ICO Hearing 46-00914
Decision
Ministry of Education, Employment and Gender Affairs

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

22 April 2016

Summary:

On 23 May 2014 an Applicant made a request under the *Freedom of Information Law 2007* (FOI Law) to the Ministry of Education, Employment and Gender Affairs (the Ministry) for records relating to the revision of the *National Pension Law (Investment Regulations)*. After a series of delays, the matter was appealed to the Information Commissioner's Office (ICO).

The Ministry located a single responsive record, and upon the urging of the applicant and the ICO, added several more. A number of records were released, but no agreement could be reached on the remaining responsive records and the matter was decided in a hearing before the Acting Information Commissioner.

In this Hearing Decision, the Acting Information Commissioner Mr. Jan Liebaers found that the exemption in section 19(a)(1) does not apply to the responsive records as they were not prepared for proceedings of the Cabinet. However, the exemption in section 20(1)(b) – which relates to free and frank exchange of views – applies to communications between the Ministry and consultants, as well as to feedback received from the National Pensions Board. In addition, the exemption in section 20(1)(d) – which relates to the effective conduct of public affairs – applies to communications relating to the draft regulations. Both exemptions are subject to a public interest test, but the Acting Information Commissioner concluded that the public interest did not require the disclosure of the exempted records. An additional responsive record was found not to be exempted and was ordered disclosed.

The Acting Information Commissioner also found that the Ministry did not meet its obligations to make reasonable efforts to locate responsive records, and required the Ministry to conduct a new search for additional records that may be held by members of the National Pensions Board.

Statutes[1] Considered:

Cayman Islands Constitution Order 2009 (SI 2009/1379)
Freedom of Information Law 2007
Freedom of Information (General) Regulations 2008

Contents:

A. INTRODUCTION

[1] On 23 May 2014 the Applicant made a request under the *Freedom of Information Law 2007* ("FOI Law") for records "relating to the operation of and proposed revisions to the National Pension Law, Investment Regulations 2003 R[evision]" (the "Investment Regulations").

[2] The Ministry of Education, Employment and Gender Affairs (the "Ministry") acknowledged the request, and on 12 June 2014 sought to narrow down the request because it considered it too wide. The Applicant agreed to drop records relating to the operation of the Investment Regulations from the request.

[3] On 23 June 2014 the Ministry again asked the Applicant to narrow down the request which it continued to consider too wide, however the Applicant refused to narrow it further.

[4] On 24 June 2014 the Ministry informed the Applicant that it needed to extend the deadline for the initial decision by 15 calendar days. This letter was dated 12 June 2014.

[5] The next day, 25 June 2015, the Ministry again contacted the Applicant to inform him that the request was too wide, apparently stating that it would let the Applicant know whether it would comply with the request or not.

[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. At the time the request in this case was made the 2015 revision of the FOI Law had not yet come into effect, and therefore this Decision is made under the 2007 FOI Law.

[6] On 9 July 2015 the Ministry informed the Applicant that it was applying the exception in section 9(c) which allows a public authority not to comply with a request where compliance would constitute an "unreasonable diversion of resources." It appears that this decision pertained to the original request of 23 May 2014, and not to the narrowed request of 12 June 2014.

[7] On 15 July 2014 the Applicant requested an internal review of that decision.

[8] After not receiving an Internal Review decision within the statutory timeline of 30 calendar days, on 3 September 2014 the Applicant appealed the matter to the ICO, which accepted the appeal on 12 September 2014.

[9] On 9 September 2014 the Ministry confirmed the narrowed nature of the request, as already agreed on 12 June 2014.

[10] On 26 September 2014 the ICO facilitated a meeting between the parties, at which time the Ministry agreed to proceed on the basis of the narrowed request of 12 June 2014.

[11] On 7 October 2014 the Ministry located a single responsive record, the Morneau Shepell Report.

[12] On 23 October 2014 the Ministry told the Applicant that a substantial number of additional responsive records had been found by a Ministry employee who was closely associated with pension matters. However, that employee was unable to review the records due to other commitments. The ICO raised the point that these records needed to be reviewed, and the Information Manager ("IM") agreed.

[13] The ICO followed up, and on 28 January 2015 the Ministry stated that the Morneau Shepell Report was exempt under section 20(1)(b), which protects disclosures which "would or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation". The IM also hinted that "these decisions are prepared for Cabinet deliberations", but only on 3 March 2015 confirmed that the exemption in section 19(1)(a) was also being applied to the Morneau Shepell Report. The latter exemption protects "opinions, advice or recommendations prepared for… proceedings of the Cabinet…".

[14] In the course of the ensuing months the ICO asked the Ministry repeatedly whether other responsive records had been located and reviewed. The ICO also asked whether the Ministry had considered the public interest, as it is required to do under section 26(1) in regard to both the exemptions it was claiming.

[15] Since no substantial responses were given to the ICO's repeated communications, on 13 May 2015 it was decided to refer the matter to the formal hearing process.

[16] As preparations for a hearing before the Acting Information Commissioner were being made, on 19 June 2015 the Ministry disclosed additional records including National Pension Board ("NPB") meeting minutes, input received from outside parties on changes to the Pension Regulations, as well as the previously exempted Morneau Shepell Report. The Applicant agreed to put the hearing process on hold at that time.

[17] On 14 July 2015 the Applicant provided a listing with additional outstanding records to the Ministry.

[18] The Ministry responded on 6 August 2015 by releasing further records containing input on investment regulation changes received from various groups. The Ministry also told the Applicant it considered some of the outstanding records he had identified as falling outside the scope of the original request, while other records were exempted under the previously applied exemptions.

[19] On 31 August 2015 the Applicant wrote back to the Ministry claiming that still more records remained outstanding, including additional communications between members of the NPB, a copy of the draft Investment Regulations, records of discussions, meetings and communications, including emails, with the parties preparing the revisions to the Investment Regulations, and the Pitcairn Report which is mentioned in the Morneau Shepell Report.

[20] On 10 September 2015 the Ministry explained that no further records relating to the NPB could be located, and that the other outstanding records were exempted under sections 20(1)(b) and (d). The Ministry later clarified that these exemptions were also being claimed in regard to the Pitcairn Report.

[21] On 16 September 2015 the ICO asked for details of the search conducted in regard to the requested NPB communications. The Ministry responded the following day that it had contacted the NPB Chairman. The ICO then requested and received a list of NPB board members who had been contacted by the Chairman. The Applicant believed a number of board members who should have been contacted, were not. When the ICO followed up on this with the Ministry, no further response was provided.

[22] As the informal resolution of the dispute had once again stalled, on 27 November 2015 the Applicant requested that the matter once again proceed to the formal hearing process.

B. BACKGROUND

[23] The Ministry of Education, Employment & Gender Affairs is responsible for schools, colleges, training programmes, job placement, labour administration and pension inspections, and includes such entities as the Cayman Islands Public Library Service, the Department of Education Services, the Department of Labour and Pensions, the Education Standards and Assessment Unit, the National Workforce Development Agency, the Sunrise Adult Training Centre, the University College of the Cayman Islands, and a number of other boards and committees, including the National Pensions Board.

C. PROCEDURAL ISSUES

The exemptions in 20(1)(b) and (d) being claimed by the IM instead of the Minister or CO:

[24] Section 20(2)(b) provides:

(2) The initial decision regarding-

(b) subsection (1) (b), (c) and (d) shall be made not by the information manager but by the Minister or chief officer concerned.

[25] I have not seen any evidence that the exemptions in sections 20(1)(b) or (d) have at any point been claimed by the Minister or chief officer, rather than by the Information Manager (IM) as required.

Other issues:

[26] A number of other procedural issues were noted, including the reluctant responses provided to the Applicant, the slow, undocumented search for responsive records, and the lack of cooperation with the ICO. These issues are further discussed below.

D. ISSUES UNDER REVIEW IN THIS HEARING

[27] The Fact Report identifies the records in dispute as follows:

1. Pitcairn Report;
2. Internal Communications of the public authority regarding the revision and preparation of the Revised Investment Regulations;
3. Revised Investment Regulations and drafting instructions;
4. Communications between Morneau Shepell and the public authority regarding the revision of the Investment Regulations; and,
5. National Pension Board feedback on the revision of the Investment Regulations, specifically a memo from Bryan Bothwell dated 22 May 2014.

[28] However, in practice some of these responsive records are intertwined, particularly the records numbered 2 and 3 above. Therefore, the following are the responsive records in this Hearing:

Documents	**Date**
1. Pitcairn report	19 Apr 2010
2. Ministry communications:	
a) Regulations with tracked changes ("Appendix #7"), including drafting instructions regarding 26 June 2012 version of Regulations	20 Dec 2012
b) Drafting instructions ("Appendix #6")	14 Feb 2014
c) Communications about the drafting of the Regs ("Appendix #5")	4-10 Mar 2014
d) Further omitted items for draft ("Appendix #4")	6 Mar 2013
3. Communications between Ministry and Morneau Shepell:	
a) Email Ministry- MS ("Appendix #3")	3 Feb 2012
b) Email MS- Ministry ("Appendix #2")	6 Feb 2012
c) Email MS – Ministry ("Appendix #1")	4-6 Mar 2013

4. Feedback from NPB: a) Letter from MS to Ministry re feedback NPB 22 May 2014 b) Feedback from NPB	 21 Apr 2015 22 May 2014

[29] The Fact Report notes the following: "The public authority must ensure that, before submissions are made to the Information Commissioner, it clarifies which exemptions apply to each specific exempted record or parts thereof". Nonetheless, I have not received any such clarifications. Therefore, out of an abundance of caution I will assume that all three of the exemptions are being claimed in relation to all responsive records.

[30] With this in mind, the issues under review in this Hearing are:

1) **Whether the remaining responsive records are exempt from disclosure under section 19(1)(a) of the FOI Law and, if so, whether access shall nonetheless be granted in the public interest pursuant to section 26 of the FOI Law;**

2) **Whether the remaining responsive records are exempt from disclosure under section 20(1)(b) of the FOI Law and, if so, whether access shall nonetheless be granted in the public interest pursuant to section 26 of the FOI Law;**

3) **Whether the remaining responsive records are exempt from disclosure under section 20(1)(d) of the FOI Law and, if so, whether access shall nonetheless be granted in the public interest pursuant to section 26 of the FOI Law; and,**

4) **Whether the Information Manager has made reasonable efforts to locate a record that is the subject of an application for access as required by regulation 6(1) of the Freedom of Information (General) Regulation, 2008.**

[31] Section 6(1) establishes the general right to access:

> *6. (1) Subject to the provisions of this Law, every person shall have a right to obtain access to a record other than an exempt record.*

[32] Section 27 provides:

> *27. Public authorities shall make their best efforts to ensure that decisions and the reasons for those decisions are made public unless the information that would be disclosed thereby is exempt under this Law.*

[33] Section 43(2) places the burden of proof on the public authority:

> *(2) In any appeal under section 42, the burden of proof shall be on the public …body to show that it acted in accordance with its obligations under this Law.*

[34] Section 19 provides for an exemption relating to the Cabinet's deliberative processes:

19. (1) Subject to subsection (2), a record is exempt from disclosure if it contains-

(a) opinions, advice or recommendations prepared for;

(b) a record of consultations or deliberations arising in the course of,

proceedings of the Cabinet or of a committee thereof.

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

[35] Section 20(1)(b) and (d) respectively provide for an exemption for records relating to the free and frank exchange of views and the effective conduct of public affairs:

20. (1) A record is exempt from disclosure if-
…
(b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;
…
(d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

(2) The initial decision regarding-

(a) …

(b) subsection (1) (b), (c) and (d) shall be made not by the information manager but by the Minister or chief officer concerned.

[36] By reason of section 26(1) the exemptions in sections 19 (1)(a), 20(1)(b) and 20(1)(d) are subject to a public interest test. Section 26(1) provides:

26. (1) 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.

(2) Public interest shall be defined in regulations made under this Law.

[37] Regulation 2 defines "public interest" as follows:

"public interest" 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;
(g) deter or reveal wrongdoing or maladministration;
(h) 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
(i) reveal untrue, incomplete or misleading information or acts of a public authority.

[38] Regulation 6 requires that a reasonable search be executed, as follows:

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

E. CONSIDERATION OF ISSUES UNDER REVIEW

1) Whether the remaining responsive records are exempt from disclosure under section 19(1)(a) of the FOI Law and, if so, whether access shall nonetheless be granted in the public interest pursuant to section 26 of the FOI Law.

The position of the Ministry regarding section 19(1)(a):

[39] The Ministry seeks to extend the reach of section 19(1)(a) to Caucus. It explains that,

> *…in practice all Cabinet papers are first vetted by Caucus… all presentations and policy decisions are reached in the Caucus meeting before such matters are discussed by Cabinet.*

[40] Since such "new procedures" involving the Caucus have "occurred post implementation of the FOI Law", the Ministry believes "that Caucus' inclusion in these critical policy decisions necessitates that [the exemption in section 19(1)(a)] should be read to apply to Caucus as well, given their role."

[41] The Ministry calls the exemption in section 19(1)(a) itself "broad in scope" and lists a number of types of documents it considers captured by it, including,

> *…information about proposals or recommendations; draft memoranda and notes made by officials; briefing documents for the purposes of Cabinet discussions; discussion papers (which include analysis, explanations, policy options etc.); draft legislation; and records used to reflect communications or discussions between Ministers on or about government policy of formulation [sic] … [as well as] documents specifically prepared for submission to Cabinet including any preliminary drafts and extracts of those document.*

[42] The Ministry argues that the exemption extends to,

> *… where a large amount of data is generated in the process of confirming the final data for Cabinet consideration, this material may also come within [the] section 19(1)(a) exemption.*

[43] As well, the Ministry contends that the exemption applies to records

> *…prepared to assist a Minister with submissions they are taking to Cabinet and records prepared to assist a Minister to consider submissions by other Ministers to Cabinet, … where a document is being prepared with the intention of informing a Cabinet discussion, or where it is being prepared at the request of Cabinet, the record should be exempt on the basis that disclosure would be contrary to the public interest as such disclosure would impair the confidentiality of Cabinet processes. Furthermore, release of such records may also inhibit the full canvassing of issues in the development of Cabinet material. … [Disclosure] could impair the integrity and viability of the decision making process to a significant or substantial degree without countervailing benefit to the public.*

[44] The Ministry states that the responsive records remain highly relevant to a currently ongoing and almost finalized revision of the Regulations, explaining that the responsive records "are relevant to the current work that is being done with the Investment Regulations," and that "A further discussion with the [NPB] is required prior to the Regulations being complete."

[45] Since the proposed revisions have not yet been seen by the Cabinet, the Ministry claims that,

> *…disclosure of records in relation to the same would prejudice Cabinet's deliberations and potentially confuse the general public regarding the policy direction…*

[46] In their Reply Submission the Ministry provides the following further clarifications:

> 1. *The regulation of pensions is not uniquely funded by pension plan members, but also from Government's general revenue.*
> 2. *The Government agrees that there is a need for additional information to be released in relation to pension plans, such as rates of return, and this is reflected in the proposed amendments to the NPL.*
> 3. *The exemption of the responsive records does not detract from the requirements for openness in the NPL.*

<u>The position of the Applicant regarding section 19(1)(a):</u>

[47] The Applicant provides a historical outline of the development of pensions legislation, drawing particular attention to the employee/member-centred nature of the Cayman Islands NPL. Section 2 of that Law provides (emphasis added by Applicant):

> *This Law applies to pension plans established and maintained <u>for the benefit of employees in the Islands.</u>*

[48] The Applicant states that there is a greater need for openness in an employee-centric pensions regime such as Cayman's, particularly since it is the employees/members

that "are exposed to all the operational risk of their pension plan", who fund "all pension plan operational costs, including investment management fees", and who "fund the cost of government's pension regulation to ensure compliance with the NPL". Consequently, the Applicant believes that government must be accountable for how it spends such "pension taxes", and should release all information used to arrive at related decisions, including the formulation of new policy and legislation.

[49] The Applicant states that "the only stakeholders/beneficiaries in Cayman Islands pension matters are employees", as well as "dependents of the employee and future generations of employees. The Applicant states:

> *Without full information about a pension plan employees cannot do their due diligence exercise in the selection of a pension, therefore I am sure you will agree that without full information a vote by employees will be an uninformed vote and that is not correct or equitable.*

[50] The Applicant states that there is an overall societal interest in ensuring "that the pension regime operates at an exceptionally high standard visible to the public eye to avoid the ever increasing taxes to fund increasing social service payments to persons without replacement income."

[51] The Applicant alleges that "the Pension Ministry has a history of making decisions that benefit pension service providers - the **Agents of the Administrator** - to the detriment of employees" (emphasis added by Applicant). Not disclosing the records would, according to the Applicant, have the effect of allowing "the financial industry and the pension regime to operate largely 'out of sight' of the public."

[52] The Applicant points out that his request is not in conflict with the provisions of the NPL, and that various parts of Cayman Islands pension legislation "have extensive provisions enabling employees to understand how pension funds are invested, investment diversification, types of investments, investment strategies, [and] the basis to charge fees", and several sections of the NPL and the above Regulations provide a right of access to information relating to pension plans for employees/members of the plan, including sections 20, 23, 24, and regulations 11, 15, 16.

[53] In particular, under regulation 3 of the *National Pensions (General) Regulations (2011 Revision)* employees have the right to receive information relating to pension plans (emphasis added by Applicant):

> *3. (1) An employer shall notify each of his employees of his intention to provide a pension plan in accordance with the Law and shall, in such notice, include-*
>
> *(a)* ***the name or names of the proposed providers;***
> *(b)* ***the reasons for choosing the proposed provider;***
> *(c)* ***the types of investments that may be purchased and the reasons for the choice of such investments;***
> *(d) the minimum level of contributions that are proposed to be made by the employees provided that such level of contributions are in accordance with the Law; and*
> *(e)* ***such other information as is necessary to assist the employee in considering the plan.***

(2) Subject to section 4, ***an employer shall not establish, select or continue on the coming into effect with a pension plan without filing with the Superintendent a certificate that all employees have been given full details of the options available to them and have been polled in accordance with this regulation and that a majority of those who voted (with, in the event of a tie, and with the written consent of the Superintendent, the casting vote of the employer) were in favour of the plan.***

(3) The polling procedure may be either-

(a) a meeting of members at which a vote is taken; or

(b) a voting form sent to all members by registered post with a minimum time limit of fourteen days from the date it was sent for its return.

(4) Employees shall be entitled to be provided by the employer with details of the outcome of the poll.

[54] The Applicant draws particular attention to what is said to be the "totally open-ended" nature of the provision in regulation 3(1)(e), quoted in the paragraph immediately above, and, essentially, claims that the responsive records fall within the meaning of "such other information" necessary for employees to understand and consider their pension plan options.

[55] As well, the Applicant draws on sections 19 and 24 of the Constitution, which respectively deal with lawful administrative action and duty of public officials. He believes these sections "[anticipate] the abuse of power and the withholding of information by government from the governed…". These sections of the Constitution provide:

19.—(1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

(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.

and,

24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified.

[56] By claiming the exemption in section 19(1)(a), the Applicant says, the Ministry is preventing the realization of section 4 of the FOI Law, which provides:

4. The objects of this Law are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely-

(a) governmental accountability;
(b) transparency; and

(c) public participation in national decision-making,

by granting to the public a general right of access to records held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information.

[57] In reference to public participation in national decision making (one of the objects of the FOI Law identified in section 4), the Applicant states:

> *The Pension Ministry attempts to use sections of the FOI Law to withhold records containing information from the stakeholders, thereby preventing participation of stakeholder[s] in discussions that would enable them to make their informed opinion known to the decision makers. Without the free flow of information decision makers often make uninformed decisions that are detrimental to the stakeholders…*

[58] In his Reply Submission the Applicant also adds the following further points:

1. He rejects the extension of the exemption in section 19(1)(a) to the "Caucus", saying,

> *In violation of the Constitution the Pension Ministry attempts to recognize "Caucus" as an unconstitutional "Superior Level Cabinet" that ranks in importance / authority superior to Cabinet.*
>
> *The statements here are telling the world that Cabinet is not the decision making entity for the Cayman Islands Government - in reality, Caucus is the decision making entity, Cabinet only executes the Caucus instructions i.e. Cabinet is now the "rubber stamping entity" for Caucus.*

2. In response to the Ministry's claim that disclosure of the responsive records would "potentially confuse the general public", the Applicant states that it is the Ministry who is confusing the general public with the piecemeal release of information which is "obviously **NOT** in the best benefit of the governed [i..e the employees]" (emphasis added by Applicant).

[59] The Applicant provides further views on the public interest which I will discuss further below, if required.

Discussion:

[60] The Ministry puts forward three arguments for interpreting the exemption in section 19 widely. Firstly, it proposes that that exemption should be read to include "opinions, advice or recommendations, prepared for… proceedings of the" caucus. Secondly, the Ministry argues that, "where a large amount of data is generated in the process of confirming the final data for Cabinet consideration" the exemption should apply to that larger set of material. Thirdly, the Ministry invites me to agree that the exemption should apply to records related to submissions to the Cabinet where disclosure would ultimately be contrary to the public interest in maintaining the confidentiality of Cabinet processes.

[61] As a matter of principle I do not agree that exemptions should be interpreted widely or that anything should be "read into" the exact wording of any exemption. The FOI law is clearly concerned with the openness, transparency and accountability of government information, and to widen exemptions beyond what the legislators intended risks upsetting the careful balance between the public's right to access and the legitimate reasons recognized for withholding certain information in the Law.

[62] In Hearing Decision 15-00611 the former Information Commissioner made the following point:

> *Public authorities should note that **it is the exemptions that should be interpreted narrowly**, not the request.*[2]

[63] Specifically, the exemption in section 19(1)(a) has been considered on a number of previous occasions. In Hearing Decision 13-00511 the former Information Commissioner stated (emphasis added):

> *The exemption in section 19(1)(a) is intended to protect records which would reveal the Government's deliberative processes. While it may be important to protect these types of records from disclosure to the general public, **this exemption should not be used broadly and should instead be limited to the parameters set by the legislators**. Simply because a record is eventually viewed by Cabinet does mean that it was "prepared" for that purpose.*[3]

[64] The wording of the exemption in section 19(1)(a) is not ambiguous. The section is clearly intended to exempt records that contain opinions, advice or recommendations prepared for proceedings of the Cabinet or a Committee thereof.

[65] For clarity, the meaning of a "Committee of the Cabinet" has previously beendefined , and the concept is not of relevance in the circumstances of the present case:

> *I have previously been informed by the Cabinet Office that a "Committee of Cabinet" should be considered in narrow terms and refers specifically to committees made up of Cabinet members and not groups or committees that may be providing a report for Cabinet…".*[4]

[66] The exemption is intended to provide a safe space for the Cabinet or a Committee of the Cabinet in which ideas may be freely expressed and the principle of collective responsibility of the Cabinet maintained. However, to "read" any other body, whether formal or informal, or any other category of records or information into the clear and unambiguous scope of the exemption in section 19(1)(a) would expand the meaning of that exemption beyond what was intended by the legislators when the FOI Law was debated and passed.

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[2] ICO *Hearing Decision 15-00611 Ministry of Finance, Tourism and Development* 2 September 2011 para 21

[3] ICO *Hearing Decision 13-00511 Ministry of Finance, Tourism and Development* 29 July 2011 para 35

[4] ICO *Hearing Decision 13-00511* op cit para 36

[67] The exemption in section 19(1)(a) is plainly not intended to cover any other body. To expand it to cover records prepared for any other body, such as the Caucus, would result in significant legal uncertainty in regard to the scope of this - and potentially any other – exemption. This approach would constitute a dangerous "slippery slope" that would inevitably result in undermining the intent of the FOI Law, and I do not support it.

[68] The second argument raised by the Ministry asks me to expand the scope of the exemption to, essentially, include a larger body of records than encompassed in the wording of section 19(1)(a), namely by including any records that are generated in preparing and fine-tuning a submission to the Cabinet, beyond the specific "opinions, advice or recommendations prepared for….proceedings of the Cabinet".

[69] In my opinion this would expand the scope of the exemption beyond the plain language of the Law. The exemption clearly covers records that contain "opinions, advice or recommendations **prepared for**… **proceedings of the Cabinet**…" (emphasis added). Conversely, the exemption in section 19(1)(a) is not engaged where a record contains opinions, advice or recommendations that are not prepared for Cabinet proceedings, but are created for some other entity or purpose, including the entities that play a part in the process of preparing such "opinions, advice or recommendations". Expanding the exemption as suggested by the Ministry would lead to legal uncertainty and introduce an imbalance in favour of withholding information from the general public, which is contrary to the intentions of the FOI Law.

[70] The third way the Ministry believes the exemption in section 19(1)(a) should be read more widely is closely related to the arguments above. The Ministry believes the exemption should cover records that are,

> …prepared to assist a Minister with submissions they are taking to Cabinet and records prepared to assist a Minister to consider submissions by other Ministers to Cabinet … where a document is being prepared with the intention of informing a Cabinet discussion, or where it is being prepared at the request of Cabinet

The Ministry argues that such records should be covered since it says the disclosure of such materials would be contrary to the public interest in maintaining the confidentiality of Cabinet processes.

[71] The marginal title of section 19 is "Records revealing Government's deliberative processes". As explained above, I accept that this exemption is concerned with providing a safe space for the Cabinet or a Committee of the Cabinet, in which ideas can be freely expressed and the principle of collective responsibility of the Cabinet is maintained by means of exempting "opinions, advice or recommendations prepared for… proceedings of the Cabinet…". I recognize that maintaining such a safe space is a matter of public interest. However, I do not accept that the exemption triggers a broader public interest which would expand the scope of the exemption beyond the exact meaning specified in the Law, as the Ministry appears to suggest.

[72] As already noted above, the exemption in section 19(1)(a) is subject to a public interest test under section 26(1), and any relevant public interest considerations can be raised if and when that section comes into play.

[73] For the above reasons, therefore, I reject all three of the Ministry's arguments for expanding the scope of the exemption in section 19(1)(a) beyond the literal text of the Law. I will now examine whether the exemption is actually engaged by the responsive records.

[74] On the surface, by emphasizing the need to expand the scope of the exemption to fit the responsive records under consideration in this Hearing the Ministry may unwittingly have implied that the responsive records may not strictly fall within the scope of the exemption.

[75] Regardless, the Ministry states that the revision of the Investment Regulations remains current and ongoing, and indicates that a "further discussion with the [NPB] is required prior to the Regulations being complete". In its reply submission the Ministry states that "at this juncture any proposed revisions have not been finalized by the Government", and again emphasizes that the drafting process within the Ministry remains ongoing. Therefore, in the Ministry's own words, it seems clear that the records have not been "prepared for proceedings of the Cabinet", since the proposed legislation is plainly not yet ready to be considered by the Cabinet.

[76] The arguments relating to the alleged imminent nature of the discussions by Cabinet of the new Regulations are in my mind diminished by the fact that the request was made as long ago as 23 May 2014. As indicated in the introduction, above, the process of locating responsive records has been piecemeal, and almost all the responsive records date from 2010-2014, with only a single record dated as late as April 2015.

[77] A full response should have been given a long time ago, and to argue now that the matter is imminently going before the Cabinet - and therefore the records should be exempted under section 19(1)(a) - seems contrived. It seems to me that records either fall within the scope of the exemption or not, but I do not see that the imminence of a debate in the Cabinet can render the responsive records to a lesser or greater degree "prepared for proceedings of the Cabinet", especially where the records clearly are "works in progress" and by the Ministry's own admission have not yet been finalized.

[78] Whether records that are more recent than the date of the initial request should be included in a public authority's response is a different question. Where a swift response is given, a public authority should avoid including responsive records that post-date the request, since the right to access in the Law extends to a record that is "held", which should be interpreted as being held at the time the request is made. However, given the piecemeal and delayed response given by the Ministry, the evolving nature of the subject matter of the responsive records, and the Ministry's duty to assist the Applicant, I welcome the Ministry's approach to include additional records caught by the request, even where these strictly post-date the request.

[79] The responsive records were created in the course of the revision of the Investment Regulations by the Ministry. They are part of the revision process and reflect input provided by different public and private parties in relation to the various parameters that were sorted out and negotiated in the process of reaching final drafting instructions for the Investment Regulations. As such, the responsive records clearly contain "opinions, advice and recommendations" reflecting the input from various parties, including external consultants, the National Pensions Board, the Ministry itself, and others. While the ultimate outcome of that process may, eventually, in some yet-

to-be determined form end up before the Cabinet, it is clear to me that the responsive records, themselves, are not records that are intended to be laid before the Cabinet. Therefore, the responsive records are not "prepared for proceedings of the Cabinet or of a committee of the Cabinet" and the exemption is not engaged.

[80] Regarding the Ministry's claim that disclosure "would… confuse the general public regarding the policy direction", I am not aware of any exemption under the Law that protects the general public from being confused by the disclosure of records held by Government. If a public authority believes an additional explanation is required, there is nothing to stop them from providing an explanation of whatever information they believe may confuse the general public. Any such explanation should of course be clearly separated from the responsive records themselves.

[81] Finally, the Ministry claims a "chilling effect" if the records were disclosed, as they believe "release of such records may also inhibit the full canvassing of issues in the development of Cabinet material." Since this issue seems more relevant to the exemption relating to the free and frank exchange of views (section 20(1)(b)) which the Ministry has also raised in this Hearing – I will discuss it further there.

[82] **For the above reasons, I find that the exemption in section 19(1)(a) is not engaged in respect of the responsive records.**

[83] Since the exemption in section 19(1)(a) is not engaged, I do not have to consider whether disclosure is nonetheless required in the public interest pursuant to section 26(1).

2) Whether the remaining responsive records are exempt from disclosure under section 20(1)(b) of the FOI Law and, if so, whether access shall nonetheless be granted in the public interest pursuant to section 26 of the FOI Law.

<u>The position of the Ministry regarding section 20(1)(b):</u>

[84] The Ministry believes that it is meeting the expectations of openness and accountability in the FOI Law by directly inviting the general public to give its views in a public consultation relating to the proposed amendments to the NPL.

[85] However, the Ministry also states,

> *While the importance of public inclusion in the legislative amendment process is recognized it is essential that disclosure of certain records do [sic] not inhibit the free and frank exchange of views throughout the policy development process with the Ministry.*

[86] The Ministry claims it is important that those involved in the preparation of policy be able to express their professional opinions confidentially. The Ministry points to a "chilling effect" whereby,

> *…release of the requested records may significantly reduce the quality, clarity or frankness and candour in the provision of advice if sensitive briefing*

> *documents are not properly protected. .. disclosure of the requested record [sic] is likely to inhibit the ability of public authority [sic] to express themselves openly, honestly and completely [in the] process of deliberation.*

[87] The Ministry argues that "the release of any information at this time would be extremely premature and inhibit the free and frank exchange of views…". The Ministry specifically mentions only one record, namely the Morneau Shepell Report (9 February 2012) which the Ministry says is amongst the records "being utilized to inform the Government's decision on the possible changes to the Investment Regulations".

[88] Finally, the Ministry expresses the view that,

> *The Cabinet is the ultimate arbiter of all government policy therefore it is essential that the integrity of the policymaking process is protected…*

The position of the Applicant regarding section 20(1)(b):

[89] Since section 43(2) places the burden of proof on the public authority, an applicant is not required to demonstrate that the Ministry did not apply the Law correctly.

[90] I refer to the general statements made by the Applicant about the request and the general observations he has made in regard to the nature of pension law and the position of the Ministry, above. He has not, otherwise, addressed the exemption in section 20(1)(b).

Discussion:

[91] As noted above, the Fact Report states: "The public authority must ensure that, before submissions are made to the Information Commissioner, it clarifies which exemptions apply to each specific exempted record or parts thereof." Nonetheless, the Ministry has not addressed the question of partial access in relation to any of the exemptions it is claiming, thus appearing to ignore the obligation under section 12(1) which provides:

> *12. (1) Where an application is made to a public authority for access to a record which contains exempt matter, the authority shall grant access to a copy of the record with the exempt matter deleted therefrom.*

[92] In a previous Hearing Decision, I have provided guidance in regard to the blanket application of exemptions, in which I point out that public authorities have a duty to consider whether an exemption applies to an entire record or set of records, or only to part thereof.[5]

[93] As noted above, the only record that is specifically mentioned by the Ministry in reference to the exemption in section 20(1)(b) is the Mornaeu Shepell Report. This is rather surprising since that Report was amongst the records that were already disclosed to the Applicant on 19 June 2015. Inclusion of this record in the Ministry's arguments for the exemption in section 20(1)(b) therefore appears to be an obvious error on its part.

[5] ICO *Hearing Decision 45-0000 The Governor's Office* 15 February 2016 paras 113, 118-119

[94] Nonetheless, out of an abundance of caution I will assume that the Ministry wishes to claim that the exemption applies to all – and all parts of – the responsive records (although of course not to records that have already been disclosed).

[95] The exemption in section 20(1)(b) has been considered in a number of previous Hearing Decisions. In particular, detailed guidance was provided in Hearing Decision 9-02210.[6] I refer to that guidance for assistance in interpreting the meaning of the exemption, in particular paragraph 39 which summarized the exemption as follows:

> *[39] Taking these meanings together, the exemption in section 20(1)(b)… intends to protect against disclosure which would result, with a certain degree of probability, in restraining the unimpeded, open and honest exchange of views expressed for the purpose of evaluating competing arguments or considerations with a view to making a decision of an issue before a public authority.*

[96] As well, in regard to the interpretation of the exemption in section 20(1)(b) the former Information Commissioner found the following:[7]

> *[42] Obviously, for a record to have any prospect of protection under this exemption it is a prerequisite that the record must actually document a free and frank deliberation in the first place. …*
>
> *[43] … the information that is being withheld has to contain free and frank comments."*[8]

[97] My view is that the protection of a "safe space" for open, uninhibited discussions is equally important between entities as between individuals. Therefore, "free and frank" deliberations and comments can occur in meetings or communications between entities as well as between individuals, and the exemption in section 20(1)(b) may apply to both.

[98] Having reviewed all the responsive records, on the basis of the above definitions and reasoning it is clear to me that only some of the responsive records document a "free and frank deliberation" or contain "free and frank comments", as follows:

Document	Status
1. Pitcairn report	1. Contains no free and frank deliberations or comments
2. Ministry communications: a) Regulations with tracked changes ("Appendix #7"), including drafting instructions regarding 26 June 2012 version of Regulation	2.a) Contains no free and frank deliberations or comments

[6] ICO *Hearing Decision 9-02210 Cayman Islands National Insurance Company (CINICO)* 24 March 2011 paras 34-39
[7] ICO *Hearing Decision 9-02210* op cit paras 42-43
[8] ICO (UK) *Arts Council England Decision FS50191595* 23 November 2009 para 85

b) Drafting instructions ("Appendix #6")	2.b) Contains no free and frank deliberations or comments
c) Communications about the drafting of the Regs ("Appendix #5")	2.c) Contains no free and frank deliberations or comments
d) Further omitted items for draft ("Appendix #4")	2.d) Contains no free and frank deliberations or comments
3. Communications between Ministry and Morneau Shepell: a) Email Ministry- MS ("Appendix #3") b) Email MS- Ministry ("Appendix #2") c) Email MS – Ministry ("Appendix #1")	3.a) Consists of free and frank deliberations or comments 3.b) Consists of free and frank deliberations or comments 3.c) Consists of free and frank deliberations or comments
4. Feedback from NPB: a) Feedback from NPB 22 May 2014 ("Appendix #9") b) Letter from MS to Ministry re feedback NPB 22 May 2014	4.a) Consists of free and frank comments by the NPB 4.b) Consists of free and frank opinions by the NPB and MS

[99] As indicated above, not all the responsive records contain free and frank deliberations or comments. In particular, the Pitcairn Report (Record 1) contains opinions and comments, but none of these are attributable to specific individuals or organizations, and I do not consider this record contains free and frank deliberations or comments. As well, the "Ministry communications" (Records 2a, b, c and d) contain questions relating to the drafting of the new legislation which are legal/technical in nature, but which do not fall into the category of "free and frank deliberations or comments",

[100] The responsive records that are communications between the Ministry and their consultants, Morneau Shepell, (Records 3a, b, and c) contain messages between the Ministry and their consultants, which consist of questions and comments that I consider free and frank deliberations or comments.

[101] As to the feedback provided by the NPB and the response to it from the Ministry's consultants, Morneau Shepell, (Records 4a and b), these records contain opinions, comments and recommendations from the NPB and responses from the consultants mostly about amendments to legal wording of the draft Investment Regulations. I consider that Records 4a and b also consist of free and frank deliberations and comments.

[102] In my opinion it is likely that the disclosure of the above records which contain free and frank deliberations and comments would inhibit the free and frank exchange of views for the purposes of deliberation in the future. This is because future parties being

asked to express their views may feel that no safe space exists in which they can articulate their opinions without public scrutiny.

[103] **Consequently, in view of the analysis of the responsive records and reasoning above, I do not find that the disclosure of the responsive records identified as Records 1, 2a, b, c and d "would or would be likely to inhibit the free and frank exchange of views for the purpose of deliberation". The exemption in section 20(1)(b) is therefore not engaged in relation to those responsive records, and no public interest test is required under section 26(1) in regard to those records.**

[104] **However, the responsive records identified as Records 3a, b and c, and 4a and b consist of free and frank deliberations and comments, and I find that their disclosure would likely inhibit the free and frank exchange of views for the purposes of deliberation by the Ministry and the other parties. Therefore, the exemption in section 20(1)(b) is engaged in relation to these records.**

Public interest test:

[105] I must now consider whether, despite being exempted under section 20(1)(b), the records listed as communications between the Ministry and Morneau Shepell (Records 3a, b and c), and the records relating to feedback from the NPB (Records 4a and b), should nonetheless be disclosed in the public interest by virtue of section 26(1).

Public interest factors weighing in favour of disclosure:

[106] As described above, the Applicant argues that openness is particularly important in an employee-centric pension system such as the Cayman Islands'. Since plan members carry all the costs and risks, they have a right to know about policies that affect their pension funds, and to be fully informed about pension fund matters. This is reflected in the NPL which specifically requires that certain types of information be provided to members. The Applicant argues that openness in regard to the responsive records is a matter of public interest, since if information is unduly withheld, pension fund members will be less likely to make informed decisions, which will be detrimental not only to them, but ultimately also to their dependents and the Cayman Islands as a whole. If retired people have inadequate income replacement funds, society will have to cover the increased social service costs, and it will become more expensive to live and do business in Cayman.

[107] The Ministry lists public interest factors it has considered for and against the exemption, including the following factors in favour of disclosure:

a. The fact that disclosure could reveal the reasons for decisions;
b. The scrutiny of decision making processes;
c. The need for the public to be better informed and more competent to comment on public affairs;
d. Scrutiny of government activity and promoting public participation in government decision making.

[108] As indicated above, the public interest is defined in regulation 2, and I consider a number of the public interest factors listed there are relevant in this case. The disclosure of communications at issue here could very well promote the accountability of Government, promote accountability for public expenditure, facilitate public

participation in decision making, improve the responsiveness of Government to the needs of the public, and possibly even deter wrongdoing or maladministration, all of which are listed in the Regulations as public interest factors in favor of disclosure.

Public interest factors weighing in favour of maintaining the exemption:

[109] The Ministry lists a number of countervailing public interest factors in favour of maintaining the exemption. In particular, it lists the following public interest arguments against disclosure:

a. The need to preserve confidentiality having regard to the circumstances of the communications;
b. Premature release could contaminate the decision making process;
c. Premature release of records would impair the integrity and viability of the decision making process to a significant or substantial degree without countervailing benefit to the public;
d. Broader community interests must be considered, as distinct from those of the Applicant and the subject of the record;
e. Protection of ministerial unity and effectiveness, and protecting ministerial discussions and collective decision making processes.

Public Interest discussion:

[110] Keeping in mind the explicit assumption of openness in the Cayman Islands FOI Law,[9] and the requirements of section 26(1) and 27, the "safe space" for the formulation and debate of high level policy in government protected by section 20(1)(b) needs to be weighed against other, potentially overriding public interests.

[111] High-level policy decisions relating to pension plans have a widespread and significant impact on the general public. There is therefore an indisputable public interest in the issue of pension reform, and a general argument in favour of openness and transparency.

[112] The Applicant argues passionately in favour of maximum disclosure in order to ensure that pension plan members have all the information they need to make informed decisions. I agree that there is a genuine expectation of transparency and an important public interest in favour of disclosure of such information. This is recognized in the sections of the NPL quoted above, which require a significant level of transparency towards employees in regard to information relating to pension plan providers. However, I am not convinced the information required to be disclosed in the public interest or under the NPL extends to records that document pension legislation reform, as the Applicant claims.

[113] While the responsive records relate to the formulation of new high-level policy on pension fund investment, they are "works in progress" and do not represent government's final position. To the extent that a final position has been taken towards pension reform, for instance the revised NPL itself, I note that the Government has shown a willingness to seek broad input in a public consultation. I note that a record of the input received from various stakeholders was disclosed by the Ministry on 19 June 2015.

[9] See: ICO *Hearing Decision 48-01115 Her Majesty's Customs* 3 November 2015 paras 52-53

[114] Even had the present revision of pension legislation been concluded and new Investment Regulations come into effect, there would continue to exist a significant public interest in protecting a "safe space" for government to formulate and debate sensitive issues away from public scrutiny, whether relating to pension reform or other topics, in the future. This is to make sure that different options and opinions, including dissenting views and frank advice, are encouraged to come to the fore, and are given due consideration, without being inthe public eye. . I think this consideration is particularly pertinent to those responsive records that contain actual free and frank deliberations or comments, namely Records 3a, b, and c and Records 4a and b.

[115] **Having reviewed the arguments on both sides of the public interest, in the circumstances of the present case I find that the public interest in favour of disclosure does not outweigh the public interest in maintaining the exemption of the responsive records that contain actual free and frank deliberations or comments. Therefore, the disclosure of the communications between the Ministry and their consultants, Morneau Shepell (Records 3a, b and c), and the records relating to feedback from the NPB (Records 4a and b) is not required in the public interest, and these records remain exempted by reason of section 20(1)(b).**

3) Whether the remaining responsive records are exempt from disclosure under section 20(1)(d) of the FOI Law and, if so, whether access shall nonetheless be granted in the public interest pursuant to section 26 of the FOI Law.

The position of the Ministry regarding section 20(1)(d):

[116] In an argument that is complementary to the statements quoted above, the Ministry argues in the alternative that the remaining responsive records are exempted by section 20(1)(d), because their disclosure "would, or would be likely to prejudice the effective conduct of public affairs".

[117] The Ministry cites the ruling of the UK Information Tribunal in *McIntyre v Information Commissioner*, stating that the exemption is intended to apply to those,

> *… cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure.*[10]

[118] The Ministry also clarifies the meaning of the phrases "would prejudice" and "would be likely to", on the basis of the same ruling and the ruling in *Office of Government Commerce v Information Commissioner*.[11]

[10] Ian Edward McIntyre v Information Commissioner and Ministry of Defence 4 February 2008 EA/2007/0061 para 24

[11] *McIntyre* op cit para 40; *Office of Government Commerce v Information Commissioner* 19 February 2009 EA 2006/0068 & 0080, paragraphs 40 & 48

[119] Specifically, the Ministry argues that the disclosure of the responsive records "would negatively impact the Government's ability to consult on policy matters and refine its development of policies that are in the best interests of its citizens." The Ministry adds:

> *When [the Government] is in the process of identifying… legislative changes and formulating its views on the revisions that are in the best interest of the general public, this exercise should continue in a confidential manner that facilitates open communication otherwise, the result may negatively impact the overall policy development by subjecting the process to public scrutiny before decisions are fully developed.*

[120] In its Reply Submission the Ministry adds that disclosure would "contaminate the decision making process and… impair the integrity and viability of the decision making process to a significant or substantial degree without countervailing benefit to the public."

The position of the Applicant regarding section 20(1)(d):

[121] As indicated above, the Applicant expresses general arguments relating to the nature of the NPL and the rights of employees to be fully informed, also in the context of section 20(1)(d).

[122] In his Reply Submission the Applicant seeks to rebut the arguments put forth by the Ministry, alleging that it is overreaching and overreacting. He calls the application of the exemption in section 20(1)(d) "very disrespectful to all 'employees in the Islands'" as in his opinion "fully informing 'employees in the Islands' about matters relating to their own pension funds could never 'prejudice the conduct of public affairs'.

[123] The Applicant also alleges that,

> *… there is mistrust of the Government's deficient grossly under resourced pension regulatory regime, which allows widespread maladministration of pension plans to the detriment of "employees in the Islands" pensions funds.*

[124] The Applicant points to the irony that the Ministry quotes from the *McIntyre* case, which he asserts,,

> *…involves a human resources matter… In the processing of an FOI Request this report identified the delaying and mishandling problems in the UK Ministry of Defence and Legal Department that exactly mirror the problems experienced in the Cayman Islands Pension Ministry. … the Fact Report [to the present Hearing] … details the tortuous path fraught with delay after delay by the Pension Ministry…*

[125] The Applicant states that the Ministry has failed to demonstrate how fully informing "employees in the Islands" regarding their pension funds could: (1) be "…necessary in the interests of good governance to withhold information"; (2) prejudice "the public authority's ability to offer effective public service or meet its wider objectives"; or, (3) cause "…disruption…or the diversion of the resources in managing the impact of disclosure".

Discussion of section 20(1)(d):

[126] Since I have found that the communications between the Ministry and their consultants, Morneau Shepell (Records 3a, b and c), and the records relating to feedback from the NPB (Records 4a and b) are exempted by reason of section 20(1)(b), I will restrict my consideration of the exemption in section 20(1)(d) to the remaining responsive records, namely the Pitcairn Report (Record 1) and the Ministry communications (Records 2a, b, c and d).

[127] I have previously provided detailed guidance on the meaning of the exemption in section 20(1)(d) relating to prejudice to the effective conduct of public affairs in Hearing Decision 41-00000.[12] I rely on that same guidance here.

[128] To the extent that there is any overlap with the exemption in section 20(1)(b), discussed above, I will not go further into the matter of the protection of a "safe space for the free and frank exchange of views", as I have previously found that,

> *Where an "applicable interest" falls within one of the other exemptions provided in the FOI Law, that other exemption must be applied, and not section 20(1)(d).*[13]

[129] The "applicable interests" which according to the Ministry would be prejudiced if the responsive records were disclosed, are: (1) the government's ability to consult on policy matters and refine its development of policies; (2) open, confidential communications in the process of identifying legislative changes and formulating views on the same; and, (3) the integrity and viability of the decision making process.

[130] The Ministry states that there is a very high likelihood of prejudice, but does not clarify the nature of the claimed prejudice. While key phrases in its argumentation appear to have been copied verbatim from the guidance and rulings of the UK Information Commissioner and Information Tribunal, these arguments are not clearly or directly linked to the specific circumstances of the present case. For instance, stating that disclosure would prejudice the Ministry's ability "to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure" sounds impressive, but the Ministry has failed to explain how or why these negative outcomes would result from disclosure in the circumstances of the present case. The Ministry needs to illustrate the causal link between disclosure and the effects it describes, for example explaining the "how', not just the "what", and its submissions fall far short of that mark.

[131] In regard to the Pitcairn Report (Record 1), I do not see any reason to suspect that the exemption applies as stated. As indicated above, that Report does not contain any references to specific views of individuals or organizations, and its disclosure would seem highly unlikely to prejudice the government's ability to consult on policy matters, harm open, confidential communications, or the "integrity and viability of the decision making process". I do not see why future external consultants would be less likely to provide a careful and considered analysis as a result of this Report being disclosed, or for stakeholders to hesitate in cooperating with external analysts. This conclusion is also supported by the fact that the Ministry on 19 June 2015 released the Morneau

[12] ICO Hearing Decision 41-00000 The Governor's Office 10 July 2014 paras 37-51
[13] ICO Hearing 41-00000 op cit para 41

Shepell Report which was authored by different external consultants but deals with a similar topic.

[132] While the communications pertaining to the draft legislation (Records 2a, b, c, and d), are somewhat technical and anodyne in nature, I agree with the Ministry that release of the comments, questions, proposed wording, etc. which are generated in the course of the legislative drafting process would likely harm the effective undertaking of such processes in the future. Public authorities should fully expect to be judged on the final draft legislation they produce, and should, in my opinion, be inclusive in canvassing and taking into account public input when researching and formulating draft legislation (as anticipated in section 4 of the FOI Law). However, the process of researching, consulting with stakeholders, preparing and reviewing legislative drafts for decision makers deserves an appropriate level of confidentiality and protection. Otherwise, I believe there is a reasonable risk to the effectiveness of the drafting process, and to that extent I agree with the Ministry that the exemption applies to the Ministry communications (Records 2a, b, c and d).

[133] **Therefore, while the Ministry has not made the case for the exemption of the Pitcairn Report (Record 1) and the exemption does not apply to that record, the communications relating to the draft regulations (Records 2a, b, c and d) are exempt by reason of section 20(1)(d).**

Public interest test:

[134] In accordance with section 26(1) I must now consider whether the records I have found to be exempted under section 20(1)(d) (i.e. the communications regarding the drafting of the regulations in Records 2a, b, c, and d) should nonetheless be disclosed in the public interest.

Public interest factors weighing in favour of, and against, disclosure:

[135] The public interest arguments in relation to section 20(1)(d) put forward by both parties are similar to those described above. I also have indicated above which parts of the definition of "public interest" in regulation 2 I consider relevant in the present case. The same arguments for and against disclosure are also relevant in regard to the exemption in section 20(1)(d).

Public Interest – discussion:

[136] **Having reviewed the arguments on both sides of the public interest, in the circumstances of the present case I find that the public interest in protecting the effectiveness of the process of developing, formulating, drafting, amending and revising high level policy and legislation by public authorities outweighs the public interest in disclosing records which document that process. Therefore, the disclosure of the communications regarding the drafting of the regulations (Records 2a, b, c and d) is not required in the public interest, and these records remain exempted by reason of section 20(1)(d).**

4) Whether the Information Manager has made reasonable efforts to locate a record that is the subject of an application for access as required by regulation 6(1) of the Freedom of Information (General) Regulation, 2008.

The position of the Ministry regarding regulation 6(1):

[137] The Ministry has not addressed this question in either its Submission or Reply Submission.

The position of the Applicant regarding regulation 6(1):

[138] The Applicant questions why it took several months, from the time of the original request on 23 May 2014 to 7 October 2014, for the Ministry to locate even a single responsive record, the Morneau Shepell Report.

[139] The Applicant claims that the Ministry is in violation of the *Chief Secretary's Code of Practice on Records Management*,[14] established under section 53 of the FOI Law.

[140] On 23 October 2014, again, the Ministry (emphasis added by Applicant),

> *... found "**a substantial number of communication[s] under the search of 'investment regulations' and 'consultant report' however, "given the volume of emails returned, [the IM was] unable to conduct a proper review of their content to determine if they [were] actually responsive records to the narrowed request".***

[141] The Applicant calls the Ministry's approach the "dribs and drabs discovery of records", and points to the many, unanswered requests sent to the Ministry by the ICO asking for an update on the search. The Applicant points out that it should not be up to him to point out to the Ministry what records they hold that are responsive to his request.

[142] In response to the Ministry's claim that disclosure of the responsive records would "potentially confuse the general public", the Applicant states that it is the Ministry who is confusing the general public with the piecemeal release of information.

Discussion:

[143] The Ministry appears to have disregarded that the Applicant had on 12 June 2014, upon the Ministry's request, agreed to narrow down his original request. This led to some confusion especially when the Ministry belatedly claimed the exception in section 9(c) relating to the unreasonable diversion of resources, which it later retracted.

[144] The Ministry did not find any responsive records until 7 October 2014 (137 days after the request had been made). Only a single responsive record, the Morneau Shepell Report, was found at that time.

[145] On 23 October 2014 (153 days after the date of the request) the IM informed the Applicant that "a substantial number of additional responsive records" had been found. However, the employee familiar with those records "was unable to review the records due to other commitments".

[14] See: http://www.foi.gov.ky/portal/pls/portal/docs/1/9186257.PDF

[146] Not until 28 January 2015 (250 days after the date of the request) did the Ministry clarify its reasons for withholding the records it had located, applying the exemption in section 20(1)(b). Another 65 days later the Ministry added section 19(1)(a) as well.

[147] In the ensuing months the ICO asked the IM several times for updates, including whether any further responsive records had been located. These requests were effectively ignored until formal proceedings for a hearing had commenced.

[148] On 19 June 2015 (393 days after the request was first made), as preparations for a formal hearing process were underway, the Ministry disclosed a number of records, including the Morneau Shepell Report which it previously had withheld.

[149] At that point the Applicant pointed out that more records should exist, which led the Ministry to release a number of additional records on 6 August 2015 (441 days after the request was made).

[150] A few weeks later the Applicant wrote to the Ministry that yet more records were missing. The IM acknowledged this and came up with the current listing of responsive records, which the Ministry says is all that is still outstanding in response to the original request.

[151] When the ICO asked the Ministry for the details of their search in regard to records relating to the NPB it turned out that they had not contacted a number of board members who may have further records. The Ministry then ignored the ICO's requests for further action.

[152] The above sequence of events is a veritable litany of how not to conduct a search for responsive records, how not respond to an FOI request and how not to cooperate with the ICO in resolving an appeal. It shows what can only be described as a blatant disregard for the Law, which has resulted in wasting incalculable hours and days of the IM's, the Applicant's and the ICO's time.

[153] In a recent Hearing Decision I have described in detail what obligations an IM and public authority have in respect of assisting an applicant and searching for responsive records. I refer to that same guidance and approach here as well. [15]

[154] The reasonableness of a search under the FOI Law is normally assessed in reference to the following three characteristics:

> 1. The quality of the public authority's initial analysis of the request;
> 2. The scope of the search that it decided to make on the basis of that analysis; and,
> 3. The rigour and efficiency with which the search was conducted.[16]

[155] There can be no doubt that the Ministry was grossly lacking in each of these categories, in that they did not appear to have conducted a proper analysis of the request, did not understand the scope of the search that was required, and did not execute the search with an appropriate level of rigour and efficiency to yield

[15] ICO Hearing *Decision 51-01914 Cayman Airways* 17 March 2016 paras 69-76
[16] Information Commissioner's Office H*earing Decision 35-01213/01313 Ministry of Education, Employment and Gender Affairs* 14 March 2013 paras 51-53

meaningful responsive records until exceedingly late in the process and upon the urging of the Applicant and the ICO.

[156] It seems hard to imagine that records documenting a legislative review process which the Ministry says is ongoing, can be so hard to find if any credible effort is made to locate them, unless the record keeping systems being relied upon are unfit for purpose. In this regard the Applicant is right to question whether the Ministry is in fact adhering to the *Code of Practice on Records Management* under section 52(3), as well as to section 52(1) which requires:

> *(1) Every public authority shall maintain its records in a manner which facilitates access to information under this Law and in accordance with the code of practice provided for in subsection (3).*

[157] IMs bear primary responsibility under the Law for coordinating the work of receiving FOI requests, locating responsive records, analyzing them and communicating with applicants about their access status. In fulfilling this role, IMs depend on support from their senior management, cooperation from other staff, and effective internal procedures, in order that lawful responses may be given within the statutory timelines.

[158] I cannot think of any good reason why records that document an active, ongoing legislative review process should not readily be at hand; why the communication of the access status of those records should be delayed for several months after they are first located; why additional exemptions are added more than two months later; nor how such a record (in the case of the Morneau Shepell Report) can, eventually, simply be disclosed almost 400 days after the request is made.

[159] The admittance by the IM that responsive records existed, but that a key staff member refused to cooperate with the IM to make sure the Ministry met its legal obligations and the records were evaluated, is perhaps the most concerning statement. This can only be described as a complete disregard for the requirements of the Law, possibly due to a lack of support for the IM from senior management and others in the Ministry necessary to allow the public authority to meet its statutory deadlines and other obligations under the Law.

[160] I strongly suspect it was the prospect of the formal hearing that finally induced the Ministry into action (almost 400 days after the request was first made), a tactic that has been used in the past. This practice is not only contrary to the Ministry's obligations under the FOI Law, but also wasteful of everyone's time and resources, and a very counterproductive way for government to communicate with members of the general public.

[161] An IM is also responsible for interacting with the ICO once an appeal has been accepted. In this instance, the IM was grossly lacking as numerous requests for clarifications from the ICO, spread over several months, went unanswered.

[162] In short, the Ministry's manner of responding to the request and the search that was undertaken were unacceptable, verging on a complete denial of the Applicant's rights and an obstruction of the process required under the FOI Law. In my opinion, these deficiencies are systemic in nature, and urgently need to be addressed by the responsible Chief Officer if the Ministry is to improve its compliance in the future.

[163] In the course of the appeal before the ICO, the Ministry did, however reluctantly and slowly, disclose a reasonable number of records. There are some remaining questions about the completeness of the search that was undertaken, particularly where it concerns records that may be held by members of the NPB. Therefore, the Ministry should communicate with the Applicant and make reasonable efforts to identify such further records and report back to the Applicant and the ICO with the search results, or in the absence of any additional records being found, provide me with a detailed record of the search efforts, as specified in regulation 6(2). If records are found, the Ministry may disclose such records to the Applicant or claim any exemption which it believes should apply. Upon the request of the Applicant I will then consider the application of the exemption in an expedited hearing.

[164] I intend to draw the Deputy Governor's attention to the many problems described above, as I am authorized to do under section 43(3)(c), especially as the Ministry's approach also falls foul of Administrative Circular 5 of 2015 in which the DG encouraged public authorities to improve upon the FOI response times reported on by the ICO in 2014-15.

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007* for the reasons stated above I make the following findings and decision.

For the reasons described above, in regard to the responsive records listed in paragraph 98 above, I make the following findings and decisions:

a) The exemption in section 19(1)(a) does not apply to any of the responsive records.

b) The exemption in section 20(1)(b), relating to the free and frank exchange of views, applies to the communications between the Ministry and their consultants, Morneau Shepell (Records 3a, b and c), and the records relating to feedback from the National Pensions Board (NPB) (Records 4a and b).

c) The exemption in section 20(1)(d), relating to the effective conduct of public affairs, applies to the Ministry communications relating to the draft regulations (Records 2a, b, c and d).

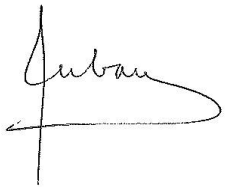
d) Having weighed the public interest arguments for and against disclosure I find that the public interest in favour of disclosure does not outweigh the public interest in maintaining the above exemptions of these responsive records.

e) The Pitcairn report (Record 1) is not exempted and is to be disclosed.

f) The Ministry did not meet its obligations in respect of making reasonable efforts to locate responsive records under regulation 6(1), particularly in regard to additional records that may be held by members of the NPB. Therefore, I require that the Ministry communicate with the Applicant and make reasonable efforts to locate such records, and inform the Applicant and the ICO of their access status under the Law. If any such records are located and withheld, the Applicant may appeal the matter directly to me, and I will deal with it under the policy and procedures relating to expedited hearings.

As per section 47 of the *Freedom of Information Law,* 2007, the Applicant or the relevant public body may within 45 days of the date of this Decision, i.e. no later than 6 June 2016, 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.



Jan Liebaers
Acting Information Commissioner

22 April 2016