

ICO Hearing 33 - 01113
Decision
Cayman Islands National Insurance Company (CINICO)

Jennifer Dilbert MBE, JP
Information Commissioner for the Cayman Islands

31 July 2013

Summary:

An Applicant was refused access by the Cayman Islands National Insurance Company (CINICO) to part of the CINICO Board minutes of 30 January 2013.

The Information Commissioner overturned the decision of the Principal Officer of CINICO to withhold a part of the responsive record under sections 21(1)(a)(ii) and (b) of *The Freedom of Information Law, 2007* and required that the record be disclosed in full. She also found an egregious and wilful failure of CINICO to comply with various obligations under the Law, and ordered a number of remedial actions.

Statutes¹ Considered:

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

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¹ In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

A. INTRODUCTION

- [1] On 11 February 2013, the Applicant requested a copy of the CINICO Board minutes of 30 January 2013. The Information Manager (IM) clarified and acknowledged the request within the statutory 10 calendar days, but took more than 30 calendar days to provide an initial decision, after being prompted by the Applicant, on 21 March 2013.
- [2] The IM's decision was to defer the disclosure, since, at that time, the minutes in question existed only in draft form and had not yet been approved by the Board. The IM clarified that this process was expected to take approximately 2 weeks, and also explained the Applicant's right to apply for an internal review.
- [3] Not being satisfied, the Applicant requested an internal review of the matter on the same day, and the CEO's decision was communicated to the Applicant on 15 April 2013. In it, the CEO released the minutes, except for a small section on page 7, consisting of a marginal title and two paragraphs, which was redacted. The cover letter stated that the redaction was done under section "21(1)(a)(b)" of the FOI Law.
- [4] The Applicant was not satisfied with this and asked the Information Commissioner's Office for an appeal on 16 April 2013.
- [5] As expanded upon below, the section of the FOI Law cited by CINICO to withhold a part of the minutes, "21(1)(a)(b)", does not exist. The ICO tried to clarify the exact exemption or exemptions being claimed by CINICO, and also asked repeatedly, in vain, for the reasoning behind the use of the exemption(s). CINICO refused to provide reasons prior to a formal hearing or to respond specifically as to which exemptions were being applied, despite being provided with detailed explanations by the ICO. Subsequently, the exemptions being applied were stated in the Notice of Hearing and Fact Report prepared for this hearing by the ICO and agreed with all parties.

B. THE CAYMAN ISLANDS NATIONAL INSURANCE COMPANY

- [6] The Cayman Islands National Insurance Company is a government-owned, "Class A" insurance company formed to provide health insurance coverage to civil servants (employees and pensioners) and other residents of the Cayman Islands who historically have had difficulty obtaining coverage through their employer or the private insurance market.
- [7] As a government company CINICO has a Board of Directors which is appointed by the Governor in Cabinet.

C. PROCEDURAL MATTERS

- [8] As indicated above, CINICO did not provide its initial decision within the statutory 30 calendar day period, in violation of section 7(4) which states:

(4) A public authority shall respond to an application as soon as practicable but not later than-

(a) thirty calendar days after the date of receipt of the application;

- [9] The internal review decision somewhat sloppily referred to section “21(1)(a)(b)” of the FOI Law as the exemption being applied for the partial redaction of one section of the minutes. The ICO assumed that this meant section 21(1)(a) and (b), and communicated the same to CINICO.
- [10] More seriously, the ICO repeatedly asked CINICO to provide its reasoning for the application of the exemption in section 21, since it is not sufficient for a public authority to simply quote the section number, for it to meet its obligations under the Law. However, CINICO refused to provide any further information, saying that it preferred not to do so until it submitted its views in the Hearing Submission.
- [11] Section 27 provides that public authorities must provide reasons for their decisions in general, and section 7(5) specifies:
- (5) The response of the public authority shall state its decision on the application, and where the authority or body decides to refuse or defer access or to extend the period of thirty calendar days, it shall state the reasons therefor, and the options available to an applicant.*
- [12] Furthermore, section 26 requires that the public interest be considered in respect of a number of exemptions, including the exemption in section 21 – which CINICO neglected to do.
- [13] As well, in the context of an appeal, section 43(2) places the burden of proof on the public authority to show that it acted in accordance with its obligations under the FOI Law.
- [14] I do not consider that a public authority can meet these obligations simply by quoting one or more numbers of sections (and incorrect ones at that), without providing further reasons as to why the quoted exemptions should apply to the information.
- [15] The FOI Law has removed the ability of a public authority to dictate whether disclosure is given, and has replaced it with a standard process where both sides follow established procedures in order to reach a fair resolution to the dispute.
- [16] I note that CINICO’s approach violated both the spirit and the letter of the FOI Law, and was uncommonly unhelpful towards the ICO and the Applicant alike. Needless to say that CINICO’s actions fell far short of the expected mark.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [17] It is problematic that CINICO did not formulate its initial decision or internal review correctly. In the initial decision, no reason under the Law was given to withhold the requested information. Then, in the internal review the exemption in section “21(1)(a)(b)” was claimed. There is no such section in the FOI Law, and ICO’s attempts to clarify CINICO’s position during the pre-hearing investigation were unsuccessful. Therefore, the ICO took this to mean that both sections 21(1)(a) and 21(1)(b) were being claimed.
- [18] As well, there are two parts to section 21(1)(a), namely paragraph (i), which relates to “trade secrets”, and paragraph (ii), which relates to “other information of a commercial

value". During the pre-hearing investigation and in the absence of any clarification from CINICO, the ICO therefore assumed that CINICO intended to refer to paragraph (ii) of 21(1)(a) only, as the redacted information did not seem to relate to a trade secret. However, even after several requests by the ICO, CINICO refused to cooperate with the ICO's pre-hearing investigation and this point was not clarified.

[19] As a result, the Fact Report and Notice of Hearing which outline the basis of the present Hearing do not include paragraph 21(1)(a)(i) as a basis for the Hearing. As per the ICO's routine hearing procedures, CINICO was given an opportunity to provide its views on the said Fact Report, but, again, CINICO did not object to the omission of paragraph (i).

[20] Nonetheless, in its hearing submission CINICO again claims exemptions 21(1)(a)(i) and (ii) – as well as 21(1)(b).

[21] I can only find CINICO's refusal to state the reasons for its decision clearly, as well as its stubborn rejection of the ICO's pleas to communicate during the appeals process, appalling. The uncertainty this created for the applicant, and for the integrity of the appeals process, is unacceptable and in clear violation of the rights of the Applicant to be told the reasons for withholding the redacted information, as provided in section 7(5).

[22] In addition, section 43(2) states:

(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.

[23] The Law clearly expects that a public authority explains exactly why information is being withheld. Where a public authority does not provide a lawful reason or merely quotes a section number without further reasoning, I consider that it does not meet these legal obligations.

[24] In the present case, CINICO did not communicate any lawful reasons for withholding the information in its initial decision, and quoted a non-existent section of the Law as the reason in its internal review. Therefore, CINICO did not meet its legal obligations in this respect.

[25] The Fact Report referred to in the Introduction above, as well as the Notice of Hearing for this case, clearly set out that the issues under review in this Hearing relate to the application of sections 21(1)(a)(ii) and (b). According to ICO procedures, both parties to the Hearing are given an opportunity to object to any part of these two documents. CINICO did not register any objections.

[26] However, in their Hearing Submission, CINICO seeks to argue the exemption found in section 21(a)(i). For the reasons above, I will not consider this exemption. CINICO also raises an entirely new exemption, 17(b)(1), for the first time. For the same reasons, I will not hear or consider this new exemption, which, incidentally is also misquoted, but intended as "17(b)(i).

[27] **The issues under review in this Hearing are therefore whether information redacted from the responsive records is exempt from disclosure under section 21(1)(a)(ii) and/or 21(1)(b).**

E. CONSIDERATION OF ISSUES UNDER REVIEW

Section 21(1)

This section provides:

21. (1) *Subject to subsection (2), a record is exempt from disclosure if-*
- (a) *its disclosure would reveal-*
 - ...
 - (ii) *any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed;*
 - (b) *it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organization (including a public authority) and the disclosure of that information would prejudice those interests.*

The position of CINICO:

[28] CINICO's submissions in full on the exemptions are as follows:

Section 21(1)(a)(ii):

Reason: The release of this information could have diminished the ability of CINICO to essentially pit the different bidders against each other, thus reducing our ability to attain the best value for the services being sought.

Section 21(1)(b):

Reason: If this information was disclosed, the finalist could possibly collude with each other, thereby driving up the cost of services OR they would know each other's' inability to provide such services, thereby mitigating the desired arena of a competitive bidding process as a traditional confidential process would yield.

Public interest test:

Reason: The disclosure of this information during an active RFP process could result to the detriment of the public whose interests are the net result of the process. When the process is completed and a decision is made, then the components of the RFP process could be release [sic] to the public based on the intent of the public interest test.

The position of the Applicant:

[29] 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 or private body to show that it acted in accordance with its obligations under this Law. In this case, the Applicant did not make a formal submission.

Discussion:

- [30] First of all, I wish to make clear that in general I do not consider that it is good practice to redact the marginal or section titles of Board minutes, even where some of the content of the section may be exempted. Section 12 requires that only the matter that is actually exempted may be deleted from a record containing exempt matter. It is rarely the case that a title itself warrants redaction. In this case, the title is not commercial information, and does not identify the bidders or anything else about the bid that could be exempted, and as such, it should not have been redacted.
- [31] The title and first three lines redacted from the responsive record contain administrative issues that have nothing to do with commercial value or commercial interests. The following four lines, as explained to the applicant in CINICO's submission, contain the names of the four companies shortlisted for tender. No further information on the bidders is contained in the responsive record.
- [32] In considering the application of the exemption in 21(1)(a)(ii), the following questions must, at minimum, be considered:
- Does the redacted information have any commercial value?
 - Would the disclosure of the redacted information destroy or diminish this value, or could it reasonably be expected to do so?
 - If so, how?
- [33] In the one paragraph submitted to support the use of this exemption, which I have copied in full in paragraph 28 above, CINICO does not adequately address these questions. During the investigation period of this appeal, these were put to CINICO in the hope of gaining an understanding of the reasons why the information is being withheld. However the questions were not answered then, and have still not been adequately addressed.
- [34] In addition, CINICO did not conduct a public interest test, in which the factors supporting withholding the information were balanced against the need for accountability and openness in Government processes and decisions.
- [35] As a result, I have no clear indication as to what commercial value the redacted information has and whether this could be destroyed or diminished in value if the information is disclosed, and, if so, how.
- [36] **I find that CINICO has not demonstrated why the exemption in section 21(1)(a)(ii) should apply to the redacted information in the responsive record.**
- [37] Similarly, in order for the exemption in section 21(1)(b) to apply, the following questions must be considered:
- Does the redacted information concern the commercial interests of a person or organization (including a public authority)?
 - Would the disclosure of the redacted information prejudice those interests?
 - If so, how, and what harm would result?

- [38] Again, CINICO was specifically requested on 9 May to address these questions and did not do so. Their submission on this exemption is found in full above at paragraph 28.
- [39] It is clear from the few lines redacted from the responsive record that the information does not relate to the commercial interests of a person or organization.
- [40] Similar to paragraph 34 above, the public interest test was not properly applied.
- [41] **I find that CINICO has not demonstrated why the exemption in section 21(1)(b) should apply to the redacted information in the responsive record.**
- [42] **I do not find that the public interest test applied by CINICO, copied in full at paragraph 28 above, is meaningful or adequate in the context of the exemptions being applied.**

F. FINDINGS AND DECISION

I refer to my Decision 30-00113² in which I found that CINICO repeatedly contravened the provisions of the FOI Law. These contraventions and lack of respect for the Law and Policies and Procedures of the ICO have continued during the course of this current appeal. It is therefore necessary for me to bring the full force of the Law to ensure compliance in future.

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

Findings:

I find that the information redacted from the responsive record is not exempt under sections 21(1)(a)(ii) or 21(1)(b) of *The Freedom of Information Law, 2007*.

I find that in the course of this request and appeal, CINICO has egregiously and willfully failed to comply with the following sections of the FOI Law. These infractions take place on the heels of similar contraventions as set out in my Decision 30, and are:

7(4)(a) – Initial response to Applicant was more than 30 days after the receipt of the application;

7(5) – Internal review response was incomplete, it did not give reasons for the application of an exemption, it cited an exemption that did not exist, and did not advise the Applicant of the right to appeal to the Information Commissioner.

45 – The Commissioner has powers under this section to conduct a full investigation of an appeal. The Policies and Procedures of the ICO set out the rules to ensure procedurally fair investigation and hearing of appeals. The Commissioner was hampered in the full investigation of this case by CINICO's disregard for the Law and Policies and Procedures of the ICO.

² ICO Hearing Decision 30-00113 www.infocomm.ky/appeals

Decision:

Pursuant to sections 43 and 44, I

- (a) order CINICO to disclose the responsive record in full.
- (b) order that the senior management of CINICO attend my office for further training in dealing with Freedom of Information requests at a date to be specified by me.
- (c) hereby refer to the Board of CINICO the egregious and willful failure of the management of CINICO to comply with its obligations under the Law,
- (d) recommend that the Board of CINICO meet with me for sensitization as to the statutory requirements which CINICO is subject to under the FOI Law, as previously requested on 9 May, 2013, at a time to be agreed with the ICO.
- (e) require that CINICO take the appropriate steps to bring it into compliance with the Law.
- (f) require the Principal Officer of CINICO to advise me within three months of the date of this Decision as to what steps have been taken to comply with the above requirements.

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 Dilbert
Information Commissioner
31 July 2013