

INFORMATION COMMISSIONER'S OFFICE CAYMAN ISLANDS



Decision 1 - 01009
Government Information Services (GIS)

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Information Commissioner for the Cayman Islands
July 30, 2009

Summary: A media Applicant was refused access to the specific salaries of individual GIS employees under section 23 of the Freedom of Information Law, 2007. The Public Authority, GIS, provided the applicant with the published Government salary bands associated with each position.

The Information Commissioner found that individual salaries are personal information and disclosure would constitute unreasonable disclosure of personal information. She also found that disclosure of salary information would not prejudice the effective conduct of public affairs. She ruled that the public interest test is not met by the disclosure of current Government salary bands. The public interest requires narrowing of the bands and full disclosure of senior management salaries. The Public Authority was required to release the exact salary of the Acting Chief Information Officer, and to amend the chart they have provided to the Applicant to give a salary range within \$10,000 or at points on the salary band nearest to a spread of \$10,000.

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Statutes Considered:

Freedom of Information Law, 2007, sections 20(1)(d), 23, and 26.
Freedom of Information (General) Regulations, 2008, section 2.

A. INTRODUCTION

On January 6, 2009, the Applicant requested the following records from Government Information Services (“GIS”):

“Complete list of all current GIS employees, their titles, brief job description and annual salaries including bonuses, overtime, incentive payments, and expenses covered, if any. I would also like a break down of specific costs related to any job-related travel taken by those employees which was paid for by Government and the reasons for such travel.”

GIS is the principal Government entity responsible for local public relations.

On May 1, 2009 GIS responded to the request, providing a list of all current GIS employees and their titles, contracts, pay grades and expenses, but refused access to the individual salaries under section 23(1) of the Freedom of Information Law, 2007 (“FOI Law”) on the grounds that disclosure of the annual salaries would be an unreasonable disclosure of personal information.

The Applicant filed an appeal of this decision to the Information Commissioner on May 4, 2009 stating his belief that “the salaries of employees paid from the public’s purse should be a matter of public record.”

As is the policy of the Information Commissioner’s Office (“ICO”) the matter was diverted to mediation to determine whether the matter could be informally resolved. Mediation was not successful, and a Notice of Hearing was issued on June 5, 2009. In addition to GIS and the Applicant, all GIS employees were included as parties to the appeal. Furthermore, the Portfolio of the Civil Service (“POCS”) was invited to participate in a limited capacity as an Intervener, and the Cayman Islands Civil Service Association (“CICSA”) requested and was permitted to participate as an intervener.

B. PROCEDURAL MATTERS

After the Notice of Hearing was issued, GIS requested that they be permitted to add an additional exception to disclosure of the records in dispute, namely section 20(1)(d) of the FOI Law, which states that a public authority may withhold information if disclosure would be likely to prejudice the effective conduct of public affairs. **I decided to allow GIS to put arguments forward as to why I should accept this late addition.**

C. ISSUES UNDER REVIEW IN THIS HEARING

The issues to be decided in this hearing are:

1. Does the salary information of employees of GIS constitute “personal information” as defined in section 2 of the Freedom of Information (General) Regulations (“Regulations”)?
2. If the salary information is determined to be “personal information,” would disclosure of that information constitute an unreasonable disclosure of personal information as stated in section 23 of the FOI Law?
3. If the answer is “yes” to questions 1 and 2, does the public interest test in section 26 require disclosure of the individual salary information?
4. Is GIS permitted to add an additional exemption (section 20(1)(d)) to the records in dispute?

D. FREEDOM OF INFORMATION – A FUNDAMENTAL CULTURE SHIFT

This is the first decision I have issued under the Cayman Islands’ FOI Law, and as such, a brief discussion about the purpose and processes under the Law is warranted. The FOI Law came into force in January 2009. Section 4 sets out the objects of the Law:

...to reinforce and give further effect to certain fundamental principles underlying constitutional democracy, namely-

- (a) governmental accountability;
- (b) transparency; and
- (c) public participation in national decision making

The FOI Law does so by replacing the discretion of Government to decide when, what and to whom it will disclose information with a uniform set of rules that all public authorities must respect and abide by when making disclosure decisions. The rules in the FOI Law allow public authorities to balance the public’s general right of access against the need, in limited and necessary circumstances, to keep information confidential in the public interest.

The FOI Law represents a fundamental shift in the operations of Government to an environment where routine disclosure of information is commonplace, and the public’s right to information is denied only when there are objective reasons and legal authority for doing so. Under the FOI Law, the onus at hearing for justifying a refusal to provide access rests solely with the public authority that withheld the requested information.

E. THE SETTING OF GOVERNMENT SALARIES

I am grateful for the assistance the Portfolio of the Civil Service rendered in this hearing by providing, at my request, background information on how salary bands are determined, how positions are assigned a band, and how an individual’s salary within that band is determined.

POCS stated that:

“The current salary bands have been in effect since 1999 and were the outcome of the recommendations of a Governor appointed Salaries Review Committee. Whilst the bands have remained unchanged during that period, the monetary amounts associated with each band are adjusted regularly to reflect Cost of Living (COLA) increases.”

A specific position is assigned to a salary band using the Hay Job Evaluation methodology: “The Hay methodology takes into account how much a job requires of the following set of criteria: “Know-How”, “Problem Solving” and “Accountability”. Points are determined within each of these factors and aggregated to give an overall rating for the role.”¹ There are eighteen “grades”, each grade relating to range of scores derived from the Hay Job Evaluation methodology. Those grades are ranked from A to R, “A” being the highest.

The table at Appendix I illustrates the salary scale currently in use by the Cayman Islands Government and available to the public. The table shows the points within each grade band, and the specific salary for each point. The salary range from the top to the bottom of each grade varies and is as large as \$27,672 for Grade G and over \$20,000 for several other grades.

An individual's salary within a band is “agreed between the appointing officer and the employee”.² It is expected that appointing officers adhere to the official Pay Policy to assist them in making “fair and equitable decisions” in placing a particular individual at a particular point on the pay scale. The POCS “Pay Policy - Guidance on Pay Allocation within Salary Grades” is intended to promote fairness and consistency in assigning salaries, and provide the basis to both make and defend those decisions.³

The Pay Policy indicates that a new employee should be paid at the “minimum point of the pay grade”, unless for example, the candidate surpasses the essential and desirable qualifications, or holds relevant alternative qualifications that exceed what is required. In addition, the experience of the employee, current salary and rarity of skill justifies starting at higher than the minimum. Moving an existing staff up the pay grade must be supported by objective measures, such as the employee upgrading his/her skills, job re-evaluation, to ensure retention of the employee or to rectify a situation that has been identified as unfair.⁴ One factor in isolation cannot be used to justify a pay increase; the policy expects that all of the factors be considered.

F. ACCEPTABILITY OF A LATE ADDITION OF AN EXEMPTION TO DISCLOSURE BY GIS

After the Notice of Hearing was sent, GIS requested that the issues under review be amended to add a second exception to disclosure. Should GIS be permitted to add an additional exemption (section 20(1) (d)) to the records in dispute?

¹ Submission of the Portfolio of Civil Service, June 8, 2009

² Submission of the Portfolio of Civil Service, June 8, 2009

³ Pay Policy - Guidance on Pay Allocation within Salary Grades January 2008

⁴ Pay Policy - sections 3 and 4

When responding to an access request, section 5 of the FOI Law requires a public authority to provide written reasons for withholding information, and cite its legal authority for doing so. In this case, GIS applied section 23, and after the Notice of Hearing was issued, requested to apply section 20(1) (g).

Public authorities must be diligent and thorough in considering and responding to requests for records. Applicants must be given complete information on a timely basis; to do otherwise may potentially prejudice the ability of the applicant to properly speak to the matter at hearing. It will generally be the case at a hearing that public authorities have more resources than the applicant and access to legal advice, and layering additional exemptions to the records in dispute at the hearing stage makes the process that much more difficult for the applicant.

In its preliminary submission, GIS explained that “because of the limited experience of the application of the exemption the [decision maker] was...uncertain as to whether various exemptions could be claimed if applicable.” GIS also stated its belief that “the introduction of new exemptions at this point will not result in prejudice to the appellant as the appellant would have the opportunity to submit arguments to oppose the grounds on which the new exemptions are being applied”⁵.

In the Notice, the only issue for me to decide was whether or not to permit the addition of section 20(1) (d), and if my answer was “yes” to seek further submissions on the merits of section 20(1) (d). However, in addition to arguing for the late application of the exception, the initial and reply submissions of both GIS and most of third parties, as well as the submission from the Civil Service Association contained substantial arguments for the application of section 20(1) (d).

Public authorities should take note that I expect them to document all exemptions in their initial response letter, or following this, at internal review. If the matter comes to appeal and further exemptions are identified during the mediation process, the Applicant will then receive proper documentation of that fact and proceed to a hearing if necessary with full knowledge of the issues under review.

However, I decided in this case to permit the addition of section 20(1) (d), but did not seek further submissions on the merits, which I discuss under 4. below.

G. CONSIDERATION OF ISSUES UNDER REVIEW

1. ARE INDIVIDUAL SALARIES OF GIS EMPLOYEES “PERSONAL INFORMATION”?

GIS has relied on section 23(1) of the FOI Law to withhold the individual salaries. That section permits a public authority to withhold information if the disclosure of that information would be an unreasonable disclosure of “personal information”. In assessing the whether section 23 has been appropriately applied, I must first determine whether the information is in fact “personal information” as defined in the Regulations. Section 23 *only* applies to “personal information.”

⁵ Preliminary submission of GIS, page 5

Does the specific salary information of GIS employees constitute “personal information” as defined in section 2 of the Regulations?

“Personal information” means:

Information or an opinion (including information forming part of a database), whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, including but not limited to-

- (a) the individual’s name, home address or home telephone number;
- (b) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations;
- (c) the individual’s age, sex, marital status, family status or sexual orientation;
- (d) an identifying number, symbol or other particular assigned to the individual;
- (e) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics;
- (f) information about the individual’s health and health care history, including information about a physical or mental disability;
- (g) information about the individual’s educational, financial, employment or criminal history; including criminal records where a pardon has been given;
- (h) anyone else’s opinions about the individual; or
- (i) the individuals personal views or opinions, except if they are about someone else;

but does not include-

- (i) where the individual occupies or has occupied a position in a public authority, the name of the individual or information relating to the position or its functions or the terms upon and subject to which the individual occupies or occupied that position, or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of those functions;
- (ii) where the individual is or was providing a service for a public authority under a contract for services, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service; or
- (iii) the views or opinions of the individual in relation to a public authority, the staff of a public authority or the business or the performance of the functions of a public authority.

“Personal information” must first be about an identifiable individual. Most of the time, this means that the name of the individual is contained in the record but, in other cases, it may be possible to identify an individual through some other information in the record. In any situation where the identity of the individual can be ascertained or deduced by the

information in the record, that information is personal information for the purposes of the FOI Law, unless it is excluded from the definition of personal information.

I conclude that the information sought is about an identifiable individual.

The Civil Service Association states, without further explanation, that this exception is “subservient” to the general definition, and as such, the salaries of civil servants should be considered to be financial and employment personal information as found in the general definition. I do not agree with this compartmentalised interpretation, and believe the definition must be considered as a whole. In my opinion, exceptions (i) to (iii) apply to the entire definition of “personal information” ie. (a) – (i). The relevant section in this discussion is (i). That section provides that the name of a current or former public employee, information relating to the employee’s position or its functions, the terms upon and subject to which the individual occupies or has occupied that position, anything written or recorded in any form is excluded from the definition of “personal information.” The question then becomes where do individual salaries fall - within the exceptions or within the general definition?

Under the exception, the “terms upon and subject to which” a person occupies a civil service post is not “personal information”. “Terms upon and subject to which” is not defined in the FOI Law. A standard principle of statutory interpretation is that a word or words are given their ordinary or plain meaning unless otherwise provided for in the statute.

“Terms” is defined as “a specified condition or proviso”.⁶ Is the exact salary a specified condition upon which an individual employee occupies a post? In the Civil Service job descriptions are weighted using the Hay Methodology, the job is assigned a letter from A to R, and each letter grade is allocated a salary range. When a new job is advertised, it is posted with the salary range, and the successful applicant negotiates a starting salary, which is confirmed in the employment agreement.

According to POCS, the starting salary of a new employee is based on a broad evaluation of seven factors: relevant qualifications, relevant experience, remuneration package, individual circumstances, rarity/difficulty of skill, internal equity of salaries and budget allocations. Increases for existing staff or increases because of job evaluations rely on the same seven factors, with two more considered - retention issues and alternatives to salary point rises, such as duty allowance.

1(a) The position of GIS

In its initial submission, GIS argues that the individual salary reveals individual characteristics of employees that fall within the general definition of “personal information.” GIS states that employees’ specific salaries are included in the definition of personal information as the exact salary “is the result of personal negotiation with each employee and are determined by varying factors, e.g. commitment, skill, experience and a range of competencies. Salaries are therefore very specific and unique to each person and are thus personal information.”

⁶ Law.Com Dictionary

1(b) The position of the Civil Service Association

The Civil Service Association mirrors the position of GIS. They argue that the individual salary constitutes “financial” and “employment” history information as defined in the general definition of “personal information”:

“We believe that the general definition of personal information, and also sub-section (g), ‘information about the individual’s...financial or employment...history’ is directly applicable to the salaries of GIS employees. This point is made stronger by the fact that while salaries are pegged to salary bands, the flexibility afforded within those bands will result in employees in the same band receiving different annual amounts because of negotiations with their employer based on their skills, tenure, experience and education. This component means that each employee’s actual take home pay will be specific to him or her, and hence personal.”

1(c) Third Party comments

All but two of the GIS employees have objected to the release of their salary, and most have sent in a standard response which states without further explanation “I am aware of the request for my specific salary. However, I feel this is personal information and therefore I do not want it published.”

One of the third parties indicated:

“I believe that the actual salary a civil servant makes is personal information because the exact salary is negotiated rather than determined according to a known formula. As a negotiated sum, the salary may reflect factors and situations that are unique to the individual civil servant and are therefore personal and private.”

Another stated:

“I understand that there is reason to be interested in how government spends its money. But this must be balanced against the right to individual salaries ... the spirit of FOI is to provide transparency into government processes, not to provide transparency into my bank account; the application is organizational, not individual.”

None of the third parties has objected to the release of the salary bands.

1(d) The Applicant’s position

The Applicant states:

“We simply did not find it credible that government would argue that a person’s current salary, or current government expenditure, qualifies as “financial history”. Financial history is generally used to mean credit history, property ownership, debts, bank account records, etc. ...surely the “terms upon and subject to which the individual occupies or occupied the position” as stated [in the Regulations] is more relevant to this matter, but if

GIS wishes to state that financial history equals government expenditure/salary, they are of course free to do their endeavor best.”⁷

1(e) Discussion and finding - is the salary information “personal information?”

GIS has provided several UK cases supporting its position. While I am not in any way bound by UK findings, in the absence of other references and mindful of the fact that the definition of “personal information” in the Cayman Islands FOI Law is identical to that found in the Irish FOI Law, such cases can be helpful. I also accept the applicant’s warning not to be “swayed” by these cases, as “there are many other countries, including the USA, Mexico, parts of Canada and even our sister Overseas British Territory Bermuda that do release individual salaries of public officials to a greater or lesser extent.”⁸

The definition of “personal information” does not include the following, where the individual occupies or has occupied a position in a public authority:

- The name of the individual
- Information relating to the position or its functions
- Terms upon and subject to which the individual occupies or occupied that position
- Anything written or recorded in any form by the individual in the course of and for the purpose of the performance of those functions

I believe that the salary range that attaches to a particular position is “information relating to the position.” The grade and the salary range attach to the position, not to the individual post-holder. Information about the “functions” of a position would include, for example, records such as job descriptions or terms of references for specific projects.

Generally, I believe that the employment contract represents the basic “terms upon and subject to which” the person occupies the post. However, it would not follow that all of the personal information contained in the document or that derives from those terms and conditions would be public. For example, the marital status, name of the spouse and dependents normally would be withheld, which occurred in this instance. Another example involves performance measurement. The standard terms and conditions state that the employee must participate in the performance management system, but records derived from that process, for example performance evaluations, do not automatically fall under the “terms” of the agreement.

I am persuaded that the actual salary or salary increases, based upon unique factors of the post holder, such as previous income, long service or performance evaluations, could potentially reveal personal characteristics of the individual and therefore reveal financial and employment personal information. As such, I find that the specific salaries qualify as “personal information” under the FOI Law.

⁷ Sur-reply of applicant, July 15, 2009

⁸ Initial submission of the applicant, July 2, 2009

2. WOULD DISCLOSURE OF THE SALARY INFORMATION CONSTITUTE AN UNREASONABLE DISCLOSURE OF PERSONAL INFORMATION AS CONTEMPLATED BY SECTION 23?

Having found that the individual salaries constitute “personal information,” I must now decide whether disclosure of that information would be “unreasonable.” In order for a public authority to apply this exception, disclosure of personal information must meet the harms test of being an unreasonable disclosure of a third party’s personal information.

Section 23 states:

“Subject to the provisions of this section, a public authority shall not grant access to a record if it would involve the unreasonable disclosure of personal information of any person, whether living or dead.”

The term “unreasonable” is not defined in the FOI Law. A useful definition of this term is “not guided by or based on good sense or beyond the limits of acceptability.”⁹

Public authorities cannot automatically assume that the FOI Law protects all personal information from disclosure by virtue of section 23. The only personal information protected is that which would be *unreasonable* to disclose. In determining whether a specific disclosure of personal information is unreasonable, the public authority must consider all of the circumstances relevant to the request, including, for example, the sensitivity of the information, the age of the record, whether the information is necessary for a fair determination of someone’s rights, the social context or whether normal procedures have not been followed.¹⁰

2(a) The position of GIS

GIS has asserted, without providing any explanation or evidence, that “GIS employees have the right to privacy, and releasing exact salaries violates this privacy.”¹¹ In the Cayman Islands, there is no legislated right to privacy, other than is found in section 2 of the FOI Law.¹²

GIS has not explained why it believes disclosure would be “unreasonable.” GIS has cited two specific decisions made by the Irish Information Commissioner under the Irish FOI Law (whose definition of “personal information” the Cayman FOI Law adopted) where the Commissioner upheld the decision to withhold the individual salaries:

“I am satisfied that the salary scale applicable to the post, as opposed to Mr. A’s point on that scale, can be said to be information relating to the office or position held by Mr. A

⁹ Oxford Online Dictionary

¹⁰ These types considerations are standard in many Freedom of Information Laws, including the BC, Alberta and Ontario Freedom of Information and Protection of Privacy Acts,

¹¹ Initial Submission of GIS

¹² There are other statutes in Cayman that provide for confidentiality of certain information (i.e. the Monetary Authority Law, 2004) but no overarching right to privacy legislation exists, although the government has indicated its intention to bring one into force in the near future.

and as such does not constitute personal information. I find that, in this case, access to Mr. A's specific salary would involve the disclosure of personal information of Mr. A."¹³

However, GIS has failed to mention that the Irish FOI Law has a lower threshold with respect to the same section found in our FOI Law. The Irish FOI Law does not contain a requirement that the disclosure be "unreasonable" The Irish statute simply states, "A head shall refuse to grant a request under section 7 if in the opinion of the head, access to the record concerned *would involve the disclosure of personal information.*"¹⁴ As such, these cases do not provide any guidance as to whether disclosure of specific salary information would be unreasonable.

2 (b) The position of the Civil Service Association

The Civil Service Association states:

"...the aim of FOI is to ensure that the public has the information that it needs in order to feel confident in the operations of Government. So while it is reasonable for the public to know that jobs within the public service have been properly assigned to salary bands based on the duties of those jobs, and for the public to know the expected cost categories of those jobs, the disclosure of the exact salaries would be unreasonable. In fact while providing no additional benefit to the public, this disclosure would offend the duty to preserve the privacy of individual public servants. Therefore, the only way to provide the public with relevant information while satisfying the privacy matter is to stop disclosure at the salary bands."¹⁵

2 (c) Third Party comments

The majority of the GIS employees object to the release of their salaries, expressed in a variety of ways:

"I strongly object to the details of my salary being made public. Civil servants' salary bands are already in the public domain and that should be sufficient for anyone. [the applicant] wants a job description - fine. But what goes into my bank account on a monthly basis is my business and my employers - no one else's."

"I believe this information is personal and that its disclosure could be detrimental to me...as follows...in the age of the Internet, where everything goes viral in seconds, the information is not only going to be available in Cayman, but all over the region and the world. Persons with less than honorable intentions could believe I have cash and this places me at risk for attacks especially traveling to certain countries in the region."

"The time that has been spent considering the repercussions of the disclosure of my exact salary has been draining. In an age of identity theft, any person could take my exact salary (which would of course, appear on the Internet if it is made public locally) and use it to commit fraud."

¹³ Office of the Information Commissioner of Ireland, Case 020248, July 18, 2002

¹⁴ Freedom of Information Act, Ireland, section 28

¹⁵ Submission of the Civil Service Association

"I am offended by this request as it is extremely personal information. I am a Caymanian and I know many people here do not want anyone; not my family friends or strangers [to] know my salary as this will certainly stir up a lot of begging, jealousy and contempt. Our staff consist of many different nationalities, has anyone considered the legal ramifications of publicizing their salaries? This island has been built on secrecy laws in particular regards to the earnings of foreign nationals. Should an individual have their personal information released because a journalist wants to shit stir...I feel this request can hurt our business and our reputation with our clients. We do not need our clients withdrawing now; in a time of global financial distress, because they feel that the individuals of GIS are overpaid. Look at what is happening all around the world, CEO's are being ridiculed for making too much money. No one gave a hoot before, but make that salary public and everybody's a lynch man. We will suffer the same fate; we will be the subjects of personal value judgment based not on real worth but on emotional value. The same thing happened when MLA's asked for raises years ago, salaries were made public and the public went nuts."

The salaries of all Members of the Legislative Assembly have since been released and published.

2 (d) The position of the Applicant

The applicant declined to comment here, correctly stating that the burden of proof in this matter rests with the public authority. However, the applicant did refer to the fact that the new Leader of Government Business has publicly announced his intention, in the near future, to release his exact salary, the exact salaries of all the members of the Legislative Assembly and appointed board members. The applicant also indicated that two "prominent public officials," the Auditor General and the Member for North Side proactively released their salaries "because they are of the belief those salaries were indeed public information."

2 (e) Discussion and finding – would disclosure of individual salaries constitute an unreasonable disclosure of personal information?

The salary bands for all eighteen grades in the Civil Service have been publicly available for more than ten years. There is internal inconsistency to the arguments GIS has put forward in this hearing. GIS argues on the one hand that the bands are sufficiently narrow to allow someone to formulate a reasonable opinion on the salary of any employee. Yet, on the other hand, it claims that releasing the actual salaries would have an unreasonable, ruinous effect on the morale of GIS, the efficiency of the Civil Service and potentially put GIS employees at various types of risk.

I accept that generally, financial information is "sensitive" personal information. It certainly is not commonplace in Cayman or anywhere else that I am aware of for individuals to disclose how much money they make, how big their mortgage is or how much credit card balance they carry from month to month. However, the fact that the public can determine how much any employee in government makes within a certain range through the salary bands diminishes to a certain degree, the sensitivity of this information.

The Applicant suggested in his initial submission that perhaps the salaries could be disclosed without the name. GIS properly countered that those lone individuals occupying one unique position, i.e. accountant, would be identifiable. However, I note from the information provided to both the applicant and to me at my request that there are eleven GIS employees at one pay grade. GIS has not explained why these salaries could not be released without the names and titles.

Factors that must be considered in determining whether disclosure of salary information is unreasonable are the seniority, control and influence the post holder commands. It is not the case that senior managers simply implement the political will. In their respective roles as agenda setters as well as implementers of political will, senior managers wield significant influence over the direction of government. Common sense and the FOI Law strongly suggest that the higher and more influential the post, the greater the need for transparency, and this includes more disclosure of personal information, for example, qualifications.

In the GIS and Third Party submissions, many comparisons have been drawn between the public and the private sector. In my opinion this is not a fair comparison, as the private sector is not funded from the tax base and can conduct its business free from the type of scrutiny that public authorities are subject to. I do however note the trend across many developed nations towards new laws requiring the disclosure of CEO and other executive compensation.

I do not believe that anyone would be in danger of identity theft or fraud through the publication of individual salaries, as suggested in Third Party comments. Gross salary information is not normally the basis for financial or identity crimes¹⁶. I am not aware of evidence of any such repercussions in jurisdictions that release the names, titles and actual salaries of all Government employees.¹⁷ The statements of the employees reflect fears, whether real or imagined, about what might happen in the event the data were disclosed, and the personal stress such disclosure would create.

How much do the employee privacy expectations and fears factor into the analysis? It is clear that the majority of GIS employees are distressed about the prospect of the release of their salaries. Their statements indicate their strong expectations that this information remain confidential. I believe that these current employees entered into their employment contracts with the legitimate expectation that their salary information would be confidential. Despite the fact that no data protection law exists in Cayman, two of the ten fundamental privacy principles (access and amendment) are contained in the FOI Law and the balance of those principles are important. However, I expect that over time, the transparency imperative will become a part not only of the Government culture but of the hiring processes and policies of POCS, and that, in the interest of accountability, the expectations of confidentiality will diminish if not disappear altogether.

Decisions of the UK Commissioner in similar disputes have focused on whether the information in dispute “relates to the third party’s public or private lives.” **In my opinion,**

¹⁶ Privacy Rights Clearinghouse, USA

¹⁷ The Vancouver Sun newspaper in British Columbia receives information from the BC government and publishes on the internet, in a database searchable by name and/or title, the exact salaries of more than 30,000 provincial employees.

the salary bands relate to the public lives of the employees, and the exact salary relates to the private lives of the employees.

I conclude that the disclosure of the specific salary information of all GIS employees, with the exception of the Chief Officer, would constitute an unreasonable disclosure of personal information.

3. DOES THE PUBLIC INTEREST REQUIRE DISCLOSURE OF INDIVIDUAL SALARY INFORMATION?

Section 26 of the FOI Law states:

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

The “public interest” in section 2 of the Regulations “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) 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.”

The threshold under this section is whether disclosure “*may or tend to*” achieve any of the articulated outcomes. An examination of the definitions of “may” or “tend to” indicate that the standard of proof required for the public interest test override is relatively low. Therefore, a high probability or great certainty is not necessary to release records in the public interest. A record *must* be released if its release may or tend to achieve one of the outcomes.

3 (a) The position of GIS

GIS believes that it has met the public interest test by disclosing the salary bands. It relies in part on a decision by the UK Information Commissioner where it was

determined that the salary bands were sufficient to satisfy the public interest.¹⁸ Again, I note that the UK legislation from which this decision derives does not contain the same public interest test, and certainly not one as robust as that found in the Cayman FOI Law. Furthermore, the UK FOI Law must be read in conjunction with the UK Data Protection Act, which is not the case here.

GIS states that, because employees' salaries are set "through a standard process" disclosure of the specific salaries would not achieve any of the objectives stated in section (g) or (i). Due to an obvious drafting error, there in fact, is no (g), so in this context, I assume GIS is referring to (h) and (j).

3 (b) The position of the Civil Service Association

The Civil Service Association agrees that, as "salaries are a component of the cost of Government, it is reasonable to expect that citizens would need to know what that overall cost is. This information is available through the budget documents, which are in the public domain. It is also reasonable to expect that citizens would want to ensure that job pricing is being done properly. This is accomplished by comparing the salary bands of employees to their respective job descriptions."

The Civil Service Association believes that requests for individual salaries "crosses the line from governmental operations" and does not provide the public with "any significantly greater knowledge of government operations."¹⁹

3 (c) Third Party comments

The Third Party comments uniformly suggest that the public interest has been met by disclosure of the salary bands, and that there is very little in any additional value in disclosing the exact salaries.

Comments of the two employees that have consented to the release of their salaries:

Of the two employees that consented to the release of their specific salaries, one stated that it was not personal information, and the other thought it should be released but commented that "in the past salaries have been unfairly set in GIS, and the unit might suffer a morale problem if we all knew each other's salaries."

3 (d) The position of the Applicant

The Applicant argues that the citizens of Cayman are essentially the "shareholders" of Government, and as such "should be given precise and correct information concerning where every dime of their money is spent." Standard documents such as the Annual Plan and Estimates provide global information but do not provide sufficient details to allow a person to formulate an opinion on whether the expenditures are proper. He states that "this is precisely the problem with the "salary ranges"...an observer looking at

¹⁸ UK Information Commissioner Decision Notice, 8 January 2008, Reference: FS50163927

¹⁹ Submission of the Civil Service Association, June 26, 2009.

“salary ranges” in any government department would have no idea how that money is really being spent.

3 (e) Discussion and finding - must the information be disclosed in the public interest?

The general thrust of the GIS, Civil Service Association and the Third Parties’ arguments with respect to the public interest is that disclosure of the salary bands satisfies the public interest.

Section (d) of the definition of “public interest” provides that records be disclosed if their release may, or may tend to, “promote accountability for public expenditures or the more effective use of public funds”.

Does the release of salary grids, as opposed to the individual salaries, satisfy section (d)? The information GIS provided to the applicant shows that the salary differentials between the low end and the high end of each position within GIS ranges from a low of \$9,000 to a high of \$27,672. **In my opinion, this information is too broad to reasonably promote any accountability for how salary dollars of GIS is spent.** Although the total salary figure of GIS is available, one cannot tell from the bands themselves whether, for example, most of the employees are compensated at the top end of the band, or whether employees are compensated outside the band. It would not allow any comparison with other departments, public authorities or the private sector.

Senior public servants exert significant pressure on the budgets through their influence over policy decisions. Most troubling is the fact that the more senior the public servant, the wider the salary band and therefore the less clear the accountability. In the instance of GIS, the Acting Chief Information Officer is paid anywhere from \$80,208 to \$107, 880 - the largest differential in the authority. It is worth noting that the smallest band, hence the greatest transparency, are for those individuals at the bottom end of the scale. **Although I have already found that disclosure of senior management salaries is not an unreasonable disclosure of personal information, the public interest test also requires its disclosure.**

It is contrary to the spirit of the legislation and to the specific wording in the public interest test to suggest that a salary band this wide provides sufficient expenditure accountability and satisfies the public interest.

4. WOULD DISCLOSURE OF THE INFORMATION PREJUDICE THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS?

Section 20(1) (d) states:

- (1) A record is exempt from disclosure if-
 - (d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs

In the FOI Law, different exemptions to disclosure require different standards of proof, depending on the gravity of the harm that is anticipated by the disclosure. For example, the law enforcement section allows a public authority to withhold information if the disclosure would “affect” an investigation, which is a lower threshold than “prejudice” as stated in section 20(1)(d). The more serious the anticipated harm, the higher the evidentiary threshold.

4 (a) The position of GIS

GIS believes that disclosure of the specific salaries would create an inevitable decline in morale and the delivery of public services, and states at page 4 of its initial submissions that:

“There is a real danger that releasing the exact salaries will result in deterioration in employee/employee as well as employee/employer relationships. This deterioration would lead to a more stress filled work environment, loss in motivation, morale and eventual loss in output. The effective conduct of public affairs requires staff to be in a position where they are able to deliver most efficiently and effectively.”

In its reply submission, GIS takes this argument further, stating, “...releasing salaries in Cayman would have a distinct effect upon post holders – from how much they are quoted for home repairs, to whether or not they would stay in the Civil Service or instead seek jobs in the private sector, where their rights to privacy would be honoured.”

4 (b) Third Party comments

Several of the GIS employees provided their perspective on the same theme:

“In reaching a final decision, I would also respectfully encourage a study of other jurisdictions who have released such personal information and the dire consequences within various workforces that resulted from such actions.”

“There is a potential for organizational discord if people discover that their colleagues are being paid more than them for equal work. ...this could undermine the organization by diminishing the spirit of unity that has defined how we operate.”

4 (c) The position of the Civil Service Association

The Civil Service Association stated:

“One of our concerns is the effect that revelations of private information could have on the public service and in particular the Department in question. There are good reasons why most organizations around the world do not make a practice of revealing staff members individual salaries to other staff members. It could only be naturally expected that within GIS the release of staff salaries would lead to unnecessary unsettlement and disappointment as staff compare their placement within bands when compared to their colleagues. This would definitely have an impact on morale within the department. Coupled with the high cost of living, it is reasonable to assume that at least some employees will attempt to renegotiate their placement within salary bands. ...it would

initiate an exercise wherein management would have to justify to employees the decisions taken for placing them on the particular point that they are on ... this may ultimately lead to ...a negative incentive to keep all employees at the same point, regardless of their specific mix of skills, experience and other factors; which again could translate into further drops in morale. If this trend were to spread throughout the service by repeated disclosure of the specific salaries of employees, the morale issues faced by managers could be substantial and significantly affect the public service."²⁰

4 (d) The position of the Applicant

"Our response is simply to reiterate the statements we have previously made regarding the release of salaries, government expenditure and public information in general in the Cayman Islands. It is simply not a high enough standard to argue that certain information should be withheld because people will be upset. If this argument is to be allowed to stand in this case, section 20 (1)(d) can then be used to deny almost any FOI request one might think of because it could "prejudice the effective conduct of public affairs," by which government means people will be too angry or jealous to do their jobs. Many, many people within government have been upset and angry that information regarding certain matters has been given to the media under FOI. We imagine this will continue as the FOI process moves along, until individuals finally accept that this instrument of openness and transparency is here to stay."²¹

4 (e) Discussion and finding – would disclosure of the information prejudice the effective conduct of public affairs?

None of the statements made by GIS, the third parties or the intervener is supported by objective evidence, and I regard them, at best, as conjecture. As stated earlier, the greater the degree of harm, the greater the obligation to produce reasonable and convincing evidence.

I am aware that more than one hundred and forty countries in the world have adopted or are in the process of adopting freedom of information legislation and there is wide variation amongst those countries as to the extent of government salary information released either in response to an FOI request or proactively in the form of routine release.²² I am also not aware of any calamitous drop in morale and effective public service in those jurisdictions that release or chose to release, through enactment of an FOI statute, the precise salaries of government employees.

Civil servants are well aware that employees in the same salary band may in fact be remunerated differently, based on skill level, experience, tenure and qualification, as permitted by the Public Service Management Law and the Pay Policy of POCS. Therefore, it does not necessarily follow that if the decisions flowing from the policy were confirmed by disclosure of the actual salaries, morale would suffer and the delivery of public services would be impacted. That managers may have to explain those decisions in my view, would be a positive step towards greater managerial transparency and accountability within a government agency.

²⁰ Submission of the Cayman Islands Civil Service Association, June 26th, 2009

²¹ Reply submission of the Applicant, July 21, 2009.

²² National Freedom of Information Bills and Regulations, 2009, Privacy International, UK

The position of GIS is that the salary information they already release through the salary bands is sufficient to enable someone to “form a clear picture of the nature of GIS employee’s remuneration...” The general salaries of public servants are already known through the release of salary bands, and there is no evidence that this has resulted in government employees receiving higher quotes for local services or any experiencing financial or other harm.

I agree with the applicant, that the intent of this section is not to protect people from discomfort, hurt feelings or strained relationships.

I find that section 20(1)(d) does not apply to the records in dispute.

H. DISCUSSION

Government salaries represent a significant expenditure in the overall budget. I provide the following factors, which do not constitute part of this decision, for public authorities to consider when deciding whether or not to disclose salary information:

- Whether the employee occupies an executive or senior management position that has significant accountability, control and influence over policy direction;
- Whether permanent or acting salaries have been awarded in a manner consistent with established policies and procedures;
- Whether to provide greater transparency, individual salaries should be disclosed, by name and title, within a smaller range than the existing salary bands.
- Where there are sufficient numbers of employees at the same point on the salary grade to ensure anonymity, whether the exact salaries should be disclosed in an unidentified format;
- Whether there is evidence of maladministration with respect to the setting of salaries;
- Whether an employee has consented to disclose their exact salary.

I. FINDINGS AND DECISION

Under section 43(1) of the FOI Law, I make the following findings and decision:

Findings:

- Individual salary information is “personal information” as defined in the Freedom of Information (General) Regulations (2008);
- The disclosure of individual salaries of GIS employees would not prejudice the effective conduct of public affairs;
- The disclosure of the individual salary of the Acting Chief Information Officer is not an unreasonable disclosure of personal information and the public interest test also requires its disclosure;
- The disclosure of the individual salaries of the remainder of the GIS employees is an unreasonable disclosure of personal information;
- The disclosure of the full salary bands does not provide sufficient accountability for the expenditure of public monies as stated in subsection (d) of the definition of “public interest” and that in the public interest a smaller band must be disclosed;

Decision:

Section 42(4)(a) states that I may, on the consideration of an appeal make any decision which could have been made on the original application.

I require GIS to do the following:

- Disclose to the applicant the exact salary of the Acting Chief Information Officer;
- For the rest of the GIS employees, amend the chart provided to the applicant to give a salary range within \$10,000 or at points on the salary band nearest to a spread of \$10,000.

Jennifer Dilbert
Information Commissioner
July 30, 2009