

Hearing 82-202000528

Decision

Workforce Opportunities & Residency Cayman (WORC)

Sandy Hermiston
Ombudsman

22 October 2020

Summary

An applicant requested access under the Freedom of Information Law (2018 Revision) (FOI Law) to a wide variety of records concerning Residency and Employment Rights Certificates (RERCs) for same-sex couples from Workforce Opportunities & Residency Cayman (WORC). Access to some records was granted, but the applicant raised an appeal to the Ombudsman for any requests made to the Cabinet and the Chief Immigration Officer (CIO) or Director of WORC for policy direction on RERCs for same-sex couples and to any responses to these requests.

WORC withheld access to two emails that were responsive to the FOI request on the basis that they were claimed to be exempt from disclosure because they consisted of legal advice given on behalf of the Attorney General. WORC also claimed that the emails were exempt from disclosure because they were prepared for the Governor or a Minister and related to the formulation or development of government policy, and because disclosure would, or would be likely to, inhibit the free and frank exchange of views and prejudice the conduct of public affairs.

The Ombudsman investigated the matter and found that the exemption relating to legal advice applied to part of one email, but that the other exemptions did not apply.

Consequently, the Ombudsman ordered the partial disclosure of one email, and full disclosure of the other.

Statutes¹ considered

Freedom of Information Law (2018 Revision) (FOI Law)

Freedom of Information (General) Regulations 2008 (FOI Regulations)

Contents

A. INTRODUCTION	2
B. CONSIDERATION OF ISSUES.....	3
C. FINDINGS AND DECISION.....	8

A. INTRODUCTION

[1] On 14 October 2019, the applicant requested access under the FOI Law to a wide variety of records from WORC relating to RERCs for same-sex couples. The request included the following:

x. If a Cabinet Direction/Policy Direction has been made to Cabinet we would request a copy of that request and any response.

...

xii. If a request to the CIO or the Director of WORC has been made seeking guidance in regards to the same sex marriage and [Residency and Employment Certificates, or RERCs], we would request a copy of that request and any response.

[2] After WORC extended the period for responding under section 7(4) of the FOI Law, the applicant received a partial response from the Chairman of the Caymanian Status & Permanent Residency Board (the Chairman; the Board). The Information Manager's initial decision, sent by email on 13 December 2019, contained additional records. It was claimed that further records were not held or were exempt under the following:

- section 17(1)(c) – records that are legal advice from the Attorney General or the Director of Public Prosecutions;
- section 19(1)(b) – records prepared for the Governor or a Minister relating to the formulation or development of government policy;
- section 20(1)(b) – records whose disclosure would inhibit the free and frank exchange of views for the purposes of deliberation;

¹ In this decision, all references to sections are to sections of the Freedom of Information Law (2018 Revision) as amended, and all references to regulations are to the Freedom of Information (General) Regulations 2008, unless otherwise specified.

- section 20(1)(d) – records whose disclosure would prejudice the effective conduct of public affairs.

[3] The applicant requested an internal review by the Chief Officer. The Chief Officer’s decision supported WORC’s initial decision, that is, that the above exemptions applied. On 5 March 2020, the applicant made an appeal to the Office of the Ombudsman in relation to access to the following:

- *The Cabinet Direction/Policy Direction request made by John Meghoo to the Cabinet of the Cayman Islands on 2 November 2017 and any response.*
- *Any document from the Board seeking guidance from the Chief Immigration Officer of the Cayman Islands (“CIO”)/Director of WORC in regards to same sex marriages and RERCs.*

[4] After an initial mix-up, we received the correct responsive records for the purposes of our investigation and decision. These records consist of two emails that form part of a long email chain, and are respectively dated 1 and 2 November 2017.

[5] In his response of 13 December 2019, the Chairman, Mr John Meghoo, mistakenly indicated that his request for policy direction from the Cabinet had been made on 2 November 2017, while it had, in fact, been made on 1 November 2017.

B. CONSIDERATION OF ISSUES

a. Consideration of whether the requested records are exempt because they are legal advice given by or on behalf of the Attorney General or the Director of Public Prosecutions, pursuant to section 17(1)(c)

[6] Section 17(1)(c) states:

17. (1) A record is exempt from disclosure if –

...

(c) it is legal advice given by or on behalf of the Attorney General or the Director of Public Prosecutions.

[7] Section 12(1) states:

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.

[8] WORC's submission and reply submission in the present hearing assert that the responsive records are exempt under this section, as follows:

... the communications between the Department of WORC and our legal advisors are deemed exempt, as it is legal advice given by Director of Public Prosecutions office.

It is the Department's position that the burden of proof of the applicability for this exemption is plain under review.

[9] These two statements constitute the sum total of WORC's arguments in support of applying the exemption in section 17(1)(c). The first sentence is factually inaccurate, since the advice in question was provided by the Attorney General's Chambers not by the Director of Public Prosecutions. The meaning of the second sentence is unclear, but I suspect it is intended to signify that the reasons for the exemption are self-evident.

[10] I consulted the initial decision provided to the applicant on 13 December 2019 and the internal review decision, neither of which gives any reasons for applying the exemption pursuant to section 17(1)(c).

[11] Section 43(2) explicitly places the burden of proof on the public authority "to show that it acted in accordance with its obligations under [the FOI Law]". WORC's arguments are not sufficient to show that this requirement has been met.

[12] The courts recognize two categories of legal professional privilege, litigation privilege and legal advice privilege. For the former to apply, records must have been created for the predominant purpose of preparing for, advising on or conducting litigation that is either under way or a reasonable prospect at the time the records were created. Litigation privilege is particularly relevant in adversarial proceedings.² The records that are the subject of this appeal consist of a request for policy direction from the Cabinet and the response to that request. Consequently, they were not created with litigation in mind and so are not subject to litigation privilege.

[13] A four-step test is used to determine whether legal advice privilege attaches to all or part of a document:

(i) there must be a communication, whether oral or written;

(ii) the communication must be of a confidential character;

(iii) the communication must be between a client (or his agent) and a legal advisor;

and

² Re L (a minor)(Police Investigation: Privilege), [1997] 2 All ER 78, paras 90-92.

*(iv) the communication must be directly related to the seeking, formulating or giving of legal advice.*³

- [14] The two emails under consideration are written communications of a confidential nature. They were copied to some 10 individuals, all of whom were either employees of WORC or the Ministry of Home Affairs, or members of the Board. The sharing of advice internally is not inconsistent with maintaining the confidentiality of the advice, as would be the case if the content were, for instance, shared in a media interview.⁴
- [15] However, the emails were not sent between a client (or his or her agent) and a legal advisor, and they are not related to the “seeking, formulating or giving of legal advice”. Instead, they consist of a request from the Chairman for policy guidance and the Chief Officer’s response to that request. Therefore, the emails as a whole are not subject to legal professional privilege.
- [16] Nonetheless, legal professional privilege may attach to part of a document only.⁵ The email containing the Chairman’s request for policy direction contains an extract of legal advice provided by the Attorney General’s Chambers to the CIO and the Board. I consider that this extract of legal advice meets the four criteria listed above in that it forms part of a written, confidential communication between a client and a legal advisor, in which legal advice is formulated.
- [17] **Therefore, while the remainder of the Chairman’s request for direction and the response from the Chief Officer are not exempt, the extract of legal advice quoted in the Chairman’s email is exempt pursuant to section 17(1)(c), as it is advice provided on behalf of the Attorney General and subject to legal professional privilege.**

- b. Consideration of whether the requested records are exempt because their disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation pursuant to section 20(1)(b), and, if so, whether disclosure would nevertheless be required, as it would be in the public interest under section 26(1)**

- [18] Section 20(1)(b) states:

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;

³ B v Canada, [1995] 5 W.W.R. 374 (B.C.S.C.).

⁴ Mann v Carnell, [1999] 201 CLR 1 (Australia).

⁵ GE Capital Corporate Finance Group Ltd v Bankers Trust CO, [1995] 1 WLP 172, CA.

[19] WORC has not presented any arguments to support its claim that the exemption in section 20(1)(b) was engaged, except by stating that:

The record contained opinions, advice and recommendations, relating to the development of Government policy and would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation effective conduct of public affairs [sic].

[20] Except for the legal advice, which I have found should not be subject to disclosure, I find that the remainder of the emails do not contain any information, including opinions, advice or recommendations relating to the development of government policy, that, if disclosed, would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

[21] **Therefore, I find that the exemption in section 20(1)(b) does not apply to the requested records.**

[22] Since I have found that the exemption does not apply, I am not required to carry out the public interest test in section 26(1).

- c. **Consideration of whether the requested records are exempt because their disclosure would, or would be likely to, prejudice the conduct of public affairs pursuant to section 20(1)(d), and, if so, whether disclosure would nevertheless be required, as it would be in the public interest under section 26(1)**

[23] Section 20(1)(d) states:

20. (1) A record is exempt from disclosure if –

...

(d) its disclosure would otherwise prejudice, or would be likely to prejudice, the conduct of public affairs.

[24] WORC has not presented any arguments to support its claim that the exemption in section 20(1)(d) was engaged.

[25] Except for the extract of legal advice, discussed above, I find that the disclosure of the remainder of the emails would not, or would not be likely to, prejudice the conduct of public affairs.

[26] **Therefore, I find that the exemption in section 20(1)(d) does not apply to the requested records.**

[27] Since I have found that the exemption does not apply, I am not required to carry out the public interest test in section 26(1).

d. Consideration of whether the requested records are exempt because they contain opinions, advice or recommendations, or a record of consultations or deliberations prepared for the Governor or a Minister relating to the formulation or development of government policy, pursuant to section 19(1)(b)

[28] Sections 19(1)(b) and (2) state:

19. (1) Subject to subsection (2), a record is exempt from disclosure if it contains opinions, advice or recommendations, or a record of consultations or deliberations –

...

(b) prepared for the Governor or a Minister relating to the formulation or development of Government policy

(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.

[29] WORC has not presented any arguments to support its claim that the exemption in section 19(1)(b) was engaged, except by stating that:

It is the Department's position that the Ministry applied this exemption noting that the advice/recommendations contained in the records under dispute are exempt with the final intent to utilize them in presentation to the respective Minister.

[30] The remainder of the emails do not contain any opinion, advice or recommendations, or a record of consultations or deliberations prepared for the Governor or a Minister relating to the formulation or development of government policy.

[31] The argument that it is the intention that the records in dispute will be used "in presentation to the respective Minister" is misapplied, as the exemption only applies to records that contain "opinions, advice or recommendations, or a record of consultations or deliberations ... prepared for the Governor or a Minister". The two emails under consideration are not records of consultations or deliberations, and they were not prepared for the Governor or a Minister.

[32] **For these reasons, I find that the exemption in section 19(1)(b) does not apply to the requested records.**

C. FINDINGS AND DECISION

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

- a) The extract of legal advice quoted in the Chairman's email is exempt pursuant to section 17(1)(c), as it is advice provided on behalf of the Attorney General and subject to legal professional privilege.
- b) The exemption in section 20(1)(b) does not apply to the requested records.
- c) The exemption in section 20(1)(d) does not apply to the requested records.
- d) The exemption in section 19(1)(b) does not apply to the requested records.
- e) WORC is required to disclose the remainder of the two responsive emails, with the quoted extract of legal advice redacted, within 14 days.



Sandy Hermiston
Ombudsman