

ICO Hearing 42-03313
Decision

Planning Department

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

16 September 2014

Summary:

In September 2013 an applicant requested records from the Planning Department relating to the Kai Village Planned Area Development in Cayman Kai. The Department responded by denying access to some records, requiring that other records could only be inspected in its offices because of copyright concerns, and applying a fee for reproduction of other records which would have to be converted from paper to a digital format as requested by the Applicant.

These matters were appealed to the Information Commissioner's Office, and only the question of reproduction fees was advanced for a formal hearing decision before the Acting Information Commissioner. Certain procedural questions were also considered.

After hearing written submissions from both parties, the Acting Information Commissioner found that the Planning Department had not breached any legal provisions in respect of the fees, as it was entitled to charge a fee in accordance with the relevant provisions of the *Freedom of Information Law, 2007* and the *Freedom of Information (General) Regulations, 2008*. Some procedural breaches were also noted.

Statutes¹ Considered:

Development and Planning Regulations, 2013 Revision

Freedom of Information Law, 2007

Freedom of Information (General) Regulations, 2008

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, 2004 (S.I. 2004 No. 3244) (United Kingdom)

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.

Contents:

A. INTRODUCTION.....	2
B. BACKGROUND	3
C. PROCEDURAL MATTERS	3
D. ISSUES UNDER REVIEW IN THIS HEARING.....	4
E. CONSIDERATION OF ISSUE UNDER REVIEW	4
F. FINDINGS AND DECISION	10

A. INTRODUCTION

- [1] The application for the Kai Village Planned Area Development (KVPAD) in Cayman Kai, and the subsequent consultation in accordance with the *Development and Planning Law (2011 Revision)* (DPL) and the *Development and Planning Regulations (2013 Revision)* (DPR) elicited a great deal of interest from the public. As a result, some 40 requests for access to related records were made to the Planning Department (the Department) under the *Freedom of Information Law, 2007* (FOI Law). Apart from certain procedural questions, the present Decision relates to a single aspect of one of these requests, namely whether a fee can be charged by the Department.
- [2] The Applicant requested access to records relating to the KVPAD on 7 September 2013. Since he had received no reply within the statutory 30 calendar days, on 17 October he asked for an internal review by the Chief Officer.
- [3] One day later, on 18 October, the Department did provide an initial decision that (1) certain records would be provided for a fee, (2) it would allow on-site inspection of other records, and (3) a third category of records would be withheld. The fees referenced were listed in the Department's Publication Scheme under the FOI Law, which is publicly available on the Planning Department website.²
- [4] The Chief Officer of the Ministry of Planning acknowledged receipt of the request for an internal review on 7 November, and informed the Applicant of his decision (dated 19 December 2013) on 22 December 2013, confirming the initial decision of the Information Manager.
- [5] In the meantime the Applicant had requested an appeal with the Information Commissioner's Office (ICO), which was accepted on 9 December.
- [6] In the course of the appeal the Applicant abandoned part of the request and pursued only the claim that the Department had failed to comply with the FOI law by charging a fee to convert paper records into electronic records. This is the main issue that is to be decided in this Hearing.

² http://www.planning.gov.ky/HTML_BODY/FOI/FOI_Library/19_Department_of_Planning_-_2012_PS_-_%20Final.pdf

B. BACKGROUND

[7] The Department's functions are summarized in its mission statement:

To ensure that all development applications are processed efficiently, courteously, unbiased and in accordance with the development plans and associated legislation so that the physical development of the Islands is aesthetically pleasing, environmentally friendly, sustainable, technically sound, promotes a strong economy, and provides an unparalleled quality of life for existing and for future generations.

[8] The Department is comprised of four divisions: Current Planning, Building Control, Policy Development, and Administration.

C. PROCEDURAL MATTERS

The initial response:

[9] The Applicant made the request on 7 September 2013, but no initial decision was given until 18 October (erroneously dated 18 September). This was one day after the Applicant requested an internal review as he was entitled to do, as explained below. There is no evidence that the Department requested an extension of the normal 30-day deadline under section 7(4).

[10] **Consequently, the timing of the initial decision was not in compliance with the requirements of section 7(4).**

The internal review:

[11] The Applicant requested an internal review on 17 October 2013, which was 40 calendar days after originally making a request for access, i.e. 10 days after the period allowed for the initial decision under section 7(4) had expired.

[12] Section 33(3) provides that "a failure to give a decision ... shall be regarded as a refusal to do so." This provision is included in the FOI Law to prevent a non-response from indefinitely holding up a request and the related appeal process. The Applicant therefore was clearly authorized to request an internal review.

[13] There is no statutory obligation to acknowledge a request for an internal review, but the Chief Officer did so on 7 November 2013.

[14] The internal review decision itself was dated 19 December 2013, and was communicated by the Chief Officer to the Applicant on 22 December 2013. This was 63 days after the Applicant initially applied for the internal review, which was far outside the period of 30 calendar days allowed for an internal review decision in section 34(3). There is no provision for an extension of the period allowed for conducting an internal review.

[15] In the absence of a response to his request for an internal review within the statutory period, the Applicant raised an appeal directly with the ICO on 28 November 2013. The appeal was accepted by the ICO on 9 December 2013.

[16] The Chief Officer seems to have been unaware that an appeal had been made when he wrote and issued the internal review decision. The Information Manager should have communicated the acceptance of the appeal to the Chief Officer in order to save him the effort of writing an internal review decision.

[17] **Therefore:**

(a) In view of the “deemed refusal” under section 33(3), the Applicant was justified in asking for an internal review on 17 October 2013, and the Information Manager’s initial decision of 18 October 2013 was no longer required as the matter had now moved on for consideration by the Chief Officer.

(b) The timing of the internal review decision was not in compliance with the requirements of the FOI Law as it was issued outside the statutory period of 30 calendar days allowed under section 34(3).

(c) The Applicant was entitled to appeal the matter to the ICO, since no internal review decision had been issued within the statutory period allowed in section 34(3) for an internal review.

(d) The fact that the ICO accepted the appeal on 9 December 2013 invalidated the need for an internal review after that date.

D. ISSUE UNDER REVIEW IN THIS HEARING

[18] Since the issues relating to access and form of access were abandoned in the course of the appeal, the only remaining issue under review is as follows:

- 1. Whether the public authority is authorized to charge a fee in accordance with section 13 of the *Freedom of Information Law, 2007* and regulation 14(1) and paragraph 11 in Schedule 3 of the *Freedom of Information (General) Regulations, 2008*.**

E. CONSIDERATION OF ISSUE UNDER REVIEW

- 1. Whether the public authority is authorized to charge a fee in accordance with section 13 of the *Freedom of Information Law, 2007* and regulation 14(1) and paragraph 11 in Schedule 3 of the *Freedom of Information (General) Regulations, 2008*.**

[19] This is the first hearing the Information Commissioner’s Office has dealt with on a question of fees. However, questions surrounding fees are an appropriate topic of an appeal since section 42(1)(d) explicitly establishes an applicant’s right to appeal on a

question whether a public authority has “charged a fee that is in contravention of this Law.”

[20] Section 13 provides:

13. (1) The communication of information may be made conditional upon the payment by the person making the request of a reasonable fee which shall not exceed the actual cost of searching for, reproducing, preparing and communicating the information.

(2) The Governor in Cabinet may make regulations providing-

(a) for the manner in which fees are to be calculated;

(b) maximum fees payable, which shall not exceed the cost referred to in subsection (1);

(c) that no fee is to be charged in relation to certain cases.

(3) For purposes of clarification, no fee shall be charged for a request for information but if the information is to be provided, the fee shall, in accordance with subsection (1), be charged for the provision of that information.

[21] Regulation 14(1) provides:

14. (1) The fees in Schedule 3 apply.

[22] Paragraphs 11 of schedule 3 provides:

FEES

This Schedule prescribes the fees for standard formats, which shall be supported (as applicable) by all public authorities providing copies of records under the Freedom of Information Law

...

11. Conversion of a paper record (text or image) into digital PDF, JPEG or TIF [sic] file format: the actual costs incurred by the authority, based on hourly rates of staff undertaking the conversion, plus the purchase cost of any carrier medium (compact disc or DVD).

The position of the Department:

[23] The Department defends the charging of reproduction fees and says that it acted entirely within the requirements of the FOI Law. It points out that it was prepared to give access by means of inspection without charging any fee, but that when copies were required, it communicated its intention to the applicant to produce an estimate of the fees in accordance with schedule 3 of the FOI Regulations, and reproductions would be provided to the Applicant once the funds had been collected.

[24] Initially providing access in the form of an inspection was particularly considered appropriate, since (a) this would allow the Applicant to narrow down and identify exactly those records he wished to have reproduced, which would save time and money, and (b) the inspection would allow the Applicant to see all the records in their full context, e.g. drawings together with associated textual documents.

[25] As explained above, in the (belated) initial decision of 18 October 2013 the Applicant was referred to the Planning Department's Publication Scheme, developed in compliance with section 5 and the schedule to the FOI Law.

[26] The Applicant would also have the right to seek a fee waiver under regulation 15, which states:

15. (1) No fee shall be charged where the chief officer or information manager is of the view that the applicant is of inadequate means or for any other good reason.

(2) An application for a waiver shall be made in writing to the chief officer or information officer setting out the grounds on which a waiver is requested.

(3) An application for a waiver shall be made no later than fourteen calendar days from the date of receipt of the estimate of the fees.

[27] The Department points to the agreement between schedule 5 of the *Development and Planning Regulations, 2013 Revision* (DPR), and schedule 3 of the *FOI (General) Regulations, 2008* stating that both the FOI Regulations and the DPR expressly provide for the charging of fees for reproductions of records.

The position of the Applicant:

[28] Paragraph 11 of schedule 3 provides that "the actual costs incurred by the authority, based on hourly rates of staff undertaking the conversion" can be charged as a fee. The Applicant argues that this should be interpreted as meaning the "costs over and above the normal cost of authority staff who have been employed in any event to undertake various tasks within any given employment position, and which on occasion may include producing copy documents relating to FOI requests."

[29] According to the Applicant, the words "based on" in paragraph 11 should be interpreted as "a convenient way to calculate a unit of cost, rather than defining the actual cost itself." He believes that the wording "actual costs" refers to "costs existing in fact", and "unless a public authority employs additional staff and/or external contractors to exclusively undertake [copying] duties, then there are no 'actual costs'".

[30] The Applicant draws attention to the fact that the parallel provisions in the UK Freedom of Information Act, 2000 (FOIA) - and presumably the related fees regulations which he does not mention - are not relevant to the question of fees in the Cayman Islands, given the significant differences in approaches, for instance the absence of a maximum "appropriate limit" in Cayman.

[31] While he cautions against "seeking to second guess what might have been in the minds of the legislators in regard to fees", the Applicant strongly believes that:

The purpose and intent of Schedule 3 fees should be to recover any additional costs incurred by a public authority in meeting its obligations to provide copies under the FOI legislation, rather than to subsidize the cost of existing permanent members of staff.

- [32] The Applicant agrees that an initial onsite inspection might be useful to identify those specific records required for reproduction, but does not believe the context argument is valid.

Discussion:

The impact of section 6(4):

- [33] Section 6(4)(b) provides:

(4) Where a record is-

*...
(b) available for purchase by the public in accordance with
administrative procedures established for that purpose,*

*access to that record shall be obtained in accordance with the provisions of ...
those procedures.*

- [34] This means that, on the question of fees, the FOI Law defers to administrative procedures established for the purpose of making a record available for purchase. The Department points out that schedule 5 of the DPR lists certain fees for the provision of copies of certain types of records held by the Department. Having read the relevant part of the DPR, I consider that schedule 5 meets the threshold in section 6(4)(b) above, since the records listed in it are “available for purchase by the public in accordance with administrative procedures established for that purpose.”

- [35] **Therefore, in relation to any records requested by the Applicant covered by schedule 5 of the DPR, the Department is entitled to apply the fees prescribed in the DPR, rather than the fees in the FOI Regulations.**

- [36] However, the question of fees relating to those requested records not covered by the DPR - and to which section 6(4)(b) therefore does not apply - must be considered under the FOI Regulations.

Fees in the FOI Regulations:

- [37] The Applicant is correct that the rules and guidance relating to fees under the UK's FOIA do not have a bearing on the question of fees under the Cayman Islands FOI legislation. On this topic the legal provisions in both countries are so different that the guidance or decisions from the UK Information Commissioner and Tribunal will not assist my interpretations.

- [38] The Applicant correctly points out that we should not try to second-guess what was in the minds of the legislators when the FOI Law and Regulations were passed in the Legislative Assembly. This is particularly so since the Law and Regulations are clear on the question of fees.

- [39] Section 10 is not in question, but I want to emphasize that it grants an applicant the right to request that responsive records be provided in whatever form he/she requires, and it obligates a public authority to provide access in the requested form, except in certain limited circumstances provided in section 10(3), of which the impact of intellectual property rights has been fully discussed in my Decision in Hearing 37-02613, already quoted above. One of the forms of inspection listed in section 10(1) is inspection, and regulation 14(2) provides that there is no fee payable if access is granted by means of inspection.
- [40] Section 13 establishes that a reasonable fee may be charged for the provision of information under the FOI Law. There is no fee for making a request itself (s.13(3)), but a fee may be charged that does not exceed the actual cost of “searching for, reproducing, preparing and communicating” the information (s.13(1)). Section 13(2) provides for regulations to be developed, including in relation to “the manner in which fees are to be calculated.”
- [41] Section 14(1) brings schedule 3 of the Regulations into force. Schedule 3 lists a number of types of records in various standard formats and lists the applicable reproduction fees. For example a public authority is entitled to charge \$1.00 for a standard black and white photocopy, and \$3.00 for reproduction of a blueprint.
- [42] Paragraph 10 of schedule 3 sets the cost of providing digital records as follows:
- 10. Provision of a digital record (text or image) in standard PDF, JPEG or TIF (sic) file format: (a) by email- no charge; (b) on compact disc or DVD - \$2.00.*
- [43] This means that there is to be no charge for providing a digital record in one of the listed formats by email. Since paragraph 11 deals with the conversion of a paper record into one of those same formats, it reasonably follows that paragraph 10 relates to records that are already held in a digital format.
- [44] The key provision is in paragraph 11 (quoted in full above). It relates to the conversion of paper into a digital PDF format, and is pertinent to the present case since the original records purportedly exist in a paper format, and have been requested by the Applicant in a PDF format.
- [45] The legislation does not support the restricted interpretation of paragraph 11 suggested by the Applicant. The meaning of “based on the actual costs” seems obvious – it plainly means that the actual costs form the basis of the fee, although I agree that it does not demand that the fee and the actual costs are absolutely identical.
- [46] Section 13(1) does not allow the fee to exceed the “actual costs of searching for, reproducing, preparing and communicating”. Therefore, any latitude in the amount of the fee would have to be in favour of the applicant. In other words, a public authority is at liberty to charge a fee that is less than the “actual costs”, but never more.
- [47] This is consistent with the practice of most public authorities not to charge any fee at all. This may be the result of a number of different considerations, for instance: (a) most requests require a response by email which mostly falls under paragraph 10 and does not involve any fees; (b) the administrative costs of receiving, processing, accounting for, etc. the very small amounts of revenue from FOI responses would in many cases exceed the

amount of the fee itself, and (c) providing information to the general public should as much as possible be free of cost. Nonetheless, where the amount of the actual costs of providing access rises, for instance where large amounts of records need to be reproduced or where the reproduction process itself is costly, a fee may be appropriate and is allowed under the Law.

- [48] The Applicant believes fees that include existing staff time amounts to “subsidiz[ing] the cost of existing permanent members of staff”. However, I disagree with this statement. The legislation does not restrict the meaning of “actual costs” as the Applicant proposes. As far as the FOI Law and Regulations are concerned the ongoing staff costs of a public authority are as much “actual” as any additional consultants fees or costs for materials relating to the reproduction requested by an applicant, and they can be taken in consideration in the determination of fees in the circumstances specified in paragraph 11 of schedule 3 of the Regulations.
- [49] This interpretation is consistent with the objectives of the FOI Law (including the intent in section 4) to grant a general right of access, while at the same time recognizing that public authorities should not be unreasonably burdened with excessive costs (e.g. in section 9(c)). I am well aware that an argument can easily be made that the general public should not have to pay for a service which it essentially has already paid for in the form of salaries and annual budgets. The general right to access under the FOI Law is an important element of good governance, and it should not be unduly obstructed by high fees or bureaucratic restraints. On the other hand, there is also an argument that FOI can be an extra burden on already cash-strapped public authorities which ought to be able to recuperate a reasonable amount for services provided to applicants, particularly if those services are onerous and exceed the cost of administering any resulting revenue.
- [50] The FOI legislation does not specify how the “actual cost” of existing staff time is to be calculated. In the Cayman Islands there is no equivalent of the UK regulation that requires staff time to be calculated at a standard rate of £25 per hour.³ No doubt, a public authority wishing to charge for staff time would have to be able to demonstrate the reasonable basis of their cost calculation, showing, for instance, evidence in the form of the hourly rate of the Information Manager and/or other staff involved in the “searching for, reproducing, preparing and communicating” in relation to an applicant’s request, and evidence of the amount of time actually spent on reproducing the requested records.
- [51] For the sake of completeness, I want to point out that regulation 15 makes provision for a fee waiver. The Department stated that it informed the Applicant of his right to request a waiver.
- [52] **In conclusion, the Department has correctly applied paragraph 11 of schedule 3 of the FOI Regulations, and is entitled to charge a fee for the conversion of paper records to digital file formats, and may include the actual cost of existing staff undertaking the conversion into the calculation of the “actual costs incurred by the authority”.**

³ *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (S.I. 2004 No. 3244), regulation 4(4)

F. FINDINGS AND DECISION

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

Findings and decision:

In my consideration of the procedural issues that came to my attention I find the following

- (a) The timing of the initial decision of the Planning Department was not in compliance with the requirements of section 7(4).
- (b) In view of the “deemed refusal” provision in section 33(3), the Applicant was justified in asking for an internal review on 17 October 2013, and the Information Manager’s initial decision of 18 October 2013 was therefore no longer required as the matter had now moved on for consideration by the Chief Officer.
- (c) The timing of the internal review decision by the Chief Officer was not in compliance with the requirements of the FOI Law as it was issued outside of the statutory period of 30 calendar days allowed under section 34(3).
- (d) The Applicant was entitled to appeal the matter to the ICO, since no internal review decision had been issued within the statutory period allowed in section 34(3) for an internal review.
- (e) The fact that the ICO accepted the appeal on 9 December 2013 invalidated the need for an internal review after that date.


In respect of the main issue for consideration in this Hearing, I find the following:

- (f) By virtue of section 6(4)(b), the Planning Department may charge the reproduction fees listed in schedule 5 of the *Development and Planning Regulations, 2013 rev.* for reproducing any records requested under the FOI Law that are listed in the said schedule.
- (g) The Planning Department is entitled to charge a fee for the conversion of paper records to digital file formats, in accordance with paragraph 11 of schedule 3 of the *Freedom of Information (General) Regulations, 2008* and may include the actual cost of existing staff undertaking the conversion into the calculation of the “actual costs incurred by the authority”. In communicating the fee to the Applicant, the Planning Department must follow the procedures in regulation 14 and offer the Applicant the option of requesting a fee waiver in accordance with regulation 15.

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 Grand 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.

A handwritten signature in black ink, appearing to read 'Jan Liebaers', with a long horizontal flourish extending to the right.

Jan Liebaers
Acting Information Commissioner

16 September 2014