Information Commissioner's Office

ICO Hearing 38-02413
Decision

Planning Department

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

16 October 2014

Summary:

On 28 May 2013 an applicant made a comprehensive request for access to records relating to the Kai Village Planned Area Development to the Planning Department under the *Freedom of Information Law, 2007*.

In its response the Department offered access to the responsive records by means of onsite inspection in its offices. It also withheld a record (to which later three more records were added) claiming the exemption in section 17(a) which protects legal professional privilege. The Department claimed that it responded under the provisions of the *Development and Planning Law (2011 Revision)* and the *Development and Planning Regulations (2011 Revision)*, pursuant to section 6(4) of the FOI Law, but also informed the Applicant of his right to an internal review under the FOI Law.

The request was internally reviewed by the Chief Officer, and was then appealed to the Information Commissioner's Office. During the appeal numerous records were disclosed on the Department's website, including all the drawings and plans relating to the proposed development. The dispute could not be resolved amicably and proceeded to a formal hearing before the Acting Information Commissioner.

In the Hearing Decision the Acting Commissioner found that three records were exempted under section 17(a) because they were privileged from production in legal proceedings on the ground of legal professional privilege. One record was not exempted under section 17(a) since it was older than 20 years, but was privileged from production in legal proceedings on the ground of legal professional privilege by virtue of the common law of legal professional privilege, and as such was subject to section 3(7) which stipulates that the FOI Law does not abrogate "any other law that restricts access" which includes the common law.

The Acting Commissioner found that the Department was not justified in applying section 6(4)(a) since the responsive records are not "open to access by the public pursuant to any other enactment" under the *Development and Planning Law* and *Regulations*.

Since all the relevant responsive records were posted on the Department's website, the Acting Commissioner did not rule on the question whether disclosing those records would be an infringement of the *Copyright Act 1956* (which applies in part in the Cayman Islands).

Finally, the Acting Commissioner found that the Department had not made reasonable efforts to locate the responsive records, as it was required to do under regulation 6(1) of the *Freedom of Information (General) Regulations*, 2008. Only in the course of the ICO appeal was a thorough search conducted.

Statutes[1] Considered:

Cayman Islands Constitution Order 2009 (2009 No. 1379)
Copyright Act 1956 (1956 c.74)
Copyright (Cayman Islands) Order 1965 (1965 No.2010)
Development and Planning Law (2011 Revision)
Development and Planning Regulations (2013 Revision)
Freedom of Information Act 2000 (2000 c.36)
Freedom of Information Law 2007
Freedom of Information (General) Regulations 2008
Interpretation Law (1995 Revision)

Contents:

A. INTRODUCTION

[1] The planning application for the Kai Village Planned Area Development (KVPAD) in Cayman Kai, and the subsequent consultation in accordance with the *Development and Planning Law (2011 Revision)* (DPL) and *Development and Planning Regulations (2013 Revision)* (DPR) elicited a great deal of interest from the public. Some 40 requests for access to related records were made to the Planning Department (the Department) under

[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. Where several laws are being discussed in the same passages, all relevant legislation has been indicated.

the *Freedom of Information Law, 2007* (FOI Law), three of which, including the present request, proceeded to an appeal and formal hearing.

[2] The Applicant made a request to the Department on 28 May 2013 for:

> *In relation to a Planned Area Development (PAD) on Parcels 33B263, 33B264, 33C9, 33C21, 33C22, 33C23, 33C26REM1, 33D21REM6 near Cayman Kai on behalf of Criton Development, Ltd.*
>
> *1. If either the Planning Department or the CPA have decided that the CPA does have vires under the law and the Bill of Rights that would allow the CPA to proceed with the hearing of this application despite the previous Grand Court decision, I would ask that you provide written reasons for any such decision to proceed as provided for by s.19(2) of the Bill of Rights. I would further ask on the basis of procedural fairness and the requirements of s.7 of the Bill of Rights that all written reasons are provided no less than 21 working days prior to any hearing of the relevant application so that I may obtain expert counsel's assistance and have such access to justice as I require prior to any substantive hearing of the relevant application.*
>
> *Please note that IF and ONLY IF either the Planning Department or the CPA have in fact decided that they have such vires as is set out in the immediately preceding paragraph then I would request pursuant to s.7 of the Freedom of Information Law all records relating to or touching upon any such decision.*
>
> *2. Please note that IF and ONLY IF either the Planning Department or the CPA have in fact decided that proper addressing within the meaning of the Interpretation Law does not require a post code in order for service to be deemed to be on the date of registration as is set out in the immediately preceding paragraph then I would request pursuant to s.7 of the Freedom of Information Law all records relating to or touching upon any such decision.*
>
> *3. Please note that IF and ONLY IF either the Planning Department or the CPA have in fact decided that there is no obligation to ensure a fair process for ensuring actual receipt of notice, then I would request pursuant to s.7 of the Freedom of Information Law all records relating to or touching upon any such decision.*
>
> *4.Please note that IF and ONLY IF either the Planning Department or the CPA have in fact decided that procedural fairness does not require notices to refer to the Planning Regulations then I would request pursuant to s.7 of the Freedom of Information Law all records relating to or touching upon any such decision.*
>
> *5.Please note that in order to properly formulate my objections so as to receive a fair hearing before the CPA I will require all relevant records relating to the application and each of the decisions of the Planning Department/CPA taken to date relating thereto.*
>
> *6. All policies and procedures of the Planning Department and/or CPA (whether published or not) applicable to the relevant application (if these are available online please direct me to them so as to avoid any unnecessary paperwork);*

7. the statement that neither the CPA nor the Planning Department have any obligation to enforce or even consider restrictive covenants as that is a civil matter between land owners;

8. Service of notice being effected on the date of registration of mail utilizing addresses obtained from the Land Register;

9. Deemed service of notice by registered mail not being rebuttable;

10. All prior decisions in which the CPA has accepted that registration of a notice letter in and of itself is not sufficient for service of notice for purposes of the law.

11. All prior decisions in which the CPA has found service of any notice to be defective;

12. All other matters touching upon the adjudication of this application.

[3] The Department responded on 26 June 2013 offering access to the responsive records by means of onsite inspection in its offices only, and withholding a record under section 17(a) for reasons of legal professional privilege. The Department on the one hand claimed that its answer fell outside the FOI Law, by virtue of section 6(4), and on the other hand pointed out the Applicant's right to an internal review under the FOI Law.

[4] The Applicant requested an internal review of the initial decision on 28 June, and received the Chief Officer's internal review decision on 26 July 2013.

[5] The Applicant made an appeal to the Information Commissioner's Office (ICO) on 31 July 2013, and the appeal was accepted two days later on 2 August 2013.

[6] In the course of the appeal numerous additional records were disclosed on the Department's website. These included CPA minutes and all the drawings and plans relating to the KVPAD application.

[7] The matter could not be resolved amicably and the pre-hearing investigation was stopped. The disclosure of further records continued when the formal hearing had commenced.

B. BACKGROUND

[8] The Department's functions are summarized in its mission statement:

To ensure that all development applications are processed efficiently, courteously, unbiased and in accordance with the development plans and associated legislation so that the physical development of the Islands is aesthetically pleasing, environmentally friendly, sustainable, technically sound, promotes a strong economy, and provides an unparalleled quality of life for existing and for future generations.

[9] The Department is comprised of four divisions: Current Planning, Building Control, Policy Development, and Administration.

[10] The Current Planning section (CP) is responsible primarily for processing development applications for presentation to the Central Planning Authority (CPA) on Grand Cayman and the Development Control Board (DCB) on the Sister Islands.

C. PROCEDURAL ISSUES

[11] The Applicant seeks to draw my attention to alleged unfairness and breaches of constitutional rights in regard to the Department's application and interpretation of the access and notification provisions of the DPL and DPR, in particular the limitations it has placed on access to planning application records by potential appellants under the planning laws.

[12] I believe that I have explored this question in this Decision, and in the previous Decision 37-02613, as far as possible without making *ultra vires* pronouncements about legislation over which I have no authority. The Applicant may wish to explore whether it would be appropriate for him to seek redress through the courts, but these matters cannot be resolved in an appeal under the FOI Law.

[13] For further guidance on some of the additional procedural questions raised by the Applicant, I refer to my discussion of procedural issues in Hearing Decision 37-02613.

D. ISSUES UNDER REVIEW IN THIS HEARING

[14] The following five issues are under review in this Hearing:

1. **Whether records may be exempted under sections 17(a);**

2. **Whether records may be exempted under 17(a) after being in existence for twenty years pursuant to section 6(2).**

3. **Whether access to records is already provided pursuant to another enactment, namely the *Development and Planning Law (2011 Revision)* and the *Development and Planning Regulations (2011 Revision)* in accordance with section 6(4) of the FOI Law;**

4. **Whether the provision of paper, or electronic copies of drawings or plans would be an infringement of intellectual property rights under the *Copyright Act 1956* as per section 10(3)(b), taking into consideration section 54(3)(b).**

5. **Whether a reasonable search was conducted by the Public Authority to identify the responsive records as per regulation 6(1) of the FOI (General) Regulations 2008.**

[15] The Department points out that the records in dispute and the issues under review were dealt with in my Hearing Decision 37-02613 which related to an application by a different applicant who requested the same records.

[16] The Applicant, on the other hand, asserts that it would be unfair for me to allow the Department to rely on arguments to which he has not been privy as only the final Decision of Hearing 37-02613 is in the public domain (which he confirms he has read), and he has not had access to the full submissions in Hearing 37-02613.

[17] While I do not agree with the Applicant that my past Decision regarding a number of identical issues under review largely in relation to identical records, is not relevant in the present Hearing, for the avoidance of doubt I have thoroughly considered all arguments afresh.

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. **Whether records may be exempted under section 17(a)?**
2. **Whether records may be exempted under 17(a) after being in existence for twenty years pursuant to section 6(2).**

[18] I am considering these two issues jointly, since both require me to consider whether the relevant responsive records are exempt from disclosure under section 17(a), the first in general, the second because of the age of the records.

[19] Section 17(a) provides:

> *17. An official record is exempt from disclosure if-*
>
> > *(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege; or*
> > *…*

[20] Section 6(2) provides:

> *(2) The exemption of a record or part thereof from disclosure shall not apply after the record has been in existence for twenty years unless otherwise stated in this Law.*

The position of the Department:

[21] In its submission the Department clarifies that the exemption is being claimed in respect of four documents which in their view are "pieces of legal advice". They are communications respectively dated 26 June 1989, 19 August 1994, 30 March 2001 and 31 July 2007.

[22] The Department bases its application of the exemption and its claim of legal advice privilege upon the delineation of the privilege by the courts in *Balabel and another v Air India* [1988] 1 CH. 317, *Three Rivers DC v Bank of England* (No.5) [2004] 2 WLR 1274, and *Three Rivers DC v Bank of England* (No.6) [2004] UKHL 48. Specifically, the privilege will attach to confidential communications between a legal professional and his client undertaken for the dominant purpose of giving or obtaining legal advice. The Department claims that these four documents are such communications.

[23] The Department also points out that legal advice is not restricted to advice on the client's legal rights and liabilities but also includes "advice as to what should prudently and sensibly be done in the 'relevant legal context'".

[24] The Department contends that the four documents are communications provided by the Attorney General's Chambers in March 2001 and July 2007, which are subject to legal professional privilege. The advice was rendered after,

> *extensive research in the area of law upon which advice was sought and provided a reasoned opinion on the particular area. The advice provided direction on the law to the client and clarified certain obligations. It is clear that the purpose of the communication between the Department of Planning and the legal advisers for the Government was to seek legal advice.*

[25] The Department has not addressed the question of the age of the responsive records in the light of the application of section 6(2), quoted above.

[26] Nor has it addressed whether the privilege may have been waived or otherwise lost.

The position of the Applicant:

[27] The Applicant points out that section 17(a) applies to "an official record", which is a term not defined in the FOI Law or in the *Interpretation Law, 1995*, and must therefore be given its plain meaning in context. He argues that "official records" must logically, in accordance with the rules of statutory interpretation, constitute a subset of records subject to the FOI Law, but does not clarify (at least not in relation to section 17(a)) in what way "official records" would be different from "records", or why this distinction is relevant to the exemption under consideration.

[28] The Applicant states that the Planning Department's claim of section 17(a), or any other exemption, must be "strictly in accordance with the law and based on reasoned justification". In this regard, the Applicant particularly objects to the Department's reasoning in its initial decision of 26 June 2013, which said that,

> *all legal opinions furnished to the Department are considered privileged and are exempt from release on the grounds of legal professional privilege.*

[29] The Applicant calls this response "materially flawed as a matter of law" as the exemption does not relate to "legal advice", and points out that not all legal advice may be protected by the exemption since some of it may have been waived or may otherwise not be "privileged from production in legal proceedings on the ground of legal professional privilege", as required for the exemption to be engaged under the FOI Law.

[30] In this respect, the Applicant refers to the findings of Carnworth LJ in *R(S) v Secretary of State for the Home Department,* that *"*A public authority may not adopt a policy which precludes it from considering individual cases on their merits".[2]

[31] The Applicant points to the Department's common law obligation expressed in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, to "ask [itself] the right question and take reasonable steps to acquaint [itself] with the relevant information to enable [it] to answer it correctly"[3]. In this regard the Applicant alleges a lack

[2] *R(S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 at 50
[3] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065

of consistency on the part of the Department in responding to FOI requests, and in particular in respect of section 17(a), which he blames on the Department's avowed lack of relevant policies and procedures.

[32] In his reply submission, after having had the opportunity to read the Departments complete argumentation, the Applicant has refocused his attention onto the key questions at hand, namely:

> *a) whether the relevant record is an 'official record' within the meaning of s.17 of the FOI Law;*
> *b) whether the relevant record is not more than 20 years of age; and*
> *c) whether the relevant record, "would be privileged from production in legal proceedings on the ground of legal professional privilege.*

[33] On the question of the age of the responsive records claimed to be exempt by the Department, the Applicant notes that one or more of the records appears to be more 20 years old, and that the exemption in section 17(a) cannot be applied to any records more than 20 years old, by virtue of section 6(2) quoted above.

[34] The Applicant particularly draws attention to the final wording in that section: "unless otherwise stated in this law". He asserts that there is no express statutory provision in relation to the exemption in question in the FOI Law, and, under the rules of statutory interpretation and taking into account the stated objectives of the FOI Law, the Applicant therefore invites me to find that the exemption does not apply to those records that are more than 20 years old.

Discussion:

"Official" records:

[35] The Department does not touch upon the meaning of an "official record".

[36] The Applicant notes the use of the term "official record" in section 17, but does not try to explain its meaning in the context of this section. However, in his reply submission the Applicant has suggested that the term ought to be given a specific meaning in the context of section 54, arguing, as further explained below, that section 54(1) relates to "official records", as does section 54(2) (indirectly), but that section 54(3) instead relates to "records". He considers this significant in that on his reading in relation to section 54 an "official record" is one "created by 'officials' and 'official processes' and therefore of governmental origin or provenance," while a "record" can have any provenance. By extension, any record received by Government from an outside source cannot be an "official record". [4]

[37] I note that the term "official record" is used in sections 17, 18 and 54(1) and (2) only. These sections respectively provide for an exemption relating to legal privilege, breach of confidence, contempt of court and infringement of the privileges of Parliament (section 17); the national economy (section 18); and, protection from liability regarding defamation, breach of confidence and intellectual property rights (sections 54(1) and (2)).

[4] See also para 96 below.

[38] I do not detect any logical link between these three sections that would lead me to agree with the Applicant's interpretation of the meaning of the term "official record". There is no reason to suspect, for instance, that the exemption relating to breach of confidence should only apply to "records created by officials". Indeed, this is exactly the opposite meaning given to the exemption in section 41 of the UK Freedom of Information Act, 2000 which – unlike section 17(b)(ii) of the Cayman Islands FOI Law – requires that for the exemption to apply the information must precisely originate outside the public authority. Nor is it reasonable, in the context of section 17(a), to assume that legal professional privilege would not attach to confidential advice provided by a legal professional outside the government, or that the grant of access by an Information Manager to defamatory materials that originate outside of government should be any more or less actionable under section 54(2) than such materials originating within government.

[39] The term "official record" is not defined in the FOI Law, nor in the *Interpretation Law, 1995*, and must therefore be given its plain meaning in the context of the FOI Law and that Law's stated objectives. The Oxford Dictionary defines "official" as:

> *Relating to an authority or public body and its activities and responsibilities*

[40] The term "record" is defined in section 2 of the FOI Law:

> *"record" means information held in any form including-*
>
> *(a) a record in writing;*
>
> *(b) a map, plan, graph or drawing;*
>
> *(c) a photograph;*
>
> *(d) a disc, tape, sound track or other device in which sounds or other data are embodied, whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;*
>
> *(e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom,*
>
> *held by a public authority in connection with its functions as such, whether or not it was created by that authority or before the commencement of this Law;*

[41] The last part of the definition of "record" specifies that it is "held by a public authority in connection with its functions as such". This indicates that a record, within the meaning of the FOI Law, has an inherent "official" quality by virtue of being "held" by a public authority, irrespective of its origins. In a previous Decision I have found that "held" in this context means that a public authority has the record in its possession, custody or control, as provided in section 2.[5] Records which originate outside the government relate just as much to the activities and responsibilities of a public authority, as records which are

[5] ICO *Hearing Decision 22-00712 (Preliminary Decision) Cabinet Office* 24 August 2012 paras 21-49

created by government itself, and both are equally "held". Consequently, I cannot identify any difference between an "official record" and a "record", as both are subject to the provisions of the FOI Law, and I conclude therefore that both terms must be treated as one and the same, and are to be given the meaning of a "record" specified in section 2.

[42] Given that each of the four documents claimed to be exempt by the Department is "a record in writing… held by a public authority in connection with its functions as such…", I find that those records are subject to the provisions of the FOI Law, including sections 17(a) and 6(2), if applicable.

Reasons for decisions:

[43] Most of the Applicant's argument in respect of section 17(a) relates to the initial response of the Department of 26 July 2013. I agree that the reasons provided by the Department in that initial response were somewhat simplistic, and that the Department thereby may have breached its obligation under section 7(5) which obligates a public authority to provide reasons for denying access:

> *(5) The response of the public authority shall state its decision on the application, and where the authority or body decides to refuse … access …, it shall state the reasons therefor, and the options available to an applicant.*

[44] It is too often the case that public authorities do not provide adequately formulated reasons for denying access, particularly in their initial decisions. This cavalier attitude on the part of some public authorities has been remarked upon by the former Information Commissioner and myself in a number of previous hearings.[6]

[45] The burden of proof for applying an exemption rests squarely on the shoulders of the public authority, and the Law unmistakably demands that reasons be stated early in the process. This is consistent with the lawful administration action requirement in section 19(2) of the Bill of Rights, which provides:

> *(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.*

It is reasonable to expect for the required "reasons", both in the Bill of Rights and in section 7(5) of the FOI Law, to mean more than a simplistic pro-forma response.

[46] In the present case, the Department's full reasoning for applying the exemption in section 17(a) was not formulated until the time of their hearing submission.

[47] However, since the Department has given its full reasons for claiming the exemption in section 17(a) in its hearing submissions, I do not consider that the Applicant's complaint about the lack of reasoning on the part of the Department remains valid.

The impact of the age of the records:

[48] I am surprised that the Department did not address this issue, although it was clearly listed in the Fact Report as being under review.

[6] See for instance: ICO Hearing *Decision 33-01113 CINICO* 31 July 2013 paras 10-16

[49] I accept that, at the relevant time - i.e. the date when the request was first dealt with - one of the four records exempted by the Department was more than 20 years old, i.e. the document dated 26 June 1989.[7]

[50] The FOI Law contains only one exemption which explicitly states that an exemption is extended beyond 20 years, namely section 23(3) which relates to personal information and has no application here. Therefore, by virtue of section 6(2) the exemption in section 17(a) does not apply to the 1989 record since it is more than 20 years old.

[51] Although no exemption applies, another provision of the FOI Law is engaged by the 1989 record, namely section 3(7) which provides:

> *(7) Nothing in this Law shall be read as abrogating the provisions of any other Law that restricts access to records.*

[52] This provision exists because the FOI Law is not intended to interfere with existing legal provisions which restrict access to records. The correct interpretation of "any other Law" in this context comprises both statute and common law, and will therefore include the common law of legal professional privilege, which does not expire in English law.[8]

[53] The 1989 record is a confidential communication received by the Director of Planning from his professional legal advisor in the Attorney General's Chambers. It consists of confidential legal advice within the relevant legal context, and I have not seen any evidence that the privilege has been waived or has otherwise been lost. Therefore, the 1989 document remains privileged from production in legal proceedings on the ground of common law of legal professional privilege, and the Department may withhold it.

The application of the exemption to the other three documents:

[54] I am puzzled as to why the Department's submission discusses the 2001 and 2007 documents in detail, but does not specifically mention the 1989 or 1994 documents, although it is clear that it is claiming the exemption in respect of all four documents.

[55] Having read the remaining three documents dated 19 August 1994, 30 March 2001 and 31 July 2007, I am satisfied that these records are exempted under section 17(a) as they are confidential communications received by the Director of Planning from his professional legal advisor in the Attorney General's Chambers. These communications consist of confidential legal advice within the relevant legal context, and I have not seen any evidence that the privilege has been waived or has otherwise been lost.

[56] **Consequently, in relation to the four document which the Department has claimed as exempt by virtue of section 17(a) I find the following:**

(a) the document dated 26 June 1989 is not exempted under section 17(a) by virtue of section 6(2), since it is over twenty years old and there is no provision in the FOI Law that extends the exemption beyond that time.
(b) However, that document remains privileged from production in legal proceedings on the ground of legal professional privilege by virtue of the

[7] On the question of what constitutes the "relevant date" in this regard, I refer to my consideration of this question in: ICO *Hearing Decision 41-00000 Governor's Office* 10 July 2014 para 18
[8] *R v Derby Magistrates' Court, ex parte B* [1995] UKHL 18 paras 41-58

common law of legal professional privilege, and may therefore be withheld by virtue of section 3(7) which provides that the FOI Law does not abrogate "any other Law that restricts access to records"; and,

(c) the three documents dated 19 August 1994, 30 March 2001 and 31 July 2007 are exempt by reason of section 17(a) since they are privileged from production in legal proceedings on the ground of legal professional privilege.

3. Whether access to records is already provided pursuant to another enactment, namely the *Development and Planning Law (2011 Revision)* and the *Development and Planning Regulations (2011 Revision)* in accordance with section 6(4) of the FOI Law;

[57] Section 6(4) provides:

> *(4) Where a record is-*
>
> > *(a) open to access by the public pursuant to any other enactment as part of a public register or otherwise; or*
> >
> > *(b) available for purchase by the public in accordance with administrative procedures established for that purpose,*
>
> *access to that record shall be obtained in accordance with the provisions of that enactment or those procedures.…*

[58] Section 15(4) of the DPL provides:

> *(4) Notice of an application for planning permission having been made to the [CPA] … shall be served in accordance with any regulations made under this Law, and the Authority shall not consider any application in the absence of evidence of service or publication, as the case may be, of such notice and unless twenty-one days have elapsed since the service or publication, as the case may be, of the last of such required notice.*

[59] Section 40 of the DPL defines the specific requirements for the service of notices, and specifies the means by which a notice may be served or given (e.g. by registered letter).

[60] Regulation 8(12) and (12E) of the DPR defines further requirements in respect of notification and publication in the context of planning applications, including the right of "an adjacent owner of full legal capacity" to lodge an objection to the CPA in regulation (12E).

The position of the Department:

[61] In the initial response of 26 June 2013, the Department referred repeatedly that its provision of information was being undertaken under the DPL and DPR, pursuant to section 6(4) of the FOI Law, while at the same time explaining the Applicant's rights to appeal under the FOI Law.

[62] In its submission the Department draws specific attention to regulations 8(12) and (12A) of the DPR. These provide, respectively:

> *(12) Applications for the approval of places of public assembly, gas stations, garages, clubs, restaurants, bars, cinemas, excavations, bulk storage tanks, dive shops and related structures, quarries, hotels, industrial plants including workshops, obnoxious and other similar establishments shall be advertised by the applicant in a manner approved by the Authority twice in a newspaper published and circulating in the Islands, with a period of at least seven days but not more than ten days between each successive publication of the advertisement; and within twenty-one days of the final advertisement, owners of full legal capacity who for the time being reside within a radius of one thousand feet of the boundaries of the land to which the application relates, or who own land (including a strata lot) within a radius of one thousand feet of the boundaries but reside elsewhere in the Islands, may lodge objections with the Authority, stating their grounds.*
>
> *(12A) Notwithstanding subregulation (12), prior to consideration of an application for planning permission by the Authority, notice of such application shall be served on the following owners -*
>
> > *(a) in the case of an application relating to development in a Residential zone -*
> >
> > > *(i) where the application relates to three to five apartments, owners at a minimum radius of one hundred and fifty feet from the perimeter of the land to which the application relates;*
> > > *(ii) where the application relates to six to ten apartments, owners at a minimum radius of two hundred and fifty feet from the perimeter of the land to which the application relates;*
> > > *(iii) where the application relates to eleven or more apartments, owners at a minimum radius of four hundred and fifty feet from the perimeter of the land to which the application relates; and*
> > > *(iv) where the application relates to any other land uses, owners at a minimum radius of five hundred feet from the perimeter of the land to which the application relates;*
> >
> > *(b) in the case of an application relating to development in an Institutional zone, owners at a minimum radius of five hundred feet from the perimeter of the land to which the application relates*
> >
> > *(c) in the case of an application relating to development in any other zone, owners at a minimum radius of three hundred feet from the perimeter of the land to which the application relates; and*
> >
> > *(d) in the case of an application for the subdivision of land in any zone -*
> >
> > > *(i) where the application relates to not more than six lots, owners at a minimum radius of one hundred and fifty feet from the perimeter of the land to which the application relates;*
> > > *(ii) where the application relates to seven to ten lots, owners at a minimum radius of two hundred and fifty feet from the perimeter of the land to which the application relates; and*

(iii) where the application relates to eleven or more lots, owners at a minimum radius of four hundred and fifty feet from the perimeter of the land to which the applications relates.

[63] The Department states that regulation 12 of the DPR requires that notice be given not only to adjoining land owners, but to all members of the public. It says that therefore the Applicant had access to two notices, i.e. the one published under regulation 12 of the DPR, accessible to all members of the public, and the notice sent to adjoining land owners under section 15(4) of the DPL.

[64] While the Department points to its well-established protocol for the inspection of records, it admits that the DPL does not prescribe any specific language to be included in the section 15(4) (DPL) notice. The Department says that this has not hitherto presented any problems, but states that it has now recommended that the legislation be amended to specify that the records may be inspected "in person at the Department… ", and that an application without evidence of service or publication will not be considered without written authorization.

The Position of the Applicant:

[65] The Applicant points out that on his first attempt to inspect the records, access was in fact denied to him as the records could not be located, and on his second visit he received "restricted and conditional access" only, by which he means that he had to identify himself as a condition of access and provide reasons for seeking access. He found the space provided for inspecting the numerous records inadequate, and says that it was quasi impossible to make notes, while he was not allowed to make any digital photographs of the records.

[66] In addition, the Applicant had to fly to Grand Cayman from one of the Sister Islands to inspect the records in the offices of the Department in George Town. He claims that the "inspection- only" rule practiced by the Department *de facto* discriminates against anyone not residing in Grand Cayman, as well as against persons with a mobility disability or other impediment which would limit their ability to visit the offices of the Department.

[67] According to the Applicant, these restrictions demonstrate that there is no "open access" as per section 6(4)(a).

[68] Furthermore, the Applicant argues that there is no applicable "enactment", i.e. primary or secondary legislation which provides "open access" as required for 6(4)(a) to be engaged. He points to the lack of written policies and procedures governing the Department's FOI and other access processes, and says that neither the DPL nor the DPR authorize the Department's "inspection-only" policy. He states that there is "no legal basis for the policy actually operated by the … Department."

[69] Finally, the Applicant claims that the Department's initiative to seek an amendment of the DPL and/or DPR is a *de facto* acknowledgment that the relevant records are not "open to access by the public" within the meaning of section 6(4)(a).

Discussion:

[70] For clarity, subsection 6(4)(b) is not engaged as there is no question of providing the records for purchase.

[71] As to subsection 6(4)(a), it is clear that certain records are routinely disclosed by the Department to qualified individuals by means of inspection in their George Town offices, as a result of the notice and appeal procedures generally provided under the DPL/DPR.

[72] The fact that, as the Department points out, a general notice regarding the planning application is published in the newspaper, seems to have little relevance on the question of access to the comprehensive records in the application file and produced in the application approval process, which are the subject of the present request. The general public is undoubtedly notified of the existence of the planning application, but this does not constitute "open access" to the relevant records.

[73] The general public notice only appears to pertain to the approval of certain types of developments (places of public assembly, gas stations, garages, clubs, etc.) and only alerts the general public of the existence of the application without providing all the detailed records asked for by the Applicant. Therefore, this means of access is very limited and cannot be called "open access to the public" as required for section 6(4)(a) to be engaged.

[74] As the Applicant argues, a close review of the DPL and DPR shows that the legislation does not explicitly mandate the disclosure of records or information as part of the notification process, either in principle or in relation to specific records or types of records. Neither do the DPL or DPR explicitly state a general or specific requirement that records can be disclosed in a particular form only, e.g. by means of inspection only.

[75] The scope and form of access provided to "adjacent owners", therefore, appears to be a matter of the Department's own practices, based on its interpretation of what is required under the DPL and DPR. There is no up to date manual of policies and procedures, and the Department's practices in this regard seem to be based on tradition, rather than explicit policy or legal provision.

[76] In my view, this does not meet the requirement of section 6(4) which stipulates that, for the section to apply, open access to the public must be "pursuant to any other enactment" and that "…access to that record shall be obtained in accordance with the provisions of that enactment". This is clearly not the case in regard to planning application records under the DPL and DPL at present.

[77] Even if the current practice indirectly amounted to "access pursuant to the DPL and/or DPR", such access is restricted in at least two ways. The records are made available (1) only to those individuals recognized as "adjacent owners of full capacity"; and, (2) only for a period of 21 days. Therefore, these records are not "open to access by the public" as required for the section to apply.

[78] I also question whether a record disclosed in the planning application process, as currently conceived, is "open to access by the public… as part of a public register or otherwise", as required for section 6(4)(a) to apply. The Department asserts that the legal provisions under DPL and DPR "demonstrate open access to the projects records", but also indicates that this is only true for those individuals legally entitled to the notification, not for the general public.

[79] Finally, the Applicant points to another restriction: the records are disclosed by inspection in the Department's offices only. The Applicant believes this essentially constitutes a denial of access and a form of discrimination against individuals who do not live in Grand Cayman, or are not sufficiently mobile or otherwise impeded to visit the Department's offices. This lends further credence to my conclusion that 6(4)(a) is not properly engaged.

[80] **Therefore, I find that the Department's reliance on section 6(4)(a) is not justified as that section is not engaged, and the Department should have responded under the FOI Law, as it subsequently did.**

4. Whether the provision of paper, or electronic copies of drawings or plans would be an infringement of intellectual property rights under the Copyright Act 1956 as per section 10(3)(b), taking into consideration section 54(3)(b).

[81] Section 10(3) provides:

> *(3) A public authority may grant access in a form other than that requested by an applicant where the grant of access in the form requested would-*
>
> *…*
>
> *(b) constitute an infringement of intellectual property rights subsisting in any matter contained in the record.*

[82] Section 54(3)(b) provides:

> *(3) The grant of access to a record in accordance with this Law shall not be construed as authorization or approval-*
>
> *…*
>
> *(b) for the purposes of any law relating to intellectual property rights, of the doing by that person of any act comprised within the intellectual property rights in any work contained in the record.*

The position of the Department:

[83] The responsive records include project drawings for the KVPAD application. The Department believes that these records should not be disclosed as doing so would result in a breach of copyright. In support, the Department points to sections 3(1), (2) and (5), and 48 of the (UK) *Copyright Act 1956* which was substantially adopted in the Cayman Islands in 1965 and remains in effect.[9] These provisions establish that architectural drawings fall within the Act's category of "artistic works", that copyright subsists in original artistic works including architectural drawings and plans, and that the reproduction or publication of such drawings and plans is restricted under the *Copyright Act*.

[84] The Department also points to section 9 of the *Copyright Act*, which states, amongst other exceptions to the protection for artistic works:

> *(1) No fair dealings with an artistic work for purposes of research or private study shall constitute an infringement of the copyright in the work.*

[9] *Copyright (Cayman Islands) Order 1965 (1965 No.2010)*

(2) No fair dealing with an artistic work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgement.

(3) The copyright in a work to which this subsection applies which is permanently situated in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

(4)The copyright in a work of architecture is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.

[85] On this basis, it is the Department's policy to allow access by inspection only, and an applicant can make notes, sketch or photograph a drawing during inspection. The Department states that this approach strikes the right balance between the requirements for openness, transparency and accountability in the FOI Law, and the need to protect the intellectual property rights of the architects and design professionals who have created the drawings. Any other form of access would invite plagiarism, according to the Department.

[86] The Department says it has changed its policy on the taking of digital images by persons who are inspecting records in their offices. This was not allowed at the time the Applicant inspected the records, but now it is.

[87] The Department also points to potential security concerns where, for instance, the detailed drawings of a bank or a school could be used to threaten public safety, and declares its intention to apply the exemption in section 24 (disclosure likely to endanger health and safety) if such access were requested. Since it has not in fact claimed this exemption, I will not consider this further.

[88] The Department has sought and obtained input from a number of architects in the Cayman Islands, and they broadly agree with these arguments and approaches, although some put forward an interesting alternative approach, which I have already further discussed in paragraph 154 of Hearing Decision 37-02613.[10]

[89] The Department dismisses the seemingly countervailing provision in section 54(2) of the FOI Law, because it does not have a "bona fide belief" that access is required. That section states:

(2) Where access to a record referred to in subsection (1) is granted in the bona fide belief that the grant of such access is required by this Law, no action for defamation, breach of confidence or breach of intellectual property rights shall lie against-

(a) the Government, a public authority, Minister or public officer involved in the grant of such access, by reason of the grant of access or of any re-publication of that record; or

(b) the author of the record or any other person who supplied the

[10] ICO *Hearing Decision 37-02613 Planning Department* 28 May 2014 para 154

> *record to the Government or the public authority, in respect of the publication involved in or resulting from the grant of access, by reason of having so supplied the record.*

The position of the Applicant

[90] The Applicant repeats that the Department has no written policies and procedures in place to meet its obligations under the FOI Law in the light of the Bill of Rights, nor on its interpretation of the *Copyright Act 1956*, and argues that it is an infringement of his rights under sections 11, 16 and 19(1) of the Bill of Rights to deny him access in the requested form instead of by inspection only.

[91] According to the Applicant section 10(3) is not fit for purpose if it does not allow for an alternative form of access when access by inspection cannot be granted, e.g. where it is impossible for an Applicant to visit the offices of the Department.

[92] The Applicant points out that section 10(3) anticipates a grant of access by inspection, but does not impose any further restrictions on access, to which he says he was subjected when visiting the offices of the Department, as described above.

[93] The Applicant points to section 9(1) of the *Copyright Act 1956* which states:

> *No fair dealing with an artistic work for purposes of research or private study shall constitute an infringement of the copyright in the work.*

[94] He argues that the making of a single paper or electronic copy of the relevant records for private study and research into the exercise of a statutory right to participate in the adjudication of a planning application falls within the meaning of "fair dealing" in the *Copyright Act 1956*, and that there would have been no copyright infringement if the Department had met his request for providing him with a copy of the responsive records. Irrespective of what the Department thought was the case in regard to the drawings, he says there was clearly no provision to deny him access to the written materials in the relevant records, or to allow him to make a digital photograph of each of the records.

[95] Since granting access to the responsive records would not be in breach of the *Copyright Act 1956*, the Applicant says that section 54(3) is not engaged, and believes that the provision of the responsive records by the Department would have been entirely lawful.

[96] Finally, in his reply submission, the Applicant presents a complex and intricate argument on section 54(1) and (2) which I have summarized as follows:

a. The Applicant notes that section 54(1) relates to "official records", as does 54(2) (indirectly), but that section 54(3) instead relates to "records". He considers this significant in that on his reading in relation to section 54 an "official record" is one "created by 'officials' and 'official processes' and therefore of governmental origin or provenance," while a "record" can have any provenance.

b. Since the term "disclosure" is not defined in the FOI Law or in the *Interpretation Law, 1995*, the Applicant considers that it must be given its plain meaning, which he says is (quoting from the Oxford English Dictionary):

The action of making new or secret information known[11]

c. According to the Applicant this demonstrates that "disclosure" in section 54(1) only relates to "previously undisclosed records". However, he claims that the responsive records have already been "disclosed" on numerous occasions, e.g. when the planning applicant provided them to the Planning Department, when an appellant was invited by registered mail to inspect the records in the office of the Department, when an appellant inspected the records, etc.

d. The Applicant therefore argues that section 54(1), in its apparent prohibition of disclosure of any "official records" which would breach intellectual property rights, and section 54(2), in precluding an action for breach of intellectual property rights in relation to such disclosure, relates only to "official records" which have not previously been "disclosed". On the Applicant's reading, therefore, since none of the requested records are "official" and they have all been previously "disclosed", he concludes that sections 54(1) and (2) do not apply to it.

Discussion:

[97] As I have indicated in a previous Hearing Decision,

> *The appeals and hearing processes under the FOI Law are not intended to answer hypothetical questions …. The Law specifies the duty and powers of the Information Commissioner in reaching a decision in regards to an appeal against a decision that has previously been made by a public authority, but it does not require the Commissioner to make prognostications about the hypothetical disclosure of … records before they have even been reviewed in detail. In reaching a conclusion under section 43 I am required to look at the facts of the case after investigating the matter and hearing evidence from both sides under section 45, but I cannot engage in hypothetical scenarios which are by their very nature based on supposition and limited evidence.*[12]

[98] Within the context of the present appeal it is essential to note that all the drawings relating to the KVPAD have eventually been posted on the Department's website after consent was obtained from the architect who is the copyright holder.

[99] The Applicant mentions other, unidentified "written materials"[13] which he believes should have been made available to him even if the Department refused access to the drawings for reasons of alleged copyright infringement. However, if the Applicant had any complaints about how the Department treated other parts of his request, he should have raised those in the appeal and hearing so that they could have been formally brought forward. This hearing is restricted to the "issues under review" in Part D, which have been agreed by both parties at the commencement of the present hearing. My consideration of the fourth issue is strictly in relation to "the provision of paper, or electronic copies of

[11] www.oxforddictionaries.com
[12] ICO *Hearing Decision 37-02613 Planning Department* 28 May 2014 para 103
[13] See paragraph 94 above

drawings or plans" as stated in the "issues under review", and I am not considering hypothetical arguments about additional "written materials" mentioned by the Applicant.

[100] **Despite the lengthy arguments on both sides on alleged copyright infringements and differing interpretations of provisions of the FOI Law, these questions are hypothetical and relate to records that have already been fully disclosed on the Department's website in the course of the appeal and hearing. Therefore, I do not consider that the Applicant has an avenue for appealing this issue, and I will consequently not decide this question.**

[101] For general guidance on the proper interpretation and application of sections 10(3)(b) and 54(3)(b) I refer to paragraphs 142 to 154 of Hearing Decision 37-02613.

5. Whether a reasonable search was conducted by the Public Authority to identify the responsive records as per regulation 6(1) of the FOI (General) Regulations 2008.

The position of the Department:

[102] The Department has chosen not to address this issue.

The position of the Applicant:

[103] The Applicant admits that he has only indirect knowledge of the search that was undertaken, having only had the direct experience of being told that the Department could not find the records upon his first attempt to inspect the records.

[104] He subsequently experienced significant delays before certain other records could be located and disclosed, often many months after the initial response of 26 June 2013.

Discussion:

[105] I note that the Department has not addressed this question which was nonetheless formally agreed as an "issue under review" in this Hearing. The least that could be expected from the Department is for it to provide some explanation for the significant delays that were undoubtedly encountered in identifying and disclosing numerous records.

[106] Regulation 6 requires:

> *6. (1) An information manager shall make reasonable efforts to locate a record that is the subject of an application for access.*

[107] The Fact Report for this Hearing lists a number of occasions when further records were released between October 2013 and April 2014, and it is clear that in the course of the appeal numerous additional records were identified and disclosed, even as the preparations for this Hearing were being finalized. This lead to a great deal of unnecessary delay and confusion for the Applicant and the ICO, and complicated the scope of the Hearing.

[108] Consequently, and particularly in the absence of any submission of the Department on this point, it is clear that the initial search was not conducted as comprehensively as it should have been, since it took several months after the request had been made to find and disclose additional responsive records.

[109] Under regulation 6(2),

> *(2) Where an information manager has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.*

However, no evidence has been presented to me to demonstrate that the Department complied with this requirement and kept a record of its search efforts.

[110] Given the problems with the initial decision noted above, I am surprised that the Chief Officer did not object to its quality or the quality of the search in his internal review decision. I note that the internal review decision is surprisingly short and was signed by an administrative officer rather than the Chief Officer himself.

[111] Nonetheless, I am satisfied that a thorough search has now been conducted.

[112] **In consequence, I find that the Department did not initially make reasonable efforts to locate all records that were subject to the application for access at the time of the initial decision, as required under regulation 6(1). However, through the identification and disclosure of further records in the course of the appeal, this initial failure has been satisfactorily addressed, and no further corrective steps are required.**

F. FINDINGS AND DECISION

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

Findings and decision:

(1) In respect of the four documents that were claimed by the Planning Department to be exempt under section 17(a) of the *Freedom of Information Law*, 2007, I find the following:

(a) the document dated 26 June 1989 is not exempted under section 17(a) by virtue of section 6(2) since the document is over twenty years old. However, that document remains privileged from production in legal proceedings on the ground of legal professional privilege, and may be withheld by virtue of section 3(7) which provides that the FOI Law does not abrogate “any other law that restricts access to records” which includes the common law of legal professional privilege; and,

(b) the three documents dated 19 August 1994, 30 March 2001 and 31 July 2007 are exempt by reason of section 17(a) as they are privileged from production in legal proceedings on the ground of legal professional privilege;

(2) The Department's reliance on section 6(4)(a) was not justified, and the Department should have responded under the FOI Law, as it subsequently did.

(3) The questions on alleged copyright infringements and differing interpretations of provisions of the FOI Law in relation to the application of intellectual property rights are hypothetical since they relate to records that have already been fully disclosed on the Department's website in the course of the appeal and hearing. I do not consider that the Applicant has an avenue for appealing this issue, and I therefore do not rule on this question.

(4) I find that the Department did not make reasonable efforts to locate all records that were subject to the application for access at the time of the initial decision, as it was obligated to do by reason of regulation 6(1). However, after identifying and disclosing all further records, this failure has been satisfactorily addressed and no more corrective steps are required.

As per section 47 of the *Freedom of Information Law,* 2007, the complainant, or the relevant public 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 for leave be sent to my Office immediately upon submission to the Court.

Pursuant to section 48, upon expiry of the forty-five day period for judicial review referred to in section 47, the Commissioner may certify in writing to the court any failure to comply with this Decision and the court may consider such failure under the rules relating to contempt of court.

Jan Liebaers
Acting Information Commissioner

16 October 2014