

Hearing 83-202000817

**Decision**

Cabinet Office

Sandy Hermiston

Ombudsman

8 February 2021

**Summary**

An applicant made a request to the Cabinet Office under the Freedom of Information Law (FOI Law) for various records relating to the Smith Barcadere Redevelopment Project. The Cabinet Office withheld the extract of Cabinet minutes (the Extract) relating to the Cabinet’s decision whether to grant an exemption under the Development and Planning Law, relying on the exemption in section 19 of the FOI Law as “a record of ... deliberations ... arising in the course of proceedings of the Cabinet”. Although asked to conduct an internal review, the Cabinet Office acknowledged that it did not conduct one, and the applicant appealed directly to the Ombudsman.

The Ombudsman investigated the appeal and found that the Extract was not exempted from the general right for access, and the Cabinet Office was required to disclose it. The Ombudsman also found that the Cabinet Office had violated the FOI Law by not conducting an internal review when asked to do so by the applicant.

**Statutes considered**

Freedom of Information Law (2020 Revision) (FOI Law) and (2021 Revision) (FOI Act)  
Freedom of Information (General) Regulations 2008 (FOI Regulations)

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## A. INTRODUCTION

- [1] On 24 June 2020 the applicant made a request to the Cabinet Office under the FOI Law, for a variety of records relating to the Smith Barcadere Redevelopment Project. The request concerned the following two issues:
1. *Confirmation whether any exemptions were granted at any time whatsoever in connection with the Smith Barcadere Redevelopment Project; and*
  2. *If any exemptions were granted, please provide copies of signed minutes of meetings recording such exemptions.*
- [2] The Cabinet Office responded on 1 July 2020 that it held responsive records but claimed that these were exempt under section 19(1) of the FOI Law because they were “a record of ... deliberations ... arising in the course of proceedings of the Cabinet”.
- [3] The request was appealed to the Ombudsman on the following grounds:
- a) *there was a failure to comply with the obligation under the FOI Law to take a decision within a period of thirty calendar days after the date of receipt of the 25 July 2020 application for internal review of the 1 July correspondence;*
  - b) *there was a failure to communicate the information contained in a record within the time allowed by the FOI Law (the information requested was not exempt from the FOI Law as it comprised materials of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature in relation to The Smith Barcadere Redevelopment Project);*
- [4] The applicant made a separate request for the same information to the Ministry of Commerce, Planning and Infrastructure (the Ministry) and received a number of records in response, about which more below.
- [5] The responsive records held by the Cabinet Office consist of the minutes of the Cabinet meeting and the Extract of those minutes. Since the Extract is identical in content to the relevant part of the minutes, it is the only record under consideration. The minutes of the Cabinet meeting are not under consideration in this appeal.

## B. CONSIDERATION OF ISSUES

- a. **Is the Extract exempt under section 19(1)(a) of the FOI Act, because it contains opinions, advice or recommendations, or a record of consultations or deliberations prepared for, or arising in the course of, proceedings of the Cabinet?**

[6] The Cabinet Office claimed that the Extract was exempt under section 19(1)(a) of the FOI Law:

*(1) Subject to subsection (2), a record is exempt from disclosure if it contains opinions, advice or recommendations, or a record of consultations or deliberations —*

*(a) prepared for or arising in the course of proceedings of the Cabinet or the National Security Council or a committee of the Cabinet or the National Security Council; or*

*(b) prepared for the Governor or a Minister relating to the formulation or development of Government policy*

*(2) Subsection (1) does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature.*

[7] The Cabinet Office asserted that for the purposes of the present appeal no distinction should be made between the minutes and an extract of the minutes, since “each extract from Cabinet minutes contains precisely the same information as the relevant part of the minutes it is extracting”. The Cabinet Office claimed that “section 19(1)(a) applies equally to extracts from Cabinet minutes as it does to full Cabinet minutes.” We have verified the Extract and confirm that it is identical in content to the relevant part of the Cabinet minutes but reiterate that this appeal deals with the Extract and not the decision as they are two distinct documents. I disagree with this argument and find that the very purpose of the Extract was to create a separate document from the minutes as a whole.

[8] The Cabinet Office recognised that the 2018 amendment of section 19 moved the exemption of “a record of consultations or deliberations arising in the course of, proceedings of the Cabinet or of a committee thereof” from subsection (1)(b) to the current subsection (1)(a) but that this amendment did not alter the scope of the exemption.

- [9] The Cabinet Office drew attention to FOI hearing decision 40, a case from 2014 which involved extracts from eight Cabinet minutes.<sup>1</sup> It contended that there were significant parallels between the present appeal and the 2014 case. In the 2014 decision referred to by the Cabinet Office, the Acting Information Commissioner had found that,

*... those sections of the minutes entitled “Deferred papers”, “New papers and notes” and “Any other business”, ... documented, amongst other things, the topics under consideration by the Cabinet, the proposals brought to the attention of Cabinet and the decisions made by the Cabinet.*<sup>2</sup> (emphasis added by the Cabinet Office)

- [10] The Cabinet Office contended that those sections of the minutes constituted a “record of consultations and deliberations arising in the course of proceedings of the Cabinet” as per the exemption in section 19, and that [the Information Commissioner] “made an explicit finding that these were precisely the records that the exemption in section 19(1)(b) was intended to protect...”. The Cabinet Office stated that,

*The extract ... records the proposal(s) brought to the attention of Cabinet, the topic(s) under consideration by Cabinet and the decision made. It irrefutably engages section 19(1)(a) of the FOI Law.*

- [11] The Cabinet Office also argued that subsection 19(2) was not relevant in the present appeal, since,

*... the record in issue ... does not contain reports, studies, tests or surveys of a scientific or technical nature. Nor can a record of Cabinet’s decision making be said to contain material of a purely factual nature.*

- [12] In contrast, the applicant asserted that the denial of access by the Cabinet Office contradicted the spirit of the FOI Law. If full access could not be granted, the applicant argued that partial access should be provided. As well, the applicant contended that “all exemptions under the FOI Law... must be balanced against the public interest ... even though Section 26(1) ... does not expressly refer to Section 19(1)(a) ... as being subject to the public interest test.”

#### **Interpretation of the exemption in section 19(1)(a)**

- [13] The decisions of the Information Commissioner and Ombudsman are binding on the parties to an appeal, but they are not precedent-setting, and each case must be decided on its own merits. The 2014 case involved a much more comprehensive request for records than in this case. The 2014 decision determined that those parts of the Cabinet minutes referred to as

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<sup>1</sup> Information Commissioner, Hearing Decision 40-02813 – Part 2: Cabinet Office, 14 November 2014.

<sup>2</sup> Information Commissioner, Hearing Decision 40-02813, op.cit., para 67.

“deferred papers, new papers and notes and any other business” were covered by the exemption set out in (the present) section 19(1)(a). I note “deferred papers” are matters that require further deliberation where no final decision has been made which is clearly not the case in this appeal. The present, narrower request provides an opportunity to specifically address the issue of whether the record of a Cabinet decision made in accordance with planning legislation and evidenced by the Extract is exempted by section 19(1)(a). See paragraph 24 below.

#### **Intent and openness as default**

- [14] The purpose and intent of the FOI Act are explicitly stated in section 4, entitled “Objects of the Act”. It gives a clear indication of the paramount importance of the underlying principles of government accountability and openness, stating:

*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.*

- [15] Section 6(1) establishes the general right of access, as follows:

*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.*

- [16] These general provisions clarify that the FOI Act is intended to advance government openness and accountability, and that openness is the default starting point for determining whether a record is disclosable. This means that any record to which the Act applies is accessible, except where it is exempt, or where there is another reason under the Act why the record may be withheld, for instance where other legislation prohibits disclosure.

#### **Narrow reading of exemptions**

- [17] It is a commonly accepted principle of statutory interpretation that exemptions in the Act should be interpreted narrowly given the purpose and intent of the Act. This principle has been expressed by the UK Information Tribunal, as follows:

*... we consider we should generally adopt a narrow interpretation of “exclusions” from the Act unless it is clear that Parliament intended otherwise. This is the view the [First Tier Tribunal] and higher courts have largely taken of the exemptions.<sup>3</sup>*

And,

*I am content to proceed on the basis that... exemptions should be interpreted narrowly.<sup>4</sup>*

### **Ordinary meaning**

- [18] The term “deliberations” in section 19 is not defined in the FOI Act or the Interpretation Act, 1995. Therefore, the phrase should be given its ordinary meaning, in accordance with the principles of statutory interpretation. This approach has also been adopted by the UK Information Tribunal:

*...the common sense application of the ordinary meaning of the word to the actual circumstances of an individual case must be the correct approach to adopt.<sup>5</sup>*

- [19] The Merriam-Webster Dictionary defines the term “deliberation” as: a discussion and consideration by a group of persons (such as a jury or legislature) of the reasons for and against a measure”.
- [20] An examination of the Extract reveals that it is a record of a decision of the Cabinet, which was reached after discussions on the matter at hand. While the Extract in this case is identical to the relevant parts of the minutes of the Cabinet Meeting, it is a separate document. It does not document any discussion, does not show how the Cabinet reached its decision, is silent on any matters taken into consideration, and gives no details about positions taken by different Cabinet Members or others. It neither contains “opinions, advice or recommendations”, nor “a record of consultations or deliberations”.

### **The impact of recent amendments to the FOI Act**

- [21] The FOI Act was amended in two consecutive amendment laws in 2018 and 2019. The Freedom of Information (Amendment) Law, 2018 amended the structure of section 19, amongst other things, by merging the exemption relating to consultations or deliberations of the Cabinet from subsection (1)(b) into subsection (1)(a). The exemption was also extended to the National Security Council (or a committee thereof), as well as the Governor and a Minister in regard to the formulation and development of government policy. In the later Freedom of Information (Amendment) Law, 2019, the public interest test in section 26(1) was removed from applying to any part of section 19.

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<sup>3</sup> First Tier Tribunal (UK), *Brendan Montague v Information Commissioner and HM Treasury*, EA/2013/0074, 13 November 2013, para 51

<sup>4</sup> Upper Tribunal (Administrative Appeals Chamber), *DEFRA v Information Commissioner and Simon Birkett*, GIA/1694/2010; and *Home Office v Information Commissioner*, GIA/2098/2010, para 26

<sup>5</sup> First Tier Tribunal (UK.), *Heather Graham v Information Commissioner*, EA/2011/0133 and 0134, para 12

[22] However, the amendments did not change the focus of the exemption, which remained on “opinions, advice or recommendations”, and “consultations or deliberations... prepared for or arising in the course of proceedings of the Cabinet...”. This wording is identical in the original and amended versions of the Act. The continuity of the exemption’s purpose is also confirmed in the marginal title which remains unchanged as “Records revealing Government’s deliberative processes”.

[23] The new wording of section 19 does not indicate any desire on the part of the Legislators who voted to bring in the amendment laws, to expand the scope of the exemption to include decisions of the Cabinet, rather than retain a focus on the consultative or deliberative process that precedes the decisions.<sup>6</sup>

**Planning Act and public domain**

[24] Under section 53(1) of the Development and Planning Act, 2021 Revision, (the Planning Act) the Cabinet has the power to grant an exemption from the requirement for a planning permission where a proposed development is in the public interest. Section 53 also requires that the decision be gazetted. I view this provision as a clear expression that such decisions should be made public. We found no evidence that the decision was published in the Gazette. If the decision had been published in the Gazette, as required, this appeal would have not been necessary as the information would have been available in the public domain.

[25] I note the applicant’s separate request to the Ministry resulted in the disclosure of a number of records, including a memo from the Ministry’s Acting Chief Officer, which confirmed that a planning exemption had indeed been granted by Cabinet. In addition, according to the Cayman Compass, the Deputy Director of Planning confirmed that Cabinet granted approval for the exemption in question pursuant to section 53(1) of the Planning Act.<sup>7</sup> While the fact that this information is available elsewhere does not impact the question of whether the Extract should, or should not, be released under the FOI Act, the disclosure of the Extract will bring with it no surprises.

[26] Based on the requirement to reflect the decision in the Gazette and the public acknowledgement that the Cabinet approved the exemption request, it is difficult to understand why the Cabinet Office is refusing to disclose the Extract – especially in light of the objects of the FOI Act which promotes government openness.

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<sup>6</sup> Unfortunately, the Hansard transcripts relating to the debate on this matter in the Legislative Assembly are not yet available.

<sup>7</sup> Cayman Compass, “Smith Barcadere exempt from planning permission”, 17 February 2020 <https://www.caymancompass.com/2020/02/17/smith-barcadere-exempt-from-planning-permission/>

**Section 19(2)**

[27] The applicant also argued that the exemption in section 19(1)(a) does not apply to the Extract because it contains “material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature” as provided in subsection 19(2). I disagree, as a Cabinet decision cannot be said to be “purely factual” in nature, rather, it is a conclusion reached after considering the facts. If I accepted this argument, it would lead to an absurdity and would annul the exemption in subsection 19(1).

**Conclusion**

[28] In conclusion, the proper approach to the application of an exemption under the FOI Act must bear in mind the objects of this legislation to advance accountability and openness, the default “open” setting of the general right to access, the need to interpret exemptions narrowly and in accordance with the actual wording of the exemption, which, unless specifically defined, must be given its ordinary meaning.

[29] **Taken together, for the reasons specified above, I find that the Extract is not subject to the exemption in section 19(1)(a) of the FOI Act.**

[30] Since I have found that the exemption does not apply, no further test is required.

**b. Did the Cabinet Office fail to respond to the request for an internal review?**

[31] Finally, the applicant requested an internal review of the Cabinet Office’s initial decision in accordance with sections 33 and 34, and the Cabinet Office did not conduct one, as it acknowledged. This omission violated the provisions of the FOI Act. However, since section 33(2) specifies that “a failure to give a decision [in an internal review] ... within the time required by this Act shall be regarded as a refusal to do so”, and in this case the matter was swiftly moved to appeal.

[32] In future, I urge the Cabinet Office to proceed with requests for internal review as prescribed in the legislation.

[33] **In conclusion, the Cabinet Office did not conduct an internal review as requested by the applicant, and therefore violated the requirements of sections 34.**

**Additional issues**

[34] In his reply submission, the applicant raised an issue in regard to the records under consideration in this appeal, stating his belief that the Cabinet paper relating to the matter in question should also be under consideration in this decision. This is not correct, as the Cabinet paper would not be responsive to the request that was made, as quoted above, and was consequently not indicated in the Notice of Hearing, to which we received no objection from either party. Therefore, we will not address the issue raised.



[35] The applicant also argued that the FOI Act is incompatible with section 122 of the Constitution. I have not addressed this issue as it is not within my remit to make decisions on the constitutional validity of legislation.

### **C. FINDINGS AND DECISION**

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

- The Extract from the Cabinet minutes which contains information on whether the Cabinet granted any planning exemptions in relation to the Smith Barcadere Redevelopment Project is not exempt under section 19(1)(a) of the FOI Act.
- The Cabinet Office is required to disclose the Extract which shows the decision of the Cabinet in regard to the planning exemption relating to the Smith Barcadere Redevelopment Project.
- The Cabinet Office did not conduct an internal review when requested to do so. This violated the provisions of section 34 of the FOI Act.



Sandy Hermiston  
Ombudsman