DECISION: HEARING 14 – 00711

Information Commissioner's Office

ICO Hearing 14 – 00711
Decision
Royal Cayman Islands Police Service

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
22 July 2011

Summary:

An Applicant was refused access by the Royal Cayman Islands Police Service to a copy of the "*2010 Promotion Examinations Exam Paper and the Marking Matrix*". While the initial response of the Public Authority was to defer access to the responsive record, during the Internal Review, reliance was asserted on the exemption that disclosure would likely prejudice the effective conduct of public affairs.

The Information Commissioner upheld the Internal Review decision of the Public Authority and found that the responsive record was exempt from disclosure. In considering the public interest test, the Commissioner found in favour of the Public Authority in that the integrity of the exam process must be secured.

Although excluded from the issues under review set out in the Fact Report for this Hearing, the Commissioner further discussed the rationale for deferring access to the responsive records and found that it would be appropriate to do so as it is not in the public interest to release the records for as long as they remain in active use by the Royal Cayman Islands Police Service.

Statutes[1] Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008

Exclusions & Exemptions Considered:

Sections 11(2)(c) and 20(1)(d)of the *Freedom of Information Law, 2007*

[1] In this Decision all references to sections are to sections under the FOI Law, unless otherwise specified.

Contents:

A. INTRODUCTION

[1] On 13 October 2010 the Applicant made a request to the Royal Cayman Islands Police Service ("RCIPS") for a copy of the "*2010 Promotion Examinations Exam Paper and the Marking Matrix*". This was later clarified to mean the 2010 Promotion Exam question papers for both sergeants and constables and the answer papers used to mark said exams which is referred to as the Answer Matrix.

[2]]On 10 November 2010 the RCIPS responded to the Applicant deferring access under section 11(2)(c) of the Freedom of Information Law 2007 ("FOI Law"). The reason claimed for the deferral was that "*the examination questions will be used in future exams".* The Applicant was informed that when questions would cease to be used, they "*will be considered for disclosure on a case by case basis."*

[3] On 18 November 2010 the Applicant requested an internal review of the decision.

[4] On 26 January 2011 the Chief Officer upheld the RCIPS's initial decision to defer the release of the records under section 11(2)(c).

[5] On 16 February 2011 the Applicant appealed the matter to the Information Commissioner. In accordance with the procedures of the Information Commissioner's Office ("ICO") an attempt was made to resolve the matter through mediation, but an amicable resolution was not found.

[6] On 11 May 2011 the Chief Officer retracted and revised the previous Internal Review decision, relying instead on the exemption in section 20(1)(d), that disclosure would prejudice, or be likely to prejudice, the effective conduct of public affairs.

[7] A formal Hearing was commenced on 12 May 2011.

B. RCIPS EXAMINATIONS

[8] The RCIPS conducts annual promotion examinations to identify officers who have attained the necessary knowledge to be promoted from the rank of constable to sergeant, and sergeant to inspector. This Hearing deals with an application to the RCIPS for copies of promotion exam question papers for both constables and sergeants, and the answer papers referred to as the "answer (or marking) matrix", used in the promotion exams held on 22 September 2010.

[9] The exams were written and marked by the Training Instructor who is a police sergeant in the RCIPS's Training and Development Unit. The exams consisted of one hundred multiple choice questions, of which the pass mark was 60 percent. The "RCIPS Training Department 2010 Examination Policy" states that an unsuccessful candidate will not have an opportunity to resit a failed paper until the following year. Additionally any officer attaining a score of 25 percent or less will be excluded from the next examination.

[10] Prior to the 2010 examinations, examinations took the form of essay questions. The format of the exams was changed for the first time in 2010 to multiple choice questions to be answered on a printed matrix provided to those sitting the exams.

C. PROCEDURAL MATTERS

[11] Section 34(3)(b) of the Law specifies that a chief officer must complete an internal review within 30 calendar days, and there is no provision for extending this time period.

[12] The Chief Officer of the RCIPS took nearly two months to complete the Internal Review, and then caused additional delays by remaining unresponsive to the communications of the ICO during the mediation process. As late as one day before the Notice of Hearing was sent out, nearly three months after the appeal to the ICO was made, and more than seven months after the request was originally received by the RCIPS, the Chief Officer retracted the previous Internal Review decision, and reformulated his conclusions based on a new exemption. The retraction of a previous position itself is not at issue, since it is a legitimate outcome of mediation. However, delaying an internal review decision effectively denies the Applicant's right to access government records as intended under the Law.

D. ISSUES UNDER REVIEW IN THIS HEARING

[13] The issues to be decided in this Hearing are:

1. **Section 20(1)(d) –** Is the responsive record exempt from disclosure because its disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs?

[14] Apart from the procedural irregularities noted above, there is a more substantial question on the actual issue under consideration in this Decision, which also needs to be addressed. There is some confusion on this point, resulting from the wavering position of the RCIPS which has shifted since its first response to the Applicant in this matter.

[15] In its initial decision the RCIPS relied on the deferral under section 11(2)(c), but in his revised Internal Review, the Chief Officer changed this position to rely on the exemption in section 20(1)(d) that is, that disclosure of the record would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs. However, in its Hearing Submission, the RCIPS again relied on deferral under section 11(2)(c) and did not address section 20(1)(d).

[16] The Notice of Hearing indicated clearly that it was the consideration of the exemption in section 20(1)(d) which constituted the basis of this Hearing, and both parties were invited to submit their views accordingly. In light of this, I find it astonishing that the RCIPS's Submission did not have a single thing to say about the exemption in section 20(1)(d). Instead, the RCIPS's Submission focused entirely on the deferral of access under section 11(2)(c), which had in fact been retracted by the Chief Officer.

[17] This omission shows a lack of coordination and communication within the Public Authority, even after a prolonged attempt at mediation on the part of the ICO, and in the face of a Hearing under the FOI Law, which undermines the effectiveness of the appeal and hearing process specifically, and the FOI law in general.

[18] The Applicant's Reply Submission correctly notes that the RCIPS's Submission has not forwarded reasons why the exemption in section 20(1)(d) should apply. According to the Applicant, the RCIPS's Submission is therefore "*completely irrelevant to the issue in the present hearing*", and, "*said submissions... must be ignored by the ICO*" since the RCIPS has failed to discharge its burden under section 43(2) of the FOI Law. This section states that:

> *"43...*
> (2) *In any appeal under section 42, the burden of proof shall be on the public... body to show that it acted in accordance with its obligations under this Law".*

[19] While I sympathize with the observations of the Applicant, I will use my discretion, as I have done in a number of previous hearings[2], and allow both arguments (deferral and exemption) to proceed. While I do this with some reluctance, I believe it is the best way forward in the interest of fairness, and for the following reasons:

[20]

a. the RCIPS's Hearing Submission and its reliance on deferral in section 11(2)(c) is consistent with the initial decision taken on 10 November 2010. The Applicant has been aware of this argument since the initial decision, and has both in their appeal letter to the ICO and in their Hearing Submission formulated credible arguments against it. I have considered whether the Applicant has had a fair opportunity in the course of this appeal to provide its views in writing with respect to the use of deferral, as required by section 43(1), and have concluded that they have.

[21]

b. in the final Internal Review letter (dated 11 May 2011, the Chief Officer's reliance on section 20(1)(d) was based in large part on the same logic and argumentation as the deferral under section 11(2)(c). The two arguments are not mutually exclusive, and are in fact quite similar, namely that premature disclosure would prejudice the effective conduct of affairs by the RCIPS, until such time as the responsive record is no longer needed in future exams. For instance, while discussing the applicability of the exemption in section 20(1)(d) the Chief Officer encourages the Applicant to "*obtain [the questions] from the Training and Development Unit as and when it is determined that certain questions will no longer be utilized for this purpose*." This overlap may go some way to explain the RCIPS's wavering position. Consequently, I consider both arguments to be quite closely aligned.

[2] ICO Hearing 11-02411 (Ministry of Finance, Tourism & Development)

[22] Therefore, the following question will also be considered in this Hearing:

2. Section 11(2)(c) – Would premature disclosure of the responsive record be contrary to the public interest, until the occurrence of any event after which or the expiration of any period beyond which, the release of the record would not be contrary to the public interest?

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Section 20(1)(d)

[23] The RCIPS has denied access to the requested records on the ground that they are exempt under section 20(1)(d) of the FOI Law. This section states:

> *"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.*"

The position of the Royal Cayman Islands Police Service:

[24] In the Internal Review, the Chief Officer upheld his previous conclusion that,

> *"disclosure of these records in their entirety could potentially undermine the promotion process as some individuals may thereafter have an unfair advantage which would discredit the whole examination and promotion process. By extension, the entire force could be brought into disrepute and the resultant damage to the credibility of the service would be in direct conflict with the public interest."*

[25] The Chief Officer also stated that,

> "*disclosure of these records... introduces the possibility that an officer who does not actually possess the required familiarity with, and working knowledge of, the necessary laws, policies, procedures, practices, etc. required by an officer of this rank, may in fact pass the exam and subsequently be promoted due to the unfair advantage that he/she has attained as a result of the disclosure*."

[26] The RCIPS also claims that "*releasing examination questions to candidates is not the norm of most regional police forces including the RCIPS*." The RCIPS supports this contention with examples from three Caribbean nations, Barbados, Jamaica and Turks and Caicos Islands, but rather fails, since none of the examples seem to demonstrate unambiguously that police exams are in fact not released in these countries.

[27] In its submission, the RCIPS has supplied the ICO with a number of communications between the parties, relating to the underlying questions and allegations made by the Applicant in respect of the fairness of the exam process to which the responsive record may testify.

[28] Consequently, according to the RCIPS's Submission, "*the issue has not materialized in theory that would favour disclosure for the Public's understanding of an issue that hasn't materialized that could be subject to national debate."* I take this to mean that the RCIPS does not consider that it would be reasonable to support the Applicant's claim that the responsive record should be disclosed because doing so would reveal wrongdoing or maladministration, particularly as the Applicant did not taken advantage of the offer to inspect the records in person.

The position of the Applicant:

[29] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

[30] The Applicant reverses the RCIPS's reasoning by stating that,

> "*it is the withholding of the questions and answers which renders the examination process unfair because the candidates who sat the test previously (and failed) will henceforth enjoy an unfair advantage over the candidates who are taking the test for the first time. In this way, examination conditions are skewed unfairly in favour of candidates who are re-sitting the exams. This is precisely why past examination papers are routinely made available to all prospective candidates in educational institutions worldwide.*"

[31] In other words, according to the Applicant, "*it is the non-disclosure of information which threatens to bring the examination process in disrepute*."

[32] The FOI Law does not require that an Applicant provide a reason for requesting access to a record of the public authority. However, the Applicant in this case has provided much detail relating to the reasons why they have made the application.

[33] The Applicant points to a number of complaints apparently received from candidates who took the exam, specifically relating to:

- the fairness of the exam process, e.g. relating to the newly introduced practice of candidates having to write their names on their answer sheets;
- the appropriateness of the questions, both in terms of composition and content;
- the alleged inadequacy of the time allocated for the exam;
- the alleged inappropriateness of the room in which the exam took place; and,
- the high rate of failure among candidates.

[34] The Applicant sought resolution of these concerns prior to seeking access under the FOI Law. In the process of doing so, the Applicant received the cooperation of the RCIPS, who have been communicative and have reasonably addressed the questions that were raised. The RCIPS also made an offer - now retracted - to allow the Applicant to inspect the records in person. However, the Applicant believes that their concerns have not adequately been addressed, and that only unconditional access to the responsive record will allow verification and investigation of the above complaints and concerns.

Discussion

General Observations

[35] In this Hearing I will determine whether or not the Applicant has a right to access the responsive records, but I cannot determine whether the RCIPS has conducted the 2010 examinations fairly and appropriately, nor consider the effectiveness of the RCIPS's handling of internal complaints. While I take the allegations made by the Applicant into consideration when determining the public interest both in respect of the exemption in section 20(1)(d) and the deferral in section 11(2)(c), the substance of these allegations falls outside the scope of my statutory powers under the FOI Law to investigate or remedy. The questions relating to the allegations of unfair practices and maladministration might be appropriate for the Complaints Commissioner to address. It appears that even without sight of the responsive records, the Applicant would have sufficient documentation to proceed in this manner.

Application of the exemption

[36] I am of the opinion that the disclosure of the "*2010 Promotion Examinations Exam Paper and the Marking Matrix*" would be likely to prejudice the effective conduct of public affairs by the RCIPS, because disclosure would be likely to damage the ability of the RCIPS to conduct exams and grant promotions according to standards deemed desirable by senior management and the Training Unit. As such, disclosure would be likely to undermine the credibility of the examination and promotion processes, and might discredit the entire Police force.

[37] However, I disagree with the Chief Officer's argument that release of the responsive record might give an unfair advantage to some who take the exams in the future in view of the plans to reuse the same questions in future exams. When a general record is disclosed under the FOI Law (unlike a record containing an applicant's personal information), it is released "to the world at large" and anyone can ask for and get a copy, or at least be told where to find the already published document. Therefore, if the record was to be released, anyone could henceforth gain access to it, and the advantage, if any, would not be limited solely to the Applicant.

[38] **In considering the arguments of both sides, I find that the exemption in section 20(1)(d) is engaged in relation to the responsive record, and its disclosure would prejudice or be likely to prejudice the effective conduct of public affairs.**

The public interest test

[39] Since I have found that the exemption in section 20(1)(d) applies to the responsive record, I must now consider whether the record should, nonetheless, be released in the public interest, as per section 26(1) which states:

> *"Notwithstanding that a matter falls within sections 18, 19 (1) (a), 20 (b), (c) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest."*[3]

[3] The Law contains a drafting error in that it lists a non–existent subsection 20(d) rather than the intended subsection 20(1)(d) as being subject to the public interest test.

[40] Relevant public interest factors are listed in regulation 2 of the *Freedom of Information (General) Regulations 2008.*

[41] In the Affidavit that accompanies their submission, the Applicant raises a number of allegations relating to the transparency and fairness of the examinations, as explained above. The Applicant believes that the responsive records would assist with their investigation into these matters. A response to these allegations also forms part of the RCIPS's Submission.

[42] The Applicant also submits that the reasoning of the RCIPS is fundamentally flawed because the release of the responsive record could not be contrary to the public interest if the RCIPS was willing to allow inspection of the record at the Training Unit's offices. The offer to allow inspection of the record was prior to the FOI request being made, and was repeated in the RCIPS's initial decision and in the first Internal Review, but was retracted in the final Internal Review and the Hearing Submission.

[43] The RCIPS accepts the potential public interest in *"deter[ring] or reveal[ing] wrongdoing or maladministration, and reveal[ing] untrue, incomplete or misleading information or acts of a public authority".* However, the RCIPS points out that the Applicant "*was afforded a reasonable opportunity to inspect the records"*, but chose not to do so. An offer was also extended for the failed candidates to review their own exam papers, but apparently none, or only a very small number did. The RCIPS has also provided copies of a number of emails between the Applicant and various officers responsible for the Training Unit and its exams, which clearly indicate a willingness on the part of the RCIPS to find a positive solution, short of granting full access to the responsive record.

[44] In the Internal Review letter (dated 11 May 2011), the Chief Officer pointed out that "*there are internal mechanisms in place for dealing with these types of concerns within the RCIPS that do not require the invocation of the FOI Law*", and encourages the Applicant to use these "*in the interest of efficiency and in recognition of the spirit and intent of the FOI Law*." The Chief Officer does not clarify what these mechanisms are, or how they would render use of the FOI Law unnecessary.

[45] While the existence and effectiveness of an internal complaints mechanism may have a bearing on the need for an applicant to request information under the FOI Law in general - that is, the better the complaints mechanism, the less likely it is that an FOI request will be filed - it does not invalidate an applicant's right to seek access to government records, or in any way diminish the legitimacy of the present application.

[46] The Chief Officer did not explicitly formulate any public interest arguments, although section 26(1) does subject the exemption in section 20(1)(d) to a public interest test.[4] The Hearing Submission does, however, contain a number of relevant public interest factors.

[47] The Hearing Submission claims that the RCIPS has no choice but to reuse the exam questions. While there is no policy that dictates this, "*reviewing examination questions on an annual basis would further inundate the understaffed Training [Unit] and divert resources".*

[4] Supra, 3; this omission on the part of the Chief Officer is understandable since the Law contains a drafting error. The ICO pointed out this minor error to both parties in the Fact Report which accompanied the Notice of Hearing in the present case. The ICO has also informed the FOI Law Review Committee of the Legislative Assembly, which is in the process of conducting a statutory review of the FOI Law, so that section 26(1) may be amended accordingly.

[48] On balance, and after considering the additional background documentation provided in both submissions, I do not accept that the Applicant has responded reasonably to the genuine efforts of the RCIPS to address their allegations short of full release of the responsive record. I believe this diminishes the weight of their allegations in the public interest test. **Therefore, I do not find the Applicant's arguments compelling, and I find that the public interest in securing the integrity of the exam process by the RCIPS prevails.**

[49] This finding does not in any way impede the RCIPS from disclosing the responsive record, or such parts of it that will no longer be used in future exams, as soon as appropriate, as stated.

2. Section 11(2)(c)

[50] Although I have already found that the exemption in section 20(1)(d) applies to the responsive record, and that it would not be in the public interest to disclose the responsive record, out of an abundance of caution I will briefly discuss the claim for deferral under section 11(2)(c) as well.

[51] This section provides that:

> *"11. …*
> *(2) A public authority may defer the grant of access to a record-*
> *...*
> *(c) if the premature release of the record would be contrary to the public interest, until the occurrence of any event after which or the expiration of any period beyond which, the release of the record would not be contrary to the public interest."*

[52] While the exception in section 11(2)(c) is not subject to a public interest test under section 26(1), it does rely directly on the public interest as a reason for applying a deferral, and, as such, public interest factors are relevant.

The position of the Royal Cayman Islands Police Service

[53] As noted above, the Chief Officer expressed his belief that,

> *"disclosure...could potentially undermine the promotion process as some individuals may thereafter have an unfair advantage which would discredit the whole examination and promotion process. By extension, the entire force could be brought into disrepute and the resultant damage to the credibility of the service would be in direct conflict with the public interest."*

[54] Although not relying on deferral in section 11(2)(c), the Chief Officer invited the Applicant to "*obtain [the questions] from the Training and Development Unit as and when it is determined that certain questions will no longer be utilized for this purpose*."

[55] In its Submission, the RCIPS justifies reliance on section 11(2)(c) by asserting that "*the examination questions will be repeated or at least a variant of the papers will be used in*

future exams". The Submission further states that questions will be considered for disclosure on a case by case basis once the RCIPS' training unit has decided "*that certain questions will not be repeated in future exams."*

[56] The RCIPS does not put forward a finite time limit in relation to the deferral, since the "*[t]raining [Unit] does not have a written policy on how often existing examination questions should be reviewed or a time limit on how long existing questions should be repeated in future exams and refresher courses."*

The position of the Applicant

[57] The Applicant submits that the reasoning of the RCIPS is fundamentally flawed because the release of the responsive record could not be contrary to the public interest if the RCIPS was willing to allow inspection of the record at the Training Unit's offices.

[58] According to the Applicant, the Chief Officer (in his letter of 11 May 2011) has effectively admitted that the RCIPS' position in respect of section 11(2)(c) is flawed by retracting the offer for inspection of the records, and by withdrawing reliance on deferral in section 11(2)(c), and instead choosing to rely on the exemption in section 20(1)(d).

[59] As previously mentioned, the Applicant in this case has provided a number of reasons why they have made an application for the responsive record, namely in order to examine allegations that the 2010 exam process was unfair and that certain questions, were inappropriate.

Discussion

[60] In balancing the arguments relating to the deferral in section 11(2)(c), I consider the RCIPS' argument that release of the exam questions and answers would likely undermine the promotion process, as important and valuable. Particularly in the light of the significant efforts and resources involved in researching and composing the exam questions by the Training Unit, there is a considerable public interest in preventing access to questions which will be used in future exams. Consequently, it would be contrary to the public interest to allow access, and a deferral would therefore seem reasonable.

[61] These interests need to be weighed against the equally important arguments of accountability and transparency put forward by the Applicant, relating to the transparency and fairness of the examination process. However, I do not believe that the disclosure of the responsive records is necessary in order for the applicant to further pursue these issues.

[62] In this regard it should be noted again that the RCIPS has demonstrated a credible willingness to accommodate the needs of the Applicant and the complainants, while defending the high standard of its exam questions and process. It should also be noted that there is a significant public interest in allowing a public authority, particularly a police service, a reasonable amount of liberty to define and, if necessary, raise the standards against which it measures candidates for promotion, and to formulate its examination questions accordingly.

[63] **Having balanced the arguments in favor and against deferral, I find that the application of section 11(2)(c) of the FOI Law by the RCIPS is appropriate, since it**

would not be in the public interest to release the responsive records for as long as they remain in active use by the RCIPS Training Unit.

E. FINDINGS AND DECISION

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

Findings:

The "*2010 Promotion Examinations Exam Paper and the Marking Matrix*" is exempt under section 20(1)(d) of the FOI Law, and it would not be in the public interest to disclose the responsive records.

Access to the "*2010 Promotion Examinations Exam Paper and the Marking Matrix*" may be deferred under section 11(2)(c) of the FOI Law until such time as the exam questions will no longer be used in future exams.

Decision:

I uphold the decision of the Royal Cayman Islands Police Service to withhold access to the "*2010 Promotion Examinations Exam Paper and the Marking Matrix*" under sections 11(2)(c) and 20(1)(d) of the *Freedom of Information Law, 2007*, and do not require any further action to be taken by the Royal Cayman Islands Police Service in response to this request.

As per section 47 of the *Freedom of Information Law,* 2007, the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.

Jennifer P Dilbert
Information Commissioner
22 July 2011