

ICO Hearing 40-02813  
**Decision**

Cabinet Office

Jan Liebaers  
Acting Information Commissioner for the Cayman Islands

22 July 2014

**Summary:**

On 19 July 2013 a request was made for “agendas and minutes of the Cabinet meetings since 1 January 2012” under the *Freedom of Information Law, 2007*.

The Cabinet Office withheld the records relying on the exemption in section 19(1)(b) relating to “consultations and deliberations arising in the course of proceedings of the Cabinet” and deferred access to reports under section 11(2)(b). It also claimed that complying with the request would constitute an “unreasonable diversion of resources”, under section 9(c).

In the course of the appeal with the Information Commissioner’s Office, all but five of the reports were disclosed, and the Applicant agreed to narrow the request to “topics, motions, decisions, and records containing material of a factual, scientific or technical nature” relating to the eight Cabinet meetings prior to 20 December 2012.

The Acting Information Commissioner found that a reasonable period of time had passed after the preparation of the outstanding five reports, and that their deferral was therefore unwarranted, and consequently ordered them to be disclosed.

The Acting Commissioner also found that complying with the narrowed request would not unreasonably divert the resources of the Cabinet Office, and returned the request to the Cabinet Office for further review and a new hearing submission in which the public authority may apply any exemption or exception (excluding section 9(c)) which it considers appropriate.

**Statutes<sup>1</sup> Considered:**

*Freedom of Information Law, 2007*

*Freedom of Information (General) Regulations, 2008*

*Public Management and Finance Law (PMFL) (2013 Revision)*

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<sup>1</sup> In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to regulations the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

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**A. INTRODUCTION**

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- [1] On 19 July 2013 the Applicant made a request for “agendas and minutes of the Cabinet meetings since 1 January 2012” under the *Freedom of Information Law* 2007 (FOI Law).
- [2] On 14 August 2013 the Cabinet Office refused access, relying on sections 19(1)(a) and (b), respectively exempting from disclosure a record which contains (a) “opinions, advice or recommendations prepared for”, and (b) “a record of consultations or deliberations arising in the course of”, proceedings of the Cabinet.
- [3] The Applicant requested an internal review and the Cabinet Secretary responded on 13 September 2013, confirming the same exemptions, and also claiming that disclosure would be an unreasonable diversion of resources pursuant to section 9(c).
- [4] On 14 September 2013 the matter was appealed to the Information Commissioner under section 42(1). The Information Commissioner’s Office (ICO) accepted the appeal on 1 October 2013.
- [5] In the course of the ICO’s pre-hearing investigation the request was narrowed down to “minutes from the eight Cabinet meetings prior to December 20<sup>th</sup>, 2012”. On 23 October 2013, the Applicant agreed to exclude the following from the request:
- a. meeting agendas.
  - b. discussions between Cabinet members or other meeting participants;
  - c. how individuals voted;
  - d. “records specifically exempted from disclosure by section 19(1)”.
- [6] The Applicant narrowed the request to the following “sections of the minutes”:
- e. topics;
  - f. motions;
  - g. decisions;

- h. “records referred to in section 19(2) of the FOI Law, i.e. records containing material of a factual, scientific or technical nature.”

- [7] On 20 December 2013 the Applicant was informed that 39 reports fell into the category of point (h) above. The Cabinet Office provided internet links to 27 of these, and 5 more were disclosed directly to the Applicant. This left an additional 7 documents in relation to which section 11(2) (deferral) was invoked. Two of these have now also been disclosed, leaving five reports subject to the claim of deferral.
- [8] On 17 January 2014 the Cabinet Office followed up with a further response to the narrowed request, continuing to rely on section 19(1)(b) in relation to the request for “topics” and “decisions”, and confirming its claim that responding to the request would unreasonably divert its resources under section 9(c). The Cabinet Office also confirmed that there were no “motions” held in relation to Cabinet minutes.
- [9] The dispute between the Applicant and the public authority could not be resolved amicably, and the matter proceeded to a formal hearing on 21 January 2014.

## **B. BACKGROUND**

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- [10] The Cabinet Office coordinates the weekly meetings of Government ministers and is responsible for the records of Cabinet and Cabinet Working Committees. The Cabinet Secretary attends Cabinet meetings as a non-voting member.
- [11] The Cabinet Office is also responsible for a number of cross-governmental policy areas, as reflected in its internal structure which includes a number of sections and departments whose work has a cross-governmental scope.

## **C. PROCEDURAL MATTERS**

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### Unreasonable diversion of resources and narrowing of the request:

- [12] In his internal review decision of 13 September 2013, the Cabinet Secretary invoked the exception in section 9(c), relating to the unreasonable diversion of resources.
- [13] Regulation 10(1) specifies what steps must be taken when applying this exception. These involve two initial steps, namely:
- (a) explaining how the request is likely to unreasonably divert resources; and*
  - (b) inviting consultation with a view to narrowing the request.*

The remainder of regulation 10 provides further details.

- [14] While the Cabinet Secretary did provide some details as to how the request is likely to divert resources, he did not invite consultation with the Applicant in order to narrow down the request, as he was required to do.
- [15] The narrowing of the request did not occur until the matter had been appealed and the ICO negotiated a narrower scope on 23 October 2013. This omission on the part of the Cabinet Office delayed the resolution of this matter by several months, which is not acceptable and must be avoided in the future.

Hearing submissions:

- [16] The Cabinet Office supplied an initial and reply submission, but the Applicant provided a reply submission only. On 27 May 2014, after the hearing had commenced, the Cabinet Office sought to have the appeal dismissed on the basis that the Applicant had not made an initial submission, and that

*...whilst the burden of proof lies with the public authority, the appeal was filed by the appellant and his grounds for filing the appeal need to be stated. A mere request for an appeal is insufficient and makes a mockery of the appeal process. It is trite law that the appellant should make out his case in order for the respondent to know what to answer to. His failure to do this is in effect a breach of natural justice as the respondent is unaware of the case that is being made against him.*

- [17] I reject this argument, since it is plainly obvious what is required of a public authority in an appeal under section 42, and specifically of the Cabinet Office in this particular appeal.

- [18] The legal context is provided by the following sections:

- Section 6(1) establishes a general right to access Government records, except where these records are exempted in the FOI Law.
- Section 6(3) states that an applicant is not required to give any reason for requesting access to a record.
- Section 7(5) requires that when a public authority responds to an application under the FOI Law, it must state its decision and provide reasons for any withholding or deferral of access.
- Section 42(1) provides an applicant the right to make an appeal, when the other means of redress have been exhausted. It does not require that the applicant provide reasons for the appeal.
- Section 43(2) places the burden of proof in any appeal on the public authority to show that it acted in accordance with its obligations under the Law.

- [19] The FOI Law provides that all Government records are to be disclosed upon request, unless they are exempted or excluded from the application of the Law. When an applicant's request for access to a record is denied, the public authority which is dealing with the request is required to meet its obligations under sections 6(1) and 7(5) by giving reasons for withholding the records in whole or in part. Specifically in an appeal, the burden of proof is squarely on the public authority to demonstrate its lawful reasons for withholding a record. It is not for the applicant to argue why

a record should be disclosed, but for the public authority to demonstrate why it should not, if it is so minded.

- [20] Although an applicant is invited to provide further details to help his case, he is not obligated under the FOI Law to do so in order for the appeal to proceed. As the Information Commissioner has stated in numerous hearing decisions,

*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 is on the public or private body to show that it acted in accordance with its obligations under the FOI Law.*

- [21] In the present case, the Applicant has made it clear throughout the case that he wishes to gain access to the requested records, and the Cabinet Office is withholding a significant portion of the records requested, for the stated reasons. The request for the records and the Cabinet Office's refusal have both been indicated in the ICO's Receipt of Appeal letter of 1 October 2013 and in the Hearing Fact Report agreed by both parties on 3 April 2014. The basis of the appeal is therefore clear, and a submission from the Applicant is not required.

- [22] It is also clear that the Cabinet Office owes the Applicant an explanation of the lawful reasons for withholding access. In the context of the present hearing the correct vehicle for communicating these is the public authority's hearing submission. There is therefore no question of ambiguity when an applicant does not provide a submission, as claimed by the Cabinet Office, and the present appeal is correctly constituted, and will proceed on this basis.

The scope of the request:

- [23] There was some confusion whether meeting agendas continue to be included within the scope of the request. The Applicant withdrew the request for agendas on 23 October 2013, but at the same time explicitly included "meeting topics" in the narrowed request. The Applicant's reply submission clarifies that he wishes meeting agendas included within the scope of the hearing.

- [24] Since the Cabinet office has made arguments regarding agendas, it is clear that it was not in doubt whether agendas were to be included, and I will allow the inclusion of meeting agendas within the scope of the request, whether they are called "meeting topics", "agendas" or otherwise.

- [25] The Applicant's reply submission also belatedly reverses the narrowing of the request, saying:

*Unless the Commissioner finds that it would truly be an "unreasonable diversion" to produce records from January 2012 –July 2013, I would like to have the records from that entire time period, not just the meetings prior to December 20, 2012.*

- [26] I do not approve of this approach. The ICO expends a lot of resources on the investigation, mediation and hearing of each appeal, and the process is not well served by uncertainty, either in the form of a public authority claiming late exemptions, or an applicant changing his mind about the scope of the request at the last possible time. The current appeal will proceed on the basis of the narrowed request as agreed between the parties on 23 October 2013, and as documented in the Notice of Hearing and Fact Report. If the Applicant wishes to make a request for the records of the entire time period, he may file a new request.

## **D. ISSUES UNDER REVIEW IN THIS HEARING**

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

- 1. Whether the deferral in section 11(2) was correctly applied to seven reports provided to Cabinet during the eight meetings prior to 20 December 2012.**
- 2. Whether compliance with the Applicant's request in regard to the records of topics discussed, and decisions taken, in the course of eight Cabinet meetings prior to 20 December 2012 would unreasonably divert the Cabinet Office's resources in accordance with section 9(c).**
- 3. Whether disclosure of the records of topics discussed, and decisions taken, in the course of eight Cabinet meetings prior to 20 December 2012 are exempt by reason of section 19(1)(b).**

## **E. CONSIDERATION OF ISSUES UNDER REVIEW**

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**Issue 1: Whether the deferral in section 11(2) was correctly applied to seven reports provided to Cabinet during the eight meetings prior to 20 December 2012.**

[28] Section 11(2) provides:

*(2) A public authority may defer the grant of access to a record-*

*(a) if publication of the record within a particular period is required under the provisions of any enactment, until the expiration of that period;*

*(b) if the record was prepared for presentation to the Legislative Assembly or for the purpose of being made available to a particular person or body, until the expiration of a reasonable period after its preparation for it to be so presented or made available to that person or body;*

*(c) if the premature release of the record would be contrary to the public interest, until the occurrence of any event after which or the expiration of any period beyond which, the release of the record would not be contrary to the public interest.*

The position of the public authority:

[29] In its submission, the Cabinet Office clarifies that the seven reports in question consist of five financial reports, one report on the National Housing Development Trust (NHDT), and one report on the construction of houses under the Affordable Housing Initiative (AHI).

[30] The latter two reports were disclosed in the course of the hearing, and are therefore no longer at issue.

- [31] The Cabinet Office has not claimed that section 11(2)(a) applies, and section 11(2)(c) was only claimed in respect of the NHDT report which has now been disclosed. Therefore, only section 11(2)(b) needs to be considered in relation to the five remaining financial reports.
- [32] Two of the five reports relate respectively to the Portfolio of the Civil Service and the Cabinet Office itself, and cover the financial year which ended in June 2012. The other three relate to the Tourism Attractions Board (TAB) and cover the years 2007, 2008 and 2009, although they are claimed to have been prepared for tabling in the Legislative Assembly (LA) as late as 2012.
- [33] Section 11(2)(b) is being relied on in relation to all five documents: the Cabinet Office does not believe that a reasonable period has expired, but does not provide any further reasoning to support this claim or state what a reasonable amount of time might be in its opinion.

The position of the Applicant:

- [34] In his reply submission, the Applicant questions whether “Cabinet is justified in deferring access to records dating back to as early as 2007”, since “access delayed is access denied”.

Discussion:

- [35] Before proceeding with my discussion of the five outstanding report, I want to clarify that, in my opinion, the reasons provided by the Cabinet Office for initially deferring the NHDT report under section 11(2)(c) were incorrectly formulated. The Cabinet Office stated that disclosure of the report would be contrary to the public interest as it would result in the “dissemination of information that had not had the benefit of further review and reassessment by the Auditor General”. The review by the Auditor General was being conducted “with the intention of making necessary corrections”. However, when the ICO contacted the Office of the Auditor General (OAG), it was clear that the auditors never intended to make any corrections, and that the data would not be altered. The OAG subsequently published the report on its website without any changes being made. I would urge the Cabinet Office, and all public authorities that present arguments on the applicability of provisions of the FOI Law, to make sure that their arguments are factually correct.
- [36] The five outstanding financial reports in question are:

1. Deputy Governor - Financial Statements of the Portfolio of the Civil Service for the year ended 30<sup>th</sup> June 2012;
2. Ministry of Finance Tourism and Development (MFTD) – Financial Statements of Cabinet Office for the year ended 30<sup>th</sup> June 2012;
3. MFTD – Financial Statements of TAB for the year ended 30<sup>th</sup> June 2007;
4. MFTD – Financial Statements of TAB for the year ended 30<sup>th</sup> June 2008;
5. MFTD – Financial Statements of TAB for the year ended 30<sup>th</sup> June 2009

Items 1 and 2:

- [37] The first two reports (items 1 and 2 above) are subject to section 44 of the *Public Management and Finance Law (PMFL) (2013 Revision)*, which requires that,

*44. (1) An annual report of a ministry or portfolio shall be presented to the Governor in Cabinet for review within four calendar months after the end of each financial year.*

The annual report in question includes financial statements by virtue of section 44(2) of the PMFL.

[38] The presentation of the financial statements is governed by subsection 44(5) which requires that,

*(5) The annual report of each ministry or portfolio shall be presented by the relevant minister or official member to the Legislative Assembly to review at the same time as the Government annual report is presented in accordance with section 29 [of the PMFL].*

[39] Sections 29(1) and (4) of the PMFL require the following:

*29. (1) No later than five months and two weeks after the end of each financial year, the Governor in Cabinet shall gazette a Government annual report for that financial year.*

*(4) At the earliest possible date after the gazettal of an annual report under subsection (1), a member of the Governor in Cabinet appointed by the Governor in Cabinet to do so on their behalf shall present the annual report to the Legislative Assembly to review.*

[40] There are therefore clear timelines for the publishing and presentation of financial statements to the LA, which, according to the Cabinet Office's own submission, have not been met and are now about a year and a half over due.

[41] I consider a year and a half since the reports were due to be presented to the LA, to be more than a reasonable period of time. Consequently, I do not agree with the Cabinet Office's deferral of access under section 11(2)(b).

Items 3, 4, and 5:

[42] In parallel, the last three of the financial statements (items 3, 4 and 5 above) relate to the TAB, which, as a statutory authority, is subject to section 52(5) of the PMFL, which states:

*(5) The annual report of each authority or company shall be presented to the Legislative Assembly four months and two weeks after the end of the financial year or on the first sitting day thereafter by the relevant minister or official member.*

The annual report in this regard includes the financial statements by virtue of section 52(2) of the PMFL.

[43] Again, the lawful timelines have not been met. In the first place, on the basis of the Cabinet Office's submission, the reports appear not to have been created after the end of the respective financial years (i.e. 2007, 2008 and 2009) as required, but in the latter part of 2012. Secondly, even based on their creation date, more than a reasonable period of time has passed to allow the reports to be presented to the LA, as required under the PMFL.

[44] **Consequently, I do not agree with the Cabinet Office's arguments for deferral of any of the five financial reports under section 11(2)(b), as I consider that more than a reasonable period of time after the reports' preparation has passed for their publication and presentation to the LA.**



**Issue 2: Whether compliance with the Applicant's request for records of topics discussed, and decisions taken, in the course of eight Cabinet meetings prior to 20 December 2012 would unreasonably divert the Cabinet Office's resources in accordance with section 9(c).**

[45] Section 9(c) provides:

*9. A public authority is not required to comply with a request where-*

*...*

*(c) compliance with the request would unreasonably divert its resources;*

*...*

[46] Regulation 10 provides:

*10. (1) Before a public authority makes a decision to refuse access under section 9 (c) of the Law (on the basis that the request would unreasonably divert its resources) the information manager shall send written communication to the applicant-*

*(a) explaining how the request is likely to unreasonably divert resources; and*

*(b) inviting consultation with a view to narrowing the request.*

*(2) Written communication sent under paragraph (1) automatically suspends the thirty-day period referred to in section 7 (4) of the Law (for responding to the application) until the date when the applicant agrees to narrow the request to such extent as may be agreed by the public authority.*

*(3) The information manager shall make a determination on "unreasonable diversion of resources" on a case by case basis and for this purpose-*

*(a) the resources to be considered are the existing resources of the public authority reasonably required to process the request consistent with attendance to other priorities including-*

*(i) identifying, locating or collating the records within the public authority's filing systems; and*

*(ii) deciding whether to grant, refuse or defer access to the records or edited copies including resources to be used in examining the records, consulting with any person or body, making copies (or edited copies) of the records, notifying the applicant of any interim or final decision on the request and any other matters; and*

*(b) the types of factors which shall be considered to determine whether the diversion of resources would be unreasonable include-*

*(i) the nature and size of the public authority;*

- (ii) the number, type and volume of records falling within the request; and*
- (iii) the work time involved in fully processing the request.*

*(4) In this regulation, a reference to the time spent by a public authority in searching for, locating or collating a record within a public authority's filing system or otherwise spent in processing the application does not include-*

*(a) where the record is not found in the place in which, according to the filing system of the public authority (referred to in this regulation as the "relevant filing system") it ought to be located, any time other than such time as would have been spent by the public authority in searching for or retrieving the record if the record had been found in that place; or*

*(b) where the relevant filing system ought reasonably to have indicated, but does not indicate, the place in which the record is located, any time other than such time as would have been spent by the public authority in searching for or retrieving the record if the relevant filing system had indicated the place in which the record is located and the record had been found in that place.*

#### The position of the public authority:

- [47] The Cabinet Office states that the responsive records contain a wide range of exempted and excluded information in a large volume of records including "close to 200 documents". It asserts that processing the request would involve reviewing each of these records, and conferring with the various ministries and portfolios involved in the matters raised before the Cabinet, "as the Information Manager would not possess sufficient knowledge on the subject matter of each record."
- [48] Furthermore, the Cabinet Office claims that the insufficiency of its human resources is further aggravated by its constitutional role. Properly responding to the FOI request "would create a significantly negative impact on its ability to carry out its constitutional mandate". Therefore, the Cabinet Office believes that section 9(c) is engaged, and that responding to the request would be an unreasonable diversion of resources.
- [49] The Cabinet Office does not provide any more specific reasons or further quantify its reasoning, in order to back up its reliance on section 9(c).

#### The position of the Applicant:

- [50] The Applicant argues that the Cabinet Office has diverted more resources to withholding the information during the past year, than it would have taken to "simply fulfill the request in the first place", and rejects the application of section 9(c).
- [51] The Applicant says he narrowed the request as a goodwill gesture, but is frustrated that this spirit was "asymmetrical" and the Cabinet Office did not reciprocate by showing a willingness to respond to the narrowed request.

Discussion:

[52] Even though, as already stated above, a public authority is obligated under the Law to provide reasons for denying access, the Cabinet Office does little to explain why section 9(c) should apply. The submission refers to the need “to research close to 200 documents and to consult with all of the Ministries/Portfolios and various public authorities”, and points to the insufficient human resources available to the Cabinet Office to respond to this request under the FOI Law, in order to warrant that claim.

[53] As explained by the Information Commissioner in Hearing Decision 5, regulation 10(3)(b) specifies the types of factors to be considered when determining whether the diversion of resources would be unreasonable, including:

- (i) the nature and size of the public authority;*
- (ii) the number, type and volume of records falling within the request; and*
- (iii) the work time involved in fully processing the request.<sup>2</sup>*

[54] While this provision is particularly intended to instruct the work of Information Managers, I find it useful as a guide for my own assessment of the application of section 9(c) as well.

The nature and size of the public authority:

[55] A general description of the Cabinet Office is provided in section B of this Decision.

[56] According to the Annual Budget Statement for financial year 2014-15 the Cabinet Office has a target annual budget of \$5,017,000 (revenue from Cabinet), up from 4,923,724 in 2013-14. The same document shows a total number of FTE staff members of 60. These staff members are for the most part divided over a number of smaller offices and units.

[57] I note in particular that the Cabinet Office has a budget of over \$128,000 for “Freedom of Information and Data Protection Coordination” as executed by the FOI Unit which is tasked, amongst other things, with providing assistance to government entities with questions on the application of the FOI Law.

[58] I recognize the importance of the work of the Cabinet Office, and agree that it is crucial that it should proceed without unnecessary interruptions, however, it goes without saying that any public authority must make every effort to meet its statutory obligations, including its obligations under the FOI Law. In particular, I would expect an important, and seemingly well-budgeted public authority with in-house FOI expertise, like the Cabinet Office, to recognize the importance of government accountability and the urgency for increased transparency in government, and make every effort to meet its statutory obligations under the FOI Law. This is particularly so in respect of the present narrowed request, given the significant scope reduction as a result of the ICO’s negotiations with both parties.

[59] **Taking into account the nature, budget and staff size of the Cabinet Office, I find the claim that complying with this narrowed FOI request would unreasonably divert its resources, unconvincing.**

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<sup>2</sup> ICO Hearing Decision 5-00310 6 August 2010 para 26

The number, type and volume of records falling within the request:

- [60] I note that the reports accompanying the meeting minutes have already been disclosed, or deferred, as discussed above, and that the focus remains only on the agendas (or “topics”) and certain information in the minutes.
- [61] The Cabinet Office’s submission does not go into much detail in this regard, but, according to the Cabinet Secretary’s internal review decision of 13 September 2013, the original request extended to records of approximately 78 Cabinet meetings. It is stated that each Cabinet meeting deals with some 25 agenda items, and on this basis the Cabinet Secretary calculated that the Information Manager would, at that time, have to review between 1,700 and 2,000 agenda items in order to respond to the request. If this had been the scope of the responsive records in the present Hearing, I would likely have been inclined to agree with the Cabinet Office that compliance with the request would constitute an unreasonable diversion of resources.
- [62] However, quantitatively speaking, the narrowing of the request to eight meetings significantly reduces the number of agenda items to be reviewed to between 174 and 205. Qualitatively speaking, it is reasonable to assume the narrowing of the request also lessens the complexity of the response. On the surface, therefore, the narrowing of the request demonstrates the Applicant’s willingness to find a reasonable compromise, but, more importantly, it constitutes a significant reduction of the burden on the public authority.
- [63] If 78 meeting minutes contain between 1,700 and 2,000 “agenda items”, as the Cabinet Secretary said, then eight minutes would contain around 200. The information that appears primarily relevant to the request is part of the eight Cabinet minutes. It is not clear to me why this would translate into 200 “documents” to be reviewed as is now being claimed in the submission. As well, the actual number of agenda items may be smaller, since a number of items are likely carried over from one meeting to the next.
- [64] **Consequently, I do not believe that the number, type and volume of records falling within the narrowed request are unreasonable for the Cabinet Office to handle.**

The work time involved in fully processing the request:

- [65] The Cabinet Office’s submission does not provide enough detail about the efforts required to respond to the request. Specifically, no indication is given about the amount of staff time that would be required, although a general claim is made that there are not sufficient human resources at its disposal to review the responsive records.
- [66] Unlike the UK’s *Freedom of Information Act 2000* (FOIA) the Cayman Islands FOI Law does not set a specific amount of work time as a threshold for applying the exception in section 9(c). The UK rules do not apply in the Cayman Islands, but I find them useful for comparison. Under the parallel provision in FOIA and applicable regulations a UK public authority in central government is not obliged to comply with a request if the cost is calculated to exceed £600, after which a standard fee schedule applies. At a standard, prescribed rate of £25 per hour per person, this means that a request would require at least 24 staff hours before the public authority no longer has to comply with the request.<sup>3</sup> In the current case, I do not consider that it would take the Cabinet Office remotely this long to review the records and respond to the narrowed request.

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<sup>3</sup> *Freedom of Information Act 2000* (CH.36 2000) section 12, and *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (2004 NO. 3244) regulations 3(2) and 4(4)

[67] Therefore, on the basis of the work time involved in processing the request, as well, it would not be an unreasonable diversion of resources to comply with the request.

[68] In conclusion, I do not agree that either on the basis of the nature or size of the public authority, of the number, type or volume of the responsive records, or of the work time involved in processing the request, it would be an unreasonable diversion of the resources of the Cabinet Office to comply with the request, as claimed.

**Issue 3: Whether disclosure of the records of topics discussed, and decisions taken, in the course of eight Cabinet meetings prior to 20 December 2012 are exempt by reason of section 19(1)(b).**

[69] Given its reliance on the exception in section 9(c), the Cabinet Office has not yet properly reviewed the responsive records and considered whether any exemptions apply to them or parts thereof. Nor have the records been supplied to me.

[70] Instead, the application of the exemption is expressed in hypothetical form. I have said the following about this before:

*... 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....<sup>4</sup>*

[71] As to the blanket application of an exemption to an entire set of records without proper review of the records:

*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.<sup>5</sup>*

[72] Considering the hypothetical nature of the Cabinet Office's statements in regard to exemptions, I am not in a position to decide whether the claimed exemption applies, and I therefore return the decision to the Cabinet Office for review and processing. The Cabinet Office will then have the opportunity to properly decide whether any exemption(s) apply to the responsive records, in whole or in part.

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<sup>4</sup> ICO Hearing 37-02613 Planning Department para102

<sup>5</sup> Ibid

## **F. FINDINGS AND DECISION**

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

### **Findings:**

I find that the Cabinet Office's deferral of the five financial reports under section 11(2)(b) is unwarranted, as I consider that more than a reasonable period of time after the reports' preparation has passed for their publication and presentation to the LA.

I find that complying with the request would not unreasonably divert the resources of the Cabinet Office under section 9(c), as claimed.

Given its reliance on the exception in section 9(c), the Cabinet Office has not yet properly reviewed and argued the application of section 19(1)(b) or any other exemption in regard to the records of Cabinet meetings, or parts thereof, and has argued the application of the exemption in section 19(1)(b) on a hypothetical basis only. Therefore, I cannot reach a decision on the application of this exemption.

### **Decision:**

I require that the Cabinet Office disclose the following five financial reports:

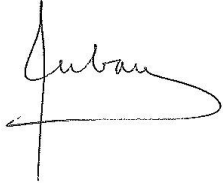
1. Deputy Governor - Financial Statements of the Portfolio of the Civil Service for the year ended 30<sup>th</sup> June 2012;
2. Ministry of Finance Tourism and Development (MFTD) – Financial Statements of Cabinet Office for the year ended 30<sup>th</sup> June 2012;
3. MFTD – Financial Statements of TAB for the year ended 30<sup>th</sup> June 2007;
4. MFTD – Financial Statements of TAB for the year ended 30<sup>th</sup> June 2008;
5. MFTD – Financial Statements of TAB for the year ended 30<sup>th</sup> June 2009

I require that the Cabinet Office review the responsive records relevant to the Applicant's narrowed request, and provide me with a new submission within 45 days from the date of this Decision. In doing so, the Cabinet Office may apply any exemption or exception (not counting section 9(c)) it considers appropriate. The Cabinet Office must also supply me with a copy of the redacted, if redaction is necessary, and unredacted records within 45 days from the date of this Decision.

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 the Information Commissioner's 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.

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

Jan Liebaers  
Acting Information Commissioner

22 July 2014