

Hearing 101-202200287

Decision

Royal Cayman Islands Police Service

Sharon Roulstone

Ombudsman

19 October 2023

Summary

The applicant made a request to the Royal Cayman Islands Police Service (RCIPS) under the Freedom of Information Act (2021 Revision) (FOIA) for an exhibit book containing the entry for a specified exhibit, and for raw data relevant to a past trial.

The RCIPS responded that the exhibit book containing the entry could not be found. The raw data had been redacted in the course of court proceedings, and, since the judicial functions of a court are excluded from the application of the Act, the RCIPS claimed that the FOIA did not apply. The issues being appealed related to the search efforts made by the RCIPS, and the application of the judicial exclusion to the raw data.

In the course of the hearing, the IM continued his search and belatedly located the exhibit book, but it did not contain an entry for the named exhibit and was therefore not responsive to the request. The Ombudsman found that a reasonable search had not been conducted until the final stages of the present hearing. Since the relevant exhibit book was ultimately located, the question relating to the documentation of the search efforts fell away. As well, contrary to the Regulations the Information Manager (IM) had not conducted an interview with the applicant, however, this did not impede the search. In regard to the second part of the request, the Ombudsman found that the court had endorsed the redactions of the raw data, and the FOIA did not apply to these records.

The Ombudsman also noted that the RCIPS had responded outside the statutory timelines, and that the Chief Officer (or delegate) had not conducted an internal review as requested. The applicant had sought to augment the initial request at a very late stage in the appeal, which was not appropriate. Finally, the Ombudsman recommended that the RCIPS review its recordkeeping procedures for the documentation of confiscated items and strengthen its procedures in support of the IM and the FOI process.

Statutes¹ considered

Freedom of Information Act (2021 Revision) (FOIA)
Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)

Contents

A. INTRODUCTION2
B. CONSIDERATION OF ISSUES.....3
C. FINDINGS AND DECISION.....10

A. INTRODUCTION

[1] On 11 January 2022 the applicant made the following request under the FOIA to the RCIPS:

I am making this FOI request via your office for I\C exhibit book for Exhibit # [X] and the Exhibit Custodian in the Exhibit Room Records, the chain of custody of Exhibit [X].

The disclosure of raw data of SH1, [phone number] in relation to indictment [Y] ...

[2] After extending the period allowed for a response, the IM provided the initial decision, stating that no exhibit book was held in which information on exhibit X should have been logged. The IM also applied the exemption in section 23 to the second part of the request, explaining that a redacted version of the raw data of SH1 (the raw data) was being provided with the same redactions as had already been served to the applicant’s legal team in the context of the trial, and that the Court had agreed with the redactions in order, *inter alia*, not to disclose personal data of third parties in violation of the Bill of Rights in the Constitution.

[3] The applicant requested an internal review of the initial decision. However, since no internal review was conducted, we accepted the appeal and started the process of investigating and seeking an amicable solution.

[4] In the course of the appeal, the RCIPS changed the reasons for partially withholding access to the raw data. It now relied on section 3(5)(b), which excludes the strategic or operational intelligence gathering activities of the security or intelligence services (as further defined in subsection 3(8)) from the application of the FOIA. Later, this position was changed to section 3(5)(a)(i), which excludes the judicial functions of a court from the application of the FOIA.

¹ In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

[5] After significant delays were encountered, an amicable solution could not be reached and the matter proceeded to a formal hearing decision by the Ombudsman.

[6] There are two general parts to this appeal. Firstly, I must decide on the search efforts made and the documentation of those efforts on the part of the RCIPS, in regard to an exhibit book that was requested by the applicant. Related to this is also a consideration whether the IM interviewed the applicant as required under regulation 21(b). Secondly, I must decide whether the RCIPS is justified in applying the exclusion in section 3(5)(a)(i) to the raw data of SH1.

B. CONSIDERATION OF ISSUES

[7] Section 43(2) states:

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

a) Did the RCIPS make reasonable efforts to locate records subject to an application for access, did it make a record of search efforts, as required under regulation 6, and did the IM interview the applicant as required under regulation 21(b)?

[8] Regulation 6 states:

Reasonable search

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), the information manager shall make a record of the efforts that information manager made.

[9] The question of reasonableness of a search under the UK's FOIA was addressed in the appeal to the UK Information Tribunal in *Bromley v Information Commissioner* in which the Tribunal concluded that,

...the standard of proof to be applied... is the normal civil standard, namely, the balance of probabilities.... [since] there can seldom be absolute certainty that the information relevant to a request does not remain undiscovered somewhere within the public authority's records...

[10] Furthermore, the Tribunal confirmed that a number of factors are relevant to this test, namely:

- the quality of the public authority's initial analysis of the request,
- the scope of the search that it decided to make on the basis of that analysis and
- the rigour and efficiency with which the search was then conducted...²

- [11] Given the extensive similarities between the UK and Cayman Islands FOI Act, I will apply the same standard and factors, as I have done in previous decisions.
- [12] The civil standard of proof (the balance of probabilities) being applied means that a matter is “more likely than not” to have occurred.
- [13] In its initial decision letter of 30 March 2022 the RCIPS explained the process that was followed in regard to the exhibit book. However, the Information Manager (IM) noted that the exhibit book containing the entry for the specified exhibit could not be found. The IM explained:
- I made a check at the RCIPS Exhibits, and the Exhibits Custodian searched her records in my presence, and she was unable to find any evidence that [Exhibit X] was logged at Exhibits.*
- [14] During the appeal, the RCIPS further clarified that the shift inspector at the George Town police station should have logged the exhibit, but apparently didn’t do so. The exhibit custodian would not have been present after hours when the exhibit would have reached the police station, and the entry was therefore not passed to her.
- [15] In its submission for this hearing the RCIPS stated – somewhat confusingly - that “the Records being requested... no longer exist”, and that,
- The Information Manager confirmed that checks were made however, they were unable to locate the record. Specifically, the RCIPS Exhibits and the Exhibit Custodian’s Records were checked but [I] was still unable to find any evidence that [Exhibit X] was logged at the Exhibits. Therefore, the public authority was unable to provide the requested record.*
- [16] Both the RCIPS and the applicant confirmed that exhibit X (a confiscated phone) had been returned to the applicant (as well as the redacted raw data, about which more below).
- [17] The applicant provided a number of witness statements and other records relating to the investigation and prosecution of his case, which amongst other things demonstrated the actions taken by the RCIPS in acquiring and processing the exhibit, and confirmed that the RCIPS had the exhibit in its possession. However, none of these ancillary sources provide further insight into the circumstances in which the exhibit failed to be logged.
- [18] It was not until this hearing was well underway and my office raised further questions, that the IM conducted a final search in the George Town Police Station and did, after all, locate the exhibit book

² Information Tribunal (UK), *Bromley v Information Commissioner and Environment Agency*, (EA/2006/0072), [2011] 1 Info LR 1273 paras 12-13

in another Office. It was provided for me to inspect, and I confirm that it does not contain any entry for exhibit X.

Regulation 6(1) – reasonable search efforts

[19] In consideration of the three factors relevant to the reasonableness of the search that was undertaken:

a) Quality of the analysis: given its explanations of the routine process of acquiring and logging exhibits, the IM clearly understood what the request was for. Given the relatively uncomplicated nature of the request for the exhibit book containing the entry for exhibit X, the quality of the analysis of the request by the IM was adequate.

b) Search scope: the scope of the search undertaken by the IM was insufficient until the final stages of this hearing. The exhibit book was expected to have a single, logical location, but it was not found there. The Exhibit Custodian’s records did not contain an entry for the named exhibit. Other parties were consulted, but this did not lead to the discovery of the exhibit book (until very late in this hearing) or other entries for exhibit X.

In response to a request for clarification from my office in relation to the exhibit book, as this hearing decision was being finalized, the IM undertook a final search and was able to locate the exhibit book in another office. However, it did not contain an entry for exhibit X, and therefore is not responsive to the applicant’s request.

While the last-minute efforts of the IM are appreciated, the search for this record was obviously flawed. Apart from not meeting the requirements of the FOIA in regard to “reasonable search efforts” as per regulation 6(1), the above account points to a grave lack of recordkeeping controls at the RCIPS in regard to exhibits, and/or a disregard for such procedures. It also points to the importance of full and timely cooperation with the IM within the organization in pursuit of the statutory duties of the public authority (in this instance, the RCIPS).

Since the exhibit book was ultimately located, I conclude that the IM did – eventually –meet the obligation in regulation 6(1) to “make reasonable efforts to locate a record that is the subject of an application for access”.

c) Rigour and efficiency: Given the tardiness of the IM’s initial response, and the lack of results until the latest possible time, the approach taken was neither rigorous nor efficient. However, thanks to the IM’s tenacious efforts to keep pursuing the responsive record, and my office’s determination to get to the bottom of this matter, the search appears to have ultimately yielded results, even though the exhibit book did not show an entry for the specified exhibit.

[20] In consequence, on the balance of probabilities, although the scope of the request was well understood, the search undertaken by RCIPS was tardy and lacked rigour and efficiency. Therefore, the requirements of regulation 6(1) were not met until an eleventh-hour effort located the record in question. As it turned out, the record did not contain the entry requested, and therefore was not relevant to the applicant's request.

Regulation 6(2) – documentation of search efforts:

[21] Regulation 6(2) requires that a record of search efforts is made where no responsive record was found. The response of the IM provided a summary of the steps taken to locate the exhibit book containing the relevant entry.

[22] Since the responsive record was ultimately found, compliance with regulation 6(2) falls away, and I do not need to expand on this point any further. In any event, the IM provided a reasonable account of the search undertaken to locate the record. No further steps need to be taken by the RCIPS in this regard.

Regulation 21(b) – interview:

[23] Regulation 21(b) states:

Functions of information managers

21. An information manager shall —

...

(b) conduct interviews with applicants to ensure that the appropriate records are located;

...

[24] The RCIPS did not address this issue in their submissions for this hearing, and I have not seen any evidence that the IM interviewed the applicant as required in regulation 21(b).

[25] The requirement for an IM to contact an FOI applicant - as required in regulations 21(b) - is helpful in many circumstances. However, I believe there would be little to gain from conducting an interview when the precise nature of the request is already clearly understood by the responding public authority. In these circumstances an interview would seem to serve little or no purpose.

[26] **Consequently, on the balance of probabilities the IM did not interview the applicant to ensure that the appropriate records were located, which is in violation of regulation 21(b). However, given the circumstances of this case, conducting an interview would not have altered the IM's adequate understanding of the request or the outcome of the search, and no further steps need to be taken by the RCIPS in this regard.**

b) Does the FOIA apply to the requested records pursuant to section 3(5)(a)(i) of the FOIA?

[27] The RCIPS relies on section 3(5), which states:

(5) This Act does not apply to —
(a) the judicial functions of —
(i) a court; ...

[28] The term “judicial” is not defined in the FOIA or the Interpretation Act (1995 Revision). Therefore, it should be given its ordinary meaning, in accordance with the principles of statutory interpretation. This approach was adopted by the UK Information Tribunal:

*...the common sense application of the ordinary meaning of the word to the actual circumstances of an individual case must be the correct approach to adopt.*³

[29] The Merriam-Webster Dictionary defines the terms “judicial” and “function” respectively as:

of or relating to a judgment, the function of judging, the administration of justice, or the judiciary

...

ordered or enforced by a court

[30] Since section 3(5) brings into question my jurisdiction in regard to records that are claimed to be judicial in nature, I want to reiterate that the Ombudsman has the power and responsibility under the FOIA to hear, investigate and rule on appeals filed under the FOIA, as stated in section 39(a). The question whether a record is subject to the FOIA lies at the heart of my jurisdiction, and it is properly the Ombudsman, not a public authority, who decides whether a matter falls within my jurisdiction.⁴ The RCIPS and their legal counsel accepted this approach.

The position of the RCIPS

[31] The RCIPS takes the position that section 3(5)(a)(i) applies to the responsive record, and that this matter therefore falls outside the jurisdiction of the FOIA. The raw data were provided to the applicant’s legal team in redacted form as part of the court’s disclosure process during the trial of the applicant, and such records are part of the judicial functions of a court. The applicant’s legal team did not object to the redactions.

[32] The submission of the RCIPS states:

8. The raw data was disclosed in their redacted form as evidence during the Applicant’s criminal trial in the Grand Court. During the cross-examination of a crown witness, the Applicant’s legal counsel inquired about the redactions. The witness informed the legal counsel that the redactions consisted of private and confidential information of individuals

³ First Tier Tribunal (UK,) *Heather Graham v Information Commissioner*, EA/2011/0133 and 0134, para 12.

⁴ See: Ombudsman, *Hearing Decision 98-202200552, Judicial Administration*, 22 June 2023, paras 10-12.

unrelated to the proceedings. There were also aspects of the data that were irrelevant to the offence for which the Applicant was being tried.

9. ... Once an explanation was provided to counsel regarding the reason for the disclosure, there was no request to the court for full disclosure.

10. The format in which the court accepted the documents is a relevant consideration. It is standard practice in the criminal courts of the Cayman Islands to have directions hearing[s] and case management hearings. These hearings permit both defence counsel and the prosecution to identify and resolve any concerns regarding disclosure. Had the Applicant been entitled to the un-redacted version, the Applicant would have been provided with the same: the duty to disclose is a positive and continuing duty on the prosecution. Having considered factors relevant to the hearing, the Court was satisfied with the format in which the evidence was presented.

11. Accordingly, section 3(5)(a) (i) of the FOI Act is applicable as the decision to release the Records in their un-redacted form falls within the judicial functions of a court. The Applicant cannot obtain documents he is not legally entitled to through an FOI request. By seeking to obtain the Records through this medium, the Applicant is asking the ombudsman to usurp the powers of the court, which it is not empowered to do.

- [33] In a meeting my office had with the RCIPS about this matter, the RCIPS further clarified that the raw data includes data from the applicant's phone as well as information from the ICT service provider. Much of this information would not be available on the phone itself (e.g. the location of callers). Some of the data is technical in nature and may be commercially sensitive to the service provider. According to the RCIPS, some of the data relates to third party individuals whose right to privacy would be violated by a full disclosure.

The position of the applicant

- [34] The applicant claims that the raw data was manipulated, but provides no evidence for this assertion.
- [35] The applicant made a number of witness statements (relevant to the investigation and prosecution of his case in court) available for this hearing, some of which provide further details on the nature of the redacted raw data which contain "details [of] calls, subscriber's information and SMS content" relating to a specified phone number, extracted for a specified period of time.

Discussion

- [36] The exclusion in section 3(5)(a) puts records of judicial functions outside the reach of the FOIA. Nonetheless, I have asserted, and it has been accepted by the public authority's legal advisors, that it is the Ombudsman who must decide whether a matter falls within her jurisdiction, as already explained above.

[37] The RCIPS has not provided me with a copy of the responsive record, and therefore I am asked to reach a decision without the benefit of access to the information in question. I generally consider this approach less than optimal, since in most cases the full meaning of a record can only be understood by examining it in unredacted form. However, the present arguments do not relate to the content of the record, but to its status before the court, and I decided not to pursue my request for access to the unredacted record, since the question to be considered was answerable without full access. This may not always be the case where an exclusion (such as section 3(5)) is claimed, but I am satisfied that it suffices in this case.

[38] As the RCIPS elucidated, the responsive raw data are an amalgam of information from different sources, put together for the purposes of a police investigation and prosecution of a serious crime. The record was used for those purposes, and the court was satisfied with the redactions. In accordance with what I understand to be the normal approach of the courts, there is no “positive” court order to confirm the court’s position on the redactions. However, it is not in dispute that the redactions were made in the pre-trial discovery process, that they were endorsed by the court, and that they were not questioned by the applicant’s lawyers.

[39] **Since the court endorsed the redactions to the responsive record, and the record relates to the administration of justice (in the sense of the dispensation of justice), I find that the redacted record is a record of the judicial functions of a court, and section 3(5)(a)(i) applies to it. Consequently, the FOIA does not apply to the responsive record (the raw data) and the RCIPS is not required to take any further steps in this regard.**

[40] The applicant provided numerous additional background documents in his submissions, however none of these appear to suggest or confirm any manipulation or irregular actions, as claimed. In any event, such questions fall outside my jurisdiction, and the applicant has the option of raising these points with his legal counsel.

Procedural issues

Late response to request

[41] The request in this case was made on 11 January 2022. On 10 February the IM informed the applicant that the period for the initial decision was extended under section 7(4), and on 16 March the IM explained that he was awaiting responses from others before being able to render a full decision. The initial decision was provided on 30 March 2022.

[42] It is understood that the gathering of records and input from others can cause delays, but these should not extend beyond the statutory time frame. The IM’s regular updates to the applicant were helpful, but the maximum statutory period allowed for an initial decision is 30 calendar days (extendable by a further 30 calendar days for a reasonable cause under section 7(4)), and should not be exceeded.

[43] The existence of appropriate internal procedures and the full cooperation of others within the broader organization including records custodians are prerequisites for a timely and complete response, especially in a public authority that is as complex and multifaceted as the RCIPS. While the IM stated that he needed more time to consult with others, it was not until much later in this process that the exhibit book was located.

[44] **Therefore, the initial decision was not communicated to the applicant within the statutory timelines provided in section 7.**

Internal review

[45] If an applicant is not satisfied with the initial decision of the IM, if one of the conditions in section 33(1) is met, he/she has the right to request an internal review by the Chief Officer or delegate.

[46] Section 33(1) states:

Application for internal review

33. (1) An applicant for access to a record may, subject to subsection (3), 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;

...

[47] Section 34(3) of the FOIA states:

(3) A person who conducts an internal review —

(a) may take any decision in relation to the application which could have been taken on an original application; and

(b) shall take that decision within a period of thirty calendar days after the date of receipt of the application.

[48] The applicant requested an internal review of the IM's decision on 19 April 2022, in accordance with section 33(1)(b) since "only some of the records specified in an application" were disclosed. However, no internal review was conducted, and my office accepted the appeal on 14 June 2022.

[49] **Therefore, the Chief Officer or delegate failed to conduct an internal review as required by law.**

New requests by the applicant

[50] In the final stage of the appeal, in his submissions for this hearing the applicant appeared to seek an expansion of the initial request. A clarification of a request or a new request can be made at any time, but it is not appropriate to add new requests to an existing appeal or augment a request already at appeal. In any event, any new requests or amendments should be communicated

separately from a hearing submission, and can then be addressed by the RCIPS or other public authority accordingly.

C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above I make the following findings and decisions:

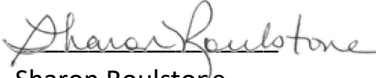
- a) On the balance of probabilities, although the scope of the request was well understood, the search undertaken by the RCIPS was tardy and lacked rigour and efficiency. Therefore, the requirements of regulation 6(1) were not met until an eleventh-hour search finally located the record in question. No further steps are required to be taken.
- b) Since the responsive record was ultimately found, the issue of compliance with regulation 6(2) falls away. In any event, the IM provided a reasonable account of the steps undertaken to locate the record. No further steps need to be taken by the RCIPS in this regard.
- c) The IM did not interview the applicant as required in regulation 21(b). Nonetheless, it is recognized that an interview would not have changed the IM's adequate understanding of the request or the outcome of the search. No further steps need to be taken by the RCIPS in this regard.
- d) In regard to the request for the raw data of SH1 in indictment Y, this record relates to the administration of justice (in the sense of the dispensation of justice) and the court was satisfied with the redactions made. Therefore, the record is a record of the judicial functions of a court, and section 3(5)(a)(i) applies to it, as claimed. Consequently, the FOIA does not apply to the responsive record and the RCIPS is not required to take any further steps in this regard.

Additional matters:

- e) Initial decision:
The initial decision was not communicated to the applicant within the statutory timelines provided in section 7.
- f) Internal review:
The Chief Officer or delegate failed to conduct an internal review as required in section 34.
- g) New or amended requests:
Applicants should refrain from adding new or augmented requests to an existing appeal. Any amendments or new requests should be communicated separately from hearing submissions.

h) Recordkeeping and procedures:

I recommend that the RCIPS review its recordkeeping procedures and related training in regard to the documentation of confiscated items. I also recommend that the RCIPS put in place, or strengthen, its procedures and training in support of the IM and the internal FOI process in order to ensure that all relevant staff give their full and timely cooperation so that the statutory timelines required under the FOIA can be met.


Sharon Roulstone
Ombudsman