant narrow the scope of the request, otherwise the public authorities concerned would have to consider pleading section 9(c) of the FOI Law – unreasonable diversion of resources. The Applicant accepted the following narrower scope of the request:

'Main Communications' (those with a formal letterhead) between the FCO and CIG involving the following individuals: the Premier, the Financial Secretary, the FCO Minister, the Governor, FCO Director Colin Roberts and the FCO Economic Advisor from 1 May until the date of [the] request.

- [3] The Governor's Office took the lead in responding to the request as both public authorities essentially held the same responsive records. The Governor's Office requested a 30-day extension to respond to the FOI request given that the request involved a number of stakeholders whose views they were seeking, and on 29 October advised the Applicant that access was being denied under sections 15(a), 15(b), 20(1)(b) and/or 20(1)d of the FOI Law. Since no internal review was possible, on 30 October 2012 the Applicant appealed the decision directly to the Information Commissioner's Office (ICO).
- [4] The ICO carried out a pre-hearing investigation and attempted an informal resolution, but the Governor's Office confirmed that their position remained unchanged, and the matter moved to a formal hearing before the Information Commissioner on 22 November 2012.
- [5] It was agreed that the records in dispute, including any attachments, and the exemptions claimed, are as follows:

	From	To	Date	Exemptions
1	FC Economic Adviser	Financial Secretary	1 st June	15(a), 15(b), 20(1)(b), 20(1)(d)
2	Premier	FCO Minister Henry Bellingham	13 th June	15(a), 20(1)(b), 20(1)(d)
3	FCO Minister Henry Bellingham	Premier	18 th June	15(a)15(b), 20(1)(b), 20(1)(d)
4	Premier	FCO Minister Henry Bellingham	20 th June	15(a), 20(1)(b), 20(1)(d)
5	FCO Economic Adviser	Financial Secretary	21 st June	15(a), 15(b), 20(1)(b), (20(1)(d)
6	Premier	Governor	22 nd June	15(a), 20(1)(b), 20(1)(d)
7	FCO Minister Bellingham	Premier	22 nd June	15(a), 15(b), 20(1)(b), 20(1)(d)
8	Premier	FCO Minister Henry Bellingham	25 th June	15(a), 20(1)(b), 20(1)(d)
9	FCO Minister Henry Bellingham	Premier	25 th June	15(a), 15(b), 20(1)(b), 20(1)(d)
10	Premier	FCO Minister Henry Bellingham	31 st July	15(a), 20(1)(b), 20(1)(d)
11	FCO Minister Henry	Premier	6 th August	15(a),15(b), 20(1)(b), 20(1)(d)
12	FCO Economic Adviser	Financial Secretary	9 th August	15(a), 15(b), 20(1)(b), 20(1)(d)
13	Premier	FCO Minister Henry Bellingham	9 th August	15(a), 20(1)(b), 20(1)(d)
14	Premier	FCO Minister Henry Bellingham	12 th August	15(a), 20(1)(b), 20(1)(d)
15	Premier	FCO Minister Henry Bellingham	13 th August	15(a), 20(1)(b), 20(1)(d)
16	Premier	FCO Minister Henry Bellingham	16 th August	15(a), 20(1)(b), 20(1)(d)
17	FCO Minister Alistair Burt	Premier	17 th August	15(a), 15(b), 20(1)(b), 20(1)(d)
18	FCO Minister Henry Bellingham	Premier	24 th August	15(a), 15(b), 20(1)(b), 20(1)(d)
19	Premier	FCO Minister Henry Bellingham	24 th August	15(a), 20(1)(b), 20(1)(d)
20	Director, Overseas Territories Dept. FCO	Premier	24 th August	15(a), 15(b), 20(1)(b), 20(1)(d)

B. BACKGROUND²

- [6] The Cayman Islands Government (CIG) operates an annual budget preparation process that has five distinct phases which are set out in sections 17 – 24 of the *Public Management and Finance Law, 2012 Revision* (PMFL). The five phases of the budget process are:
1. Strategic Phase;
 2. Detailed Planning and Budgeting Phase;
 3. Governor in Cabinet Collective Review Phase;
 4. Legislative Assembly Review Phase; and
 5. Documentation Phase
- [7] Typically the budget process runs from October through June and involves input from all Ministries, Portfolios, Statutory Authorities and Government Owned Companies. The Ministry of Finance (Public Finance) is the CIG entity that coordinates the budget process including the consolidation of all budget forecasts, analysis, policy advice and production of all budget documentation to the Cabinet and Legislative Assembly.
- [8] In accordance with sections 39 – 42 of the Framework for Fiscal Responsibility (FFR) that was agreed with the United Kingdom on 23 November 2011 and enshrined in *the Public Management and Finance (Amendment) Law, 2012*; the CIG has a responsibility to seek the approval of the Secretary of State of the United Kingdom where the CIG Budget forecasts indicate non-compliance with the terms of the FFR over the forecast period - which is the next three financial years.

C. PROCEDURAL MATTERS

- [9] There were no procedural matters other than a delay of approximately one month to the commencement of the Hearing due to the unavailability of the Governor and legal assistance for the Governor's Office from the Legal Department.
- [10] As a general observation, I applaud the willingness of the Governor's Office in taking the lead in providing a response to a request which was also made to another public authority, the Ministry of Public Finance. Requests under the FOI Law are frequently made to a number of different public authorities, and the effectiveness of Government's response often depends on the willingness of the Information Managers concerned to cooperate, or for one Information Manager to take the lead. However, I note that the Governor's Office took the lead in this particular case (rather than the Ministry), where the records reflect communications which took place between the Government of the Cayman Islands and the UK, and in which the Governor's Office was not a direct participant. Nonetheless, the Ministry's agreement with this arrangement is documented, and I have no fundamental objections to it.

² Background information provided by the Ministry of Finance (Public Finance)

D. ISSUES UNDER REVIEW IN THIS HEARING

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

1. **Section 15(a)** – Are Documents 1 through 20 exempt from disclosure because their disclosure would prejudice the security, defence or international relations of the Islands?
2. **Section 15(b)** - Are Documents 1, 3, 5, 7, 9, 11,12, 17, 18 and 20 exempt from disclosure because they contain information communicated in confidence to the Government by or on behalf of a foreign government or by an international organization?
3. **Section 20(1)(b)** - Are Documents 1 through 20 exempt from disclosure because their disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation? If so, should access nevertheless be granted in the public interest?
4. **20(1)(d)** – Are Documents 1 through 20 exempt from disclosure because their disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs? If so, should access nevertheless be granted in the public interest?

E. CONSIDERATION OF ISSUES UNDER REVIEW

[12] Given that the Governor's Office has sought to apply the exemptions in section 20(1)(b) to all of the responsive records, and these records all relate to specific negotiations on the Cayman Islands Government's 2012/13 Budget, I will consider the application of this exemption first. While it is not normally advisable to apply a blanket exemption across a number of documents, in this case the specific nature of the responsive records, and the particular exemption being applied, makes it possible to consider the application of this exemption to the records altogether.

Section 20(1)(b)

This section provides:

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;*

Pursuant to section 26, this exemption is subject to the public interest test:

26. (1) Notwithstanding that a matter falls within sections 18, 19 (1) (a) 20[1] (b), (c) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.

(2) Public interest shall be defined in regulations made under this Law.

The Position of the Governor's Office

[13] The Governor's Office submits that:

For relations between the Cayman Islands Government and the UK Government to thrive, there needs to be a comfortable private space where the governments can discuss issues confidentially. The release of the records would damage the negotiating process and would deprive the governments of this space. Ministers and officials in the Cayman Islands Government, in the UK Government and in other OT Governments involved in future budget negotiations would become less willing to set down candidly their views and proposals in writing. Instead, participants in the negotiations could carry out negotiations via unrecorded telephone conversations. The deliberative process would be severely undermined as information critical to the nation's economy would not be presented in writing to allow for fully informed decision to be taken on government's long term and short term plans. The parties' views would no longer be freely and frankly exchanged.

[14] They note that subsequent to the budget negotiations, a letter from the FCO Minister to the Premier concerning the Framework for Fiscal Responsibility being transposed into Law was made public at the request of the Minister. The result of the budget negotiations, that the UK Government was willing to approve the final budget proposals subject to certain conditions, was also made public. They also state that "In the view of the Governor's Office, this is a reasonable and legitimate position to hold – that private negotiations are kept private and that the result of the negotiation are made public." They contend that the publication of the letter from the UK Minister shows their "willingness to make public records not considered confidential".

[15] In applying the exemption, the Governor's office cites the UK Information Tribunal's ruling in McIntyre v. ICO³ for a definition of "would be likely to" and contend that "it is not only more probable than not, but there is a real and significant risk that disclosure of the records would inhibit the free and frank exchange of views for the purposes of deliberation".

The Position of the Applicant

[16] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

[17] In their Reply Submission, the Applicant objects to the references made to UK rulings by the Governor's Office, and notes that they do not refer to any previous decisions of the Cayman Islands Information Commissioner made over the past four years.

[18] They also object to the "blanket exemption" applied, that is, the fact that the documents are considered *en block* for the application of most exemptions.

[19] The Applicant argues that some information was released to the public, mostly via reports in the newspapers of proceedings in the Legislative Assembly and public meetings. At certain points certain communications between government and the FCO were read out in public. They

³ McIntyre v I.C.O & MoD. EA 2007/2008 – paragraph 40; Office of Government Commerce v Information Commissioner, EA 2006/0068 & 0080, paragraphs 40 & 48

contend that a public authority should not be able to “pick and choose” what is released to the public.

[20] The applicant responds to the Governor’s willingness to make some records public as follows:

The purpose of the law is not to determine whether the governor’s office, FCO or Cayman Islands government has “shown its willingness” to release records. Judging by this statement, left up to the FCO and governor’s office, government records would be released solely by their own judgment of what is releasable. The point of any open records law anywhere is to create some objective criteria by which the public can access government documents ... The test ... is not whether the public authority is “willing” to release records or if it has marked documents “confidential”, but rather what the law and the process requires.

[21] In their submission, the Applicant quotes from my Hearing Decision 9-02210⁴,

A public authority is not at liberty to cordon off ... a section of its activities or records, and post a ‘private and confidential’ label on information in the name of protecting free and frank deliberation, thus effectively placing those activities or records beyond the reach of the FOI Law.

[22] With respect to government needing a ‘comfortable private space’ in which to conduct the budget deliberations, the Applicant feels that the Governor and legislators have adequate private space, given that the “cabinet of this country meets entirely in secret”. They state that “in the writing of official letters regarding the Cayman Islands government budget – surely one of the most public documents that exist in these Islands – there may be limited expectation of confidentiality”

Discussion

[23] While, as the Applicant points out, rulings under the UK or any other country’s Freedom of Information legislation are not directly applicable to the Cayman Islands, I maintain that it is useful to refer to these rulings, as well as to UK ICO’s guidance notes, especially where the wording of the UK legislation is similar to Cayman’s. In some of my previous decisions, I have examined such cases for guidance.

[24] I also want to point out that I reject the argument made by the Governor’s Office that public officials in both the Cayman Islands and the UK would be likely to refrain from keeping a proper record of future budget negotiations, if the records under consideration in this Decision were disclosed under the FOI Law. Responsible civil servants in both governments should continue to meet the statutory requirements of their respective organizations, which in the Cayman Islands includes the application of section 6 of the National Archive and Public Records Law, 2010 Revision, which provides:

6. (1) Every public agency shall make and maintain full and accurate public records of its business and affairs, and such public records shall be managed and maintained in accordance with this Law.

⁴ ICO Decision 9 www.infocomm.ky/appeals

(2) *It shall be the responsibility of the most senior officer in every public agency to ensure that public records of that public agency -*

(a) *are maintained in good order and condition; and*

(b) *are created, managed and disposed of in accordance with records management standards and disposal schedules drawn up under this Law.*

[25] In previous decisions 4-02109, 9-02210, 19-01911 and 21-01212⁵, I have considered this exemption, in most detail in Hearing 9-02210. It may be helpful to repeat part of the discussion from that Hearing Decision.

[26] The FOI Law does not define any of the key terms used in the exemption found in 20(1)(b), which must therefore be afforded a normal meaning. Some guidance is also available from the English courts, the decisions of the UK Information Tribunal, and the published advice of the UK Information Commissioner.

“Would, or would be likely to” - According to the *Oxford Dictionary* “would” expresses a conditional mood, and indicates “the consequence of an imagined event or situation”, as where something happens when a certain condition is fulfilled.⁶ The UK Information Tribunal, quoting Mr. Justice Murphy’s ruling on an identical phrase in the Data Protection Act in R (on the application of Lord) v Secretary of State for the Home Office found that the term ‘would be likely to’ “does not mean more likely than not”, but it “connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests”.⁷ Therefore, the prejudice following from release of the responsive record must either follow as a result of the disclosure, or there must be a “very significant” chance that the prejudice would follow, but this chance need not be more likely than not.

“Inhibit” - According to advice from the UK Information Commissioner relating to a similarly phrased exemption in the UK’s FOI Act, this term means “to restrain, decrease or suppress the freedom with which opinions or options are expressed”.⁸

“Free and frank” - According to the *Oxford Dictionary*, these terms respectively mean “not physically restrained, obstructed, or fixed; unimpeded”, and “open, honest, and direct in speech or writing, especially when dealing with unpalatable matters”.⁹

“Deliberation” – The UK Information Commissioner considers that this term “tends to refer to the evaluation of the competing arguments or considerations that may have an influence on a public authority’s course of action. It will include expressions of opinion and recommendations but will not include purely factual material or background information. The information must reveal the ‘thinking process’ or reflection that has gone into a decision.”¹⁰ In its normal, day to day meaning this term indicates “long and

⁵ ICO Decisions 4, 9, 19 and 21 www.infocomm.ky/appeals

⁶ www.oxforddictionaries.com

⁷ *R (On the Application of Alan Lord) v The Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) paras 96-100. *Information Tribunal John Connor Press Associates Ltd v Information Commissioner* EA/2005/0005 25 January 2006 para 15 (available at: www.informationtribunal.gov.uk/DBFiles/Decision/i89/John%20Connor.pdf)

⁸ Information Commissioner’s Office *Freedom of Information Act. Awareness Guidance 25. Section 36: Effective conduct of public affairs*. Version 2 11 September 2008 p.5 (available at:

www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/EFFECTIVECONDUCTOFPUBLIC%20AFFAIRS.ashx)

⁹ www.oxforddictionaries.com

¹⁰ Information Commissioner’s Office *Awareness Guidance 25* p.5

careful consideration or discussion".¹¹

[27] Taking these meanings together, the exemption in section 20(1)(b) of the FOI Law 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 a public authority.

[28] In the case of the records being considered in this Decision, in order to determine whether the exemption applies, the following questions must be considered:

[29] *Do the responsive records contain views freely and frankly expressed for the purposes of deliberation?*

The responsive records being considered in this Hearing all form a part of the negotiations on the budget, and do contain views of the various parties, freely and frankly expressed for the purpose of coming to an agreement on the budget. One record contains an attachment, which is itself can be taken to be a part of the negotiations.

[30] *What is the probability that disclosure of the redacted records would restrain the unimpeded, open and honest exchange of views?*

It is important to note that the FOI Law clearly recognizes the legitimate need for public authorities to conduct candid and robust discussions, make hard choices, and conduct business in the secure knowledge that an exemption to disclosure is available where applicable. Section 20(1)(b) offers necessary and appropriate protection where public authorities legitimately require it.

[31] I am convinced that documents 1 – 20 contain such records that require this protection.

[32] I also refer to the conclusion of the Governor's Office based on McIntyre v ICO referred to in paragraph 15 above. This case involves the exemption in the UK FOI Act, which protects against prejudice to the effective conduct of public affairs, and while the term "would be likely to" is discussed, it arises in a different legal context as the exemptions in the FOI Act and the Cayman Islands Law are not identical. The McIntyre case was not about free and frank deliberations, although it was about the effective conduct of public affairs, and may therefore be more relevant to a consideration of section 20(1)(d).

[33] I refer to the Applicant in this case quoting from Decision 9, "a public authority is not at liberty to cordon off, *a priori*, a section of its activities or records, and post a "private and confidential" label on information in the name of protecting free and frank deliberation, thus effectively placing those activities or records beyond the reach of the FOI Law". With respect to the records under consideration, I find that the Governor's Office has identified and reviewed the responsive records, and that they do consist of free and frank discussions for the purposes of deliberation on the Government's 2012/13 Budget.

[34] **I find that section 20(1) (b) applies to the responsive records.**

¹¹ www.oxforddictionaries.com

Public Interest Test

[35] The public interest is defined in regulation 2 as follows:

“public interest” means but is not limited to things that may or tend to-

- (a) promote greater public understanding of the processes or decisions of public authorities;
- (b) provide reasons for decisions taken by Government;
- (c) promote the accountability of and within Government;
- (d) promote accountability for public expenditure or the more effective use of public funds;
- (e) facilitate public participation in decision making by the Government;
- (f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;
- (h) [sic] deter or reveal wrongdoing or maladministration;
- (i) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (j) reveal untrue, incomplete or misleading information or acts of a public authority.

Furthermore, section 6(5) provides that:

(5) Where the factors in favour of disclosure and those favouring nondisclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26.

[36] The Governor’s Office lists a number of factors in support of disclosure, but contends that the weight to be given to these factors would have been reduced by the disclosure of Government’s decision following the negotiations. They state that:

Whilst the public may have an interest in knowing the details surrounding the discussions and negotiations it is not within the interest of the public to erode the safe space that it is fundamental to maintain in order to encourage and ensure that discussions among governments are carried out freely and candidly for the benefit of the people of the Cayman Islands.

[37] The Applicant believes that the Governor’s Office has made a weak argument when applying the public interest test and does not agree that the public interest factors in disclosing the records are reduced by the subsequent disclosure of Government’s decision following the negotiations. They contend that no ‘negative factors’ that apply to the release of the records have been cited.

[38] I find that the disclosure of the responsive records is not necessary to promote greater public understanding of the processes or decisions made by Government with respect to the budget negotiations with the UK Government, nor would disclosure provide reasons for decisions taken by Government. The public has already been made aware, in some detail, of the processes for review and acceptance of the budget, and I do not believe that further promotion of accountability within Government would result. Disclosure would also not reveal wrongdoing or maladministration in the budget process.

- [39] However, I consider that disclosure of the responsive records would be likely to have a significant adverse effect on Government's ability to carry out free and frank discussions to the benefit of the Cayman Islands, and disclosure would therefore not be in the public interest.
- [40] For clarity, particularly as this issue was raised by the Applicant, I do not consider that partial access can be granted under section 12 in a meaningful way.
- [41] **Having balanced the public interest arguments in favour of and against disclosure, I find that it is not in the public interest to disclose the responsive records.**

Other exemptions claimed

- [42] Given my findings above, whether the additional exemptions (sections 15(1a), 15(b) and 20(1)(d)) apply is irrelevant and I will not consider these exemptions.

F. 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 all the responsive records are exempt from disclosure under section 20(1)(b) of the *Freedom of Information Law, 2007* and that it is not in the public interest to disclose these records.

Decision:

Under section 43(3)(a) of the *Freedom of Information Law, 2007* I uphold the decision of the Governor's Office to withhold the responsive records in this Hearing and do not require the Governor's Office to disclose the records.

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

5 March 2013