Hearing 96-202100364

Decision

Ministry of Health and Wellness

Sharon Roulstone
Ombudsman

10 February 2023

Summary

An applicant requested records under the Freedom of Information Act (2021 Revision) (FOIA), relating to a recruitment exercise in which he was a candidate. The request was made to the Mosquito Research and Control Unit (MRCU), and was split, with one part resulting in the disclosure of numerous records by the MRCU, and the other part being handled by the Ministry of Health and Wellness (the Ministry).

The Ministry eventually disclosed a heavily redacted single record, an email about the recruitment process, which was the only outstanding responsive record, relying on exemptions in section 20(1)(b) relating to free and frank deliberations, and section 20(1)(d) relating to prejudice to government affairs, with which the Ombudsman largely agreed.

However, the application of the exemptions required a further consideration of the rights of the applicant (who was mentioned in the responsive email) under the Data Protection Act (2021 Revision) (DPA). The Ministry had disclosed some, but not all of the data that was required to be disclosed under the DPA.

The Ombudsman considered the application of data protection, and identified a number of additional parts of the email that contained the applicant's personal data, and which were required to be disclosed.

The Ombudsman also pointed out the significant, unjustified delays incurred by the Ministry in responding to the applicant and to the Office of the Ombudsman in bringing this FOI appeal to a close. Despite the fact that the Ministry has the burden of proof, it chose not to make submissions for this hearing, eventually clarifying that it wished to rely on previous emails.

Statutes[1] considered

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

Contents

A. INTRODUCTION

[1] On 3 May 2021 the applicant made a request under the Freedom of Information Act (2021 Revision) (FOIA) in relation to the MRCU:

> *To our discussion in the meeting this morning regarding the FOI requests. I am requesting All documents concerning the senior disease prevention officer (SDPO) recruitment which was held in November 2017 and again in July 2018. This includes all emails from within MRCU, Ministry of Health and POCS and the records of any meetings about the position. Also include interview notes and scores for all people who applied and the panel report that of the interview. I also request the same information for the recruitment of the safety and compliance officer position which I have already requested for and is long overdue.*

[2] Without offering any explanation for the delayed response, on 1 July 2021 the Ministry informed the applicant that it had decided to split the request in two, separately dealing with a key email message, which remains the record in dispute in this appeal and hearing. The other part of the request, involving numerous records, was granted by MRCU and does not form part of this appeal.

[3] The responsive record in this hearing decision is an email dated 29 November 2017, between the Assistant Director and the Acting Director of the MRCU, concerning a recruitment process in which the applicant was involved as a candidate. The record also contains a brief acknowledgment from the Acting Director that the email had, indeed, been received.

[4] The Ministry does not appear to have communicated an initial decision within the statutory timelines specified in section 7(4) of the FOIA.

[5] The Acting Chief Officer/Chief Officer (CO) completed her decision on 2 July 2021, in which she concluded that the record was exempt under section 20(1)(d) of the FOIA, claiming that "its

[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.

disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs". This was in accordance with section 20(2)(b) which states that that exemption may be claimed "by the Minister or chief officer concerned", rather than by the Information Manager (IM). However, contrary to section 26(1), the CO did not conduct a public interest test.

[6] The applicant was not satisfied with this decision and appealed the matter to the Ombudsman.

[7] Since the record in question appears to contain the personal data of the applicant and others, and the FOIA provides for a number of ways in which the FOIA and the DPA overlap, our FOI and Data Protection teams cooperated in handling this appeal.

[8] Significant unexplained delays were encountered in providing replies to our questions, and in December 2021, after we had sent numerous reminders, the CO finally gave us an interim response, while still awaiting further input from third-party individuals.

[9] It was not until March 2022 – and after numerous further reminders - did the CO provide an update, explaining she was still expecting a response from a further third-party individual.

[10] Finally, on 30 May 2022 - more than a full year after the request had been made – the Ministry disclosed a heavily redacted record to the applicant. It withheld most of the record, except for what was considered the applicant's own personal data. However, in contravention of sections 7(5) and 27 of the FOIA, no reasons were given for the redactions. The CO communicated her reasoning to us, but not to the applicant. We immediately asked her to provide the same explanation to the applicant, which she only did on 26 August 2022, after again incurring unexplained and significant delays.

[11] The applicant then asked for a formal hearing decision by the Ombudsman.

B. CONSIDERATION OF ISSUES

[12] In preparation for a formal hearing decision, each party is routinely asked to provide a written submission, which is then exchanged. Each party has an opportunity to provide a reply-submission in response. The submissions and reply-submissions of public authorities are particularly important, since they provide the reasons for withholding information from an applicant. In this appeals process, public authorities have the burden of proof under section 43(2) of the FOIA:

> *(2) In any appeal under section 42, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Act.*

[13] Notwithstanding this clear statutory mandate, the Ministry chose not to make a submission or reply-submission to lay out its case for the claimed exemptions. After further delays we were able to confirm that the Ministry wished to rely on the reasoning provided in the course of the informal stage of the appeal.

[14] The Ministry claimed the exemptions in sections 20(1)(b) and (d) of the FOIA. If one or both of these exemptions are engaged, a public interest test must be conducted and section 26(3) would also need to be considered, since the responsive record contains personal data. This is explained further below.

[15] The Ministry indicated its reliance on "section 20" in various parts of the email by highlighting and colour-coding the relevant redactions. Out of an abundance of caution, I will assume the Ministry intends to exempt the entire record under both sections 20(1)(b) and (d), and additionally rely on section 26(3) to exempt certain personal data under the DPA, as outlined below.

[16] Furthermore, section 12(1) states:

> ***Partial access***
> ***12****. (1) Where an application is made to a public authority for access to a record which contains exempt matter, the authority shall grant access to a copy of the record with the exempt matter deleted therefrom.*

a) Is the responsive record exempt under section 20(1)(d) because its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs?

Overlap between sections 20(1)(b) and 20(1)(d)

[17] The responsive record is an email dated 29 November 2017, from the Assistant Director of the MRCU to the Acting Director, regarding a recruitment process in which the applicant was a candidate. The record also contains a brief acknowledgment from the Acting Director that the email was, indeed, received, which is otherwise irrelevant.

[18] In communications to the applicant and to my office the CO stated that she had already provided reasons for exempting the email correspondence under section 20(1)(b) "in [her] initial decision", i.e. the internal review decision of 2 July 2021. However, section 20(1)(b) was not mentioned in the CO's decision, except in a general reference to section 20(2) which affirms that the exemptions in 20(1)(b) and (d) can only be claimed by a Minister or CO. The CO's decision relied on section 20(1)(d), not (b). This confusing explanation does not meet the duty of the CO and the Ministry to provide reasons for decisions, as explicitly required pursuant to sections 7(5) and 27 of the FOIA.

[19] In regard to section 20(1)(b) the Ministry provided my office with advice it had received in an email dated 28 May 2021, which the Ministry appears to have adopted as its own rationale for some of the exemptions. To the best of my knowledge this rationale was not provided to the applicant. It appears to state the following in relation to section 20(1)(b):

> *I expect civil servants would want to be able to freely exchange views in this way to deliberate on recruitment and selection processes without that information being exposed to a candidate (especially an internal candidate). While the person providing the views in this case may not object to the disclosure, this exemption under the FOI Act is not about whether the specific person in question would object but rather whether that disclosure could have a general "chilling effect", i.e. if someone else in the future wanted to raise a concern about how a selection process was carried out and knew this information had been disclosed under the FOI Act, would they raise that concern? It is important for the CIG to ensure civil servants are not inhibited from speaking out when important decisions are being made.*

[20] In short, to the extent that the Ministry has clarified its reasons for claiming the exemption in section 20(1)(b), it focuses on a claimed 'general "chilling effect"' and implies that civil servants would not raise concerns in the future if this record were disclosed. This appears to relate to the general exemption in section 20(1)(d) (prejudice to the conduct of public affairs), rather than the more specific exemption in section 20(1)(b) (free and frank deliberation).

[21] Considering the overlap between the arguments for and against these two exemptions I will consider both under the more general exemption in section 20(1)(d).

Consideration of section 20(1)(d)

[22] Section 20(1)(d) states:

> *20. (1) A record is exempt from disclosure if —*
>
> *…*
>
> *(d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.*

[23] According to the UK Information Tribunal in **Hogan and Oxford City Council v Information Commissioner**,[2] demonstrating prejudice involves two steps: the prejudice must be "real, actual or of substance" and there must be a causal link between the disclosure and the prejudice.

[24] For the prejudice to be "real, actual and of substance", the disclosure must at least be capable of harming the interest in some way, i.e. capable of having a damaging or detrimental effect on the effective conduct of the specified public affairs. The prejudice must be more than trivial or

[2] Information Tribunal (UK), *Hogan and Oxford City Council v Information Commissioner*, EA/2005/0026 and 0030, 17 October 2006, paras 28-36.

insignificant, but does not have to be particularly severe or unavoidable. According to guidance from the UK's Information Commissioner:

> *There may be a situation where disclosure could cause harm... but the authority can mitigate the effect of the disclosure, perhaps by issuing other communications to put the disclosure in context. In such a case… the exemption may not be engaged, or we may still accept that the exemption is engaged but then consider the effect of these mitigating actions as a factor in the public interest test.*[3]

[25] In regard to the causal link between the potential disclosure and the prejudice claimed:

> *There must be more than a mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.*[4]

[26] The meaning of the identically worded exemption in the UK's Freedom of Information Act, 2000, was expressed by the UK's Information Tribunal in **McIntyre v Information Commissioner and the Ministry of Defence:**

> *… this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure.*[5]

[27] The Ministry provided me with very little reasoning to support its claim of prejudice. The CO's decision claimed the entire record was exempt under section 20(1)(d), as follows:

> *The reasons for my decision relate to the nature of the record. The record is an internal email between managers at MRCU discussing a recruitment process. Managers need to be able to discuss matters such as this confidentially, and it is not uncommon for managers to have open communication in a confidential manner.*

[28] This reasoning identifies the free and frank discussion of confidential matters in the recruitment process as the applicable interest which allegedly would be prejudiced by disclosure, which overlap with the exemption relating to free and frank deliberations in section 20(1)(b). In this regard, the Ministry claimed that disclosure would have a general "chilling effect" on potential future expressions of concern by civil servants about recruitment exercises.

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[3] Information Commissioner's Office (UK), *The Prejudice Test: Freedom of Information Act*, Version 1.1, 5 March 2013, para. 19.
[4] Information Commissioner's Office (UK), op. cit., para. 21.
[5] Information Tribunal (UK), *McIntyre,* op cit., para. 25.

[29] I accept that there is a strong interest in protecting the confidentiality of government's recruitment processes. Equally, civil servants should not be discouraged from expressing concerns if they feel that inappropriate, inaccurate and/or unfair statements are made, approaches employed, or actions taken in the course of a recruitment exercise.

[30] This interest has to be balanced against the need for public authorities to be transparent and accountable, which section 4 of the FOIA identifies as "fundamental principles underlying the system of constitutional democracy". This consideration is particularly relevant when serious allegations are raised, which is the case in the responsive record in this appeal.

[31] The advice received and adopted by the Ministry in May 2021, added the following rationale:

> *There are some quite serious allegations in this email about what specific people said and/or did. In the CIG, there are mechanisms for these types of concerns to be raised and appropriately dealt with – sending this email to the Acting Director would be following that internal process – and, arguably, the effective conduct of public affairs would be prejudiced if those mechanisms are undermined by the disclosure of information that is not in its full context, has not been fully investigated, is still an open concern, etc. I also note that if the applicant is dissatisfied with the selection of another candidate, my understanding is that he would also have a right to appeal the Appointing Officer's decision to the Civil Service Appeals Commission.*

[32] This argument is different from the one stated by the CO, in that it centres on the mechanisms in place to deal with serious allegations, not the free discussion of matters in the context of recruitment. It asserts that those mechanisms would be undermined if the record was disclosed "not in its full context", without being "fully investigated", or while it "is still an open concern".

[33] The CO resumed this general rationale again in December 2021, when she wrote:

> *We also note portions of this email may be incomplete/misleading and that certain opinions and intentions in relation to the applicant are being reported in this email "second hand" and not directly by the (alleged) source, which is relevant to the Ministry's various considerations in this matter.*

[34] The Ministry stated that the recruitment exercise in question was cancelled and restarted some time after the initial exercise, but it did not clarify whether an investigation was undertaken into what it admitted were "serious allegations", and why, or to what extent (given the subsequent repeat of the recruitment exercise and the passage of time since 2017), this remains "still an open concern". Given the many delays incurred in finalizing this FOI appeal, it is reasonable to assume this matter is no longer a "live" issue, and the Ministry appears to agree, as the CO (in a different communication to us) said "the matter is arguably no longer extant".

[35] As to the argument that the information is "not in its full context", there is nothing to stop the Ministry from clarifying the context of this record, for instance by explaining in general terms what, if any, subsequent steps were taken to remedy the mistakes that may have been made. This approach would go some way towards mitigating the alleged effects of disclosure, as per the UK Information Commissioner's guidance, quoted above, which elucidated that, "There may be a situation where disclosure could cause harm... but the authority can mitigate the effect of the disclosure, perhaps by issuing other communications to put the disclosure in context. In such a case… the exemption may not be engaged…*".*[6]

[36] Plainly, the fact that a record does not reveal "the full context" of a matter is not a reason for withholding it under the FOIA. Taking this argument to its logical conclusion would make a mockery of the objectives of government openness, transparency and accountability, stated in the FOIA. Government undoubtedly (and unavoidably) holds vast numbers of records that could be characterized as "not revealing the full context", yet the FOIA nonetheless applies to them. On the contrary, this is a strong argument for greater openness and proactive disclosure of additional information explaining "the full context", to the extent possible in any given case.

[37] It is understood that the Ministry does not agree with the author's assertions. However, the perceived veracity or completeness of a record is irrelevant to its status under the FOIA. As long as a record is "held" (as defined in section 2) – which is clearly the case here - it must be disclosed unless it is exempt under, or excluded from, the FOIA, whatever the public authority's views on the veracity or completeness of its contents may be. As stated, public authorities do have the discretion of complementing any records they feel may be misunderstood by other records or a statement providing further contextual explanations.

[38] Finally, the Ministry also raises an argument relating to the fourth data protection principle in the DPA (which it erroneously identifies as the third data protection principle), which requires that personal data be kept accurate and up to date. The Ministry suggests that this is a further reason for not disclosing the email. However, this is a grave misunderstanding of the meaning of the fourth data protection principle, and certainly would not justify "correcting" opinions and views expressed in a complaint, which would be indefensible. In this regard, the data protection pages on the Ombudsman website contain comprehensive guidance for data controllers including the following:

> *In other cases, it will be equally obvious that you do not need to update information. Indeed, in some cases it may be necessary to preserve inaccurate or incomplete personal data, for example as part of an audit or complaints handling record.*[7]

[39] The Ministry informed me that the author has no objections to the disclosure of his complaint – although he asked that his name be withheld. This indicates that the author personally has no

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[6] Information Commissioner's Office (UK), *The Prejudice Test, op cit, para 19.*

[7] https://ombudsman.ky/data-protection-organisation/data-protection-principles/fourth-data-protection-principle-data-accuracy

expectation of confidence in regard to his email, and does not feel that disclosure would prejudice him in raising a similar complaint in the future.

[40] **Consequently, for the above reasons, on the balance of probabilities I find that disclosure of the responsive email would cause prejudice to the interest identified by the Ministry, i.e. the confidential discussion of opinions and views in a recruitment process, and the airing of concerns by civil servants.**

[41] **For the above reasons I find that the exemption in section 20(1)(d) relating to prejudice to the effective conduct of public affairs is engaged in relation to the responsive record in its entirety, except for the part identified by the Ministry as "not harmful to release", which in any event has already been disclosed to the applicant.**

Public interest test

[42] Since I have found that the exemption applies, section 26(1) requires that I conduct a public interest test. Section 26 states:

> ***Granting access to exempt information***
> *26. (1) Notwithstanding that a matter falls within sections 18, 20(1)(b) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.*
>
> *(2) Public interest shall be defined in regulations made under this Act.*

[43] "Public interest" is defined in regulation 2 of the FOI (General) Regulations (2021 Revision), as follows:

> *"**public interest**" means but is not limited to things that may or tend to —*
> *(a) promote greater public understanding of the processes or decisions of public authorities;*
> *(b) provide reasons for decisions taken by Government;*
> *(c) promote the accountability of and within Government;*
> *(d) promote accountability for public expenditure or the more effective use of public funds;*
> *(e) facilitate public participation in decision making by the Government;*
> *(f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;*
> *(g) deter or reveal wrongdoing or maladministration;*
> *(h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or*
> *(i) reveal untrue, incomplete or misleading information or acts of a public authority.*

[44] A public interest test involves weighing up the public interest arguments for and against disclosure to determine whether, considering all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the requested information.

[45] Public interest can include a wide range of values and principles relating to the public good or what is in the best interests of society. It is something that is of serious concern and benefit to the general public, not just something of interest to an individual. It serves the interests of the public at large, although it does not necessarily relate to the entire population. However, public interest is not the same as "something the public is interested in". It is what is in the interest of the public good or society at large.[8]

[46] A public authority is expected to explain to an applicant what arguments for and against disclosure it has considered, but the Ministry did not do so.

[47] Factors in favour of withholding the responsive record essentially relate to the exemption itself, i.e. the fact that those managers and others concerned with conducting a recruitment exercise must feel confident that their communications remain confidential, so as not to jeopardize the formulation of fair and appropriate conclusions leading to the hiring of the best candidate, as required under the Public Service Management Act (2018 Revision) and the Personnel Regulations (2022 Revision).

[48] As explained above, the applicant in this case was a candidate in the recruitment exercise that is the subject of the record, and therefore has a strong interest in the disclosure of the information. However, in its explanation of the public interest, the ICO clarified that "the interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they may reflect a wider public interest.

[49] Public interest factors in favour of disclosure are that it would:

- promote greater public understanding of the processes or decisions of the Ministry;
- provide reasons for decisions taken by government;
- promote the accountability of and within government;

and would potentially:

- deter or reveal wrongdoing or maladministration; and,
- reveal untrue, incomplete or misleading information or acts of a public authority.

[8] Information Commissioner's Office (UK), *The Public Interest Test: Freedom of Information Act, Version 2.1,* 19 July 2016.

[50] **After weighing the public interest factors for and against disclosure, I find that the public interest in maintaining the exemption overrides the public interest in disclosure. Therefore, the public interest in section 26(1) does not override the exemption claimed, and the exemption is maintained.**

[51] **This exemption and public interest test has no bearing on those parts of the responsive record that were marked as "not harmful to release" by the Ministry, which in any event have already been disclosed to the applicant.**

Data protection considerations

[52] There is a further, more complex test that has to be applied under section 26(3), which involves establishing whether "disclosure is required under the Data Protection Act", in which case the exemption falls away. Section 26(3) states:

> *(3) Notwithstanding that a record or part thereof is exempt from disclosure, access shall be granted to personal information if disclosure would be required under the Data Protection Act, 2017 [Law 33 of 2017].*

[53] As noted above, the applicant is named throughout the responsive letter, and therefore may have rights under section 8(1)-(2) of the DPA, which states:

> ***Fundamental rights of access to personal data***
> ***8****. (1) A person is entitled to be informed by a data controller whether the personal data of which the person is the data subject are being processed by or on behalf of that data controller, and, if that is the case, to be given by that data controller a description of —*
>
> > *(a) the data subject's personal data;*
> > *(b) the purposes for which they are being or are to be processed by or on behalf of that data controller;*
> > *(c) the recipients or classes of recipients to whom the data are or may be disclosed by or on behalf of that data controller;*
> > *(d) any countries or territories outside the Islands to which the data controller, whether directly or indirectly, transfers, intends to transfer or wishes to transfer the data;*
> > *(e) general measures to be taken for the purpose of complying with the seventh data protection principle; and*
> > *(f) such other information as the Ombudsman may require the data controller to provide.*
>
> *(2) A data subject is entitled to communication in an intelligible form, by the relevant data controller, of —*

(a) the data subject's personal data; and
(b) any information available to the relevant data controller as to the source of those personal data.

[54] Disclosure requirements, including for third-party personal data or so-called "mixed" personal data (i.e. data that relates to more than one individual), are further governed by sections 8 and 9, in particular subsections 8(6) – (10) of the DPA, as follows:

(6) A data controller shall comply with a request under this section within thirty days (or such other period as may be prescribed by regulations) of the date on which the data controller receives both the request and fee referred to in subsection (4), but where the data controller has requested further information under subsection (5), the period shall not resume until the information has been supplied.

(7) If a data controller cannot comply with the request without disclosing personal data relating to another data subject who can be identified from that personal data, the data controller is not obliged to comply with the request unless —

(a) the other data subject has consented to the disclosure of the personal data to the person making the request; or
(b) it is reasonable in all the circumstances to comply with the request without the consent of the other data subject.

(8) In subsection (7), the reference to personal data relating to another data subject includes a reference to personal data identifying that other data subject as the source of the personal data sought in the request.

(9) Subsection (7) shall not be construed as excusing a data controller from communicating so much of the personal data sought in the request as can be communicated without disclosing the identity of the other data subject concerned, whether by the omission of names or other identifying particulars or otherwise.

(10) In determining for the purposes of subsection (7)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other data subject concerned, the data controller shall have regard to, in particular —

(a) any duty of confidentiality owed to the other data subject;
(b) any steps taken by the data controller to seek the consent of the other data subject;
(c) whether the other data subject is capable of giving consent; and
(d) any express refusal of consent by the other data subject.

[55] Section 2 of the DPA defines "personal data" as follows:

*"**personal data**" means data relating to a living individual who can be identified and includes data such as —*

> *(a) the living individual's location data, online identifier or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the living individual;*
> *(b) an expression of opinion about the living individual; or*
> *(c) any indication of the intentions of the data controller or any other person in respect of the living individual;*

[56] Our online guidance for data controllers states:

> *When considering whether information 'relates to' an individual, you need to take into account a range of factors, including the content of the information, the purpose or purposes for which you are processing it.*[9]

[57] Guidance from the UK Information Commissioner states:

> *To decide whether or not data relates to an individual, you may need to consider:*
>
> - *the content of the data – is it directly about the individual or their activities?;*
> - *the purpose you will process the data for; and*
> - *the results of or effects on the individual from processing the data.*[10]

[58] The Ministry takes the position that the applicant's personal data is mixed with the third-parties' personal data, and that it cannot be separated from the latter. Therefore, the data controller has no obligation to disclose it, unless the third party has given their consent or it is reasonable in all the circumstances to disclose. However, the Ministry concludes that it would be reasonable to disclose some of the "mixed" personal data in question, while redacting other mixed data.

[59] In considering this matter, the Ministry consulted with three third-party individuals, one of whom was the author of the responsive record. Two of them explicitly withheld their consent, while the author agreed with the disclosure of his personal data except his name. Upon our advice the Ministry also consulted the supplementary guidance in the UK Information Commissioner's Employment Practice Code.[11]

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[9] https://ombudsman.ky/data-protection-organisation/what-information-does-the-dpl-apply-to; see also: Information Commissioner's Office (UK), *Access to information held in complaint files*. 24 November 2020, https://ico.org.uk/media/1179/access_to_information_held_in_complaint_files.pdf.
[10] https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/what-is-personal-data/.
[11] *Information Commissioner's Office (UK), Data Protection. The Employment Practices Code, November 2011.* https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf.

[60] The Ministry provided us with a copy of the responsive record, indicating which parts it considered as the applicant's own personal data, and which other parts it considered third-party personal data. However, it has not consistently applied its own analysis in the redacted record disclosed to the applicant since there are a few instances in which the personal data which the Ministry itself identified as relating to the applicant was not disclosed, while in other instances data that was identified as third-party data was disclosed.

[61] The email contains the personal data of several individuals including the applicant, also comprising the opinions of others about the applicant. Some of the information is the personal data of more than one individual. The Ministry has identified the personal data, and excluded those parts of the email that consist of information that is about the recruitment methodology applied, the actions of some of the individuals involved in the recruitment process, and the author's views on the process as it was, or in his view, ought to have been handled.

[62] In my review of the responsive record, I have in particular relied on the above quoted parts of section 8, which involve:

- the applicant's right to access his own personal data. This includes the opinions and views of others about him, but not information that is focused on the recruitment process rather than on the applicant; and,
- the need to protect the personal data of third parties, especially where they have explicitly refused to provide their consent. This is not determinative in deciding whether it can be disclosed, but it is a strong indication of the expectations of privacy on the part of the data subjects.

[63] **Following this rationale, in pursuance of section 26(3), I find that additional parts of the responsive record, beside the parts already disclosed, are the personal data of the applicant which are required to be disclosed under the Data Protection Act.**

[64] I have prepared a separate document which I will make available to the Ministry, which indicates the additional parts that are required to be disclosed to the applicant.

C. FINDINGS AND DECISION

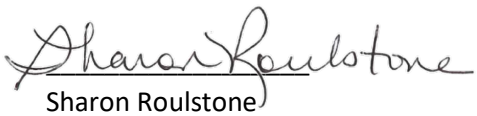
Under section 43(1) of the Freedom of Information Act, for the reasons outlined above I make the following findings and decisions:

- I find that it is more probable than not that disclosure of the responsive email would cause prejudice to the interest identified by the Ministry, i.e. the confidential discussion of opinions and views in a recruitment process, and the airing of concerns by civil servants.

- Therefore, I find that the exemption in section 20(1)(d) relating to prejudice to the effective conduct of public affairs is engaged in relation to the responsive record in its entirety, except for the part identified by the Ministry as "not harmful to release", which in any event has already been disclosed to the applicant.
- I find that the public interest in section 26(1) does not override the exemption claimed, and the exemption is maintained.
- In pursuance of section 26(3), additional parts of the responsive record, beside the parts already disclosed, are the personal data of the applicant which are required to be disclosed under the Data Protection Act.

I have prepared a separate document to communicate the additional parts of the record that need to be disclosed.

The Ministry has 10 calendar days to communicate the additional parts of the responsive record to the applicant. Please note that the disclosure is to the applicant alone, and not to the world at large as is usually the case in disclosures under the FOIA.



Sharon Roulstone
Ombudsman