

Hearing 67 - 201800197

Decision

Lands & Survey Department

Sandy Hermiston
Ombudsman

23 May 2019

Summary:

An applicant made a request for access under the Freedom of Information Law (2018 Revision) to cadastral claim files relating to 30 land registration blocks, dating from the 1970s, to the Lands & Survey Department.

The Department withheld access, claiming that compliance with the request would be an unreasonable diversion of resources under section 9(c). The Department also claimed several exemptions:

- Section 20(1)(b) – free and frank exchange of views;
- Section 20(1)(d) – prejudice to public affairs; and,
- Section 23(1) – personal information.

Since a public authority is not required to comply with a request if section 9(c) applies, that argument must be considered before any exemptions are taken into consideration.

Due to the labour-intensiveness of the historical search which would have to be undertaken for each parcel of land in the 30 blocks, the Ombudsman agreed that complying with the request would constitute an unreasonable diversion of resources under section 9(c). Therefore, the Department is not required to comply with the request.

The Ombudsman sent the request back to the Department for consultation with a view to narrowing the request, as they are required to do under regulation 10(1)(b).

Statutes¹ Considered:

Freedom of Information Law (2018 Revision) (FOI Law)

Freedom of Information (General) Regulations 2008 (FOI Regulations)

¹ In this decision all references to sections are to sections of *the Freedom of Information Law (2018 Revision)*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

Contents:

A. INTRODUCTION 2
B. CONSIDERATION OF ISSUES 3
C. FINDINGS AND DECISION..... 12

A. INTRODUCTION

- [1] On 14 March 2018 the Applicant made a request under the FOI Law for information relating to 30 “cadastral claim files” held by the Lands & Survey Department (the Department).
- [2] In a letter dated 10 April, the Registrar of Lands (the Registrar) wrote to the Applicant explaining the decision to withhold the records on the basis of the concept of indefeasibility of title. Two days later the Information Manager (IM) denied access on the basis of the exemptions in sections 20(1)(b) (inhibition to free and frank exchange of views) and (d) (prejudice to effective conduct of public affairs).
- [3] The Applicant asked for an internal review by the Chief Officer, but none was conducted, and on 4 June the Applicant appealed to the Office of the Ombudsman.
- [4] We requested a representative sample of the responsive cadastral claim files, and with the help of the Chief Surveyor 11 claim files were identified and provided to us.
- [5] The cadastral claim files date from the early 1970s when the Cayman Islands’ Land Register (the Register) was created. The files are physically stored in the Records Centre at the Cayman Islands National Archive (CINA) and remain under the control of the Department.
- [6] As confirmed by CINA, the Department claimed that some of the claim files had become damaged in Hurricane Ivan. Although subsequently restored, some claim files remain illegible and in delicate condition. This includes one of the 11 claim files provided to us as a sample, which was photographed rather than copied in order to corroborate its damaged status.

B. CONSIDERATION OF ISSUES

(a) Whether compliance with the request would unreasonably divert the Department’s resources under section 9(c).

- [7] Section 9 provides that a public authority is not required to comply with a request if one of the four listed conditions is met. In this instance, the Department is invoking section 9(c) which states:

9. A public authority is not required to comply with a request where -

...

(c) compliance with the request would unreasonably divert its resources;...

- [8] Section 9 is situated in Part II of the FOI Law which is entitled "Right of Access". It is not part of the exemptions which are listed in "Part III – Exemptions". Because of its potential to stop the request outright, a claim under section 9 must be considered before any exemptions are taken into consideration.
- [9] It is not clear to me why this fundamental argument - which has the potential of stopping the request altogether - was not raised at the earliest possible opportunity. The magnitude of the search ahead should have been obvious from the start. The Department should have made this decision at the outset, avoiding the investigation of irrelevant exemptions. However, the Department did not raise section 9 until its written submission. This rendered the investigation of the exemptions redundant and caused unacceptable delays in the resolution of the appeal.
- [10] The Department justifies its application of section 9(c) as follows:
- (a) The request identifies 30 blocks of land, each of which may contain up to a few hundred parcels. Each of these parcels is the subject of a separate cadastral claim file.
 - (b) Identifying the applicable claim files would require a senior member of the Department's staff to do a historical search for each of the parcels contained in the 30 named registration blocks, involving execution of the following steps for each parcel:
 - i. The current, up-to-date Land Register serves as the starting point of the search. A search would have to be done to identify each current-day parcel in the 30 blocks requested by the Applicant.
 - ii. The Land Register is then checked to see how many editions exist for each relevant present-day parcel. Consecutive editions are created each time a parcel changes, e.g. due to boundary changes or realignments.
 - iii. Each present-day parcel number is then linked to one or more of the previous numbers by which it was known in previous editions of the Register, using so-called mutations tables, which are long lists of old and new parcel numbers. This would have to be undertaken for each change that has occurred to each parcel since 1972.
 - iv. When the original 1972 parcel number has been identified, the adjudication record has to be consulted to find the correct claim file number relating to that specific parcel. The relevant claim file can then be retrieved by CINA and delivered to the Department.
 - v. The Department has experience doing historical searches, and therefore knows they can be very labour-intensive. It is estimated that each historical search would take between a few minutes (if the parcel has not changed since 1972) to multiple hours and potentially even several days (if the parcel has changed several times).
 - (c) The Department has different versions of cadastral block maps from the 1970s which show the number and lay of each parcel in a specific block. However, these maps would not simplify the search since, in the words of the Registrar, "several maps would relate to a block, and we would not be in a position to state the specific map that we would be required to review." Therefore, it appears that the starting point of the search has to be the current-day Register, and the labour-intensive nature of the search cannot be avoided.

(d) Based on this workflow the Department submits that it would be unreasonable to comply with the request given the size of the task at hand and the Department's limited resources.

[11] As noted above, the 30 "cadastral claim file" numbers in the request are actually 30 land registration blocks, each of which consists of a number of parcels. The Department provided me with a sample of registration maps from the early 1970s. On these maps each block contains between 21 and 260 parcels per, or an average of 77 parcels per block. This is a substantially lower number of parcels than the one claimed by the Department, but it is still a significant number since (at an average of 77 parcels per block) the 30 blocks would contain some 2,310 parcels.

[12] In order to retrieve the relevant claim files, the Department has explained that each parcel would need to be identified and historically back-tracked through various editions of the Register to the original parcel file. Then, the adjudication record would need to be retrieved and the claim number noted. Only then can the claim file for that parcel be requested from CINA. Based on the above calculations this process would have to be repeated approximately 2,310 times. Even if each parcel would take only 30 minutes, which seems a low estimate, it would take nearly 1,200 hours or over 150 working days to identify the relevant claim files in all 30 blocks.

[13] Regulation 10 (1) prescribes that public authorities must take certain steps when they "refuse access under section 9(c) of the Law", namely:

... the information manager shall send written communication to the applicant-

*(a) explaining how the request is likely to unreasonably divert resources; and
(b) inviting consultation with a view to narrowing the request.*

[14] While the reasons for the claim of unreasonable diversion were explained in the Department's hearing submission, they did not directly communicate those reasons to the applicant and no attempt at narrowing the request was undertaken as required by regulation 10(1)(b).

[15] **In conclusion, I accept the Department's claim that compliance with the request would unreasonably divert its resources. Therefore, the Department is not required to comply with the request, pursuant to section 9(c). I am returning this request to the Department, requiring that it send written communication to the Applicant providing reasons for the decision that the request would be an unreasonable diversion of resources and inviting consultation with a view to narrowing the request, as required under regulation 10(1)(b).**

[16] Apart from its reliance on section 9(c), the Department has claimed a number of exemptions which it believes justify withholding the requested records under the FOI Law. Since I have found that the Department is not required to comply with the request because doing so would unreasonably divert its resources under section 9(c), I cannot at this time examine the exemptions that were claimed.

C. FINDINGS AND DECISION

[17] Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following findings and decisions:

- (a) I accept that compliance with the request would unreasonably divert the Department's resources. Consequently, the Department is not required to comply with the request, pursuant to section 9(c).
- (b) The Department did not meet its obligations under regulation 10(1)(b). Therefore, I am returning this request to the Department, to comply with the requirements in the regulation.
- (c) In light of the delay caused by the Department's failure to raise section 9(c) in a timely manner, I order the Department to reach out to the Applicant and invite consultation with a view to narrowing his request within 14 days of this decision.



Sandy Hermiston
Ombudsman