Information Commissioner's Office CAYMAN ISLANDS

ICO Hearing 54-02516
Decision

Her Majesty's Cayman Islands Prison Service

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

11 May 2017

Summary:

The Applicant, a female prison guard, requested access to an investigation report conducted by Her Majesty's Cayman Islands Prison Service (HMCIPS) following a complaint raised against her by a female inmate.

HMCIPS claimed the exemption in section 16(b)(i) of the Freedom of Information Law (2015 Revision) - affecting the conduct of a law enforcement investigation or prosecution, as well as sections 16(a) - endangering a person's life or safety, 16(c) - identifying a confidential source of information, 16(f) - jeopardizing the security of a prison, 20(1)(d) - prejudicing the effective conduct of public affairs, and 24(a) and (b) - endangering the physical or mental health, or safety of an individual.

After careful consideration the Acting Information Commissioner found that none of the claimed exemptions applied, but found that the disclosure of the names and personal identifiers of the witnesses, such as prisoner ID numbers, prisoner categories, initials and specific information that could identify the individuals, would be unreasonable under section 23(1), and that it is not in the public interest to disclose that information.

Since the name of the complainant had already been communicated to the Applicant, that information is not protected, nor are the names of HMCIPS staff and management which appear in the report.

The Acting Information Commissioner ordered the disclosure of the redacted investigation report to the Applicant only, and communicated the specific redactions which are required in a separate communication to HMCIPS.

Statutes[1] Considered:

Freedom of Information Law (2015 Revision)
Freedom of Information (General) Regulations 2008

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A. INTRODUCTION

[1] On 9 November 2016 the Applicant made a request under the Freedom of Information Law (FOI Law) to Her Majesty's Cayman Islands Prison Service ("HMCIPS") for:

> *1… my personal file…* [including] *the transcripts re: my adjudication for Feb 2016 done by Director Mr. Lavis. Minutes were taken by HR Manager Ms. Raquel Solomon.*
> *2. … the full investigation report done by Supervisor James Walrond commissioned by now Acting Director Mr. Daniel Greaves. Re: Allegations made by inmate* [name of the complainant, nature of the allegation and name of the person accused]. *If these records are not in my personal file, I would like for the Prison to locate the above documents and submit them to me…*

[2] The next day, on 10 November the Information Manager (IM) acknowledged the request, and at the same time informed the Applicant: (a) that access to the requested transcript was being deferred because it had not yet been completed, and (b) that access to the investigation report was being denied under section 16, since it formed part of an ongoing investigation, adding that the report, in whole or in part, would also be disclosed to the Applicant once it had been completed. A tentative date of 15 December 2016 was mentioned in this regard.

[3] The Applicant immediately asked for an internal review of the IM's initial decision. The responsible Ministry, the Ministry of Home Affairs ("the Ministry") responded that the

[1] In this decision all references to sections are to sections under *the Freedom of Information Law (2015 Revision)* and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified. Where several laws are discussed in the same passages, the relevant legislation is indicated.

request for internal review was premature in view of the deferral. However, after intervention by the ICO the Ministry proceeded with the internal review.

[4] On 7 December 2016 the internal review decision taken by the Acting Chief Officer endorsed the position of HMCIPS, namely that access to the two requested records was deferred until the records had been completed. The transcript was expected to be completed on 9 December. The report was said to be "a working draft…. [to be] completed in the near future." The Acting Chief Officer added "I have asked [the Prison Director] to provide me with a copy of [the report] as soon as it is completed and when I am in possession of the same, you will be provided with a copy."

[5] On 9 December 2016 the Applicant was sent an email with two attachments, i.e. the requested transcript and a related Formal Warning Form.

[6] On 13 December 2016 the Applicant applied to the ICO for an appeal under section 42(1), and the appeal was accepted on that same day.

[7] On 18 December 2016 HMCIPS informed the Applicant that the investigation to which the report relates was being reopened.

[8] In the ensuing days the ICO requested details of the exemptions applied to the report. The ICO also asked for a copy of the report under section 45(1) and paragraph 3.4 of the Appeals Policy and Procedures[2]. These requests were repeated on several occasions.

[9] On 18 January 2017 the IM confirmed that HMCIPS was relying on the exemption in section 16(b)(i) to withhold the report.

[10] On 24 January 2017 the ICO received the report.

[11] On 31 January 2017, at a meeting of the IM, the HMCIPS Director and ICO the internal processes of the Prison were further clarified. The Applicant was informed that this meeting had taken place.

[12] As the dispute could not be resolved amicably, on 1 February 2017 the Applicant asked for a formal hearing.

B. BACKGROUND

[13] HMCIPS was opened in 1982 to secure persons committed to serve prison time by the Cayman Islands Judiciary. The Prison Service plays a key role in keeping the citizens of the Cayman Islands safe. Responsibilities of the service include taking care of all adult and juvenile offenders in custody, as well as ensuring that court orders are followed and

[2] http://www.infocomm.ky/images/ICO%20Appeals%20Policy%20and%20Procedures%202016-02-22.pdf

community standards upheld. In addition to public safety, the Prison Service is also committed to providing opportunities for all inmates to rehabilitate themselves, improving their chances of a positive life after release.

[14] HMCIPS consists of three facilities, Her Majesty's Prison Northward provides services to convicted and pre-trial adult male prisoners, Her Majesty's Prison Fairbanks provides services to convicted and pre-trial female adult, young and juvenile prisoners and Eagle House Rehabilitation Centre provides service to convicted and pre-trial male young and juvenile prisoners. HMP Northward suffered a riot in 1999, when A wing, B wing, Eagle House (which held female prisoners) and some ancillary buildings were set on fire. These buildings were mainly repaired and bought back into use. HM Prison Fairbanks, formerly an immigration centre, came into existence as a female establishment as a direct consequence of the riots.

[15] According to the Ministry's website, HMCIPS employs 142 employees, and houses 182 prisoners, of whom 16 are females.[3]

C. PROCEDURAL ISSUES

Timing of the internal review

[16] On 10 November 2016, when the IM had provided the Applicant with the initial decision to defer access until the two requested records had been completed, the Applicant immediately asked for an internal review of that decision, as she thought was permitted under section 33(1).

[17] The Ministry responded without delay by stating that the request was premature, and that the Applicant should let 30 days pass, as they claimed was required under the FOI Law, before requesting an internal review. A further reason given by the Ministry was that the date of completion of the uncompleted records, estimated by the IM, was 15 December.

[18] When the ICO found out about this approach, we contacted the Ministry and explained that the request for an internal review was lawful and not premature, as the initial decision not to release the records and defer other ones, had clearly been made.

[19] Section 33(1) states:

> *33. (1) An applicant for access to a record may, subject to subsection (4), apply for an internal review of a decision by a public authority to-*
>
> > *(a) refuse to grant access to the record;*
> > *(b) grant access only to some of the records specified in an application;*

[3] For more details, see: http://www.mha.gov.ky/agencies/her-majestys-prison-service/

(c) defer the grant of access to the record; or
(d) charge a fee for action taken or as to the amount of the fee.

[20] Furthermore, section 34(2) provides:

(2) An application for internal review shall be made-

(a) within thirty calendar days after the date of a notification (in this subsection referred to as "the initial period") to the applicant of the relevant decision, or within such further period, not exceeding thirty calendar days, as the public authority may permit; or

[21] Clearly, refusal to disclose and deferral of the requested records had been communicated to the Applicant on 10 November in the IM's initial decision, and the immediate application for an internal review was done "within thirty calendar days".

[22] This makes the application for an internal review valid, and the Ministry had no grounds to call the application "premature".

[23] Nor is there a restriction of the right to seek an internal review for deferrals, even if they are relatively short-term. This may seem to invite unnecessary work on the part of the authority conducting the internal review, for instance where an initial decision to defer may be internally reviewed, yet the record is shortly afterwards in any event disclosed. However, public authorities may miscalculate the timing of a deferral, and it is therefore generally in the interest of an applicant to move the FOI process along swiftly, as witnessed in the current case, in which the report is claimed to be exempt, even while promises were made that it would be disclosed within weeks of the initial request.

Conduct of an internal review concerning section 16

[24] Section 34(1) provides the following:

34. (1) An internal review shall be conducted-

(a) by the responsible Minister in relation to records referred to in sections 15, 16 and 18;

(b) in any other case, by the chief officer in the relevant ministry or the principal officer of the public authority whose decision is subject to review,

but no review shall be conducted by the same person who made the decision or a person junior in rank to him.

[25] In so far as the initial decision concerned a deferral of access under section 11(2) it was correct that the Acting Chief Officer conducted the internal review.

[26] However, the investigation report was being withheld on the grounds of section 16. Therefore, the internal review of that part of the initial decision should have been conducted by the responsible Minister, not by the Chief Officer.

Cooperation with the ICO

[27] Some public authorities still do not cooperate in a full and timely manner with the ICO in the course of an appeal, causing unnecessary delays. An example of this was displayed by HMCIPS when it took a whole month to explain to the ICO their reasons for withholding the records, and even longer to provide the ICO with a copy of the requested report.

D. ISSUES UNDER REVIEW IN THIS HEARING

[28] The first part of the request of 9 November was fulfilled by the release, on 9 December, of the transcript and a related and completed Formal Warning Form. It is not in dispute between the parties that the transcript and form are unrelated to the investigation report which forms the subject of this hearing.

[29] HMCIPS had deferred access to those records, and had not invoked any exemptions. I consider that the information in the transcript and form is the personal information of the Applicant (and potentially of a number of other named individuals). It is not intended for general disclosure to the wider world as most records disclosed under the FOI Law are.

[30] The second part of the request pertains to a workplace investigation report concerning the Applicant, which is the responsive record in this hearing. Both the initial decision and the internal review decision refused to disclose this record because they claimed that it was exempted under section 16(b)(i) and deferred access to it. Therefore, this is the responsive record in this hearing.

[31] Therefore, the issue under review in this hearing, as agreed between the parties, is:

- ❖ **Whether the responsive record is exempt from disclosure under section 16(b)(i) of the FOI Law.**

E. CONSIDERATION OF ISSUES UNDER REVIEW

- ❖ **Whether the responsive record is exempt from disclosure under section 16(b)(i) of the FOI Law.**

[32] Section 16(b)(i) exempts certain records from the general right to access in section 6(1):

> *16. Records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to-*
> *…*
> *(b) affect-*
> *(i) the conduct of an investigation or prosecution of a breach or possible breach of the law; or*
> *…*

[33] Section 16(b)(i) is not subject to a public interest test under section 26(1).

[34] Every exemption is subject to the provisions relating to redaction in section 12(1):

> *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.*

[35] It is up to HMCIPS to prove that the exemption applies (in whole or in part), and it is not up to the Applicant to demonstrate why the record should be disclosed. Section 47(2) places the burden of proof on the public authority:

> *(2) In any appeal from a decision pursuant to section 43, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under the law.*

The position of HMCIPS:

[36] In its submission HMCIPS lays out the factual background of this case, as they see it, as follows:

(a) In April 2016 a female prisoner filed a complaint against the Applicant, who is a female prison officer, alleging serious misconduct.

(b) The Prison's Director received the complaint and delegated it to the Deputy Director to investigate, who in turn delegated it to the Acting Custodial Manager.

(c) The Acting Custodial Manager conducted an investigation and submitted a report to the Deputy Director in May 2016. That report is the subject of this hearing under the FOI Law.

(d) The Deputy Director "accepted [the report] and decided to take no further action". He communicated that decision to the Applicant in November 2016, after the latter made inquiries about it.

(e) The Deputy Director "then forwarded the investigation report to the HR Manager" for placement on the Applicant's personnel file. Upon reading the report, the HR Manager – who is also the IM - "returned the report" to the Deputy Director asking that it be annotated to indicate "that it [had] been accepted and what if any action was being taken".

(f) The HR Manager/IM also communicated with the Director about the "further documentation to be added to the file", in response to which the Director provided "supporting instructions".

(g) Only after the application under the FOI Law had been made (on 9 November 2016) did the HR Manager/IM become aware that the Deputy Director had communicated that "the matter was closed and the report finalized."

(h) When the initial decision was internally reviewed by the Acting Chief Officer, the latter is said to have "found significant gaps that needed to be closed before the report be considered complete. It was even more imperative that the investigation be thorough and accurate because of the nature of the allegation and that it could potentially become a police matter."

(i) The Acting Chief Officer was "serving a dual purpose", since she had "responsibility for the Prison Service, wanted to ensure that the matter was dealt with appropriately and as the [person conducting the internal review under the FOI Law] felt that it was premature to release the report considering the identified gaps." The Acting Chief Officer returned the report to the Director "to address the concerns, which he is currently working on with the original author of the report."

[37] Specifically in explaining reliance on the exemption in section 16(b)(i) HMCIPS states (in full):

> *16(b) Additionally, releasing the report to [the Applicant], even after it is complete may infringe on a potential further investigation by other law enforcement bodies if the matter is found to have merit and it is escalated to RCIPS for further investigation, the report may become a critical part of that process. If the matter reaches the courts, disclosure would be considered by the judge and evidentiary rules of law.*

[38] No further argumentation or reasoning is provided in support of the exemption in section 16(b)(i), except for the contextual information provided above.

[39] Besides the exemption in section 16(b)(i) HMCIPS also wishes to raise a number of new exemptions, namely sections 16(a), 16(c), 16(f), 20(1)(d), 24(a) and 24(b). These exemptions did not form part of the initial decision, nor the internal review, and do not form part of the Fact Report or Notice of Hearing which were mutually agreed between the Applicant and HMCIPS as the basis for this hearing. The late raising of new exemptions is discussed further below.

[40] The additional exemptions relate to the following provisions:

> *16. Records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to-*
>
> > *(a) endanger any person's life or safety;*
> > *…*
> > *(c) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, in relation to law enforcement;*
> > *…*
> > *(f) jeopardize the security of prison.*
>
> *20. (1) A record is exempt from disclosure if-*
>
> > *…*
> > *(d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.*
>
> *24. A record is exempt from disclosure if its disclosure would, or would be likely to-*
>
> > *(a) endanger the physical or mental health of any individual; or*
> > *(b) endanger the safety of any individual.*

[41] On section 16(a), HMCIPS claims that the prisoners and staff who participated in the investigation "would not have done so without assurances from management, specifically from the Director, that they [sic] contributions would remain confidential and they would be protected. The Applicant has "significant power" over the prisoners, and they "fear reprisal and victimization" from her, if their names were to be known.

[42] HMCIPS admits it is not known whether reprisal would take place, but "the fear expressed by the witnesses was real".

[43] In regard to section 16(c), HMCIPS states that, due to the small number of female prisoners, "even in redacted format, the witnesses are easily identified by persons who work [in HMP Fairbanks].

[44] In regard to section 16(f), HMCIPS states (in full):

Unresolved grievances, the perception that the Director has not been able to uphold his commitment to protect the witnesses, the perception that the grievance process is not fair and robust, trustworthy management, and general perceptions that justice is not accessible to the prisoners are all factors that potentially have destabilizing effects on the Prison Service and its ability to operate smoothly and efficiently. It is a proven, research supported fact that prisoners who do not trust the management to give them a voice, provide for their safety and security, will resist, even to the extent of violence against each other, staff and the facility. A single incident in the Prison could result in mass indiscipline (riots) and threaten not only the security of the prisons but public safety. Although these scenarios may seem hypothetical, such incidents in correctional facilities happen daily and it is difficult to predict. It is certainly circumstances prison management make every effort to avoid.

[45] In regard to section 20(1)(d), HMCIPS believes the disclosure of the investigation report "would likely impact any further action that is indicated once the report is complete, if any." While pointing to a possible subversion of justice, HMCIPS also believes disclosure would make it "difficult to get witnesses to participate further".

[46] Finally, in regard to section 24 HMCIPS simply refers to "the risk to vulnerable female prisoners who both initiated the complaint and those who gave witness statements" if the Applicant were to be able to identify them as participants or supporters of the complaint.

<u>The position of the Applicant:</u>

[47] In her reply submission the Applicant responds specifically to the points raised on the exemption in section 16(b)(i) and the other claimed exemptions.

[48] The Applicant expresses the view that it is only because she asked for the report that the investigation is [claimed to be] reopened, stating: "None of this would have come about if I did not ask for my report".

[49] The Applicant says she was provided with "a copy of [the complainant's] report", which I assume means the statement made by the inmate which triggered the investigation. In this instance the Applicant names the same complainant as the one she previously named in the FOI application of 9 November, as well as another female inmate who she says was a witness. She wishes to point out the inconsistency of HMCIPS which at that time allowed her to see the [alleged] names of the complainant and at least one of the witnesses, but now claim that these same names are confidential and sensitive, and that there are grave risks associated with disclosure of the requested report to the Applicant.

[50] The Applicant points out that if she really posed a risk of the magnitude claimed by HMCIPS, she ought to have already been removed from the prison, or placed on suspension. Instead, she has been allowed to remain on duty, working closely with the prisoners, including the complainant and (alleged) witness she names.

[51] The Applicant wonders how the exemption in section 16(b)(i) can apply to a "potential further investigation". Instead, the request was for the "investigation that was decommissioned by the Deputy Director of Prisons, based on the fact that no evidence [was] found to support the allegation." She asks: "Where is the criminal aspect of the allegation?"

[52] In regard to section 16(f), the Applicant points out that the Director should protect both staff and prisoners, adding: "It is evident in this case though that this protection and concern was not addressed or dealt with until I ask [sic] for the outcome of the investigation."

[53] Contrary to the submission from HMCIPS, the Applicant believes she, herself, is being victimized in an attempt to tarnish her reputation. She states: "I am defending my integrity because I have been accused wrongfully", and claims: "…as far as I'm concerned it is all about making the management of the Prison look good at the cost of my reputation."

[54] In general, the Applicant believes the claims of HMCIPS are "overstated". She says she, herself, in April 2016 asked for the allegations to be investigated, yet after doing so found herself under investigation a month later.

[55] The Applicant also refers to a tribunal decision relating to management at Northward Prison, which has not been made available to me.

<u>Discussion:</u>

[56] In my opinion it is highly unusual that when an investigation into wrongdoing by one of its employees is conducted by a public authority, and that employee is twice informed that the investigation is over and she has been exonerated, yet, when she asks for a copy of the findings, is told the matter is not closed after all, and that she may be subject to further, possibly even criminal, investigation.

[57] It has now been 6 months since that change of course was first communicated to the Applicant, yet to date no indication has been given that the matter has been finalized, and I believe I am to understand that the re-opened investigation remains ongoing.

[58] From the perspective of the FOI Law it is not acceptable that a report, which clearly is held by HMCIPS and for a period of six months was considered finalized by those responsible for its creation (a status which was communicated to the Applicant on more than one occasion), was suddenly in a matter of a few days believed to be in need of amendment, right after it had been requested under the FOI Law.

Section 16(b)(i):

[59] The arguments HMCIPS raises in support of the claimed exemption in section 16(b)(i) are very brief. I am reading them in the context of the general background information provided, namely their claims that the investigation remains open and undecided, and that it may yet result in a further police investigation, as explained above.

[60] The meaning of the exemption in section 16(b)(i) was extensively considered in Hearing 45-00000, as follows:

> *[65] In regard to the term "would", I have already observed elsewhere that the UK Information Tribunal has clarified that the words "would prejudice" have been interpreted by the Tribunal to mean that it is "more probable than not" that there will be prejudice to the specific interest set out in the exemption…*[4]
>
> *[66] Therefore, the phrase "would affect" means that it is more probable than not that the disclosure will affect the investigation, prosecution, trial and/or adjudication.*
>
> *[67] The meaning of the phrase "could reasonably be expected to" has not been fully explored, but it was previously considered by the former Information Commissioner, who observed that, It is worth noting that the harms test for some other exemptions in the Law is whether disclosure "could reasonably be expected to" which appears to be a lower standard than "would". In this context, the term "would" implies something that is likely, whereas the term "could" expresses possibilities.*[5]
>
> *The phrase "could reasonably be expected" therefore has a lower threshold than "would", and means that it is reasonable to expect in all the circumstances that the disclosure will affect the investigation, prosecution, trial and/or adjudication.*
>
> *[68] Section 16(b) sets a low threshold for the exemption, which applies if the disclosure of the records "would, or could reasonably be expected to … affect" an investigation, prosecution, trial or adjudication. I note that this exemption does not require prejudice to the investigation, prosecution, etc. as a result of the disclosure, but only that the disclosure has to affect the investigation, prosecution, etc.*

[4] *Ian Edward McIntyre v Information Commissioner and Ministry of Defence* 4 February 2008 EA/2007/0061 para 40

[5] Information Commissioner's Office *Hearing Decision 4-02109 Cabinet Office* 20 May 2010 para 17

[69] The exemption in section 16(b) is not subject to a public interest test pursuant to section 26(1).[6]

[61] Even given the wide meaning of "affect", I have not heard cogent arguments that would tend to support the notion that the disclosure of this investigation report would, or is likely in any way to, affect the conduct of another investigation, whether it is the alleged continuation of the present report as claimed by HMCIPS or a potential follow-up investigation by the RCIPS.

[62] HMCIPS does not provide any specifics as to how any evidence collected and included in the report may become compromised by disclosure, and I cannot think of any information in the report which, once known by the Applicant, would allow her to obstruct, alter or affect any further possible investigation by HMCIPS or RCIPS. HMCIPS states that prisoners may not be willing to be interviewed further if the report is disclosed, yet full statements have supposedly already been taken by the Acting Custodial Manager.

[63] For this exemption to apply there needs to be a rational and clear connection between the disclosure of the report and the affect it may have on any further investigation. Any claimed connection between the two cannot simply be hypothetical.

[64] It is unclear to me why any purported shortcomings of the investigation were not detected in the six months following the finalization of the report. Instead, they were apparently only discovered after the Applicant had twice been informed by the Deputy Director that there was insufficient evidence for HMCIPS to pursue the matter, and a request under the FOI Law had been made.

[65] Nor is there any suggestion that new facts have emerged after the conclusion of the report.

[66] The wrongdoing was alleged to have taken place on 4 April 2016, after which the investigation began almost immediately. The Director delegated conduct of the investigation to the Deputy Director in order to maintain a distance from the proceedings in case there was an appeal, which is a reasonable approach. HMCIPS's submission explains that the complaint was,

> *… delegated to the Director… who in turn delegated it to the Deputy Director… to investigate to maintain objectivity in the event of an appeal. [The Deputy Director] assigned the investigation to [the] Acting Custodial Manager… who conducted the investigation which includes written statements from [the Applicant], interviews of the aggrieved prisoner and others who may have been witnesses.*

[67] The report was completed and presented to the Deputy Director about a month later, i.e. 7 May 2016.

[6] Information Commissioner's Office *Hearing Decision 45-00000 Governor's Office* 15 February 2016

[68] The Applicant made the first inquiry on 10 October, but (in part due to unavoidable circumstances) a response was only provided to her on 2 November when the Deputy Director sent her the following message, which was also copied to the Director (my emphasis):

> *As I had promised I have provided you an edited summary of the findings of the inquiry which was conducted by* [the Acting Custodial Manager] *based on allegations made by Prisoner* [the inmate named in the FOI Application]
>
> • [the allegation made by an identified prisoner]
> • *I commissioned* [the Acting Custodial Manager] *to conduct an inquiry into the said allegation*
> • *Several person* [sic] *including yourself submitted reports or was* [sic] *interviewed on the matter*
> • *As a result* <u>[the Acting Custodial Manager] *determined that there was insufficient evidence to support the allegation*</u>*.*
> • *Recommendation was provided which the management will determine if and when they will be acted upon* [sic]*.*

[69] On 7 November the Deputy Director responded to the Applicant once more, again copying the Director, as follows (my emphasis):

> *I am afraid I will not be disseminating any further information as it relates to the inquiry which I commissioned, as this document technically belong the administration* [sic]. *As I mentioned in my previous email to you that I gave instruction for an inquiry to be conducted based on allegation received* [sic]. <u>*The finding does not merit any further action on this matter, therefore your involvement is no longer necessary.*</u>
>
> <u>*As a result the document will be decommissioned.*</u>

[70] HMCIPS's own submission in this hearing confirms that the Deputy Director "accepted [the report] and decided to take no further action". The HR Manager herself sent the report back to the Deputy Director asking that it be annotated to indicate "<u>that it [had] been accepted</u> and what if any action was being taken" (my emphasis).[7]

[71] It is not clear to me whether the Deputy Director's decision that the matter was closed was documented in any other form besides the email to the Applicant, as I would expect to be the case. I have not been given any additional evidence on this point.

[72] In short, some seven months after the events were alleged to have occurred and six months after the investigation had been completed, the Deputy Director notified the Applicant that the investigation had concluded that "there was insufficient evidence to

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[7] See paragraph 36 point (e) above

support the allegation", that "the finding does not merit any further action on this matter", and that "the document will be decommissioned". Notably, this communication was in response to queries from the Applicant, and was not initiated by the Deputy Director or the HR Manager.

[73] In addition, the Deputy Director also clarified that the report made recommendations which were being considered, and that it remained to be determined "if and when they will be acted upon" by HMCIPS management. Having read the report, I want to confirm that it does contain recommendations of a general nature, but those do not question the findings of the investigation itself, or point to the need for a further investigation.

[74] The HR Manager stated that final decisions and actions resulting from the complaint and the investigation (including agreement with the report's conclusions that no further action was to be taken) remained outstanding and should be documented and maintained on the file.

[75] I find no fault with this advice from the HR Manager, but I believe it is important to recognize that this further step does not necessitate an amendment to the actual investigation report. It could easily be met in another form, e.g. by adding a note or letter to the Applicant's personnel file, or (given the general nature of the recommendations) by updating a standing policy.

[76] Therefore, while the overall handling of the complaint may be incomplete until a final management decision has been documented, I reject the notion that inevitably this also means the investigation report itself remains unfinished and cannot be disclosed for that reason, as HMCIPS claims.

[77] If further documentation of any resulting final decisions or actions are indeed required to close the case, as the HR Manager reasonably states, then it seems peculiar to me that the Deputy Director or Director waited six months to do so, or that the HR Manager waited until after the FOI request was made before noticing that a final decision remained outstanding. In fact, had the Applicant not made inquiries and requested access to the report, the matter might still not have advanced (in so far as it in fact has), as she pointed out in her submission.

[78] Having taken into consideration the detailed meaning of section 16(b)(i) explained in Hearing 45-00000,[8] and under the circumstances of this case, it is my view that the disclosure of the investigation report to the Applicant would not, or could not reasonably be expected to, affect "the conduct of an investigation or prosecution of a breach or possible breach of the law", as required for the exemption to be engaged.

[79] **In conclusion, I do not find that the exemption in section 16(b)(i) is engaged.**

[8] Information Commissioner's Office *Hearing Decision 41-00000 Governor's Office* 15 February 2016 paras 65-69

The other exemptions

[80] In regard to the new exemptions claimed by HMCIPS the Information Commissioner may, by virtue of section 42(2), “make any decision which could have been made on the original application”. In previous hearing decisions, the former Information Commissioner and I have taken the view that it is within my discretion to accept an exemption late in the hearing process. However, it is not up to the Information Commissioner to raise and consider every possible exemption that might apply in a given case.[9]

[81] In *The Governor of the Cayman Islands v The Information Commissioner (2)*, Acting Justice Timothy Owen ruled that late exemptions may be justified, if there are relevant new factual developments that occur after the initial decision has been reached.[10]

[82] This point has not been addressed by HMCIPS. I do not believe there are any new factual developments since the time the initial decision was taken, or the internal review was conducted. I am therefore not under any obligation to consider the exemptions raised late.

[83] Nonetheless, out of abundance of caution, and given the serious nature of the claimed exemptions, I will consider all the exemptions raised by HMCIPS.

Section 16(a):

[84] In regard to section 16(a), involving the endangerment of a person’s life or safety, I have not been given any evidence that assurances of confidentiality were actually given to the witnesses, or indeed that it is the standard policy of the prison to consider such matters as confidential. The verbatim transcription of the witness statements do not state that such guarantees were given.

[85] The Applicant raises the point that she is already aware of the identity of the complainant and one of the witnesses, and has not engaged in any abuse of power or retribution towards those individuals in the meantime. She wonders why HMCIPS would keep her working closely with prisoners, if she is such a danger to their lives and wellbeing. She also points out, quite rightly, that if she was to endanger a prisoner’s life or safety, she would be unfit to hold a position as prison officer and the matter should be dealt with as a serious disciplinary matter.

[86] As explained above, the identity of the complainant was divulged to the Applicant in the email from the Deputy Director dated 2 November, and the Applicant was apparently already aware of that inmate’s identity, because she claims to have been allowed to read the complainant’s statement. Therefore, there is no reason the complainant’s name should be further protected under this or any other exemption, in relation to the Applicant.

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[9] See, for instance: Information Commissioner’s *Office Decision Hearing 43-00814 Portfolio of Legal Affairs* 10 April 2015 paras 18-21

[10] *The Governor of the Cayman Islands v The Information Commissioner (2)* Cause G 0188/2014 16 March 2015.

[87] I am not sure whether the Applicant knows the identity of the witnesses. Out of abundance of caution I will deal with this issue further below, but not as an issue under this exemption, which in my view remains unproven as I do not believe disclosure would, or could reasonably be expected to, endanger any person's life or safety, as required for the exemption to be engaged.

[88] **Therefore, I do not find that the exemption in section 16(a) is engaged.**

Section 16(c):

[89] HMCIPS does not explain how this exemption is engaged, namely how the disclosure of the investigation report would disclose or enable a person to ascertain "the existence or identity of a confidential source of information in relation to law enforcement".

[90] As stated on a number of previous occasions, the exemptions in Part III should be interpreted narrowly, and I do not believe section 16(c) is intended to protect witnesses to a complaint, but, rather, specifically confidential sources used in the context of law enforcement, such as confidential informants which provide intelligence information rather than witness statements.

[91] **Therefore I do not find that the exemption in section 16(c) is engaged.**

Section 16(f):

[92] This section protects information which, if disclosed would, or could reasonably be expected to, jeopardize the security of a prison.

[93] In this regard HMCIPS's reasoning goes as follows: the disclosure of this report would cause negative perceptions, particularly about the grievance process and HMCIPS's management. This would lead to destabilization, and could potentially cause serious breaches of security and even a riot at the Prison.

[94] I do not consider that HMCIPS have provided me with a credible argument in this regard. I do not consider that it is reasonable that the disclosure of the investigation report into this one alleged incident to the Applicant would, or could be reasonably expected to have such inflated, cataclysmic results.

[95] **Therefore, I do not find that the exemption in section 16(f) is engaged.**

Section 20(1)(d):

[96] This exemption can only be applied by a minister or chief officer, which is not the case here. It has therefore been misapplied in view of section 20(2)(b) which 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.

[97] Even if the exemption were available to HMCIPS at this late stage, I am not convinced that the disclosure to the Applicant would have the claimed effects.

[98] **Therefore, I do not find that the exemption in section 20(1)(d) is engaged.**

Section 24(a) and (b):

[99] The argument presented by HMCIPS is not convincing given that the Applicant already knows who the complainant was, and for the reasons indicated above in my consideration of section 16(a).

[100] **For the reasons stated above, I do not find that the exemption in either section 24(a) or (b) is engaged.**

Additional exemption:

[101] As I explained above, by virtue of section 42(2) the Information Commissioner may make any decision which could have been made on the original application".

[102] In my view, the responsive record contains personal information of various inmates and staff, and I will therefore consider whether the exemption in section 23(1) applies.

[103] Section 23(1) exempts personal information from disclosure, as follows:

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

[104] Regulation 2 defines personal information as follows:

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

(a) the individual's name, home address or home telephone number;
(b) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations;
(c) the individual's age, sex, marital status, family status or sexual orientation;

(d) an identifying number, symbol or other particular assigned to the individual;
(e) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics;
(f) information about the individual's health and health care history, including information about a physical or mental disability;
(g) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given;
(h) anyone else's opinions about the individual; or
(i) the individual's personal views or opinions, except if they are about someone else;

but does not include-

(i) where the individual occupies or has occupied a position in a public authority, the name of the individual or information relating to the position or its functions or the terms upon
and subject to which the individual occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of those functions;

(ii) where the individual is or was providing a service for a public authority under a contract for services, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service; or

(iii) the views or opinions of the individual in relation to a public authority, the staff of a public authority or the business or the performance of the functions of a public authority; and

[105] As confirmed in previous hearing decisions, there are three questions that have to be answered to determine whether the exemption in section 23(1) applies:

A. Is the redacted information personal information?
B. If so, would it be unreasonable to disclose the personal information?
C. If so, would disclosure nonetheless be in the public interest?

A. Is the redacted information "personal information"?

[106] In my view the names of the witnesses and prisoner ID numbers constitute the personal information of those individuals, as they fall into category (a) and (d) of the above definition. The report contains verbatim witness statements which utilize the initials of the witnesses and contain the prisoner category and a small number of details, by which individuals could be identified, especially considering the small number of female prisoners currently incarcerated. These too fall into category (d) if the definition.

[107] Therefore, I find that such names, identifiers and initials are personal information.

[108] Since the definition of "personal information" in regulation 2 excludes "the name of the individual or information relating to the position" where "the individual occupies or occupied a position in a public authority", any references in the responsive record to HMCIPS staff or management are not personal information, and are not exempted.

B. If so, would it be unreasonable to disclose the personal information?

[109] In order to determine whether it would be unreasonable under section 23 to disclose the personal information, the former Information Commissioner found in hearing 9-01610[11] that the following questions should be considered:[12]

1. Is the information sensitive?

The information identifies individuals who are witnesses in the context of an investigation of a complaint made against a prison officer. The witnesses are inmates who are currently incarcerated, and therefore in a dependent position. The information itself is of a sensitive nature, in that it refers to conversations and matters of a very personal nature in the context of an allegation of wrongdoing by a public officer. Under these circumstances, I am convinced the information is sensitive.

2. Would disclosure prejudice the privacy of an individual?

If the identity of the inmates who provided witness statements was disclosed, I believe it would violate the privacy of those persons, given the delicate, personal nature of the allegations and the testimonies they provided.

3. Would disclosure prejudice the public authority's information gathering capacity (e.g. as a regulator)?

As explained above, I am not convinced that the disclosure of the report to the Applicant, with the personal information redacted, would prejudice HMCIPS's ability to investigate future alleged breaches.

4. Has the information "expired"

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[11] Information Commissioner *Hearing 8-01610 Decision Health Regulatory Services (HRS*) 4 March 2011, pp.10-11. See the ICO's guidance document for Information Managers on the exemption relating to personal information: http://www.infocomm.ky/images/IM%20Seminars%20Series%20II%20Personal%20Information%20Handout%20-%20June%202013.pdf

[12]

The witness statements relate to events that are alleged to have occurred in April 2016. The prison officer and at least some of the inmates will still be at the Prison in the same capacity. Therefore, the information has not expired.

5. Is the information required for the fair determination of someone's rights?

The personal information is part of an investigation report into alleged wrongdoing by a prison officer (the Applicant). In my view it is necessary that the Applicant receive as much information as possible in relation to the investigation and the allegations, in order to defend herself, if required to do so. However, I do not consider that knowing the actual identities of the individual witnesses would diminish the defendant's ability to defend herself. This may change as the circumstances change, e.g. if this matter was taken forward in the form of an appeal, whether before the courts or otherwise, it may be necessary for the Applicant to know more exact details, including the identity of some of the witnesses.

6. Would the social context render disclosure reasonable?

I do not believe the social context tends to support disclosure. The names and identifiers relate to female inmates in a prison, and I believe they deserve an appropriately high level of protection and anonymity.

7. Is there any suggestion of procedural irregularities or wrongdoing?

The wrongdoing is not alleged against the witnesses, and therefore there is no heightened accountability in relation to their names and identifiers.

[110] **In conclusion, on the basis of the above considerations, it would be unreasonable for the personal information consisting of the names, prisoner ID numbers, prisoner categories and initials of the witnesses, as well as some specific information that could identify individuals in the investigation report to be disclosed, and such information is therefore exempted under section 23(1).**

[111] **Considering that the Applicant was told the identity of the complainant, as explained above, it would not be unreasonable to disclose that person's name and identifiers.**

C. <u>If so, would disclosure nonetheless be in the public interest?</u>

[112] Section 26(1) requires that a public interest test be conducted to determine whether, notwithstanding that the exemption in section 23(1) applies to certain parts of the responsive record, "*access shall be granted if such access would nevertheless be in the public interest.*

[113] 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;
(h) deter or reveal wrongdoing or maladministration;
(i) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
(j) reveal untrue, incomplete or misleading information or acts of a public authority.

[114] I also want to point out that section 6(5) instructs that:

> *(5) Where the factors in favour of disclosure and those favouring nondisclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26.*

[115] The public interest test "involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining the exemption."[13] The test assumes the form of a balancing exercise between the factors in favour of disclosure and those factors in favour of maintaining the exemption.

Factors in favour of disclosure:

[116] Some of the factors listed in the Regulations support the notion that the report in its entirety, including the names of the witnesses, be disclosed. For instance, (a), promoting greater public understanding of the processes or decisions of public authorities; (c), promoting accountability of and within Government; (f), improving the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public; (h) deterring or revealing wrongdoing; and (i) revealing untrue, incomplete or misleading information or acts of a public authority (in this instance, the accused prison officer).

[117] However, I do not consider that any of these factors carry much weight in the context of the investigation, particularly as they relate to the personal information of the prisoners who provided witness statements.

[13] Information Commissioner's Office (UK) *The Public interest test. Freedom of Information Act* Version 2 5 March 2013 p 6

<u>Factors in favour of withholding the responsive records:</u>

[118] As explained above, the nature of the personal information that is being exempted is sensitive, and its disclosure would violate the privacy of the individuals, although I do not feel it would prejudice HMCIPS's ability to conduct investigations in the future if the record was disclosed in redacted form. There are no allegations against the persons who testified and the disclosure is – at this stage – not necessary for the Applicant to defend herself.

[119] I believe these are strong factors, and they trump the factors favouring disclosure. Under the circumstances of this case, I believe that the public interest in protecting the identity of the witnesses outweighs any possible public interest benefit from their disclosure.

[120] **Therefore, I do not find that it is in the public interest to disclose the names, prisoner ID numbers, prisoner categories, initials of the witnesses, and specific information that could identify the witnesses. Consequently, the exemption in section 23(1) applies to those parts of the report.**

[121] **Section 12(1) requires that any parts of the report that are not exempted be disclosed. Therefore, apart from the personal information identified above, the report is to be disclosed.**

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law (2015 Revision)* for the reasons stated above I make the following findings and decision in relation to the responsive record in this appeal:

1. I find that the exemption in section 16(b)(i) is not engaged

2. I find that the exemption in section 16(a) is not engaged.

3. I find that the exemption in section 16(c) is not engaged.

4. I find that the exemption in section 16(f) is not engaged.

5. I find that the exemption in section 20(1)(d) is not engaged.

6. I find that the exemption in either section 24(a) or (b) is not engaged.

7. I find that it would be unreasonable for the personal information consisting of the names and other personal identifiers of the witnesses such as their prisoner ID numbers, prisoner categories, initials, and specific information that could identify individuals, to be disclosed. Such information is exempted under section 23(1).

8. Having conducted a public interest test, I do not find that it would be in the public interest to disclose the names and personal identifiers of the witnesses, such as their prisoner ID numbers, prisoner categories, initials, and specific information that could identify individuals.

9. Since the Applicant already knows the identity of the complainant it is not unreasonable to disclose that person's name and personal identifiers, and the exemption and redaction does not apply to that information.

10. As well, since the definition of "personal information" in regulation 2 excludes "the name of the individual or information relating to the position" where "the individual occupies or occupied a position in a public authority", any references in the responsive record to HMCIPS staff or management are not personal information, and must be disclosed.

For these reasons I require that HMCIPS disclose the responsive record in this hearing to the Applicant, after redacting the names and identifiers of the witnesses, such as their prisoner ID numbers, prisoner categories, initials and specific information that could identify the individuals.

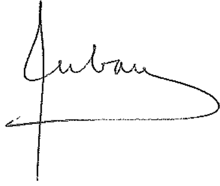
I am separately providing HMCIPS with a communication which indicates specifically those parts of the responsive record that are to be redacted consequent to the above findings.

Since the investigation and personal information in the responsive record relate to the Applicant, disclosure is to the Applicant only, not to the world at large.

In accordance with section 47 of the *Freedom of Information Law (2015 Revision)* the Applicant or the relevant public body may within 45 days of the date of this Decision (i.e. by 25 June 2017) 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

11 May 2017