

Hearing 87-202100205
Decision

Royal Cayman Islands Police Service (RCIPS)

Sharon Roulstone
Ombudsman

4 November 2022

Summary

An applicant made a request to the Royal Cayman Islands Police Service (RCIPS) under the Freedom of Information Act (2021 Revision) (FOI Act) for information relating to the Police Welfare Fund (PWF) and the Police Welfare Committee (PWC – jointly PWC/F).

The initial response from the RCIPS indicated that the PWC was a separate entity from the RCIPS, and that the applicant should address his request directly to the PWC. The internal review by the Police Commissioner (the Commissioner) of the RCIPS stated that the PWC was not a “public authority” as defined in the FOI Act. An appeal was made to the Ombudsman, and we initially asked the RCIPS to reconsider whether they held any responsive records, after which the matter was escalated to a hearing.

In the hearing decision, the Ombudsman confirmed that the PWC was a “public authority” by virtue of being a “statutory body... whether incorporated or not” as intended in the definition in the FOI Act. The Ombudsman required the PWC to make all relevant records available to the Information Manager (IM) of the RCIPS to provide a response.

The Ombudsman also required the RCIPS to reconsider whether it held any responsive records, and, if so, to consider whether disclosure was required under the FOI Act.

Statutes¹ considered

Freedom of Information Law (2021 Revision) (FOI Act)

Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)

Contents

A. INTRODUCTION 2
B. CONSIDERATION OF ISSUES 4
C. FINDINGS AND DECISION 14

A. INTRODUCTION

[1] On 7 February 2021 the applicant made the following request to the RCIPS under the FOIA:

- 1) *Please confirm when an AGM can be expected to be held by the RCIPS Welfare Committee? This is to include but not limited to details of date, time and place of this AGM. Also details of subjects to be discussed at this meeting.*

- 2) *Please confirm if the RCIPS Welfare Committee has plans for any kind of meeting with the membership regarding the current status of the Welfare Fund & Welfare Committee? This is to include but not limited to details of date, time, place meeting is planned to be held. Also details of subjects to be discussed at this meeting.*

- 3) *Please confirm if the funds from the Airport duties, which were unlawfully held by the Commissioner of Police, has being transferred to the Welfare Committee per the requirements of the Police Law. This is to include but not limited all correspondence between the RCIPS Welfare Committee and the Commissioner of Police pertaining to the funds held, or transferred back to the Welfare Committee. Also, details of total amount of funds held by the Commissioner of Police, or total amount of funds transferred/paid back to the Committee by the Commissioner of Police.*

¹ In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

4) *Please confirm the status of the Internal Audit conducted of the Welfare Fund accounts, whether that audit process has been completed, and if completed, details of the said audit, to include but not limited to a full copy of any draft or completed audit report(s) produced, and all correspondence between the Welfare Committee, the Commissioner of Police, and the Internal Audit department regarding this audit process and or reports.*

5) *Please confirm the status of the Welfare Fund accounts audit conducted by the Office of the Auditor General, and if completed, to provide full details of this audit. This is to include but not limited to a full copy of any completed or draft audit report(s) produced, and all correspondence between the Welfare Committee, the Commissioner of Police, and the office of the Auditor General regarding this audit process and or reports.*

- [2] On 11 February 2021, the RCIPS responded to the request, stating that “the Welfare Committee is a separate entity from the RCIPS. Therefore, the RCIPS does not hold their records. Please direct your request to the Chairman of the Welfare Committee...”.
- [3] On 27 March 2021, two weeks after expiry of the statutory period allowed for this purpose, the applicant asked for an internal review of the initial decision. On 30 March 2021, the Commissioner stated that neither the “RCIPS Welfare Fund Committee”, nor the “RCIPS Welfare Committee”, as the entity of interest had variously been called by the applicant, “relate to a public authority as defined under the [FOIA]... and neither come under the ambit of Section 3(1)(a) of the same law.”
- [4] The applicant made an appeal to the Office of the Ombudsman on the basis that access to the requested records had been unjustly denied. We accepted the appeal on 30 April 2021 and started an investigation and an attempt at informal resolution of the question “whether the RCIPS Welfare Fund and Committee are subject to the FOIA, and, if so, whether any responsive records are held.”
- [5] We met with the PWC, and they provided us with a copy of their draft policy dated 2011, which they described as “unapproved”, on the basis of which they operate the Fund. The PWC did not disclose records to the applicant.
- [6] We also met with the Commissioner to discuss the appeal. The RCIPS held some related records, although not necessarily responsive to the applicant’s request. As it appeared to us the RCIPS might hold some responsive records, we asked that the IM again review the request and consider any responsive records for potential disclosure. However, no records were disclosed and our investigation continued.

- [7] We also contacted the Internal Audit Department (IAD) and the Office of the Auditor General (OAG) to obtain more background information. We learned that the IAD concluded a report on the PWF, but the OAG's audit remains ongoing.
- [8] As the dispute could not be resolved amicably, the appeal escalated to a formal hearing decision before the Ombudsman.

B. CONSIDERATION OF ISSUES

- [9] The single question to be decided is whether the FOI Act applies to the PWC. This question is preliminary in nature since further actions may need to be taken by the RCIPS and/or the PWC depending on my findings and conclusions.
- [10] Since the outstanding issue relates closely to the nature and the workings of the PWC, I invited them to provide their views, as further described below. I am grateful for the response provided.

The Police Act (2021 Revision):

- [11] The PWF was established in section 46 of the 2006 Police Law, and is continued in section 91 of the Police Act (2021 Revision) (the Police Act), which also identifies the following sources of funding:

Welfare Fund continued

91. The Police Welfare Fund established under the repealed Police Law (2006 Revision) shall be continued under this Act and the following shall be paid into it —

- (a) all the proceeds of sale of police property under section 89, after deducting the expenses of sale, if any;*
- (b) all money held after the lapse of six months under section 88; (c) all fines imposed upon and collected from police officers under powers conferred by this Act; and*
- (d) all other authorised contributions.*

- [12] Section 93 of the Police Act identifies an additional source of revenue for the PWF:

Voluntary contributions to Welfare Fund

93. The Police Welfare Committee may accept voluntary contributions to the Welfare Fund, either from police officers or members of the public.

- [13] Sections 92 of the Police Act lists the purposes of the PWF, and provides for its administration by the PWC (emphasis added):

Custody and application of Welfare Fund

92. (1) Subject to any regulations, **the Welfare Fund shall be administered by the Police Welfare Committee, and may be applied for the purpose of —**

(a) assistance to the spouses or civil partners or families of a deceased police officer or special constable, or to any police officer or special constable discharged from the Service as medically unfit for further service; (b) payment to a police officer or special constable as rewards for meritorious acts or service in the execution of duty, where such payments are not met from public funds;

(c) expenditure for the benefit and advancement of authorised recreation and sport and other branches of police activity organised within the Service; and

(d) any other purpose which the Police Welfare Committee considers to be for the general welfare of police officers or special constables.

(2) The Police Welfare Fund shall be subject to an annual audit.

[14] Section 146 of the Police Act provides that Cabinet may make regulations for a number of purposes related to the Police Service, including:

(e) the control, administration and application of the Welfare Fund;

No such regulations have yet been made.

[15] The wide powers of the Commissioner of Police (the Commissioner) are set out in sections 6 and 7 of the Police Act:

General powers of Commissioner

6. (1) *The Commissioner shall have the command, superintendence and direction of the Service and may —*

...

(c) make such rules of practice and procedure for the efficient operation of this Act as the Commissioner may see fit. ...

Administration of the Service

7. (1) *The administration of the Service throughout the Islands is vested in the Commissioner.*

...

The position of the RCIPS:

[16] Section 43(2) of the FOI Act places the burden of proof in an appeal on the public authority, which in the first instance is the RCIPS. The RCIPS states that the PWC was founded in the 1970s by a group of officers. Furthermore,

PWC consists of police officers who are employed by the RCIPS ..., but the Commissioner has never had any involvements with chairing the Committee or taking part in its AGM because there is no legislation that invest that power in him.

[17] The RCIPS states that, “Traditionally, PWC held its Annual General Meeting (AGM) every December of each year to re-elect its Committee’s Board. Since the current Commissioner has taken command of the RCIPS in 2016, there has been no AGM. However, ... the PWC [is] operating under a draft unsigned policy dated 30th August 2011 which has not been approved.”

[18] The RCIPS also points to sections 6(1) and 7 of the Police Act, which confirm the wide powers of the Commissioner to direct the Police Service.

[19] The RCIPS also states that the “PWC is not a statutory body or authority because it would have to be registered as such”, and that the “PWC is not a company because it is not registered as such.”

[20] According to the RCIPS, the PWC is not a “statutory authority” as defined in section 2 of the Public Authorities Act (2020 Revision) (PAA), since neither the Commissioner, nor the Cabinet “have the power vested in them to dismiss its Board or to mandate its functions”.

The position of the PWC:

[21] In general, the PWC agrees with the views expressed by the RCIPS. The PWC points to section 92(1) of the Police Act which states that the PWF “shall be administered by the Police Welfare Committee...”. While regulations may be developed, none are currently in effect.

[22] Although the PWC refers to section 6(1) of the Police Act (which grants the Commissioner the command, superintendence and direction of the RCIPS), it states that there are no provisions “that dictate that the RCIPS or its Commissioner is in control or in charge of the PWC or/and its [PWF]”, asserting that:

... once the PWC’s members are conducting its function in compliance with its policy and the laws the Commissioner cannot interfere with the PWC’s mandated function. The Commissioner does not take part in the day-to-day running of the PWC or attend its Annual General Meetings.

[23] Somewhat contradictory to the statement of the RCIPS in this regard, according to the PWC, the Deputy Commissioner of Police and the Commissioner (or their designates) do

participate in the annual elections of new Committee members, which the PWC describes as a function akin to that of election observers, intended “to improve the quality of the election, and to help build confidence in the honesty of the electoral process”. These statements are also somewhat contradictory, as the election of the PWC presumably takes place at the AGM. Nor is it clear what the legal basis is for this arrangement.

[24] The PWC explains that it has four members and is “managed solely by a body of serving police officers”. The PWC describes its mandate in some detail – again without explaining what the legal basis for this claimed mandate is:

- (i) PWC acts on behalf of police welfare provided that it does not undermine the integrity of the RCIPS;
- (ii) To consider welfare matters referred to it by its members and support staff of the RCIPS;
- (iii) To recommend policy to the Commissioner for independent consideration and approval;
- (iv) To meet, review and consider small in-house loans (salary advance) and grant applications as applied for by members and support staff;
- (v) To decide any questions referred to it by a simple majority of the membership;
- (vi) To determine its own rules of procedure insofar as they are not laid down by its policy;
- (vii) To make such policy as may be deemed necessary for the efficient operation of the PWC and for the benefit of its members and the promotion of its objects in the Cayman Islands.

[25] The PWC states that there is no public interest in information held by the PWC or PWF, as “its funds received are not governmental related or are not funded by the Cayman Islands Government or the RCIPS”.

[26] PWC points out that it is the Commissioner who is by law (section 142 of the Police Act) responsible for paying fees for special duties into the PWF:

[The Commissioner] details a police officer to perform special services ... but not the PWC because it is not a part of its function... Part of the funds are paid to the officer for their duties worked and the other part is paid into the [PWF]”. The applicants to the special duties are private companies.

I note that this is contested by the Commissioner who says that in reality, it is the PWC that is making direct arrangements with the client companies and receives and disburses the gains directly. If so, this is quite disturbing since there appears to be virtually no independent oversight or accountability associated with these revenues or disbursements.

[27] The PWC also makes the following additional claims in regard to the nature of its funding:

- “Fines imposed upon officers under the Police Act are the officers’ money, irrespective whether the money derived from the officers’ police salary. Once an officer is paid for their service/duty, it is no longer the Government’s funds.”
- “Lost/found or property handed over to the police by a member of the public is police property, unless the true owner claims it within six months of receipt by the RCIPS. The proceeds of the sale, at an auction, is deposited into the [PWF] and should not be regarded as the Government’s funds.”
- “All other contributions by police officers or members of the public are not governmental related.”
- “The proceeds of the auctioning of police vehicles are deposited into the Cayman Islands Government’s account, and not into the [PWF].”

[28] In conclusion, the PWC argues that it is not subject to the FOI Act as “it does not fall within the definition of a public authority as explained in the IM’s submission”. As well, although the PWC “is considered a part of the RCIPS because its complement is solely serving police officers, ...that does not make it subject to the FOI Act because there is no governmental accountability or funding by the Cayman Islands Government or the RCIPS.”

The position of the applicant:

[29] Contrary to these views, the applicant states that “the Commissioner... and Cabinet do have [sic] exercised powers vested in them to dismiss the [PWC] or to mandate its functions and are currently exercising those powers”. The applicant bases this view on the following:

- As quoted above, the applicant asserted (and provided supporting evidence) that there has been no AGM to re-elect the PWC since the current Commissioner took command in 2016. According to the applicant, this indicates that the Commissioner does have powers over the workings of the PWC.
- The applicant also wonders why both the RCIPS and the PWC refer to the policy under which the latter operates as “unapproved” and asks who would have the power to approve the policy, if not the Commissioner. According to the applicant, this is further proof that the Commissioner has powers over the PWC.
- The PWC “is being funded in part by both the RCIPS and Cabinet”, since the funds specified in sections 88, 89 and 91 of the 2021 Police Act (as quoted above) “are government funds”, as are any fines imposed within the Cayman Islands.
- Although no regulations concerning the PWF have yet been prescribed under section 146(1)(e) of the Police Act, the fact that the Cabinet is empowered to make regulations concerning “the control, administration and application of the Welfare Fund” confirms that it has power “to dismiss [the PWC] or to mandate its functions”.
- The PWC’s own draft policy makes provision for the exercise of the Commissioner’s powers.

[30] Finally, the applicant provided me with correspondence to and from the Commissioner, concerning the PWF, which appear to indicate that the RCIPS holds at least some records that are responsive to points 3, 4, and 5 of the initial requests, about which more below.

Discussion:

The FOI Act (2021 Revision):

[31] Section 4 of the FOI Act provides the objects of the Act and states that the right to access applies to records held by public authorities (emphasis added):

Objects of this Act

4. The objects of this Act 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.

[32] Section 6(1) provides a general right to access:

General right of access

6. (1) Subject to the provisions of this Act, every person shall have a right to obtain access to a record other than an exempt record.

[33] Section 3 sets the boundaries of the application of the FOI Act, and confirms that the FOI Act applies to “public authorities”, as follows (emphasis added):

Application

3. (1) Subject to subsection (2), this Act applies to —

(a) public authorities;

...

(2) The Cabinet may after consulting the entity concerned where it considers such consultation appropriate, by Order, declare that this Act shall apply to —

...

(b) any other body or organisation which provides services of a public nature which are essential to the welfare of the Caymanian society, or to such aspects of their operations as may be specified in the Order; and (c) any other body or organisation which receives government appropriations on a regular basis.

...

To date, no other bodies or organisations have been brought under the FOI Act by Order of the Cabinet.

[34] Section 2 defines a “public authority” as follows:

“public authority” means —

- (a) a ministry, portfolio or department;*
- (b) a statutory body or authority, whether incorporated or not;*
- (c) a government company which —*
 - (i) is wholly owned by the Government or in which the Government holds more than fifty percent of the shares; or*
 - (ii) is specified in an Order under section 3(2); or*
- (d) any other body or organisation specified in an Order under section 3(2);*

[35] In reference to the definition in section 2 of the FOI Act, there is no argument that the PWC is either: (a) a ministry, portfolio or department; (b) a statutory... authority... ; (c) a government company...; or, (d) any other body or organisation specified in an Order under section 3(2). Therefore, for the PWC to be subject to the FOI Act, by elimination it would have to be a “statutory body... whether incorporated or not”,

[36] The Ombudsman’s powers and methodology in deciding whether a particular entity is subject to the FOI Act was addressed in a decision of the former Ombudsman. Although neither the RCIPS nor the PWC stated their opposition to the present determination being made by the Ombudsman, I want to briefly address the question of jurisdiction.

[37] In hearing decision 62-00618 my predecessor made the following statement, with which I concur:

[28] Under the FOI Law, the Ombudsman has the power and responsibility to hear, investigate and rule on appeals filed under the FOI Law (s. 39(a)). The question of

whether an entity is a public authority under the FOI Law lies at the heart of my jurisdiction.²

[38] Our investigation found that the PWC/F has a bank account to which three members of the PWC have access (a fourth position remains unfilled), and that statements are apparently sent to the RCIPS mailing address. However, it is not registered as a company or as a nonprofit organisation.

[39] The RCIPS did not explain its contention that the “PWC is not a statutory body or authority because it would have to be registered as such.” Whether the PWC/F is obliged to be registered (e.g., under the Non-profit Organisations Act (2020 Revision)) or whether it complies with those obligations is not for me to decide. Since section 21 of that Act exempts a “government entity” from registering, the registration status of an entity appears to be irrelevant to its status under the FOI Act.

[40] Both the RCIPS and the PWC argue that the PWC is not a statutory body since the Welfare Fund was originally created by officers on a voluntary basis, rather than by statute. The establishment of the PWF in the Police Act, 2006, and the continuation of its establishment in subsequent Police Acts, including the 2021 Police Act, according to the RCIPS and the PWC, do not change this status.

[41] I find the conclusions (*mutatis mutandis*) of the Australian Commonwealth Administrative Appeals Tribunal (Tribunal) in **Re Brennan and the Law Society of the Australian Capital Territory (1984) 1 AAR 529; 6 ALD 428** helpful in this regard. The Law Society was first founded in 1933 but was not enacted until 1972. The Tribunal rejected the Law Society’s arguments under the Queensland Freedom of Information Act, 1992, that it should therefore not be considered subject to the Act. In his ruling, Deputy President Hall stated (*emphasis added*):

It is appropriate to observe ... that when it assumed the wide range of selfregulatory functions conferred by the Ordinance concurrently with being constituted as a body corporate, the Law Society surrendered its autonomy over its own constitution ... and, it would seem, over its own destiny. Having been constituted a body corporate by Ordinance, it presumably could not be dissolved except by the same process or, at the very least, without an amendment to its constitution - either of which process requires government approval and cooperation.

² Ombudsman, Hearing Decision 62-00618, Cayman Islands Institute of Public Accountants, 9 July 2018, para 28.

*In my view, therefore, when the Law Society was "constituted a body corporate" ... it was "established" as a body corporate within the ordinary meaning of that word. It matters not, in my opinion, that the Law Society was previously an unincorporated body established as such in 1933.*³

- [42] I agree with this rationale: the PWF may very well have been created originally on a voluntary basis, but it has since been established under an Act of the Cayman Islands Parliament, and it is therefore certainly a type of statutory body.
- [43] However, this does not necessarily mean that the FOI Act must apply to it. As the previous Ombudsman pointed out: "... the term statutory body must also be considered within the context of the term it is helping to define (public authority) as well as the objects of the FOI Law."
- [44] The objects of the FOI Law are set out in section 4, quoted above. The focal point of the FOI Law is clearly on the government and the public sector. The RCIPS and the PWC/F are part of the Cayman Islands Public Sector. While police officers may – understandably - have a

strong sense of ownership in regard to their welfare and that of their colleagues, the wellbeing of public servants, including police officers, is a public function.

- [45] Although the term "public function" is not always precise or easily understandable,⁴ this conclusion is confirmed by a number of the identifying factors in the UK's Human Rights Act 1998 (Meaning of Public Functions) Bill, including the statutory nature of the PWF and the PWC, the public funding provided, and the heightened need for a welfare scheme in regard to police officers, whose profession by its very nature exposes them to higher risks and challenges to their safety in the interest of the general public.⁵
- [46] As noted above, the RCIPS also raised the definition of a "statutory authority" under the PAA. Although the PAA defines "public authority" narrowly (as only a statutory authority or government company), I find it helpful to consider the definition of a "statutory authority" under the PAA:

"statutory authority" means an entity established by a law to carry out functions which are capable under that law, of being funded, partly or entirely, by money

³ *Brennan and the Law Society of the Australian Capital Territory, Re* (1984) 1 AAR 529; 6 ALD pp. 434-436, as quoted in: Office of the Information Commissioner (QLD), *S.J. English v Queensland Law Society Incorporated*, S 178 of 1993 (Decision No. 95022), paras 31-32.

⁴ *YL (FC) v Birmingham City Council and others*, [2007] UKHL 27, para 128.

⁵ See, for instance the UK Parliament's *Human Rights Act 1998 (Meaning of Public Function) Bill* (Bill 45, 2008).
FOI Hearing 87-202100205 - Decision

provided by the Cabinet, and for which the Governor or the Cabinet has the power to appoint or dismiss the majority of the board or other governing body,

This definition further clarifies the Legislature's view of what a statutory authority or body means: an applicable entity would need to be (at least in part) publicly funded, and the Governor or the Cabinet must have certain powers in regard to the governance of the entity.

[47] Despite the argumentation of the RCIPS and the PWC to the contrary, in accordance with the Police Act the PWF is funded in large part by public funds, derived from the government's central revenues, including the proceed of sales of police property, fines imposed upon police officers, fees resulting from the performance of special duties, etc.

[48] The Police Act is almost entirely silent on the question of the governance framework for the PWC, apart from the provision that the PWF is to be administered by the PWC, quoted above. The Police Act appears to have significant gaps, including in regard to delineating the roles, responsibilities, structure, inner workings and powers of the PWC. Among the elements the Police Act does not specify are: the method of appointing or selecting members of the PWC, the structure of the PWC, the decision-making processes of the PWC, the role (if any) of the Commissioner in regard to the PWC (apart from the general statement in section 6), how and when meetings are to be held, what controls, limits and reporting obligations are placed on the PWC (except that an annual audit of the PWF must be done). In the absence of further regulations, these significant gaps may in part explain

the widely differing, no doubt well-intended, interpretations of the RCIPS, the PWC and the applicant.

[49] Although it has not yet done so, it is clear that the Cabinet has the power to prescribe "the control, administration and application of the Welfare Fund" in regulations, as per section 146(1)(e) of the Police Act. If it chose to do so, the Cabinet would have the power to appoint and/or dismiss the governing body.

[50] Despite the current lack of regulations, since the PWC is a statutory body that fulfils a public function, is publicly funded and is subject to government controls, I find that the PWC is subject to the Freedom of Information Act (2021 Revision).

[51] With the public funding also comes a greater need for public accountability, both in financial terms and in terms of general transparency and openness. Since the PWC is empowered by law to administer the PWF, and since I have found that it is subject to the FOI Act, it has a duty to respond directly to the applicant under the FOI Act. Alternatively, the PWC may submit all relevant records that it holds in response to the applicant's request to the RCIPS's IM for further processing under the FOI Act.

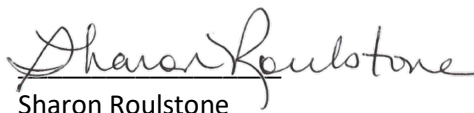
[52] In the course of our investigation, it remained unclear to what extent the RCIPS had considered records that were responsive to some of the applicant's questions, e.g., the Internal Audit report. There were strong hints throughout this appeal that this has not yet been properly done, which caused a number of delays. Now that I have clarified the present status of the PWC/F and its records, the RCIPS should undertake a fresh review of its holdings in order to determine whether it holds any responsive records and whether their disclosure is required and inform the applicant accordingly. Depending on the outcome of this exercise, the applicant will then, in turn, have a right to seek an internal review and/or appeal of that new decision.

[53] Under the circumstances described in this decision, I support the urgent development of regulations to codify the governance framework of the PWC/F so that its accountability, transparency and openness can be clarified and bolstered.

C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act (2021 Revision), for the reasons outlined above, I make the following findings and decision:

- I find that the PWC is a statutory body subject to the FOI Act.
- I require the PWC to make all relevant responsive records it holds available to the IM of the RCIPS immediately or as soon as practicable.
- I require the RCIPS to conduct a new search for records responsive to the applicant's request, and, if so, determine whether their disclosure is required under the FOI Act, and inform the applicant within 30 days from the date of this decision.



Sharon Roulstone
Ombudsman