Information Commissioner's Office

ICO Hearing 37-02613
Decision

Planning Department

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

28 May 2014

Summary:

On 12 June 2013 an applicant made a comprehensive request to the Planning Department for records relating to the Kai Village Planned Area Development and minutes of the Central Planning Authority.

After an internal review by the Chief Officer, the case was appealed to the Information Commissioner's Office where a lengthy pre-hearing investigation could not resolve the dispute on a number of issues, and the matter proceeded to a formal hearing before the Acting Information Commissioner.

Numerous questions were raised in this Hearing, including issues pertaining to the Planning Department's use of:

- the exemption relating to legal professional privilege (section 17(a));
- the exemption relating to free and frank deliberation (section 20(1)(b);
- the exemption relating to the effective conduct of public affairs (section 20(1)(d);
- the exception relating to unreasonable diversion of resources (section 9(c));
- the exception relating to information already in the public domain (section 9(d)); and,
- a number of procedural issues involving sections 6(4), 7(4) and (5), 10(3), 49(1), 52(1), 54 and Schedule 1.

In hearing this case, the Acting Information Commissioner ruled that the Planning Department was justified in its use of the exemption relating to legal professional privilege, the exception on unreasonable diversion of resources, and the exception on information already in the public domain.

However, the Planning Department had failed to meet its obligations relating to providing reasons for denying access (section 7(5)), promoting best practices in terms of records maintenance (section 49(1)), and conducting a reasonable search under regulation 6(1).

The Department rectified most of these failures before this Decision was issued, by disclosing the responsive records relating to the proposed development.

The Acting Information Commissioner recommended that the Planning Department contact the Cayman Islands National Archive in order to prepare for applying the record keeping standards and tools required under the *National Archive and Public Records Law (2010 Revision).*

Statutes[1] Considered:

Development and Planning Law (2011 Revision)
Development and Planning Regulations (2013 Revision)
Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
Interpretation Law (1995 Revision)
National Archive and Public Records Law (2010 Revision)

Contents:

[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. Where several laws are being discussed in the same passages, all relevant legislation has been indicated.

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 *Development and Planning Regulations (2013 Revision)* (DPR) elicited a great deal of interest from the public. 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), three of which proceeded to an appeal and formal hearing. The present Decision addresses the first of these three hearings.

[2] The Applicant made a comprehensive request in two parts on 12 June 2013, for:

> *… any and all records held by the CPA, relating to or touching upon the KVPAD application, and in addition all records relating to or touching upon:*
>
> *1. all policies and procedures of the Planning Department and/or CPA (whether published or not) applicable to the KVPAD application (if these are available online please direct me to them so as to avoid any unnecessary paperwork);*
> *2. the absence of any obligation to consider restrictive covenants;*
> *3. service of notice being effected on the date of registration of mail utilizing addresses obtained from the Land Register;*
> *4. deemed service of notice by registered mail not being rebuttable as provided by section 53 of the Interpretation Law (1995);*
> *5. all prior decisions in which the CPA has accepted that the presumption of service arising in relation to the registration of a notice letter may be rebutted by evidence to the contrary as specified in s. 53 of the interpretation Law (1995);*
> *6. all prior decisions in which the CPA has found service of any notice to be defective;*
> *7. all other matters touching upon the adjudication of this KVPAD application*

[3] The Department responded on 26 June, and the Applicant requested an internal review on 17 July, which was conducted on 26 July. An appeal was requested on 8 August and accepted by the ICO on 14 August 2013. The matter could not be resolved informally and proceed to a formal hearing before the Acting Information Commissioner.

[4] Numerous questions were raised in this Hearing, including issues pertaining to the Planning Department's use of:

- the exemption relating to legal professional privilege (section 17(a));
- the exemption relating to free and frank deliberation (section 20(1)(b);
- the exemption relating to the effective conduct of public affairs (section 20(1)(d);
- the exception relating to unreasonable diversion of resources (section 9(c));
- the exception relating to information already in the public domain (section 9(d)); and,
- a number of procedural issues involving sections 6(4), 7(4) and (5), 10(3), 49(1), 52(1), 54 and Schedule 1.

[5] This case is somewhat unusual in a number of ways. The Applicant raised the appeal because they disagree with the non-disclosure of specific records, but also sought an answer to certain hypothetical questions in principle.

[6] This case is also unusual because the Department placed a great number of records on their website during the appeal, and released additional records right up to the point when this Hearing commenced.

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.

[9] The Current Planning section (CP) is responsible primarily for processing development applications for presentation to the Central Planning Authority (CPA) on Grand Cayman and the Development Control Board (DCB) on the Sister Islands.

C. PROCEDURAL MATTERS

[10] In the course of the appeal and Hearing, questions were raised by the Applicant regarding several duties prescribed under the FOI Law and their applicability to the request. To the extent that these are separate from the issues discussed in the main body of this Decision, I am dealing with these questions as procedural issues here. In addition, I have raised a number of procedural issues myself.

a. Did the Department meet its obligations under section 4?

[11] The Applicant raised this question in the context of the release of information by the Department in accordance with the provisions of the DPL and DPR in relation to the proposed KVPAD. The Applicant contends that the Department failed to conform to the objectives of the FOI Law, as defined in section 4(c), stating that the Applicant was disenfranchised because access was not provided in a manner that facilitates public participation in decision making.

[12] Section 4 outlines the general objectives of the FOI Law:

> *4. The objects of this Law are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely-*
>
> *(a) governmental accountability;*
> *(b) transparency; and*
> *(c) public participation in national decision-making,*

by granting to the public a general right of access to records held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information.

[13] The Applicant seeks to raise the point that section 4(c) was breached because public participation was impeded due to the Department's delay in making electronic copies of the relevant records available. The Applicant states that proper access to the necessary records was not given until 30 September 2013, which was well after the deadline for written objections to the proposed development to the CPA of 2 July 2013.

[14] To the extent that this question pertains to the timeliness of the Department's response to the FOI request under section 7(4) I will discuss it further below. I have also discussed the apparent conflict between the DPL and FOI timelines further below.

[15] Section 4 is a broad statement about the rationale for, and objectives of the FOI Law and the general right of access provided under it. It lists public participation as one of the principles the FOI Law is intended "to reinforce and give further effect to". Section 4 assists in the interpretation of the other provisions of the FOI Law, particularly where the intention of a provision may be unclear.

[16] However, section 4 is not prescriptive or enforceable, and cannot be interpreted as imposing an obligation on Government, for instance, to actively seek public participation in any particular decision it is preparing to make. Elsewhere in the FOI Law there are clear prescriptive and enforceable obligations which, for instance, oblige public authorities to disclose records under certain conditions and within defined parameters, and balanced against exemptions that may apply.

[17] **Therefore, I disagree with the Applicant's interpretation of section 4 as imposing an obligation on the Department, and no corrective steps need to be taken in this regard.**

b. Did the Department meet its obligations under subsection 7(4)?

[18] Section 7(4) states:

(4) A public authority shall respond to an application as soon as practicable but not later than-

(a) thirty calendar days after the date of receipt of the application; or

(b) in the case of an application transferred to it by another authority pursuant to section 8, thirty calendar days after the date of the receipt by that authority,

so, however, that an authority may, for good cause, extend the period of thirty calendar days for a further period, not exceeding one period of thirty calendar days, in any case where there is reasonable cause for such extension.

[19] The request was not transferred by another public authority, and subsection 7(4)(b) therefore is not engaged.

[20] The Applicant made the request on 12 June 2013, and received a response from the Department on 26 June 2013 which explained the Applicant's options for internal review and appeal. An internal review was requested on 17 July, and the Chief Officer confirmed the initial decision of the Information Manager (IM) on 26 July 2013, after which the case was appealed to the Information Commissioner.

[21] **Therefore, the Department has met its obligation under section 7(4) to respond within the statutory period of 30 calendar days.**

c. Did the IM make reasonable efforts to locate records responsive to the request as required by regulation 6(1)?

[22] Regulation 6 mandates the following:

> *6. (1) An information manager shall make reasonable efforts to locate a record that is the subject of an application for access.*

[23] As the appeal went on the IM continued to discover additional records, and disclosed them, even as the preparations for this Hearing were being finalized. This lead to a great deal of confusion, and complicated the scope of the Hearing, not least because the submissions were being written while records were still being disclosed.

[24] The Department's own submission lists numerous occasions when further records were released between October 2013 and February 2014, and its reply submission states categorically that all KVPAD records requested in 12th June 2013 have been supplied to the applicant and that none of these records [except for the records that are claimed to be legally privileged] are currently in dispute.

[25] Consequently, it is clear that the initial search was not conducted as comprehensively as it should have been, since it took several more months to find and disclose additional responsive records. However, I am satisfied that a thorough search has eventually been conducted.

[26] **Therefore, I do not consider that the IM made reasonable efforts to locate all records that were subject to the application for access at the time of the initial decision, as required under regulation 6(1). However, through the disclosure of further records, this specific failure has now been satisfactorily addressed, and no further corrective steps are required.**

<u>Perceived conflicting timelines:</u>

[27] The Applicant perceives a conflict between the 21 days granted for raising an objection to a planning application under the DPR, and the 30-day timeline of the initial FOI process. In his view it is unfair to force qualified individuals (i.e. those who have received a notice under the DPL/DPR) to use the FOI Law in order to complement the Department's own, limited disclosure of information, since under the differing time lines certain essential records may not be disclosed (under FOI) until several days after the deadline for objections has passed (under the DPR and DPL). This is not taking into account further delays due to a possible internal review and appeal under the FOI Law. The Applicant believes this raises questions of administrative fairness in respect of the planning appeal

process, and claims that he did not receive all the information he considers relevant through the standard approach of the Department, which denied him an opportunity to exercise his right to raise an informed objection.

[28] It would be *ultra vires* for me to make any statements about the fairness, or perception of fairness, of the Department's disclosure practices in the context of planning appeals in general, or in relation to the Applicant's specific rights under the DPL and DPR. This may be a question for the Complaints Commissioner, but it has no bearing on compliance with the FOI Law, and therefore I will refrain from ruling on this topic.

[29] I would like to clarify that there is no objection to using the FOI Law to complement other means of access. If access to certain records is provided under another law, it is always possible to make an FOI request for additional records.

[30] As well, I want to emphasize that section 7(4)(a) provides that the initial response to an FOI request must be provided "as soon as practicable but not later than" 30 calendar days after receipt of the application. The 30-day period is too often seen as a target, rather than a maximum allowable period for response. In other words, nothing in the FOI Law prevents a public authority from responding well before the 30-day deadline.

d. Did the Department meet its obligations under section 7(5), particularly in view of section 6(4)?

[31] Section 7(5) states:

> *(5) The response of the public authority shall state its decision on the application, and where the authority or body decides to refuse or defer access or to extend the period of thirty calendar days, it shall state the reasons therefor, and the options available to an applicant.*

[32] Section 6(4) of the FOI Law allows a response in accordance with existing procedures (i.e. outside of the FOI Law):

> *(4) Where a record is-*
>
> *(a) open to access by the public pursuant to any other enactment as part of a public register or otherwise; or*
>
> *(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 that enactment or those procedures.*

[33] In the initial decision of 26 June 2013, the IM referred in numerous instances to the provision of information under the DPL and DPR, while at the same time explaining the Applicant's rights to appeal under the FOI Law. The IM did not initially seem to have recognized that the request was more comprehensive than would be covered by the Department's routine procedures for disclosure.

[34] The Department's submission confirms this approach and states that the initial response was made under sections 15(4) and 40 of the DPL, and regulation 8 of the DPR, in the belief that these provisions override the FOI Law by virtue of section 6(4) of the FOI Law.

[35] The Department's notification framework relating to planning applications is defined by sections 15(4) and 40 of the DPL and regulations 8(12) to (12E) of the DPR.

[36] Section 15(4) of the DPL provides:

> *(4) Notice of an application for planning permission having been made to the [CPA] … shall be served in accordance with any regulations made under this Law, and the Authority shall not consider any application in the absence of evidence of service or publication, as the case may be, of such notice and unless twenty-one days have elapsed since the service or publication, as the case may be, of the last of such required notice.*

[37] Section 40 of the DPL defines the specific requirements for the service of notices, and specifies a number of means by which a notice may be served or given (e.g. by registered letter).

[38] Regulation 8(12) and (12E) of the DPR defines further requirements in respect of notification and publication in the context of planning applications, including the right of "an adjacent owner of full legal capacity" to lodge an objection to the CPA in regulation (12E).

Is section 6(4) of the FOI Law engaged?

[39] Firstly, subsection 6(4)(b) is not engaged as there is no question of providing the records for purchase.

[40] As to subsection 6(4)(a), it is clear that certain records are routinely disclosed to qualified individuals by the Department by means of inspection, as a result of the notice and appeal procedures provided under the DPL/DPR.

[41] As far as notification under the DPL and DPR is concerned, the legislation seems to suggest that "adjacent owners" will be given access to certain records in order to allow the formulation of objections to a planning application. However, a close review of the DPL and DPR shows that the legislation does not explicitly mandate the disclosure of records or information as part of the notification process, either in principle or in relation to specific records or types of records. Neither do the DPL or DPR explicitly state a general or specific requirement that records be disclosed in a particular form only, e.g. by means of inspection.

[42] The scope and form of access provided to "adjacent owners", therefore, appears to be a matter of the Department's own practices, based on its interpretation of what is required under the DPL and DPR. There is no up to date manual of policies and procedures – about which more below – and the Department's practices in this regard seem to be based on tradition, rather than explicit policy or legal provision.

[43] In my view, this does not meet the requirements of section 6(4) which stipulates that open access to the public must be "pursuant to any other enactment" and that "…access to that record shall be obtained in accordance with the provisions of that enactment".

[44] Secondly, I question whether a record disclosed in the planning process, as it is currently conceived, is "open to access by the public… as part of a public register or otherwise", as required under section 6(4)(a).

[45] The IM himself asserts that the legal provisions under DPL and DPR "demonstrate open access to the projects records", but indicates that this is only true for those individuals legally entitled to the notification, not for the general public:

> *if... a public member desired to know information about a project and did not have the rights to access that information via the planning law's notification framework then that individual would have the option to make an FOI application to access the information.*

[46] It is clear to me that access to the records routinely disclosed pursuant to the DPL and DPR, is restricted in at least two ways. The records are made available (1) to those individuals recognized as "adjacent owners of full capacity"; and, (2) for a period of 21 days only. Therefore, these records are not "open to access by the public" as required, and the Department's reliance on section 6(4)(a) fails on this point as well.

[47] The Applicant points to a further restriction: the records are disclosed by inspection in the Department's offices only. The Applicant believes this essentially constitutes a denial of access to a number of "adjacent owners", e.g. individuals who live abroad, or those not sufficiently mobile to visit the Department's offices. Given the fact that in the current case the records have been placed on a website, and that this issue therefore does not present itself (as further discussed below), I will not consider this specific issue in the context of the Department's obligations under section 7(5).

[48] **Consequently, I find that the Department's reliance on section 6(4)(a) was not justified.**

Did the Department meet its obligations under section 7(5)?

[49] As I have found that section 6(4) was not engaged, the Department should have responded under the FOI Law, both in relation to the records it routinely provides to "adjacent owners", and to the records responsive to the broader request.

[50] The quote above shows that the IM accepts this logic. However, the Department did not apply its own stated approach unequivocally or consistently. Although its initial response was (erroneously) given outside of the FOI Law, it nonetheless also informed the Applicant of the right to seek an internal review and appeal to the ICO. No reasons were given for denying access to the additional responsive records which were later discovered and disclosed. It was not until the matter had been appealed to the ICO that the Department appears to have treated the request fully under the FOI Law.

[51] This ambiguous approach on the part of the Department caused significant uncertainty and delay, increased the antagonism between the parties, and added to the complexity of the issues at stake. It is also the reason why many additional records and issues, beyond the initial decision and internal review, did not come to light until a significant amount of time had passed and the appeal process was well advanced.

[52] As communicated in Decision 9-02210, and quoted in other decisions since,

> There *is no provision in the FOI Law which would allow a [public authority] to communicate a decision, or the reasons for refusing or partially refusing access, in a piecemeal manner…*[2]

[53] Under section 7(5) an applicant is entitled to a full response to an application for access, including the reasons for withholding records, in the initial decision. He should not need to insist that a matter is dealt with under the FOI Law, before a public authority agrees to act in accordance with the FOI Law.

[54] The Department eventually corrected its course of action, and responded comprehensively and in accordance with its obligations under the FOI Law, but it did not do so in the initial decision.

Legibility of disclosed records:

[55] The Applicant raises another related issue, which is the legibility of the records that were initially provided. A number of the records were architectural drawings which had been scanned in a black and white format at a relatively low resolution. According to the Applicant this made the records "utterly useless in providing any information relating to the KVPAD whatsoever."

[56] When records are disclosed, under the FOI Law or otherwise, there is a reasonable assumption that the disclosed records or information will be legible and intelligible. This may have different connotations depending on the medium of the records, but in the case of graphic records such as plans and drawings this means that any attributes of the display or reproduction, such as colours and resolution, need to be sufficient for interpretation by the reader/viewer of all the information conveyed by the record. I understand that the subsequent release of drawings has adequately addressed this issue.

[57] **Both in terms of the erroneous application of section 6(4) and the inadequate response to the broader request, the Department's initial response did not meet the requirements of section 7(5). However, I note that the Department has adjusted its approach in the course of the Appeal, and no further corrective action is required in this regard.**

e. Did the Department meet its obligations under section 49(1)(a)?

[58] The Applicant argues that in the absence of a current internal manual of policies and procedures, the Department has contravened section 49(1)(a).

[59] Section 49(1)(a) provides the following:

> *49. (1) Every public authority shall appoint an information manager who, in addition to any duties specifically provided for under this Law, shall, under the general and specific supervision of the head of the authority concerned,-*
>
> *(a) promote in the public authority best practices in relation to record*

[2] ICO Hearing Decision 9-02210, 24 March 2011, para 22

maintenance, archiving and disposal; and
…

[60] The Applicant states:

> *The PA claims to have no current written internal policies or standard operating procedures in relation to how its personnel handle and progress planning applications from initial receipt... through to the granting of a certificate of occupancy. [This] is simply not credible...*
>
> *Under s.49(1)... there is a clear obligation placed on the PA to have maintained this manual, updating it from time to time as required. [This is] a clear breach of the FOI Law.*

[61] The Department disclosed an expired manual of "CPA Policies and Procedures" to the Applicant on 21 October 2013. By its own admission, this document has not been kept up to date for some time. The IM explained that many practices of the Department have over the years been incorporated into consecutive amendments of the DPL and DPR proper, and also referred the Applicant to a number of useful sources on the Department's web site, such as recent draft policies and application forms which together constitute the Department's current policies and procedures.

[62] I agree with the Applicant that the lack of an up-to-date, approved policies and procedures manual is not best practice.

[63] I also partially accept the IM's explanation that many of the practices that could formerly be found in the Policy and Procedures Manual have in the course of a number of revisions and amendments been incorporated into the DPL and DPR. The legislation does appear to include a number of procedural details.

[64] However, as discussed above, the DPL and DPR do not, for instance, explicitly address all matters relating to the routine disclosure of information in the context of planning applications and appeals, and there would seem to be a strong argument in favour of a more complete manual of policies and procedures to fill in some of these gaps. The fact that a draft manual exists suggests that the Department still relies on it for some practical purpose.

[65] In any event, I consider this a relatively marginal issue in terms of the FOI Law. Far more relevant to the point made by the Applicant is the *National Archive and Public Records Law (2010 Revision)* (NAPRL) which contains clear statutory requirements for best practices for record keeping in the Cayman Islands Government. For instance, the NAPRL requires that a records retention and disposal schedule be drawn up, and stipulates that the most senior officer in charge of the public authority ensure that records be created, managed and disposed of in accordance with the NAPRL. I consider that this, more than the creation of a policy manual, is what is required under section 49(1)(a).

[66] I should clarify that meeting the requirements of the NAPRL is the responsibility of the Department as a whole, as stated in section 49(1), and not only of the IM, although any IM would play a significant role in this regard.

[67] In reaching this conclusion, I have sought input from the Cayman Islands National Archive (CINA), and it seems that the Department – not unlike many other public authorities – has

not yet actively sought to bring itself in compliance with the statutory requirements of the NAPRL, although it has consulted with the National Archive on a number of record keeping issues in recent years.

[68] **Therefore, the Department did not meet its obligations under section 49(1)(a) to promote best practices in relation to record maintenance. As I am authorized to do under section 44(2)(b), I therefore recommend that the Department contact the CINA and make preparations for applying the record keeping standards and tools required under the NAPRL.**

f. Did the Department meet its obligations under section 52(1)?

[69] Section 52(1) provides:

> *52. (1) Every public authority shall maintain its records in a manner which facilitates access to information under this Law and in accordance with the code of practice provided for in subsection (3).*

[70] The Applicant contends that,

> *the PA systematically failed to maintain its records adequately, which lead to it being unable to furnish us with the requested information...*

[71] As explained above, the IM did not initially locate all responsive records. This does not appear to be due to a failure to properly maintain the Department's records, but rather to the fact that the initial response was considered within the requirements of the DPL and DPR and not under the FOI Law, as described above.

[72] There is no reason to suggest that the Department "systematically failed to maintain its records adequately" as claimed by the Applicant. The fact that, eventually, all responsive records were located once the request was considered under the FOI Law in the course of the Appeal, also negates the notion that the Department was "unable to furnish… the requested information".

[73] **The Planning Department has not failed to meet its obligations under section 52(1) to maintain its records in a manner which facilitates access to information under the FOI Law. All the relevant documents were held and were eventually considered in the context of the Applicant's request. No further action is required in this regard.**

g. Did the Department meet its obligations under paragraphs 1(d) and (e) of Schedule 1?

[74] Section 5 provides for the creation of a Schedule to the FOI Law, which contains information to be published:

> *5. (1) A public authority shall cause to be published… an initial statement of its organization and functions, containing the information specified in the Schedule.*
>
> *(2) The Schedule applies for the purposes of making available to the public the records described in that Schedule.*

[75] Schedule 1 requires each public authority to list the types of records and information it holds in its annual publication scheme, including the types of records indicated in paragraphs 1(d) and (e):

> *1. The information referred to in section 5 of this Law is-*
>
> *...*
>
> *(d) a statement of the records specified in subparagraph (e) being records that are provided by the public authority for the use of, or which are used by the authority or its officers in making decisions or recommendations, under or for the purposes of, an enactment or scheme administered by the authority with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled or subject;*
>
> *(e) the records referred to in subparagraph (d) are-*
>
> *(i) manuals or other records containing interpretations, rules, guidelines, practices or precedents;*
>
> *(ii) records containing particulars of a scheme referred to in paragraph (d), not being particulars contained in an enactment or published under this Law.*

[76] In this regards, the Applicant states that,

> *the PA has also failed to take any account of the obligations placed on it by [these] requirements...*

[77] I disagree with the Applicant's contention. The obligation imposed by section 5 and Schedule 1 is, as I said above, to publish a listing of the types of records it holds. Judging from the Department's information in the 2013 Publication Scheme (current at the time the request was made), the Department appears to have complied with this requirement.[3]

[78] While the proactive publication of certain types of information is clearly compulsory (e.g. the functions of a public authority), neither section 5 nor schedule 1 should be read as imposing an obligation to create new records where they do not already exist, such as an up-to-date policy and procedures manual for the Planning Department.

[79] As regretful as the absence of an up-to-date manual with policies and procedures may be, section 5 and Schedule 1 cannot be interpreted as imposing an obligation to create or update a manual in the first place.

[80] **Schedule 1 does not impose an obligation to create new records where they do not already exist. The Planning Department has met the obligations in paragraphs 1(d) and (e) of Schedule 1 to the FOI Law, and no further action is required in this regard.**

[3] see: http://gazettes.gov.ky/sites/default/files/gazette-supplements/Gs792013_web.pdf

D. ISSUES UNDER REVIEW IN THIS HEARING

[81] The issues that need to be decided in this hearing are:

1. **Whether records may be exempted under section 17(a).**

2. **Whether records may be exempted under sections 20(1)(b) and (d).**

3. **Whether, in regards to the CPA minutes, the Public Authority is required to comply with the request because the request would unreasonably divert the Public Authority's resources as per section 9(c).**

4. **Whether the provision of hard, or electronic copies, of the KVPAD drawings or plans would be an infringement of intellectual property rights as per section 10(3)(b), taking into consideration section 54(3).**

5. **Whether, in regard to the electronic copies of the KVPAD planning file, the Public Authority is required to comply with the request because the information requested is already in the public domain as per section 9(d).**

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Whether records may be exempted under section 17(a)?

The position of the Department:

[82] In its submission the Department gives an overview of legal professional privilege. It relies on Scott LJ's findings on the nature of legal advice privilege in Three Rivers District Council v Bank of England (No. 6) [2004] UKHL 48, in order to claim privilege in relation to four separate records, respectively dated 26 June 1989, 19 August 1994, 30 March 2001 and 31 July 2007. Later on, the submission appears to focus on only two of these records, stating that,

> *This appeal relates to four pieces of advice which were rendered to the Department of Planning, by the Attorney General's Chambers, in March 2001 and July 2007… Both documents were exempted from disclosure.*

[83] The records in relation to which privilege is claimed constitute legal advice provided by the Attorney General's Chambers in that they are legal opinions provided in response to a request from the Department.

The position of the Applicant:

[84] The Applicant has picked up on the apparent confusion about the exact number of records in relation to which legal professional privilege is being claimed, saying:

> *One might reasonably expect that four pieces of legal advice would be contained in four documents rather than two…The [public authority] has been somewhat uncertain… in respect of the number of documents over which they are claiming legal privilege. This is clearly… unsatisfactory…*

[85] The Applicant also asks why the public authority has not considered whether it would, nonetheless, be in the public interest to disclose the records.

Discussion:

[86] The Applicant correctly notes the confusion about the number of records in relation to which the exemption is claimed. This type of nebulous approach to the identification of records that are being withheld is unsatisfactory, and unnecessarily adds to the disagreement between the parties.

[87] The exact identification of all responsive records should have been completed well before this matter came to a formal hearing. I suspect that this issue is at least in part due to the ongoing discovery and disclosure of more responsive records by the IM, as late as the commencement of the Hearing, and the resulting uncertainty whether certain records were to be considered at all.

[88] Section 17(a) provides:

> *An official record is exempt from disclosure if-*
>
> *(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege; …*

[89] I have read the four documents, i.e. the communications dated 26 June 1989, 19 August 1994, 30 March 2001 and 31 July 2007, and I am satisfied that they are exempted under section 17(a) for the following reasons.

[90] All four documents are communications received by the Director of Planning from his professional legal advisor in the Attorney General's Chambers. They contain confidential legal advice within the relevant legal context, and it has not been claimed that this information has been disclosed, since. Therefore, the exemption in section 17(a) applies to these four records.

[91] The Applicant's point about public interest is incorrect. While some of the exemptions identified in the FOI Law are subject to a public interest test in accordance with section 26(1), the exemption in section 17(a), relating to legal professional privilege, is not covered by this provision. Unlike the UK's *Freedom of Information Act, 2000*, the Cayman Islands FOI Law does not subject records to which legal professional privilege applies to a public interest test.

[92] I am satisfied that a fifth record has already been disclosed in February 2014. For the avoidance of doubt, I have read the fifth record and find that it is not legally privileged, since it is not a communication between the Department and its legal professional advisor, and does not contain legal advice. I do not consider this record particularly relevant or responsive to the request.

[93] **Therefore, I find that the four documents dated 26 June 1989, 19 August 1994, 30 March 2001 and 31 July 2007 are exempted under section 17(a) as they would be privileged from production in legal proceedings on the ground of legal professional privilege.**

2. Whether records may be exempted under sections 20(1)(b) or (d)?

[94] Sections 20(1)(b) and (d) provide:

> *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;*
>
> *…*
>
> *(d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.*

[95] The Department's arguments in respect of section 20(1)(b) and (d) are closely associated with its claim under section 9(c) (unreasonable diversion of resources), which is discussed further below. Both arguments pertain to the scanning and (proactive) publication of CPA minutes on the Department's website.

The position of the Department:

[96] The Department says that CPA minutes routinely contain sections marked as "Matters from the DOP", "Matters from the Chairman" and "CPA Members Information/Discussion" which may contain information on such matters as alleged infractions of planning laws, and requests for investigation of planning violations. Disclosure of these types of information would, in the opinion of the Department, undermine the likelihood that CPA Board Members could freely voice their concerns in the future due to fear of repercussions in the community, and "could actually impede the department's investigative efforts", thereby engaging sections 20(1)(b) and (d). These exemptions respectively protect the "free and frank exchange of views for the purposes of deliberation", and the "effective conduct of public affairs".

[97] The Department states that the FOI Law needs to be applied to CPA minutes for the last 20 years, i.e. the duration of most FOI exemptions under section 6(2), to make sure no exemptions apply, and, if they do, potentially apply a public interest test, before the minutes could be disclosed or proactively published.

[98] However, the Department also states its intention that any decision made by the CPA be published without application of any FOI exemptions.

The position of the Applicant:

[99] According to the Applicant, the exemptions in sections 20(1)(b) and (d) do not apply to the CPA minutes, and the Department's statement in this regard is "inconsistent and not relevant to the current appeal".

[100] The Applicant raises the point that under the FOI Law exemptions are to be applied "on a record by record basis", and "not [in relation to] entire classes of documents with no consideration of the merits of such exemptions in individual cases", and that according to section 20(2) the exemptions in sections 20(1)(b) and (d) are to be applied by the Minister or Chief Officer, not by the IM.

[101] The Applicant also objects to the fact that the Department has not applied the public interest test in its consideration of the exemptions.

Discussion:

[102] The records described by the Department have not yet been reviewed by the Department to determine which portions of them should be exempted. The Applicant correctly remarks that this question is not relevant to the appeal.

[103] The appeals and hearing processes under the FOI Law are not intended to answer hypothetical questions about disclosure. The Law specifies the duty and powers of the Information Commissioner in reaching a decision in regards to an appeal against a decision that has previously been made by a public authority, but it does not require the Commissioner to make prognostications about the hypothetical disclosure of entire sets of records before they have even been reviewed in detail. In reaching a conclusion under section 43 I am required to look at the facts of the case after investigating the matter and hearing evidence from both sides under section 45, but I cannot engage in hypothetical scenarios which are by their very nature based on supposition and limited evidence.

[104] Questions of disclosure under the FOI Law must relate to specific records and a blanket application of an exemption to an entire category of records is unjustifiable and disproportionate. Section 12 requires that exemptions be applied only to those parts of a record that are actually exempted. This could never be achieved with a blanket approach.

[105] Given the hypothetical nature of the public authority's invocation of the exemptions, the public interest test does not come into play.

[106] **Therefore, this question is misconceived and I cannot rule on it. Once the records have been reviewed and if the public authority decides to exempt any portion of them, then the Applicant may request an appeal at that time.**

3. Whether, in regards to the CPA minutes, the Public Authority is required to comply with the request because the request would unreasonably divert the Public Authority's resources as per section 9(c).

The position of the Department:

[107] Out of 544 CPA meetings held between 1998 and 2014, 261 sets of minutes are available on the Department's website, comprising all meetings between 2007 and the present. Some 283 sets of minutes remain to be uploaded to the website. The Department is gradually placing more minutes online, covering the years 1998 to 2007, after reviewing them e.g. to identify and redact personal information, at a pace of up to 4 sets per month.

[108] The average number of pages per set of minutes is 64, but some sets are 200 pages long. The records in question are already in electronic format, but need to be reviewed under the FOI Law before uploading. The Department's IM has many other tasks, and reviewing and uploading the roughly 20,000 remaining pages would jeopardize his operational duties, e.g. his work with the Online Planning System (OPS), his work on various committees, etc. and doing so would therefore constitute an unreasonable diversion of the Department's resources.

[109] An additional 27,000 pages of CPA minutes from 1973 to 1996 have been microfilmed, and are available at the National Archive, and 87 bound volumes from 1989 to 1997 have not yet been filmed. According to the Department, scanning the remaining minutes from

the microfilm, or from the original (paper) bound volumes would also constitute an unreasonable diversion of resources under section 9(c).

[110] The IM states that the Applicant can gain access to any of the specific CPA minutes through the normal FOI process, including those between 2004 and 2007 not yet placed on the website, but that not all minutes can be made available online in short order, except at prohibitive cost. The Department also contends that

> *To reproduce these documents in 'hard copy' would be an unreasonable diversion of resources*

The position of the Applicant:

[111] The Applicant is particularly irritated by the gap in minutes from 2004 and 2007 available online. He does not agree that a rate of four sets of minutes being uploaded to the website per month is an acceptable rate, and demands faster action.

[112] The Applicant points out that the Department has only added three sets of minutes in the last several months (between September 2013 and March 2014). The ICO has confirmed with the IM that this is correct.

Discussion:

[113] The exclusion in section 9(c) states:

> *9. A public authority is not required to comply with a request where-*
>
> *…*
>
> *(c) compliance with the request would unreasonably divert its resources;*

[114] The FOI Law or Regulations do not provide further guidance on what would be, for instance, a reasonable amount of time or money to spend on complying with a request, as is the case in some other jurisdictions.

[115] The ICO has consistently asserted that public authorities should publish more of their records proactively.

[116] Proactive publication is a positive by-product of any Freedom of Information regime. The more records are disclosed upfront, the fewer formal requests under the FOI Law need to be made and processed, the more "open" Government is and the better informed the general public is. It is therefore in the interest of Government and the general public to publish as much information as possible proactively.

[117] However, proactive publication also bears a cost, and this is the point on which the Department and the Applicant disagree. The Department has recognized that it is reasonable for the public to expect that CPA minutes are freely available online (in redacted form to protect e.g. personal information), and no doubt realizes that this is a better way of making the information available than on demand under the FOI Law or via its internal procedures. Nonetheless, not all minutes or other applicable records can be placed on the internet all at once, and given the high number of documents and pages involved, the Department has taken a gradual approach and has (loosely) self-imposed an uploading schedule.

[118] There is an obvious need to balance the resources required for uploading CPA minutes to the website with other duties of the Department and the IM, but I find the Department's uploading schedule not very ambitious. At a rate of 4 sets of minutes per month it would take more than 5 and a half years to upload the remaining 283 sets. Moreover, I find it worrisome that the Department has not kept to its own, modest uploading schedule. Whatever the reason for this, it does not demonstrate a high commitment to proactive openness of the CPA minutes on the part of the Department in recent months. I would therefore urge the Department to improve this performance and clearly commit to openness by ensuring that the number of CPA minutes that is freely available online steadily increases at a reasonable rate, so that all CPA minutes will be available online within the foreseeable future.

[119] I express this criticism mildly, in the full knowledge that, despite its limited ambition in this particular regard, the Department is acting in a spirit of openness, and publishes far more records proactively than most other public authorities, and I commend it for that.

[120] In any event, the IM has not provided details on the projected costs of the uploading or reproduction, and it would not seem suitable to, for instance, outsource the evaluation of each set of minutes under the FOI Law.

[121] Under section 13, regulations 14 to 16 and schedule 2, it would be possible for the Department to charge the Applicant a reasonable reproduction fee, e.g. if the microfilmed minutes were needed in an electronic format. It is not clear to me whether this has been discussed between the parties, but in any event this aspect of reproduction does not appear to be the crux of the matter.

[122] At any time the Applicant could request specific sets of minutes but has chosen not to do so. Instead he appears to have broadly requested that thousands of pages of minutes be produced to him in a short period of time.

[123] I am satisfied that reasonable access is not impeded, and that there is no need to force the Department to incur the cost of uploading all remaining CPA minutes to the website in the immediate future in order to meet the demands of the FOI Law.

[124] **For these reasons I find that it would be an unreasonable diversion of resources to upload all CPA minutes in short order, and I agree with the Department's current approach and its application of the exclusion in section 9(c).**

4. Whether the provision of hard, or electronic copies, of the KVPAD drawings or plans would be an infringement of intellectual property rights as per section 10(3)(b), taking into consideration section 54(3).

The position of the Department:

[125] The Department relies on section 10(3)(b) of the FOI Law which states:

> *(3) A public authority may grant access in a form other than that requested by an applicant where the grant of access in the form requested would-*
>
> *…*
>
> *(b) constitute an infringement of intellectual property rights subsisting in any matter contained in the record.*

[126] The responsive records include project drawings for the KVPAD application. The Department believes that these records should not be disclosed as doing so would result in a breach of copyright. In support, the Department points to sections 3(1), (2) and (5), and 48 of the (UK) *Copyright Act, 1956*, (the Act) which was substantially adopted in the Cayman Islands in 1965 and remains in effect. These provisions establish that architectural drawings fall within the Act's category of "artistic works", that copyright subsists in original artistic works, and that their reproduction or publication is restricted under the Act.

[127] Section 9(4) of the Act states, amongst other exceptions to the protection for artistic works:

> *(4)The copyright in a work of architecture is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast.*

[128] On this basis, it is the Department's policy to allow access by inspection only, and an applicant can make notes, sketch or photograph a drawing during inspection. It states that this constitutes the correct balance between the requirements for openness, transparency and accountability in the FOI Law, and the need to protect the intellectual property rights of the architects and design professionals who have created the drawings. Any other form of access would invite plagiarism, according to the Department.

[129] The Department also points to potential security concerns where, for instance, the detailed drawings of a bank or a school could be used to threaten public safety, and declares its intention to apply the exemption in section 24 (records likely to endanger health and safety) if such access were requested. Since it has not in fact claimed this exemption, I will not consider it further.

[130] The Department furthermore states that unconditional disclosure of the drawings to FOI applicants would also constitute a breach of confidence, as many drawings are signed as being confidential. However, it has not invoked the related exemption in section 17(b)(i), and I will not consider this contention either.

[131] The Department has sought and obtained input from a number of architects in the Cayman Islands, and they broadly agree with these arguments and approaches, although some put forward an interesting alternative approach, about which more below.

[132] The Department dismisses the seemingly countervailing provision in section 54(2) of the FOI Law, because it does not have a "bona fide belief" that access is required. This section states:

> *(2) Where access to a record referred to in subsection (1) is granted in the bona fide belief that the grant of such access is required by this Law, no action for defamation, breach of confidence or breach of intellectual property rights shall lie against-*
>
> > *(a) the Government, a public authority, Minister or public officer involved in the grant of such access, by reason of the grant of access or of any re-publication of that record; or*
> >
> > *(b) the author of the record or any other person who supplied the record to the Government or the public authority, in respect of the publication involved in or resulting from the grant of access, by reason of having so supplied the record.*

[133] After these arguments, it is important to emphasize that all the drawings relating to the KVPAD, were eventually posted on the Department's website after consent had been obtained from the architect who is the copyright holder.

The position of the Applicant:

[134] The Applicant relies on section 54(3)(b) of the FOI Law, which states:

> *(3) The grant of access to a record in accordance with this Law shall not be construed as authorization or approval-*
>
> *…*
>
> *(b) for the purposes of any law relating to intellectual property rights, of the doing by that person of any act comprised within the intellectual property rights in any work contained in the record.*

[135] This indicates, according to the Applicant, that disclosure under the FOI Law is allowed and would not, in fact, be an infringement of intellectual property rights.

[136] In addressing the apparent contradiction between sections 10(3)(b) and 54, the Applicant believes that section 54(2) means that there would be no infringement if records are copied for release under the FOI Law, that section 54(3)(b) "trumps" section 10(3)(b), and that there is no specific provision in the Act, which would prevent disclosure under the FOI Law.

[137] The Applicant does not contest that the architects would lose control of copyright by making them available under the FOI Law, but believes that

> *It is simply that the copyright that exists in such documents does not extend to prevent copies of those documents being made available to individuals for private reference purposes only, i.e. non–commercial purposes under the fair dealings provisions of the UK Copyright Act 1956.*

[138] The Applicant points out that, in contradiction of the policy stated by the IM in the Department's submission, he was not allowed to take photographs of the drawings while inspecting them.

Discussion:

[139] I have commented above that it would be inappropriate for the Information Commissioner to answer hypothetical questions through the FOI Law's appeals and hearing processes, and engage in hypothetical scenarios.

[140] The question put forward in this instance is hypothetical in nature, since the drawings that are responsive to the Applicant's request have already been disclosed on the Department's website and therefore there is no longer any avenue for appeal on these grounds.

[141] **Therefore, I cannot rule on this question.**

[142] However, I do wish to provide the following additional guidance.

[143] Access and form of access are related, but separate questions, and I believe the IM has to some degree conflated them. Questions of access to a record held by Government cannot be concerned with how that record might be used in the future. This would be a shortcut to censorship, and would contradict the fundamental objectives of the FOI Law. Either a record is exempt under the Law or it is not, but, in either case, any presumed future use of a record can have no bearing on its disclosure. This principle is stated in section 6(3), which states that an applicant is not required to give any reason for requesting access. In the UK it is known as "motive blindness".[4]

[144] Admittedly, these provisions are not easily comprehensible, and we are fortunate that Lord Justice Moses has clarified similar questions relating to defamation in the recent judgment in The Governor of the Cayman Islands v The Information Commissioner Cause G 0003/2013, 23 December 2013. Neither section 10(3) nor section 54 can be used as an exemption, that is, they cannot be used to deny access. In parallel to the Judgment in the above case, if the FOI Law had intended for records in which intellectual property rights subsist to be excluded from the general right of access established in section 6(1), the FOI Law would have provided an explicit exemption for that purpose.

[145] Section 10 is not about access at all, it is about the form in which access is to be provided. It assumes that a decision is taken about access in accordance with the relevant provisions of the FOI Law, and comes into play only in regard to the form of the disclosure.

[146] Subsection 10(1) provides that access may be granted in a number of different forms. Subsection 10(2) states that public authorities must grant access in the form requested by an applicant, and subsection 10(3) defines two exceptions to this rule, namely where doing so would (a) be detrimental to the physical condition of the record, or (b) constitute an infringement of intellectual property rights subsisting in the record.

[4] Information Commissioner's Office (UK), *Freedom of Information Good Practice Guidance No. 6. Consideration of requests without reference to the identity of the applicant or the reasons for the request.* Version 1.0, October 2007

[147] I note that the expression "would … constitute an infringement" in section 10(3) sets a very high threshold of certainty. It denotes that the infringement is not just a likelihood, but a definite certainty. Infringement must not merely be likely to follow, it must definitely follow,[5] otherwise, the record must be disclosed in whatever form requested by the applicant, as per section 6(2).

[148] Subsection 54(2) provides protection from liability for breach of intellectual property rights. It provides that no action shall lie against the Government, a Minister, a public authority, or a public officer for infringement of intellectual property rights by reason of granting access under the FOI Law. This might, for instance, be the case if a copyrighted record were reproduced by an IM in order to provide it to an Applicant when its disclosure is required under the FOI Law. The "bona fide" belief of the IM in this regard is not his subjective intuition but rather his objective conclusion after careful analysis of the record in the light of the exemptions in the FOI law.

[149] Furthermore, section 54(3) prohibits the applicant in the above scenario from further publication or any other infringement of intellectual property rights subsisting within the disclosed record. It is intended for that applicant's personal use, but it cannot, for instance, be copied further.

[150] Therefore, if one of the two conditions in 10(3) applies, the public authority "may grant access in a form other than that requested by an applicant" (my emphasis). In other words, in cases where reproduction would breach intellectual property rights, access may either be granted in the requested form, or in another form that does not constitute a breach. If the former, there will be no liability for breach of intellectual property rights subsisting in the record that has been reproduced. The Law does not state a preference or impose an obligation: a public authority has the option, and it is not mandated to act in either way.

[151] Taken together, the provisions in sections 10(3), 54(2) and 54(3) mean that the following steps should be taken by a public authority dealing with a request involving a record in which intellectual property rights subsist:

a. Access is determined on the basis of the general right of access balanced against the exemptions provided in the Law, and with consideration of the public interest as required. Intellectual property rights are not taken into consideration in deciding whether access is granted;
b. If access is to be granted to a record and the form in which it has been requested would constitute an infringement of intellectual property rights subsisting in that record, the public authority may provide the record in:
    i. the requested form; or,
    ii. a different form which would not constitute a breach;
c. If a record in which intellectual property rights subsist is disclosed in a form that would constitute an infringement:
    i. there is no liability against the Government; and,
    ii. the applicant is not authorized to do anything which would further breach the intellectual property rights subsisting in the record.

[5] In this regard I refer to the findings of Justice Murphy in R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin), paras 96-100

[152] In view of the FOI Law's objectives of openness and transparency, and its bias towards openness – as for instance expressed in section 6(5) - I would expect public authorities to exercise this discretion pertaining to the form of access with great care, amongst other things, in order to avoid placing unnecessary impediments in the way of an applicant's ease of access, which I recognize can be hampered if the form of access is restricted to one that is not convenient for the applicant in the circumstances.

[153] With this in mind, I would encourage the Department to look for technological solutions besides the often inconvenient inspection of paper records. I understand that there are technological ways of providing an online equivalent of inspection, which would show an image of, for instance, a drawing while at the same time ensure that no copy can be made.[6] This would seem extremely useful in the context of planning application appeals.

[154] As well, it would seem that another potentially fruitful approach might be the separation of "project" and "building" stage drawings in the routine disclosure under the DPL/DPR, as suggested by a number of the architects polled by the Department, with the latter drawings being far more detailed and therefore more likely to be subject to plagiarism and illegal reproduction, and the former seemingly sufficient to meet the demands of the DPL and DPR and give planning notification recipients sufficient information to give a reasoned response.

5. Whether, in regard to the electronic copies of the KVPAD planning file, the Public Authority is required to comply with the request because the information requested is already in the public domain as per section 9(d).

The position of the Department:

[155] The Department posted minutes of the relevant CPA meeting (No. 17 of 2013) in which the KVPAD was discussed online, and well as the project drawings which formed part of the agenda of that meeting, with the consent of the creating architect. One landscape drawing was excluded from this, but was later provided directly to the Applicant by email in a .pdf format.

[156] The Department's views on the broader question of access to the full set of CPA minutes have been noted above. Specifically, it submits that the minutes from 1973 to 1995 have all been posted online, and that this concludes the matter.

[157] In respect of both the KVPAD drawings and the CPA minutes available online, the Department claims the exception in section 9(d) and does not believe it is required to comply with the request to provide further copies of these records as the records are already in the public domain, in the sense that they can be openly viewed by members of the public.

[6] See, for instance: http://wordpress.org/plugins/wp-copysafe-web/

The position of the Applicant:

[158] The Applicant disagrees, saying:

> *Posting the drawings to the [Department's] website as part of the CPA17/13 agenda does not constitute placing them in the Public Domain. This posting to the… website is fundamentally no different to making the documents available to be viewed by the public at the PA's offices. The definition of Public Domain is precise…*
>
> *… the drawing [provided separately as a single .pdf file by email] was the ONLY drawing to be supplied to us under our FOI Requests and in the format requested.*
>
> *… being able to view [the responsive drawings] online did not amount to them being available in the Public Domain.*

[159] The Applicant adds a printout from a website of a copyright course at the University of Illinois with the title "The meaning of "in the public domain", which in essence states that,

> *the public domain contains:*
>
> - *Everything that is not protected by copyright…;*
> - *Everything that may be used by anyone without permission.*

[160] The Applicant's argument is that "public domain" in section 9(d) of the FOI Law should be read as quoted above. Even the drawings provided, with some delay, on the Department's website, which are in colour and show full details, therefore, "did not amount to documents in the 'Public Domain'". In the Applicant's opinion all the drawings, except for the landscape drawing provided separately as a .pdf file,

> *remain outstanding to be supplied as required under our FOI Requests. The fact that other drawings are available on the PA's website is completely irrelevant in respect of the PA's obligation to supply the drawings… because they are not in the Public Domain (as defined) nor are they public records (as defined) that could be exempted from supply to us under s.9(d) and/or s.6(4)(a) of the FOI Law respectively, as has been claimed by the PA.*

Discussion:

[161] Section 9(d) states:

> *9. A public authority is not required to comply with a request where-*
> *…*
> *(d) if the information requested is already in the public domain.*

[162] The expression "in the public domain" is not defined in the FOI Law, FOI regulations, or *Interpretation Law (1995 Revision)*. I am therefore required to give the term its natural and ordinary meaning in the relevant context, which is the FOI Law.

[163] There is a satisfactory popular meaning of the expression "in the public domain", which also happens to coincide with the meaning given within the context of the FOI Law, namely: "accessible to the public".

[164] The Applicant disagrees and claims that another specific meaning should be given to the expression, namely one relevant within Intellectual Property Law. I do not agree with this assertion. The meaning of the exception in section 9(d) is clear, in that it seeks to prevent a public authority from being obligated to apply the FOI process when the requested information is already available to the applicant elsewhere. Within this context, i.e. the context of the FOI Law, the matter of copyright simply does not come into play in the interpretation of this provision.

[165] This is confirmed in a number of previous hearing decisions by the Information Commissioner, in which the term "public domain" was consistently taken to mean "accessible by the public". For instance, in a direct parallel to the present case, in Decision 13-00511 the Information Commissioner found that the exception in section 9(d) had been properly applied by the Ministry of Finance because the relevant records were "publicly available on the internet".[7]

[166] The parallel provision in the UK's *Freedom of Information Act, 2000* (FOIA) assumes the form of an exemption (FOIA, section 21) relating to "information accessible to applicants by other means".

[167] In a substantive search of UK Information Commissioner and Tribunal decisions I have not encountered a single instance when either body gave it the meaning "where no copyright applies", as proposed by the Applicant. On the other hand, it is striking that the expression "in the public domain" is consistently used interchangeably with "available to the public" in the decisions of the UK Information Commissioner and Information Tribunal in their consideration of FOIA exemption 21.

[168] Given the different language of the UK and Cayman provisions, I draw no substantive conclusions directly on the basis of UK legal interpretations, but I find the parallels significant given that the expression is used in the same context of FOI legislation.

[169] For example, in the case of Anthony Craven v The Information Commissioner the Information Tribunal concluded, under the heading "The relevance of public disclosure":

> *If the [responsive record] were fully in the public domain, there would be no purpose in requesting it under FOIA.*[8]

[170] As well:

> *Since much that is in the [responsive record] is already in the public domain, the interference with the privacy of [the subject]'s business affairs would be relatively limited.*

[171] These statements would be nonsensical if the Applicant's meaning were correct.

[172] The Applicant's interpretation would place an additional condition in the way of access. If correct, which I do not believe it is, it would not be sufficient for the record to be available for access for the exception in section 9(d) to be engaged, but it would also have to be

[7] ICO Hearing Decision 13-00511, 29 July 2011, paras 38-41. See also ICO Hearing Decisions 3-02209, para 15; 18-01311, para 28; 19-01911, para 22; 24-00612, para 68; and 26-00312, paras 17, 25, and 37;

[8] Anthony Craven v The Information Commissioner, EA/2008/0002 13 May 2008, paras 25-28, 47

free from any applicable intellectual property rights before the FOI Law could be set aside. I cannot see that this is what the provision reasonably intends.

[173] I want to make clear that I am puzzled by the Applicant's uncompromising stance. On the one hand a single landscape drawing was provided directly to the Applicant in a .pdf format, presumably by email, and this satisfied him. However, on the other hand, all the remaining KVPAD drawings are made available as part of a large .pdf file on the Department's website, yet, this does not satisfy the Applicant. I fail to see the logic of this stance.

[174] Above I have already addressed the tardiness and piecemeal nature of the Department's response, and pointed out the failure to meet its obligations under section 7(5) in its initial decision. I accept that the responsive records were not "already" publicly available at the time the request was made, but they were made accessible in the course of the FOI appeal, and I see no benefit in reaching a conclusion that does not take the current state of affairs into account.

[175] **Therefore, I am satisfied that the Department has correctly claimed section 9(d), and the requested information is already in the public domain. No further action is required in this regard.**

F. FINDINGS AND DECISION

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

Findings:

(a) Section 4 of the *Freedom of Information Law, 2007* does not impose an obligation on public authorities to release records, or actively seek public participation in its decisions. Therefore, the Planning Department had no obligations to meet under that section.

(b) The Planning Department met its obligation under section 7(4) to respond within the statutory period of 30 calendar days.

(c) The Information Manager did not make reasonable efforts to locate all records that were subject to the application for access, as required under regulation 6(1) of the *Freedom of Information (General) Regulations, 2008.*

(d) Section 6(4)(a) was not engaged, and the Planning Department did not meet its obligations under section 7(5) to give reasons for effectively denying access to other records.

(e) The Planning Department did not meet its obligations under section 49(1)(a) to promote best practices in relation to record maintenance.

(f) The Planning Department met its obligations under section 52(1) to maintain its records in a manner which facilitates access to information under the FOI Law.

(g) Schedule 1 does not impose an obligation to create records where they do not already exist. The Planning Department has met its obligations under paragraphs 1(d) and (e) of Schedule 1 of the FOI Law.

(h) The four documents dated 26 June 1989, 19 August 1994, 30 March 2001 and 31 July 2007 are exempted under section 17(a) as they would be privileged from production in legal proceedings on the ground of legal professional privilege. The fifth document has been disclosed to the Applicant.

(i) The Planning Department has correctly applied the exclusion in section 9(c) as it would be an unreasonable diversion of resources to upload, or otherwise release, all remaining CPA minutes in short order.

(j) The Planning Department has correctly applied the exclusion in section 9(d) and the requested information is already in the public domain.

Decision:

Since the Department has already addressed the bulk of the issues noted above by locating and making available the responsive records relating to the KVPAD, only the following recommendations remain to be made.

I recommend under section 44(2)(b) that the Department contact the Cayman Islands National Archive and start preparations for applying the record keeping standards and tools required under the National Archive and Public Records Law (2010 Revision), and send me a progress report within 3 months.

As per section 47 of the *Freedom of Information Law,* 2007, the complainant, or the relevant public body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.

Pursuant to section 48, upon expiry of the forty-five day period for appeals referred to in section 47, the Commissioner may certify in writing to the court any failure to comply with this Decision and the court may consider such failure under the rules relating to contempt of court.

Jan Liebaers
Acting Information Commissioner

28 May 2014