

ICO Hearing 7 – 01010
Decision
Public Service Pensions Board (PSPB)

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

Summary:

An Applicant was refused access by the Public Service Pensions Board to a “*list of which sitting and former Members of the Legislative Assembly are now receiving their pensions and how long those individuals had served/are serving in the Legislative Assembly*”.

The Information Commissioner found that the responsive record does not contain personal information, and therefore its release would not constitute an unreasonable disclosure of personal information.

Statutes Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
Cayman Islands Constitution Order 1972
Cayman Islands Constitution Order 2009

Contents:

- A. INTRODUCTION**
- B. PUBLIC SERVICE PENSIONS BOARD**
- C. PROCEDURAL MATTERS**
- D. ISSUES UNDER REVIEW AT THIS HEARING**
- E. CONSIDERATION OF ISSUES UNDER REVIEW**
 - (a) The Position of the Public Authority
 - (b) The Position of the Third Parties
 - (c) The Position of the Applicant
 - (d) Discussion and Findings
- F. FINDINGS AND DECISION**

A. INTRODUCTION

- [1] On 2 June 2010, the Applicant made the following request to the Legislative Assembly (“Legislative Department”): *“Could you please release the list of which sitting and former Members of the Legislative Assembly are now receiving their pensions and how long those individuals had served/are serving in the Legislative Assembly”*.
- [2] On 30 June 2010, the Applicant, not having received a response to the Freedom of Information (“FOI”) request, contacted the Information Commissioner’s Office (“ICO”) and after intervention by my Office the Public Service Pensions Board (“PSPB”) accepted the request.
- [3] On 30 July 2010, the PSPB provided the Applicant with a formal response that they were withholding access to part of the requested record, pursuant to section 23(1) of the Freedom of Information (“FOI Law”). On the same day, the ICO informed the Applicant that there was no option of Internal Review because the Managing Director of the PSPB had been involved in the initial decision.
- [4] On 2 August 2010, the Applicant appealed the request to my Office, and as per the procedures of the ICO, an attempt was made to resolve the case through mediation. The issues were not resolved, and the matter proceeded to a formal Hearing before me.

B. THE PUBLIC SERVICE PENSIONS BOARD

- [5] PSPB is responsible for the management and administration of Public Sector pension funds/plans. They ensure efficient delivery of retirement pension benefits to public sector employees and pensioners, in accordance with relevant Cayman Islands legislation and international professional standards.

C. PROCEDURAL MATTERS

- [6] There are several procedural issues that arose in the processing of the Applicant’s request. The Applicant originally submitted the FOI request to the Legislative Department which was not the appropriate authority to handle the request. However, the Legislative Department failed to acknowledge receipt of the request and transfer it to the appropriate authority. The ICO became involved in the matter, and twenty eight days after the request was initially submitted, the PSPB provided the Applicant with a formal acknowledgment.
- [7] When a public authority receives a request under the Law, it must acknowledge receipt within ten calendar days as per section 7(3)(b) of the Law. Where the request is for a record that is held by another public authority, or the subject matter of which is more closely connected with the functions of another public authority, section 8 of the Law provides that the first authority must transfer the application, or such parts of it that may be appropriate to that other authority as soon as practicable, but in any event no later than 14 days after the request was received. The Information Manager of the initial public authority is required to inform the applicant of the transfer within ten calendar days of the transfer taking place, as per regulation 9(2) of the *Freedom of Information (General) Regulations, 2008*.

- [8] It appears that the Legislative Department has failed to apply these provisions correctly in the present case, and for future requests, the Legislative Department should ensure that all applications are properly logged, acknowledged and transferred where necessary.
- [9] Another procedural matter that needs to be addressed in this Decision involves the question of whether there was a legitimate need for an internal review of the request.
- [10] In the initial response, the Applicant was informed of their right to request that an internal review of the initial decision be conducted. It was indicated that this would be done by the PSPB's Managing Director. However, this was not sound advice as the Managing Director had already been involved in the initial decision. As such, an internal review by the same person would not only be meaningless and cause unnecessary delays, it would also be contrary to section 34(1) of the Law, which states that "*no review shall be conducted by the same person who made the decision...*".
- [11] It is critical that the PSPB identify and designate the person who will conduct internal reviews in accordance with section 34(1) of the Law. In the interest of fairness and expediency, this should not be a floating responsibility that is transferred to another person if and when the designated person has already been involved in the original decision. Instead, once the person responsible for internal reviews has been involved in the initial decision, the applicant should be advised of their right to appeal directly to the Information Commissioner.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [12] Is the record requested exempted under section 23(1) of the FOI Law?

23. (1) Subject to the provisions of this section, a public authority shall not grant access to a record if it would involve the unreasonable disclosure of personal information of any person, whether living or dead.

E. CONSIDERATION OF ISSUES UNDER REVIEW

- [13] In considering if the requested record is exempt from disclosure under section 23(1) of the FOI Law, the following points must be addressed:
- (i) Are the names of sitting and former Members of the Legislative Assembly ("MLA") who are now receiving their pensions, and how long those individuals had served/are serving in the Legislative Assembly the personal information of the pensioners?
 - (ii) If so, would the release of the information constitute an unreasonable disclosure of personal information as contemplated by section 23?
 - (iii) If so, does the public interest require disclosure of a list of which sitting and former MLAs are now receiving their pensions and how long those individuals had served/are serving in the Legislative Assembly?

(a) The position of the PSPB

[14]

(i) The PBPB submits that it has a fiduciary responsibility to serve and protect the legal owners: the participants and the pensioners of the Plans they administer and to do so in good faith. The PSPS contends that although these individuals held public offices and are paid from the public purse, the benefits they earned during this period are personal to the individual.

[15]

(ii) The PSPB has stated that the release of the information being requested would constitute an unreasonable release of personal information, but has not put forward arguments to support this position.

[16]

(iii) In applying the public interest test, the PSPB expresses that it has no assurance that [future] requests of this nature would be limited to Public Officials. It is concerned that in releasing the requested record it would not be able to protect the individuals who are the information's subjects.

(b) The position of the Third Parties

[17] Persons listed in the responsive record were invited to participate as Third Parties in this Hearing. Three individuals responded to the invitation and provided submissions in the matter.

[18] **Third Party "A"** fundamentally objected to being included in the responsive record and named as a MLA.

[19] **Third Party "B"** supported the decision of the PSPB to not release the information, "as Section 23(2) of the FOI Law is specific and exempts the PSPB from releasing such information."

[20] **Third Party "C"** confirmed that they had no objections to the release of the record, as no actual monetary amounts would be released.

[21] **I have considered the objection of Third Party "A" and am satisfied, based on the description of the Legislative Assembly given in both the Cayman Islands Constitution Order 1972 (Section 17) and the Cayman Islands Constitution Order 2009 (Section 60), that this Third Party can be considered a Member of the Legislative Assembly and should therefore be included in the responsive record.**

[22] ***Cayman Islands Constitution Order 1972, Section 17 states:***

17. (1) There shall be a Legislative Assembly for the Islands.

(2) Subject to the provisions of this Constitution, the Assembly shall consist of –

(a) the Chief Secretary, the Attorney-General and the Financial Secretary, ex officio; and

(b) fifteen elected members, who shall be persons qualified for election in accordance with the provisions of this Constitution and elected in the manner provided by any law in force in the Islands; and

(c) if he is not an elected member of the Assembly, the Speaker.

[23] **Cayman Islands Constitution Order 2009, Section 60 states:**

60. (1) *The Legislative Assembly shall consist of -*
- (a) *the Speaker;*
 - (b) *eighteen elected members, who shall be persons qualified for election in accordance with this Constitution and elected in the manner provided for in a law enacted for the purposes of section 93; and*
 - (c) *the Deputy Governor and the Attorney General, ex officio.*

(c) The position of the Applicant

[24] (i) The Applicant points to my Decision 1 – 01009 in which I found that the disclosure of a senior member of the civil service’s pay was not an unreasonable disclosure of personal information and that the public interest test also required the disclosure. The Applicant submits that *“given that [Decision] concerned the salary of a non-elected public official it must follow that it is fair and reasonable that the details, concerning those who are elected to their positions by the people and only have access to this pension by virtue of that process, are released.”*

[25] (ii) With respect to disclosure in the public interest, the Applicant further submits that *“the issue concerns public money and therefore the public have a right to know who receives funds from the public purse and why. ... the primary goal of the request is to establish which MLAs have received a pension while they are still serving... and which MLAs received a pension after only one sitting”*. The Applicant feels that the electorate needs to have this information in order to determine whether it wishes to continue supporting such policies in the future and whether [those policies] serve the public interest.

[26] The Applicant also notes that some of this information is already in the public domain as *“at least two current sitting members have publicly admitted that they are drawing their pension entitlement while still being paid as members of the country’s parliament.”*

(d) Discussion and Finding

[27] I preface my findings with the fact that 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.

[28] (i) Regulation (2) of the *Freedom of Information (General) Regulations*, defines “personal information” as:

information or an opinion (including information forming part of a database), whether true or not, and whether recorded in material form or not, about an

individual whose identity is apparent, or can reasonable be ascertained, from the information or opinion, including but not limited to-

- (a) the individual's name, home address or home telephone number;*
- (b) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations;*
- (c) the individual's age, sex, marital status, family status or sexual orientation;*
- (d) an identifying number, symbol or other particular assigned to the individual;*
- (e) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics;*
- (f) information about the individual's health and health care history, including information about a physical or mental disability;*
- (g) information about the individual's educational, financial, employment or criminal history; including criminal records where a pardon has been given;*
- (h) anyone else's opinions about the individual; or*
- (i) the individuals personal views or opinions, except if they are about someone else;*

but does not include-

- (i) where the individual occupies or has occupied a position in a public authority, the name of the individual or information relating to the position or its functions or the terms upon and subject to which the individual occupies or occupied that position, or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of those functions;*
- (ii) where the individual is or was providing a service for a public authority under a contract for services, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service; or*
- (iii) the views or opinions of the individual in relation to a public authority, the staff of a public authority or the business or the performance of the functions of a public authority.*

[29] The PSPB submits that they have a fiduciary responsibility to the pensioners they serve, but they have not demonstrated, and I see no reason why that duty would be affected by the release of this information. They admit that pensions are paid from the public purse, but contend that the benefits they earned during their tenure relate to their personal lives.

[30] The Applicant submits that MLAs who are in receipt of a pension are only entitled to that pension from the fact that they held, or currently hold, a public position.

[31] Decisions of the UK Information Commissioner in similar disputes have focused on whether the information in dispute *"relates to the third party's public or private lives."* The Commissioner there has emphasized that disclosure of information should normally only relate to an employee's public function, where decisions or actions may be accountable to

the population they serve. In my opinion, in this case, whether a MLA is drawing a pension relates to the public life of the Member. The UK Commissioner states that “*Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned*”.¹ In a 2009 decision, on a request for pension information of a former public servant, the UK Commissioner also found that “*It is clear that pension arrangements are directly linked to an employee’s work at an authority*.”² I agree with the UK Commissioner and find that in this case, whether a MLA is drawing a pension relates to the public life of that Member. I do not therefore agree with the PSPB or Third Party “B” that MLA pensions are personal information.

- [32] It is also clear to me that the information being sought falls under the exclusion in (i) set out above. The individuals concerned occupy or have occupied a position in a public authority, and the information relates to their positions or functions or the terms upon and subject to which the individuals occupy or occupied that position.
- [33] **I find that the information being requested is not personal information under the FOI Law.**
- [34] **As I have found that the information being requested is not personal information under the FOI Law, it follows that there is no need to address whether; (ii) it would be unreasonable to disclose it; and, (iii) whether the public interest test requires its disclosure.**

F. FINDINGS AND DECISION

Under section 34(1) of the FOI Law, I make the following findings and decision:

Findings:

The responsive record identified in this case, containing a “*list of which sitting and former Members of the Legislative Assembly are currently receiving their pensions and how long those individuals had served/are serving in the Legislative Assembly*” is not exempt from disclosure under Section 23(1) of the *Freedom of Information Law, 2007*, as it would not involve the unreasonable disclosure of personal information.

Decision:

I overturn the decision of the Public Service Pensions Board to withhold the responsive record under section 23(1) of the *Freedom of Information Law, 2007* and require the

¹ Information Commissioner’s Office (2008) *Freedom of Information Act. Environmental Information Regulations. The Exemption for Personal Information* Version 3, 11 November 2008, page 8 (available at: http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx) ; Information Commissioner’s Office (2007) *Data Protection Technical Guidance: Freedom of Information. Access to Information about Public Authorities’ Employees* Version 2 Final 25 April 2007 (available at: http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/public_authority_staff_info_v2.0_final.pdf)

² Information Commissioner’s Office (2009) *Lancaster City Council* 17 November 2009 FS50150198 page 5 (Available at: http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50150198.pdf)

Public Service Pensions Board to provide the Applicant with a copy of the responsive record.

Concurrently, the Public Service Pensions Board is required to forward me a copy of the cover letter together with a copy of the record it supplies to the Applicant.

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.

If judicial review has not been sought on or before 8 April 2011, and should the Public Service Pensions Board fail to provide the Applicant with the responsive record in this matter, I will certify in writing to the Grand Court the 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 February 2011