

Hearing 89-202100276

Decision

Ministry of Border Control & Labour

Sandy Hermiston

Ombudsman

23 September 2021

Summary

An applicant made a request under the Freedom of Information Act (2021 Revision) (FOI Act) for a report (Report) written by the “Review Committee on Permanent Residence” (Committee) in 2013, as well as the names of the members of the Committee.

The Ministry of Border Control & Labour (Ministry) released the names of the members but withheld the report under section 20(1)(b), the exemption relating to the free and frank exchange of views. Later, the Ministry added two more exemptions, section 19(1)(a), relating to records containing opinions, advice and recommendations for the Cabinet, and section 17(1)(c), relating to legal advice given by or on behalf of the Attorney General.

The Ombudsman considered the appeal and found that the Report consisted of “opinions, advice or recommendations... prepared for... proceedings of the Cabinet”, but it was not purely factual, scientific or technical in nature. Therefore, the Ombudsman found that the Report was exempted pursuant to section 19(1)(a). The Ministry is not required to take any further steps.

Statutes¹ considered

Freedom of Information Law (2021 Revision) (FOI Act)

Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)

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¹ In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

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A. INTRODUCTION

[1] On 30 April 2021 the applicant made a request under the FOI Act to the Ministry for:

On 23 October 2013, the Premier of the Cayman Islands made reference to a Cabinet Committee which was appointed in July 2013. That Committee made a report in August 2013 in regards:

- I. Term limits,*
- II. Key Employee Status.*
- III. Permanent Residence.*
- IV. Term limit Exemption Permits.*

...

Can I also have the names of the individuals who sat on the Committee.

[2] The Ministry’s decision was provided by the Chief Officer on 1 June 2021. The names of the members of the Committee were released, but the report was exempted under section 20(1)(b), claiming that “disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation”.

[3] The applicant appealed and we accepted the appeal on 7 June 2021. On the applicant’s request the matter progressed to a formal decision from the Ombudsman.

B. CONSIDERATION OF ISSUES

[4] The Ministry provided us with two documents which together constitute the Report. Both documents were appended to the Cabinet paper that dealt with this matter, and are marked “Appendix E” and “Appendix F”.

[5] The Ministry also sent us related records, including correspondence and the Cabinet paper to which the Report was appended. These additional records are not within the scope of the request, which was for the Report and the names of members of the Committee only, as also confirmed in the applicant’s submission. Therefore, they will not be considered further.

[6] The Ministry introduced two new exemptions in its initial submission, section 17(1)(c) – legal advice given by or on behalf of the Attorney General or the Director of Public Prosecutions, and section 19(1)(a) – records containing “opinions, advice or recommendations, or a record of consultations or deliberations... prepared for or arising in the course of proceedings of the Cabinet...”.

[7] It is best practice for public authorities to introduce exemptions and arguments as soon as practicable in the FOI process. This assists the speedy resolution of the dispute, and supports the applicant's right to natural justice and procedural fairness. In this case, the Ministry raised two new exemptions in its initial submission in the formal part of this appeal. The applicant objected to this, saying that I should not consider these new exemptions.

[8] Since the new exemptions were raised in the Ministry's initial submission, the applicant was able to utilize their right to reply, which they did in their reply submission. As well, considering that section 43(5) empowers me to introduce "any decision which could have been made on the original application" – which includes applying an exemption – and that I firmly believe that the outcome detailed below is correct, I would not have hesitated to introduce the exemption relied on if it had not been raised by the Ministry.

a) Is the record exempt under section 19(1(a)), because it contains opinions, advice or recommendations, or a record of consultations or deliberations prepared for, or arising in the course of, proceedings of the Cabinet or a committee of the Cabinet?

[9] Section 19(1)(a) states:

(1) Subject to subsection (2), a record is exempt from disclosure if it contains opinions, advice or recommendations, or a record of consultations or deliberations

—

(a) prepared for or arising in the course of proceedings of the Cabinet or the National Security Council or a committee of the Cabinet or the National Security Council; or

...

(2) Subsection (1) does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature.

[10] The Ministry provided the following rationale for applying this exemption:

17. ... [the Committee] was appointed by Cabinet. The purpose of the Committee was to undertake a comprehensive review of the law and prepare a report containing recommendations in preparation for and/or in arising in the course of Cabinet Proceedings relating to the formulation of government policy. It is noted that:

a. Cabinet commissioned the report on 16 July 2013;

b. Cabinet determined the date by which a report was to be presented back to Cabinet;

c. Cabinet approved the Terms of Reference for the report on 25 July 2013;

and

d. Cabinet considered the report on 16 September 2013.

18. It is common ground that the record requested (as set out in the Appellant's request for information) was de facto prepared for or arising in the course of proceedings of the Cabinet.

- [11] Having examined the Report and the ancillary documentation closely, it is clear to me that the Committee was set up to review the law and processes relating to permanent residency, and to report its findings and recommendations back to the Cabinet.
- [12] The fact that the Report was appended (in two parts) to a Cabinet paper is not conclusive as to the correctness of the application of the exemption in section 19(1)(a). Records appended to Cabinet papers should be considered in their own right, and documents that “contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature”, would not be exempted pursuant to section 19(2).
- [13] Both parts of the Report contain detailed findings and recommendations intended for consideration by the Cabinet in the form of “opinions, advice or recommendations... prepared for... proceedings of the Cabinet”, as required for the exemption to apply. Neither part of the Report is purely factual, scientific or technical in nature.
- [14] For these reasons the exemption in section 19(1)(a) applies to the Report.
- [15] This exemption is not subject to a public interest test.
- [16] Since I have found that the Report (including both parts) is exempted from the general right of access under section 19(1)(a), I do not need to consider whether the two other exemptions that were claimed also apply.

C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above, I make the following findings and decision:

- The Report of the Committee set up to review permanent residency in 2013 is exempted under section 19(1)(a) because it contains “opinions, advice or recommendations... prepared for... proceedings of the Cabinet”, and does not “contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature”.
- No further action is required on the part of the Ministry.



Sandy Hermiston
Ombudsman