DECISION: HEARING 9 - 02210

Information Commissioner's Office

ICO Hearing 9 – 02210
Decision
Cayman Islands National Insurance Company (CINICO)

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

Summary:

An Applicant was refused access by the Cayman Islands National Insurance Company ("CINICO") to the "private and confidential executive session" part of the minutes of the CINICO Board meeting of 7 September 2010.

The Information Commissioner found that the responsive record was not exempt under the *Freedom of Information Law* 2007, and ordered CINICO to release a copy of the record to the Applicant.

Statutes Considered:

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

Contents:

A. INTRODUCTION

[1] On 26 September 2010 the Applicant made a request to CINICO for "a copy of the minutes of the Board of CINICO held on the 7th of September 2010 including the "Private and confidential Executive session" part of the minutes."

[2] On 27 October 2010 the IM responded to the Applicant withholding the requested record in part, pursuant to section 12(1) of the *Freedom of Information Law, 2007* ("FOI Law"), claiming the exemption in section 20(1)(b). The IM provided a redacted version of the requested record to the Applicant, and informed the Applicant that an Internal Review of the initial decision could be sought from the "CINICO Chief Officer (Carole Appleyard)" who at the time was the Acting Principal Officer of CINICO.

[3] On 28 October 2010 the Applicant applied for an Internal Review. However, for procedural reasons further explained below, an Internal Review should not have been pursued, and the Applicant should have been advised that any appeal should be directed to the Information Commissioner. Both parties were informed of this fact, and on 23 November 2010 the Applicant made an appeal to the Information Commissioner.

[4] In accordance with the procedures of the 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. THE CAYMAN ISLANDS NATIONAL INSURANCE COMPANY

[5] The Cayman Islands National Insurance Company is a government-owned, "Class A" insurance company formed to provide health insurance coverage to civil servants (employees and pensioners) and other residents of the Cayman Islands who historically have had difficulty obtaining coverage through their employer or the private insurance market.

[6] As a government company CINICO has a Board of Directors which is appointed by the Governor in Cabinet.

C. PROCEDURAL MATTERS

[7] There are three procedural matters that need to be addressed in this Decision, respectively relating to the exemption applied by CINICO, the Internal Review process, and the late mentioning of exemptions in the CINICO submission.

Conditions for raising the exemption in section 20(1)(b):

[8] In their initial decision letter of 27 October 2010, CINICO's Information Manager ("IM") withheld part of the requested record on the basis of the exemption in section 20(1)(b) of the FOI Law, as is allowed under section 12(1). During the investigation of the matter, the ICO established that the IM was acting under the direction of the Chairman of the Board of Directors in this matter.

[9] Section 20(1)(b) provides that:

"(1) A record is exempt from disclosure if-

…

(b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;"

[10] However, use of this exemption is limited to the Minister or Chief Officer concerned, by virtue of subsection 20(2)(b), which states:

"(2) The initial decision regarding-

…

(b) subsection (1) (b), (c) and (d) shall be made not by the information manager but by the Minister or chief officer concerned"

[11] Therefore, the IM was not entitled to use the exemption. Instead, the IM should have asked the Minister or Chief Officer to determine whether the exemption could be applied, and obtain the Minister or Chief Officer's written decision to do so, before communicating it to the Applicant.

[12] Once the ICO became involved, this issue was identified, and the Information Commissioner advised the Chief Officer to provide written agreement to apply the exemption, as required by subsection 20(2)(b). However, the Chief Officer did not follow up as requested, and instead, on 26 November 2010, signed a letter conveying the findings of a purported internal review to the Applicant. The ICO received a copy of this letter with the PA's initial submission in this matter.

[13] This raises the second procedural matter that needs to be addressed in this Decision, namely whether it was correct for the request to go through the Internal Review process.

The Internal Review process:

[14] In the initial decision of 27 October 2010, the Applicant was informed of their right to request that an internal review of the initial decision be conducted by the Acting Principal Officer of CINICO. This is generally in accordance with the Law since section 34(1) states that:

"34. (1) An internal review shall be conducted-

…

(b) … by the chief officer in the relevant ministry or the principal officer of the public authority whose decision is subject to review"

[15] However, since it transpired that the initial decision had in fact been taken by the Board of Directors, of which the Chief Officer of the Ministry of Health is an *ex officio* member, the second part of section 34(1) comes into play, which provides that:

"no review shall be conducted by the same person who made the decision or a person junior in rank to him."

[16] Since the CINICO Acting Principal Officer is junior in rank to the Chief Officer of the Ministry, it would be incorrect under the FOI Law for the former to review a decision of the

latter. In order to help avoid this potentially misleading and delaying scenario in the future, it is important to note that, in any case where an IM is effectively acting on the direction of someone else, it is the higher authority, in this case the Chairman of the Board, who should sign the letter to the Applicant, not the IM.

[17] Furthermore, as explained above, the exemption in section 20(1)(b) may only be applied by the Minister or Chief Officer concerned. Therefore, in respect of this and similar exemptions listed in section 20(2), the requirements for an internal review outlined in section 34(1) cannot be met, and the applicant must be informed that any appeal should be made directly to the Information Commissioner.

[18] Further attention is drawn to the discussion of internal reviews in Decision 7-01010 (PSPB) in which the Information Commissioner made the following recommendation:

> *"It is critical that each public authority 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, wherever possible, 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, in these circumstances applicants should be informed of their right to appeal directly to the Information Commissioner."*

[19] Due to the convoluted sequence of events in the present case, the ICO initially accepted the appeal on the basis that the exemption in subsection 20(1)(b) had not been applied correctly since it was claimed by the Information Manager and not by the Minister or Chief Officer as the Law prescribes. After communicating with both parties and receiving a copy of the letter of the Chief Officer on 26 November 2010, which stated her agreement with the application of the said exemption (although placing it in the context of an Internal Review), the Information Commissioner accepted the appeal on the basis that the exemption in subsection 20(1)(b) was being claimed by the PA, and was being contested by the Applicant. This is the essential question before me.

Additional exemptions mentioned in the Hearing Submission:

[20] Although the PA had ample time to claim additional exemptions, it was only after the Hearing had commenced that the IM raised two further exemptions in the CINICO submission, hypothetically stating that these "could" apply. These additional exemptions relate to personal information purportedly discussed by the Board in the minutes, as per subsections 23(1), (3) and (4), and to proceedings of Cabinet or a committee thereof, as per subsections 19(1)(a) and (b) of the Law.

[21] Section 6(1) grants a general right to "obtain access to a record other than an exempt record". Under section 7(5) of the Law a public authority ["PA"] is obliged to state "its decision on the application" within thirty days, and where it refuses or partially refuses access it must state its reasons for doing so.

[22] 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, or in a hypothetical manner without any supporting evidence, as is the case in the PA's Submission. 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.

[23] 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.*"[1]

[24] Therefore, I do not accept that it is my duty under the Law to consider the additional exemptions hypothetically raised, without supporting evidence, and in this case I will not do so.

D. ISSUES UNDER REVIEW IN THIS HEARING

[25] **Section 20(1)(b)** – Is the responsive record exempt from disclosure because its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation?

E. CONSIDERATION OF ISSUES UNDER REVIEW

[26] In considering if the responsive record is exempt from disclosure under Section 20(1)(b) of the FOI Law, we must examine the following:

(a) Would disclosure of the "private and confidential executive session" part the minutes of the CINICO Board meeting of 7 September 2010 inhibit, or be likely to inhibit, the free and frank exchange of views for the purposes of deliberation?

(b) If so, does the public interest nonetheless require disclosure of the minutes?

The position of CINICO:

[27] **(a) & (b)** CINICO argues in favor of applying the exemption, stating that there is a general public interest to allow a Board to hold "open and frank discussions… when decisions are in process or finalized. The Board must

[1] Information Tribunal *Department for Business, Enterprise and Regulatory Reform (DBERR) v Information Commissioner and Friends of the Earth* EA/2007/0072 29 April 2007 para 42 (available at: http://www.informationtribunal.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOEfinaldecision_web0408.pdf)

have the freedom and protection to determine the best course of action for that organization without harmful interference, which could occur if certain information is made public."

[28] According to the submission, the "topics discussed in the 'Executive Session of the Board (Private & Confidential)'", as reflected in the minutes, meet this standard and therefore deserve the protection afforded by the exemption.

[29] The submission states that this conclusion is further bolstered by the concurrence of the Chief Officer in her letter of 26 November 2010, in which she stated that she had "considered [the] application for information and … upheld the original decision by the Information Manager". The Chief Officer concurs that "it is in the public interest that the record should not be disclosed", since "if the redacted information was released it could severely impact the ability of the CINICO Board to hold open and frank discussions."

The position of the Applicant:

[30] 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.

[31] **(a) & (b)** The Applicant states, as a matter of general principle, that all board meetings of Government companies should be "held in the interest of the public, and not 'Private and Confidential'". The Applicant questions whether the CINICO Board could actually have anything to discuss that was so important that it should override this general public interest in openness and transparency, and instead has to be recognized as "private and confidential".

[32] The Applicant's submission also indicates the belief that the labeling of a part of a Board meeting as "private and confidential" is a new phenomenon at the CINICO Board, only recently initiated and practiced by the current Chairman and Board.

Discussion:

[33]

(a) Section 20(1)(b) provides that:

> *"20. (1) A record is exempt from disclosure if-*
>
> *…*
>
> *(b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;"*

[34] The FOI Law does not define any of the key terms in this provision, which must therefore be afforded a normal meaning. Some guidance is also available from the English courts, the decisions of the UK Information Tribunal, and the published advice of the UK Information Commissioner.

[35] **"*Would, or would be likely to*" -** According to the *Oxford Dictionary* "would" expresses a conditional mood, and indicates "the consequence of an imagined event or situation", as where something happens when a certain condition is fulfilled.[2] The UK Information Tribunal, quoting Mr. Justice Murphy's ruling on an identical phrase in the Data Protection Act in *R (on the application of Lord) v Secretary of State for the Home Office* found that the term 'would be likely to' "*does not mean more likely than not*", but it "*connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests".* [3] Therefore, the prejudice following from release of the responsive record must either follow as a result of the disclosure, or there must be a "very significant" chance that the prejudice would follow, but this chance need not be more likely than not.

[36] ***"Inhibit"* -** According to advice from the UK Information Commissioner relating to a similarly phrased exemption in the UK's FOI Act, this term means *"to restrain, decrease or suppress the freedom with which opinions or options are expressed*".[4]

[37] ***"Free and frank"* -** According to the *Oxford Dictionary,* these terms respectively mean "*not physically restrained, obstructed, or fixed; unimpeded*", and "*open, honest, and direct in speech or writing, especially when dealing with unpalatable matters*".[5]

[38] ***"Deliberation"* –** The UK Information Commissioner considers that this term *"tends to refer to the evaluation of the competing arguments or considerations that may have an influence on a public authority's course of action. It will include expressions of opinion and recommendations but will not include purely factual material or background information. The information must reveal the 'thinking process' or reflection that has gone into a decision."*[6] In its normal, day to day meaning this term indicates "*long and careful consideration or discussion*".[7]

[39] Taking these meanings together, the exemption in section 20(1)(b) of the FOI Law intends to protect against disclosure which would result, with a certain degree of probability, in restraining the unimpeded, open and honest exchange of views expressed for the purpose of evaluating competing arguments or

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[2] http://www.oxforddictionaries.com
[3] *R (On the Application of Alan Lord) v The Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) paras 96-100. Information Tribunal *John Connor Press Associates Ltd v Information Commissioner* EA/2005/0005 25 January 2006 para 15 (available at: http://www.informationtribunal.gov.uk/DBFiles/Decision/i89/John%20Connor.pdf)
[4] Information Commissioner's Office *Freedom of Information Act. Awareness Guidance 25. Section 36: Effective conduct of public affairs.* Version 2 11 September 2008 p.5 (available at: http://www.ico.gov.uk/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/EFFECTIVECONDUCTOFPUBLIC%20AFFAIRS.ashx)
[5] http://www.oxforddictionaries.com
[6] Information Commissioner's Office *Awareness Guidance 25* p.5
[7] http://www.oxforddictionaries.com

considerations with a view to making a decision of an issue before a public authority.

[40] In the record which was made available to the Applicant, the entire section entitled "Executive Session of the Board (Private and Confidential)", comprising 15 paragraphs, was redacted by the IM on the basis of the claimed exemption, as authorized under section 12(1). The redaction also covered the marginal headings which in a general way identify the four subjects that were discussed in the "Executive Session".

[41] In order to determine whether the exemption applies to this section of the minutes, the following questions must be considered:

(i) *Does the redacted section relate to views freely and frankly expressed for the purposes of deliberation?*

[42] Obviously, for a record to have any prospect of protection under this exemption it is a prerequisite that the record must actually document a free and frank deliberation in the first place. I can think of no circumstances where free and frank deliberation would be inhibited by the release of any other record, or partial record, than the account of an actual free and frank deliberation itself. This is not to say that other exemptions may not apply.

[43] The UK Information Commissioner agrees with this reasoning, stating that the exemption "*is based on the premise that disclosure of free and frank discussions... would be likely to inhibit future deliberations... The Commissioner does not dispute the logic of this argument. However, in order for this argument to be reasonable the information that is being withheld has to contain free and frank comments*."[8]

[44] Upon review of the responsive record, I note that the four headings in the margins of the minutes of the "Executive Session" cannot be covered by the claimed exemption, since they are not a record of a free and frank deliberation. Even where an Applicant cannot have access to the contents of minutes because they are protected by an exemption, only very rarely will the table of contents, or a listing of topics under discussion in the minutes also deserve such protection. This preserves the general public's right to know what public authorities deal with, even when the content of those dealings may themselves be protected. Given their anodyne nature, and the fact that the claimed exemption clearly does not apply to them, there is no reason why the headings in the "Executive Session" should not be released.

[45] When reading the "Executive Session" section of the minutes itself, it is clear that the information which has been withheld from the Applicant is largely factual and neutral in nature. There is no apparent reason for the redacted information to be any more private or confidential than the un-redacted

[8] Information Commissioner's Office *Arts Council England Decision* FS50191595 23 November 2009 para 85 (available at: http://www.ico.gov.uk/~/media/documents/decisionnotices/2009/FS_50191595.ashx)

information which has freely been made available to the Applicant in response to their application under the Law. Surprisingly, some of the information already released to the Applicant reflects the free and frank exchange of views by the Board members, more so than the section that was redacted. However, the exemption has been claimed only in relation to the "Executive Session", and I will focus uniquely on the latter.

[46] Paragraphs 1 through 8, and paragraphs 10 through 15 of the "Executive Session" document certain facts, actions executed, and decisions taken, by various Board members, or by the Board as a whole. However, these paragraphs do not, taken either individually or collectively, record any differing views, competing arguments, expressions of opinion, or recommendations, as would be the case in a record of a free and frank deliberation. In my opinion, therefore, these paragraphs (1-8, and 10-15) do not document free and frank deliberations, and the exemption does not apply to them.

[47] Paragraph 9 states that "a discussion ensued" about a certain issue, and identifies two possible alternative outcomes in general terms. The related decision – one of the two possible outcomes - was adopted unanimously, as recorded in paragraphs 13 and 14, but does not demonstrate any difference of opinion, or does not identify who cast a dissenting vote (since no one did). It is possible that in between these two points in time – the commencement of the "discussion" in paragraph 9 and the decision and vote in paragraphs 13-14 - a free and frank discussion did take place, but the minutes do not document any individual Board members' views, positions, arguments, opinions or recommendations. Therefore, the exemption does not apply to paragraphs 9-14 either.

[48] It is important to note that a decision itself generally does not form part of deliberations, and can therefore not be protected by the exemption in section 20(1)(b), also in light of section 27 of the FOI Law which provides that public authorities *"shall make their best efforts to ensure that decisions and the reasons for those decisions are made public",* unless an exemption applies, which it does not in the present case.

[49] Consequently, the exemption does not apply to any part of the withheld information.

[50] In relation to the second question,

> **(ii)** *What is the probability that disclosure of the redacted section would restrain the unimpeded, open and honest exchange of views by the Board?*

this would apply if the exempted record constitutes a record of a free and frank deliberation, but it is irrelevant here since it has already been established, above, that the responsive record does not contain a record of free and frank deliberation.

[51] It is important to note that the FOI Law clearly recognizes the legitimate need for public authorities to conduct candid and robust discussions, make hard choices, and conduct business in the secure knowledge that an exemption to disclosure is available where applicable. My conclusions in the present case should not be mistaken for a disregard for, or an attempt at diminishing, the exemption in section 20(1)(b) which continues to offer necessary and appropriate protection where public authorities legitimately require it.

[52] Although the FOI Law provides a clear legal imperative towards openness, transparency and accountability, which are harbingers of good governance in a democratic society, the Law appropriately balances these public interests against means of protecting certain opposing interests, including the free and frank exchange of views for the purposes of deliberation, so that not everything discussed by a Board or any other public authority need under all circumstances be disclosed to the general public.

[53] However, a public authority is not at liberty to cordon off, *a priori,* a section of its activities or records, and post a "private and confidential" label on information in the name of protecting free and frank deliberation, thus effectively placing those activities or records beyond the reach of the FOI Law.

[54] I find that disclosure of the "Private and confidential Executive session" part of the minutes of the CINICO Board meeting of 7 September 2010 would not inhibit the free and frank exchange of view for the purposes of deliberation, and that the exemption in section 20(1)(b) does not apply to the responsive record.

[55]

(b) Having found that the disclosure of the responsive record would not inhibit the free and frank exchange of views for the purposes of deliberation, there is no need for me to conduct a public interest test, which would otherwise be mandated by section 26(1) of 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:

The "Private and confidential Executive session" part of the minutes of the Cayman Islands National Insurance Company (CINICO) Board meeting of 7 September 2010, is not exempt from disclosure under Section 20(1)(b) of the *Freedom of Information Law* 2007.

Decision:

I overturn the decision of the Cayman Islands National Insurance Company to withhold the responsive record under section 20(1)(b) of the *Freedom of Information Law* 2007, and require CINICO to provide the Applicant with a copy of the "Private and

confidential Executive session" part of the minutes of the CINICO Board meeting of 7 September 2010.

Concurrently, CINICO 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 Cayman Islands National Insurance Company 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.

As per section 48, if judicial review has not been sought on or before 6 May 2011 and should CINICO 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
24 March 2011