

ICO Hearing 31 - 02012

Decision

Ministry of Home and Community Affairs,
(formerly the Ministry of Community Affairs, Gender and Housing)
and Department of Children and Family Services (DCFS)

Jennifer Dilbert MBE, JP
Information Commissioner for the Cayman Islands

22 August 2013

Summary:

The Applicant made a request to the Department for Children and Family Services (DCFS) for particular files. Most records requested were eventually disclosed to the Applicant, with some information redacted pursuant to section 23(1). The Applicant also claimed that further responsive records must be held.

The Information Commissioner upheld the decision of the DCFS to withhold personal information of third parties, but ordered that the Applicant be provided with some of the redacted information. She determined that with respect to the records claimed by the Applicant to have been withheld, the DCFS had provided such records as exist which are responsive to the request.

Statutes¹ Considered:

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

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¹ In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

A. INTRODUCTION

- [1] The original request for records was made by the Applicant on 2 August 2012. Being dissatisfied with the response of the Public Authority, the Applicant appealed to the ICO in October. Over the course of the next several months, with much involvement of the ICO, further records were released to the Applicant. Much negotiation took place as to what records had already been released, what records actually existed, and what records were still required by the Applicant.
- [2] This appeal encountered a number of delays which were unavoidable. Even after the Notice of Hearing and Fact Report were issued by the ICO, clarifications were forthcoming as to the records in dispute. Further records were also located by the DCFS and provided to the Applicant at this late stage. As a result, the Hearing was further delayed, with the completed hearing binder only being available for the Commissioner on 1 August 2013.
- [3] After much negotiation, the records in dispute were set out in the Notice of Hearing which was provided to both parties. These were numbered 1 – 7 under records redacted, and 8 and 9 as records withheld. However, further submissions were received concerning these records, and it was agreed that items 5 and 6 are the same record. Whether items 8 and 9 have already been provided to the Applicant will be dealt with below.
- [4] In this Hearing, as much as possible, only matters directly related to the Freedom of Information request will be dealt with. In addition, the discussion of specific events and the titles and descriptions of records in this Decision have deliberately been kept vague, as the issues which underlie the request for records are of a very sensitive and personal nature.

B. THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES

- [5] The Department of Children and Family Services² exists to encourage and promote self-sufficiency; to advocate, motivate and educate individuals and families, empowering them to realize their full potential thus functioning effectively as members of our society. This is achieved through the provision of therapeutic services and community based programmes enhanced by on-going research and in partnership with key stakeholders.
- [6] As per the Cayman Islands Government's Organizational Chart of 1 July 2013, The DCFS currently falls under the Ministry of Home and Community Affairs. Prior to this, responsibility for this Department fell to the former Ministry of Community Affairs, Gender and Housing (The Ministry).

C. PROCEDURAL MATTERS

- [7] There are many factors which contributed to the length of time this request took to reach a Hearing before me. Most of these are a result of both the Public Authority and the Applicant experiencing great difficulty in separating an involved complaint/case concerning an individual, and the Freedom of Information request for records.

² DCFS website www.dcf.gov.ky

- [8] Importantly, as the requested records pertain to the affairs of the Applicant, these should have been quickly and fully identified and disclosed, withholding any information that might be subject to exemptions under the FOI Law, such as the personal information of a third party. The delays in responding to this request and the difficulty in identifying and locating records responsive to the request are unacceptable.
- [9] A very strained and contentious situation between the Applicant and the DCFS led at times to poor or confused responses from both the DCFS and the Applicant, and what appeared to be a breakdown in the relationship between the Applicant and the DCFS resulted in further delays. As well, the Applicant was prone to combining details of the complaint/case with the request for records, asking questions and stating various grievances relating to the one, thereby contributing to the delay of the other.
- [10] There was a time-consuming question as to whether an Internal Review as required under the Law had been conducted by the Ministry, and delays in locating and identifying records. In the course of the Appeal, the DCFS for the most part did not meet ICO deadlines for provision of information for the pre-hearing investigation, the location and identification of records, and preparation for the Hearing. There is also the issue of whether specific records being requested by the Applicant actually exist.
- [11] During the pre-hearing investigation, the ICO suggested that much information that had initially been redacted by the DCFS did not qualify as personal information under the Law. This information was subsequently provided to the Applicant. Further records were also identified and provided to the Applicant during the Appeal.
- [12] The Applicant points out, and I agree in this case, that there is a conflict of interest with the Human Resource Manager and Information Manager (IM) being the same person. In my view a conflict may arise where an IM decides on the application of the FOI Law to records relating to matters in which he or she personally played a role, as was the case here. The DCFS has since appointed a new IM, who has received training from the ICO, so it is hoped that some of the problems experienced with this request will not be repeated.
- [13] While the Applicant has thanked the ICO for its assistance during this appeal, which resulted in further records being located and disclosed, there remains a considerable amount of frustration with respect to the resolution of the actual complaint/case, and all means of redress such as to the Civil Service Appeals Commission and the Office of the Complaints Commissioner appear to have been exhausted. However I am confined to looking only at the matters that relate to the FOI Law.
- [14] I must again remind all public authorities that pursuant to section 6 of the National Archive and Public Records Law, 2007, they must make and maintain full and accurate records of their business and affairs. In addition, under section 52 of the FOI Law public authorities must maintain their records in a manner that facilitates timely retrieval and allows them to comply with freedom of information requests. This is especially important when dealing with highly sensitive issues with far-reaching consequences that may have an impact on the rights of individuals. In this case the responsive records were not promptly and thoroughly identified and provided, and this may have been the case because of poor record keeping.

- [15] If records which are the subject of a request cannot be found, the public authority must advise the applicant of this, and demonstrate that a reasonable search has been conducted. Similarly, if a specific record requested does not exist, this should be clearly stated to the applicant.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [16] The issue to be decided in this Hearing, as set out in the Notice of Hearing and Fact Report is:

Section 23(1) – Is the information redacted from the responsive records exempt from disclosure because its disclosure would involve the unreasonable disclosure of personal information of any person, whether living or dead?

- [17] In addition I will consider whether responsive records 8 and 9 have been withheld from the Applicant.
- [18] In the Initial Hearing Submission of DCFS, dated 13 June 2013, additional exemptions are also applied, namely those found in sections 16, 17(b)(i), 24 and further or in the alternative, section 20(1)(d).
- [19] I will consider, in the circumstances, whether I will allow the DCFS to plead additional exemptions.

E. CONSIDERATION OF ISSUES UNDER REVIEW

- [20] Both parties provided Submissions and Reply Submissions for this Hearing, however much of the content of both was not relevant to the issues under review.

The position of DCFS

- [21] The Public Authority confirmed the records that have already been provided, and that documents 5 and 6 as listed in the Fact Report were the same record. The arguments put forward with respect to the disclosure of third party personal information are not relevant as the Applicant had already agreed that this was not being asked for.
- [22] DCFS put forward arguments as to why I am obligated to hear exemptions that were not submitted until their formal Hearing Submissions.
- [23] In their Reply Submission, DCFS states that “the allegations made by the Applicant in the Initial Submissions are not properly Freedom of Information issues and are wholly irrelevant to the issues before the Information Commissioner.” They go on to detail, for the record, their objections to the allegations made.

The position of the Applicant

- [24] 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 or private body to show that it acted in accordance with its obligations under this Law.

- [25] The Applicant's submissions consist mainly of details of the complaint made against DCFS and their handling of same. With respect to the freedom of information requests, the difficulty and delays in obtaining responsive records are noted. The Applicant is seeking specific records that in their opinion should exist, and these are listed in detail.
- [26] An annotation to records, discussed below, is requested. The Applicant also requests that I recommend the matter discussed in the submission to the appropriate disciplinary authority.

Discussion

Document 1

- [27] For the most part the redacted information is clearly personal information of third parties such as names, sex, and other identifying characteristics which in my view would be unreasonable and not in the public interest to disclose. However, there are three words or phrases in one paragraph of this document that do not constitute personal information and these can therefore not be correctly redacted under section 23(1).

Document 2

- [28] The information redacted is clearly personal information of third parties which would be unreasonable and not in the public interest to disclose under section 23(1). However, pursuant to section 23(2), the application for access is made by the person to whose affairs the record relates, so section 23(1) does not apply. Although the record could therefore be provided in full, the Applicant is not asking to be provided with this information.

Document 3

- [29] This document was written by the Applicant and directly concerns them. Section 23(2) states that subsection (1) shall not apply in any case where the application for access is made by the person to whose affairs the record relates. In this case, while the record may contain the personal information of a third party, this information is already known to the Applicant, who authored the record in the first place. It is therefore not unreasonable to provide the information to the Applicant. As above, while the Applicant does not wish to receive the names of the third parties which have been redacted, all other information in this record should be provided.

Document 4

- [30] This document consists of two records, both written by the Applicant. As above, these records should be provided to the Applicant in full, except for the redaction of names of third parties as mutually agreed.

Document 5

- [31] All redactions are of third party personal information, agreed as above, except the name of a place which should not be redacted, and in fact is disclosed later on in the record.

Document 6

- [32] All parties have agreed that Document 6 is the same as Document 5.

Document 7

- [33] All redactions are of third party personal information, the redaction of which is not at issue.

Document 8

- [34] During the course of the appeal this document was provided to the Applicant in full.

Document 9

- [35] Further records responsive to this part of the request were located by the DCFS during the appeal, and provided to the Applicant in full. The DCFS has indicated that they have provided all records in relation to this part of the request. While the Applicant is seeking further specific records which they expect to have been prepared, I have no reason to believe that further records exist.

Late exemptions

- [36] Although the request was made by the Applicant on 2 August 2012, and much negotiation and discussion took place with the Applicant and the ICO following an appeal being made, the DCFS did not seek to plead further exemptions under the FOI Law until after the formal Hearing had commenced, in their Initial Submission of 13 June, 2013. In their Reply Submission the Applicant objects to the raising of these new exemptions.
- [37] The DCFS states that “case law indicates that an exemption which applies to a request for a record may be claimed at the appeal stage, even if not relied on previously”. I remind the Public Authority that this appeal was, in fact, lodged with the ICO in October of 2012, and there was ample time for them to give me their views in writing as to what exemptions were being relied upon, prior to the commencement of the Hearing, which is the culmination of the appeal, not its commencement.
- [38] The ICO is guided in its investigation and hearing of appeals by section 43(1), which states that the Commissioner shall “*decide an appeal ... within thirty calendar days, after giving both the complainant and the relevant public authority an opportunity to provide its views in writing*”. As per the ICO’s Appeals Policy and Procedures [footnote], before a formal hearing commences, the pre-hearing investigation seeks to further refine or identify the position of both parties, and attempts to find common ground for an amicable resolution. During this time, there is ample opportunity for either party to change its position. In the present case, the Public Authority did not change its position about the application of the exemption claimed (s.23) for many months, and agreed to the Fact Report which identifies this same single exemption as the basis of the dispute. Then, eight months after the appeal started, and well after commencement of the final stage of the appeal, new exemptions were claimed in the Hearing Submission.
- [39] The Notice of Hearing in this case, issued on 10 May 2013, set out the issues under review as follows:

At Hearing, the Information Commissioner will consider and decide whether the requested records are exempt from disclosure under section 23(1) of the FOI Law.

[40] Both parties to the appeal were given an opportunity to object to this Notice of Hearing, and no further exemptions were put forward even at this stage.

[41] The Appeals Policies and Procedures, which were provided to both parties to the appeal, states:

If a public authority wishes to seek advice from legal counsel, it is encouraged to do so without delay, and not wait until the pre-hearing investigation or hearing stage of an appeal.

The Law requires that the reasons for refusing or deferring access must be stated in the initial decision, as well as in the internal review, and it is not acceptable for a public authority to wait until the matter is appealed, or indeed until a hearing has commenced, before it determines its legal position and provides its full reasons for refusing or deferring access to a record.

Particularly during the hearing stage of the appeal, both parties are expected to meet strict deadlines and delays must be minimized.

[42] As stated in previous Decisions, and reinforced to Information Managers and the Legal Department during training and the investigation of appeals, I do not accept that it is my duty under the Law to consider exemptions raised so late in the appeals process. I quote below from Hearing Decision 9 – 02210³:

There is no provision in the FOI Law which would allow a PA to communicate a decision, or the reasons for refusing or partially refusing access, in a piecemeal manner Neither does the Law provide that the Information Commissioner is required to consider exemptions thus raised, although it would remain within her discretion to do so, depending on the circumstances.

I do not encourage or condone the application of exemptions so late in the appeals process, since doing so would undermine the timeliness, credibility and fairness of the process, and would risk delaying the applicant's fundamental right to access as established by the FOI Law. This is consistent with the practice in the UK, where the Information Tribunal has found that: "it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations... This is a public policy issue which goes to the underlying purpose of FOIA."

[43] In this case the Applicant has also objected to the raising of the late exemptions, and I will not agree to hear them.

³ ICO Decision 9 www.infocomm.ky/appeals

Annotation of records

- [44] The Applicant's submission dated 10 June 2013 contains a request for annotation of a record under section 28 of the FOI Law. While I regret the length of time that this request has taken to be resolved, due to the factors stated above, it is not possible for me to consider the issue of annotation in the course of this Hearing.
- [45] The request for annotation needs to be made to the Public Authority, in this case the DCFS, and dealt with as set out in Part IV of the FOI Law. If the Applicant is not satisfied with the response to the request for annotation, then a separate appeal can be made to me.

Referral to the appropriate disciplinary authority

- [46] The Applicant has requested that "*given the Public Authorities' egregious and willful failure to comply ... the matter be recommend(ed) to the appropriate disciplinary authority*" ...
- [47] My powers under the FOI Law are for the most part limited to enforcing the provisions of the FOI Law. Section 43 states:

43. (3) *In his decision pursuant to subsection (1), the Commissioner may-*

(c) *In cases of egregious or willful failures to comply with an obligation under this Law, refer the matter to the appropriate disciplinary authority.*

- [48] In this case, there were delays and a failure to meet deadlines and to identify and provide records in a timely manner. However to the best of my knowledge all records as exist that are responsive to the request have now been provided. While there are obvious gaps in record keeping, and the manner in which this request was handled overall by the DCFS was poor, I do not find that there was an egregious or willful failure to comply with an obligation under the FOI Law.

F. FINDINGS AND DECISION

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

Findings:

As the responsive records in this case contain either the personal information of the Applicant, or third party personal information already known to the Applicant, the information ordered released below is to be disclosed to the Applicant, but not to the general public.

Except for three words or phrases in one paragraph in Document 1 the redacted information can be withheld under section 23(1).

The information redacted from Document 2 is the personal information of third parties which would be unreasonable and not in the public interest to disclose to the public under section 23(1). However, pursuant to section 23(2), the application for access is made by

the person to whose affairs the record relates, and therefore section 23(1) does not apply. Although the record could be provided to the Applicant in full, the Applicant is not asking to be provided with this information, and no further action is required on the part of the Public Authority in respect of Document 2.

Document 3 was written by the Applicant and directly concerns them. As above, section 23(1) does not apply. However, the Applicant does not seek the names of the third parties which have been redacted, but all other information in this record must be disclosed.

Document 4 consists of two records, both written by the Applicant. As above, these records are not exempt under section 23(1), and should be provided to the Applicant in full, except for the redaction of names of third parties as agreed between the parties.

All redactions to Document 5 are of third party personal information, agreed as above to be withheld from the Applicant, except the name of a place which should not be redacted, and in fact is disclosed later on in the same record.

All parties have agreed that Document 6 is the same as Document 5.

All redactions made to Document 7 are of third party personal information, the redaction of which is not at issue.

In the course of the appeal Document 8 was provided to the Applicant in full.

The DCFS has indicated that they have provided all records in relation to the part of the request to which Document 9 is responsive. I have no reason to believe that further records, as detailed in the closing remarks of the Applicant's Reply Submission, exist.

Given the length of time taken to identify, locate and provide the records responsive to this request, I find that the DCFS is in contravention of section 52 (1) in that it is not maintaining its records in a manner which facilitates access to information under this Law.

Decision:

I uphold the decision of the Ministry of Home and Community Affairs, (formerly Ministry of Community Affairs, Gender and Housing), and the Department of Children and Family Services (DCFS) to withhold the redacted information from the responsive records except for three words and phrases in Documents 1, four phrases in Documents 3 and 4, and the names of a place in Document 5 (which in any event is disclosed later in the document).

The ICO will provide the DCFS with the details of information to be provided to the Applicant.

The Public Authority has confirmed that it has provided to the Applicant all records which constitute Documents 8 and 9 and there are no further records to be provided.

Pursuant to section 43(3)(b) I require that the DCFS work with the National Archive to develop and maintain adequate operational record keeping tools. The DCFS should report back to me in 3 months on progress made in this respect.

As per section 47 of the *Freedom of Information Law, 2007*, the complainant, or the relevant public 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.

Pursuant to section 48, upon expiry of the forty-five day period for appeals 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.



Jennifer Dilbert
Information Commissioner

22 August 2013