DECISION: HEARING 8 – 01610

Information Commissioner's Office

ICO Hearing 8 – 01610
Decision
Health Regulatory Services (HRS)

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
4 March 2011

Summary:

An Applicant was refused access by the Health Regulatory Services to the name of the insurance carrier who provides malpractice coverage or the insurance carrier which is used for business purposes for the Third Party.

The Information Commissioner found that the *Freedom of Information Law, 2007* applies to the record in question. However, she upheld the decision of the Health Regulatory Services to refuse access to the responsive record as disclosure of the record would involve the unreasonable disclosure of personal information of the Third Party.

Statutes Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
Health Practice Law (2005 Revision)
Health Practice Registration Regulations (2005 Revision)
Confidential Relationships (Preservation) Law (1995 Revision)

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A. INTRODUCTION

On 9 June 2010, the Applicant made the following request to the Health Regulatory Services ("HRS"): "I would like to request the name of the Insurance Carrier who provides the Malpractice coverage or the Insurance Carrier which is used for business purposes for [the Third Party]… . "

On 19 August 2010, the HRS refused access to the records citing section 23(1) of the *Freedom of Information Law, 2007 ("FOI Law")*. The Applicant appealed the matter to my Office on 30 September 2010, and as per the procedures of the Information Commissioner's Office ("ICO") an attempt was made to resolve the matter through mediation. The issues were not resolved, and the matter proceeded to a formal Hearing before me.

B. HEALTH REGULATORY SERVICES

The HRS resulted from the merger on 1 July 2008 of the Health Insurance Commission and the Health Practice Commission ("HPC"), although both Commissions continue as separate statutory bodies. The HPC derives its authority from the *Health Practice Law (2005 Revision)* ("HP Law") and its statutory functions are set out in this Law. These include "advising the Minister on policy relating to health practice in the Islands including determination of the types of health professions which should be permitted in the Islands". Under the Law, the HPC is required to approve malpractice insurance or indemnity cover used by registered practitioners.

The Mission of the Department of Health Regulatory Services, as stated on their website, is "to effectively monitor and regulate the health insurance and health care industry in the Cayman Islands." The Department also provides assistance to the public in resolving disputes regarding the provision of health insurance and health care services.

C. PROCEDURAL MATTERS

The initial processing of this request was in line with the procedural requirements of the Law. The HRS ("Public Authority" or "PA") acknowledged the request within two days of receipt and the Applicant was notified within the initial 30 calendar days that additional time would be needed to process the request. However, the dealings with the Third Party in this matter were incorrect and somewhat confusing for all involved. Below is a summary of the procedural errors, and recommendations as to how these issues should be dealt with in future.

1. A public authority is required to notify a third party only if it intends to release the third party's personal information. If the information is not personal, the third party does not need to be notified. If the information is personal, but the public authority does not intend to release it, the third party does not need to be notified.

2. The HRS informed the Applicant on day 29 that it considered the requested information personal to a third party, and that it would need to provide this party an opportunity to provide their views on releasing the record. The PA stated that a further 30 days was needed to do so. The Third Party should have been notified within 14 calendar days of the receipt of the application, if the PA intended to release the record.

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3. The Public Authority provided the Applicant with a formal response 42 days after seeking the extension of time. This was 12 days over the deadline.

In any event, the ICO invited the Third Party to be a party to the Hearing, and its submissions were received and considered by the Information Commissioner.

Another matter that needs to be addressed in this decision is the ambiguity surrounding the Internal Review of this request.

During the investigation of this appeal, it was not immediately evident if an Internal Review had been conducted. As the result of a phone conversation, the ICO's Intake Analyst discovered that the principal officer (referred to at the time as "Director") of the HRS had been involved in the initial review of this request. At this point, the Applicant should have been informed that no Internal Review would be possible, and advised to appeal directly to the Information Commissioner if the Applicant was not happy with the PA's response.

In this case, the Public Authority, at a much later stage of the appeals process and once the formal hearing had already commenced, indicated that an internal review could have been conducted at the Ministry level. It is very important to note that section 34(1)(b) of the FOI Law states that an Internal Review shall be conducted "*...by the chief officer in the relevant ministry or the principal officer of the public authority..., but no review shall be conducted by the same person who made the decision*." It is critical that the HRS identify and designate the person who will conduct Internal Reviews. This should not be a floating responsibility that is transferred to another person if and when the designated person is involved in the original decision, as this will cause confusion and unduly delay the appeals process.

D. PRELIMINARY ISSUES UNDER REVIEW IN THIS HEARING

Preliminary issues to be decided in this Hearing are:

1. Is the record requested subject to the **FOI Law**?

2. **Section 9(a) –** Is the Public Authority excused from complying with the request because the request is vexatious?

E. CONSIDERATION OF PRELIMINARY ISSUES

1. IS THE RECORD REQUESTED SUBJECT TO THE FOI LAW?

1(a) The position of the HRS

The HRS did not argue that the record requested was not subject to the FOI Law. Rather, it identified the responsive record, and has provided me with a copy. In its submission the PA states:

> It is the health care facilities' obligation under this [the Health Practice Law (2005) Revision] legislation to confirm the presence of active malpractice insurance for the practitioners utilizing their premises. The Health Practice Commission has the responsibility of approving the insurer for use in malpractice insurance. However, there is no mandate for the Health Practice Commission to actually obtain a record of each individual's malpractice carrier... Thus, they have traditionally requested that all facilities provide a copy of the certificate of indemnity for each practitioner listed as working there or proof of blanket coverage in order to maintain their facility registration. It should be clearly noted that although the name of the carrier and policy number are on the record this information is irrelevant to the Health Practice Commission Board since their only concern is the proof of its existence.

1(b) The position of the Third Party

The Third Party has submitted that the information sought does not form part of the "record" held by HRS in connection with its functions. It contends that "the Health Practice Commission's statutory functions and authority do not include any provision for holding or maintaining any form of records or information as to the identity of the malpractice insurer or carrier of medical or dental practitioners". It further notes that in the Publication Scheme of the HRS none of the functions set out include the obtaining or maintenance of records of the malpractice insurer/carrier of practitioners. In addition, the Third Party states that the requirements for registration of medical and dental practitioners as set out in the Health Practice Registration Regulations make no mention of malpractice insurance, nor is the disclosure of any such information required. The Third Party also contends that "if … the HRS has information as to the Third Party's malpractice carrier this information was acquired and is held as a result of an overzealous if understandable (mis)interpretation of its duty."

1(c) The position of the Applicant

The Applicant sees no reason why this information should not be considered a record held under the FOI Law, as it is filed within a Government Authority.

1(d) Discussion and finding – is the record requested subject to the FOI Law?

I cannot agree with the Third Party that the information sought does not form part of the "record" held by HRS in connection with its functions. The record exists and a copy has been provided to me by the HRS. The HRS did not plead that no record existed, or that no record could be found. It is surely necessary for the HRS to hold or have access to such a record in order to ensure that a health care facility and a registered practitioner is in compliance with section 15(2) of the *Health Practice Law (2005 Revision)* ("HP Law") which states:

15. (2) Whoever operates a health care facility shall –

(a) provide malpractice insurance or indemnity cover approved by the Commission for the registered practitioners employed by the health care facility;
(b) ensure that the health care facility is covered with adequate liability insurance; and
(c) ensure that persons who work at the facility under a contract of services with the health care facility have adequate malpractice and other relevant insurance,

and such malpractice insurance, liability insurance, indemnity cover and any other relevant insurance shall be obtained from an authorised insurer.

To contend that the HPC's statutory functions and authority do not include any provision for holding or maintaining any form of records or information as to the identity of the malpractice insurer or carrier of medical or dental practitioners is incorrect. Section 23 (1) of the HP Law states that:

> *The registrar shall establish and maintain, in respect of each profession regulated by the Councils, registers of the names, addresses and qualifications, and such other particulars as may be prescribed by each Council, of all persons who are registered in accordance with this Law.*

Section 28(2)(c) states that regulations may make provisions as to the documentary and other evidence which is to accompany applications for registration.

Also, regulation 3(1) of the *Health Practice Registration Regulations (2005 Revision)* ("HP Regulations") states that an application to a Council for registration shall be accompanied by "– (j) such other documents and information as the Council considers necessary in determining the application."

The fact that in the Publication Scheme of the HRS none of the functions set out include the obtaining or maintenance of records of the malpractice insurer/carrier of practitioners cannot be interpreted to mean that such records will not be held. It is obvious that various records must be provided to a regulator as proof that a regulated entity is meeting its statutory obligations.

The Third Party states that the requirements for registration of medical and dental practitioners, as set out in the HP Regulations, make no mention of malpractice insurance, nor is the disclosure of any such information required. Further to the sections of the HP Law and HP Regulations set out above, section 29(3) of the HP Law allows a Council to publish such other information derived from the registers as the Council may determine is appropriate for publication.

Finally, I cannot support the contention that the acquisition and holding of the responsive record by the HRS is an overzealous misinterpretation of its duty. A regulator must have the right to acquire and hold such documentation as is necessary to carry out its regulatory functions, including any information or record it needs in the normal course of its business.

I therefore find that the responsive record is subject to the FOI Law.

2. SECTION 9(a) – IS THE PUBLIC AUTHORITY NOT REQUIRED TO COMPLY WITH THE REQUEST BECAUSE THE REQUEST IS VEXATIOUS?

2(a) The position of the HRS

The HRS did not argue that the request was vexatious, and did not submit that it was not required to comply with the request as per Section 9(a) of the FOI Law.

2(b) The position of the Third Party

The Third Party sets out arguments as to why the request should be deemed vexatious within the meaning of section 9(a) of the FOI Law.

2(c) The position of the Applicant

The applicant states that the reasons for seeking the information do not include trying to slander or make reckless and unnecessary claims against the Third Party.

2(d) Discussion and finding – is the request vexatious?

I am not prepared to consider the Third Party's arguments as to why it considers the request vexatious. The FOI Law states that a public authority is not required to comply with a request where the request is vexatious. The Public Authority in this case has not excluded the request under the FOI Law, and has dealt with the request as required. It is not within the purview of a Third Party to make representations as to why a PA should find a request vexatious. Further guidance on vexatiousness can be found in my ICO Decision 5-00310.

F. MAIN ISSUES UNDER REVIEW IN THIS HEARING

Section 23(1) – Would disclosure of the responsive record requested involve the unreasonable disclosure of personal information?

G. CONSIDERATION OF MAIN ISSUES UNDER REVIEW

In considering if the requested record is exempt from disclosure under section 23(1) of the FOI Law, we must examine the following points:

(i) Is the name of the Insurance Carrier who provides the Malpractice coverage or the Insurance Carrier which is used for business purposes by the Third Party the personal information of the Third Party?

(ii) Would disclosure of this information constitute an unreasonable disclosure of personal information as contemplated by section 23 of the FOI Law?

(iii) Does the public interest require the disclosure of the information?

(a) The position of the HRS

(i) The PA submits that the name of a practitioner's malpractice carrier constitutes the practitioner's personal information. It points out that each practitioner in the private sector arranges for his/her own indemnity coverage and engages into this contract with the insurer.

(ii) & **(iii)** The HRS consulted one of the largest malpractice carriers in the Cayman Islands, the Medical Protection Society ("MPS") for their views on the request. The MPS advises that the UK Data Protection Act prohibits the MPS from releasing any information held on any MPS member to any third party without that member's express consent unless there is an overriding legitimate reason to share this information.

The MPS also contends that the confidentiality of matters between a member and MPS are further protected in the Cayman Islands by the provisions of the *Confidential Relationships (Preservation) Law (2009 Revision)* ("CRPL") as being "confidential information".

In considering whether it would be reasonable for this personal information to be disclosed, or whether it should be disclosed in the public interest, the HRS and the MPS set out that a patient has no grounds for correspondence with a doctor's malpractice insurance carrier. They contend that the only purpose to be served in a patient having the specific name of a practitioner's malpractice insurer would be to submit a complaint or make a claim. However, specifically, the MPS states that "a patient cannot file a complaint about an MPS member with MPS, nor can they seek compensation from MPS as a result of a member's negligent practice…" Consequently, they can see no reason why it would be reasonable or in the public interest to disclose the name of a practitioner's insurance carrier.

(b) The position of the Third Party

(i) According to the Third Party, the Applicant is seeking information pertaining and directed specifically to one individual whom the Applicant has identified. The Third Party states that particulars of the identity of the Third Party's malpractice insurer or carrier, are clearly and unequivocally personal information, just as would be information for example as to the identity of the Third Party's bank or home insurer. In addition, it is pointed out that Form (D) of the HRS Register sets out the prescribed information which pertains to each practitioner, and is made available to the public. It does not include information as to the practitioner's malpractice carrier. The Third Party states that "[t]he information contained in these registers emphasizes the division between what information which [sic] is available to the public and that information which is personal to the practitioners."

(ii) The Third Party states that the Applicant's request is an unreasonable request for personal information but does not provide further evidence.

(iii) With respect to disclosure in the public interest, the Third Party cites the definition of "public interest" in Regulation 2 of the FOI Regulations which includes "…things that may or tend to –":

(a) promote greater public understanding of the processes or decisions of public authorities;
(b) provide reasons for decisions taken by Government;

and contends that the disclosure of the responsive record would not result in either of these.

(c) The position of the Applicant

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.

(i), **(ii)** & **(iii)** The Applicant states that the information is registered by the Health Regulatory Services as their requirement, and that it is for the benefit and protection of the general public and patients why such information is required. It is further stated that the Applicant is seeking the information to be able to follow up on, and find some recourse from, malpractice that was allegedly done by the Third Party.

(d) Discussion and Finding

(i) As per Regulation (2) of the FOI Regulations:

> *"personal information" means 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.

Personal information must first be about an identifiable individual. Most of the time, this means that the name of the individual is contained in the record but, in other cases, it may be possible to identify an individual through some other information in the record. In any situation where the identity of the individual can be ascertained or deduced by the information in the record, that information is personal information for the purposes of the FOI Law, unless it is excluded from the definition of personal information.

The responsive record itself contains a number of details and does contain personal information of the Third Party, such as their name and address. However, this information is already in the public domain, and it is not in question here.

The responsive record also refers to the qualifications of the Third Party, the name of their insurer, and the term of the coverage. The qualification details pertain to the Third Party's educational background and in turn their eligibility for coverage. The name of the insurer and the term of coverage are associated with the Third Party in a business and professional capacity. This information is obviously about, and linked to this individual, in the sense that it provides particular, biographical data about this individual.

In my opinion, therefore, the record responsive to this request contains personal information for the purposes of the FOI Law.

(ii) Having found that the "name of the insurance carrier who provides malpractice coverage or the insurance carrier which is used for business purposes for [the Third Party]..." constitutes personal information, I must now decide whether disclosure of that information would be *unreasonable*.

Section 23 of the FOI Law states:

> *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.*

Public authorities cannot automatically assume that the FOI Law protects all personal information from disclosure by virtue of section 23. The only personal information protected is that which would be *unreasonable* to disclose.

The Common Law reasonableness test is relevant: what would the proverbial "reasonable man" make of this case? In this sense it is important to note that it is not the mind of the "reasonable man of ordinary susceptibilities" which should be examined – i.e. the average man in the street - but the mind "of "a reasonable person of ordinary sensibilities… placed in the same position" as the medical practitioner in this case.[1]

In determining what is unreasonable, it is important to consider all of the circumstances relevant to the request, including the sensitivity of the information, the potential prejudice to the privacy of the individual, the potential prejudice to the information-gathering by the Regulator, the age of the record, whether the information is necessary for a fair determination of someone's rights, the social context, and whether normal procedures have been followed.[2] It is also important to make the distinction, in this case, between a public servant or public authority, and a private individual.

Is the information sensitive?

In my opinion, in this case, the fact that a practitioner has in place the required insurance relates to the business or professional life of the practitioner, but the name of the specific insurer relates to the private life of the practitioner, as this is a specific contract negotiated and agreed by the practitioner or by the health care facility in which the practitioner works. Information in the responsive record could therefore be sensitive to the individual.

Would disclosure prejudice the privacy of the individual?

It is the case that even though a regulator may require certain details from a regulated entity, there is an expectation of confidentiality with respect to some of the information submitted to a regulator. Given that this information is not made available to the public by the HRS in the normal course of its business, a practitioner might reasonably expect that it be held in confidence by the HRS.

Would disclosure prejudice the Regulator's information gathering?

Given that medical practitioners are required by law to make the requested information available to the Regulator, I do not believe that there is a risk that disclosure under FOI would have a negative impact on the ability of HRS to carry out its functions in protection of the public.

Has the information "expired"?

The responsive record was current at the time the request was made. As such, I cannot find that the age of the record is a factor in favor of finding its disclosure more reasonable.

Is the information required for the fair determination of someone's rights?

As further explained below, this information could not be used by the Applicant as expected to assist in seeking recourse from alleged malpractice. Therefore, the

[1] *Campbell v MGN Ltd* [2004] 2 All ER 995 para 99
[2] These, or similar considerations are standard in many Freedom of Information and Privacy laws, including the British Columbia, Alberta and Ontario Freedom of Information and Protection of Privacy Acts.

withholding of the record will not affect the Applicant's rights. Also, in this case, the practitioner has an expectation of confidentiality, has decided to withhold this personal information, and has a right to do so.

Does the social context render disclosure reasonable?

I have found that the industry norm is for disclosure to be by the practitioner or with the consent of the practitioner. In this case, the practitioner has not consented to the release and the social context does not seem to lend itself to the information being disclosed by the Regulator. In addition, the Third Party in this case is a private practitioner, not paid for by public funds, and whose services are not mandatorily used by the general public, but used, instead, as a matter of choice. Under these circumstances, I believe that disclosure of the responsive record without the consent of the practitioner would be an unreasonable invasion of privacy.

Is there any suggestion of procedural irregularities?

I have found no procedural irregularities relating directly to the disclosure of the responsive record. Procedural matters relating to the handling of the FOI request are addressed above.

On balance, I conclude that the disclosure of the name of the Third Party's insurer by the HRS would be an unreasonable disclosure of personal information.

(iii) Having found that the name of the insurance carrier who provides malpractice coverage or the insurance carrier which is used for business purposes for the Third Party constitutes personal information, and that disclosure of that information would be unreasonable, I am now required to apply the public interest test.

Section 26 of the FOI Law 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.*

The "public interest" in section 2 of the Regulations "means, but is not limited to, things that *may or tend to*:

> *(a) promote greater public understanding of the processes or decisions of public authorities;*
> *(b) provide reasons for decisions taken by Government;*
> *(c) promote the accountability of and within Government;*
> *(d) promote accountability for public expenditure or the more effective use of public funds;*
> *(e) facilitate public participation in decision making by the Government;*
> *(f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;*
> *(h) deter or reveal wrongdoing or maladministration;*

(i) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or

(j) reveal untrue, incomplete or misleading information or acts of a public authority.

The threshold under this section is whether disclosure "may or tend to" achieve any of the articulated outcomes. An examination of the definitions of "may" or "tend to" indicate that the standard of proof required for the public interest test override is relatively low. Therefore, a high probability or great certainty is not necessary to release records in the public interest. A record must be released if its release may or tend to achieve one of the outcomes.

The HRS is responsible for insuring that all the requirements for insurance have been met, and if they are not, a practitioner is struck from the Register. The Register, which contains basic information on each practitioner, is available to the public and can confirm that all the requirements for registration of a practitioner have been met. As such, I am satisfied that none of the above, or other, public interest factors apply to the provision of the responsive record.

I conclude that the disclosure of the name of the Third Party's insurer would not be in the public interest.

H. DISCUSSION

In this case, it is helpful to look at what benefit would be served to the Applicant, and indeed the public at large, in disclosing this information. While it is not necessary for an applicant to state why a certain record is being requested, in this case, a reason has been given by the Applicant, and it is helpful to examine this reason, and determine whether or not the document would be useful to the Applicant.

The Applicant is seeking the information in order to find some recourse from alleged malpractice. However, from the representations made by the HRS and the MPS, it is clear that access to the responsive record will not facilitate the seeking of recourse. In the course of this Hearing, it has emerged that the Applicant has not yet sought, for whatever reason, assistance with their grievance from the HRS. The HRS submits that:

> If they were aware of the reason that the applicant was making the request, the applicant would have been informed of the two other avenues for "recourse" … as follows:
>
> 1. A complaint letter can be written directly to the Medical and Dental council (MDC) citing the practitioner's actions. The MDC is responsible for the registration of Physicians, Dentists and Dental auxiliary practitioners. The possibility of warning, suspension, and revocation of the practitioner's registration are the tools available to the Council if negligence is discovered.
> 2. The Court is a Government Agency that also handles grievances due to malpractice of a practitioner.

> The release of this practitioner's "personal" information would not replace a formal letter of complaint to the MDC or an application to the Court; and as such would not be of "benefit" to anyone.

While the Applicant indicates that "further legal avenues" have been considered, no evidence of a complaint to the MDC or any other regulatory body has been submitted. I do not see where the provision of the responsive record will assist the Applicant or the general public in any way.

The HRS should consider making public further information, such as the fact that the necessary insurance is in place for practitioners or health services facilities. While this is clearly stated in their Mission Statement and website, the HRS may consider further publicity to ensure that members of the public are aware of the recourse available in the event of any complaints against licensed practitioners in the Cayman Islands.

During the course of this Hearing, it has been brought to my attention that there may be some inadequacies in the record keeping and procedural policies of the HRS, particularly as they relate to files dating back before the creation of the HRS and enactment of the HP Law. In order to ensure that the HRS is able to effectively carry out its vital duty of regulating the provision of health services in the Cayman Islands, I would strongly recommend that these inadequacies be addressed, and that a full audit be conducted on all the documentation held by HRS on currently registered practitioners in the Cayman Islands.

The UK Data Protection Act 1998

In the Public Authorities submission, it was stated by MPS that the *UK Data Protection Act ("Act") 1998* prohibits the disclosure of any information held on any member to a third party without that member's express consent. This argument is not entirely accurate or persuasive. Since the information is not being imparted to a third party by the insurance carrier, the Act does in fact allow for data processing (including disclosure) without the data subject's consent, e.g. where it is necessary for the exercise of public functions, or where "the processing is necessary for the purposes of legitimate interests [of a] third party" as long as it does not prejudice "the rights and freedoms or legitimate interests of the data subject"[3]. In any event, UK Act is not applicable in the Cayman Islands.

***The Confidential Relationships (Preservation) Law (2009 Revision*)**

Both the Public Authority and the Third Party submissions refer to the CRPL. The MPS states that it has been advised that "…the confidentiality of matters between a member and MPS are further protected in the Cayman Islands by the provisions of the Confidential Relationships (Preservation) Law (2009 Revision), as being 'confidential information' which the MPS would not be authorized to disclose without the consent of the member."

The Third Party states that "[t]he Third Party's insurer/carrier will not engage with the applicant in any dialogue, and will be bound by the provisions of the Confidential Relationships (Preservation) Law (2009 Revision), not to disclose any information respecting the Third Party to the applicant".

[3] *Data Protection Act 1998* (1998 c.29) Schedule 2 para 6(1)

In this case, the issue is not the disclosure of information by the insurer or carrier. This case involves the disclosure by a Public Authority which is the regulator of health services in the Cayman Islands. With respect to the legality of the disclosure of the information by the HRS, I quote the below argument from the report by the Freedom of Information Steering Committee (c.2008) entitled: Review of Statutory Provisions in Cayman Islands Laws which are, or may be considered to be, inconsistent with the Freedom of Information Law. This report quotes the Confidential Relationships (Preservation) Law 1995, but there is no difference in the relevant sections of the 2009 Revision.

> There is a potential conflict between the Section 6 'right of access' provision in the Freedom of Information Law and section 5 of the CRPL.
>
> Section 5 of the CRPL creates criminal offences relating to breach of confidentiality, including divulging information protected by law, (and inchoate forms of that offence) as well as obtaining and attempting to obtain such information. The offences are committed only when the information disclosed or obtained is 'confidential information' within the meaning of the CRPL. The CRPL defines 'confidential information' as:
>
> "*including information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge"*
>
> The CPRL goes on to define a 'principal' as being:
>
> *"a person who has imparted to another confidential information in the course of the transaction of business of a professional nature"*
>
> It is clear from this that, where a person imparts information concerning property to another in the course of a business or professional relationship, the recipient of the information will commit an offence if he divulges that information otherwise than in the normal course of business.
>
> The CPRL defines 'normal course of business' as:
>
> *"the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees."*
>
> Given that a 'professional person' as defined by CRPL includes *"a public or government official … and every person subordinate to or in the employ or control of such person for the purpose of his professional activities",* there will be occasions when a public authority holds records which are imparted to it by a person in the course of a business or professional relationship and this information will be deemed confidential information under the CRPL, not to be divulged except in the normal course of business.
>
> In this respect, unless one of the exceptions to the CRPL apply, (see section 3(2) of the CRPL) a civil servant could feasibly be guilty of an offence under the CRPL when responding to a request under the Freedom of Information Law, if such response is not deemed the 'normal course of business.' Given the restrictive

definition of 'normal course of business,' it is unlikely that compliance with a Freedom of Information request will fall within that definition.

I agree with this interpretation, and conclude that the CPRL would not in itself prevent the release of the record, as disclosure of the requested information in this case could be done in the normal course of business of the HRS, which includes assuring the public that the HRS has met its obligations under the HP Law and that practitioners are being properly regulated.

In addition, section 3(2)(c) of the CPRL allows for "the seeking, divulging or obtaining of confidential information… (c) in accordance with this of any other law", which would cover the provision of information relating to insurance coverage under the FOI Law by the HRS, in as far as such disclosure is not excluded, excepted or exempted under the FOI Law. Furthermore, the PA did not argue that the FOI provisions do not apply under section 3(7) of the FOI Law, which states that "nothing in this Law shall be read as abrogating the provisions of the any other Law that restricts access to records.

G. FINDINGS AND DECISION

Under section 34(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

Findings:

The responsive record which contains "the name of the insurance carrier who provides malpractice coverage or the insurance carrier which is used for business purposes for [the Third Party]..." is subject to the *Freedom of Information Law, 2007* and the request for this record is not vexatious.

The responsive record in this matter is exempt from disclosure under section 23(1) of the *Freedom of Information Law, 2007* as it would involve the unreasonable disclosure of the personal information of the Third Party. I do not find that there is an overriding public interest in disclosing the record.

Decision:

I uphold the decision of the Health Regulatory Services to withhold the responsive record under section 23(1) of the *Freedom of Information Law, 2007* and do not require the Health Regulatory Services to provide the Applicant with a copy of the record.

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.

Jennifer Dilbert
Information Commissioner
4 March 2011