

Hearing 93-202100567

Decision

Cayman Islands Airports Authority (CIAA)

Sharon Roulstone

Ombudsman

July 19, 2022

Summary

An applicant made a request under the Freedom of Information Act (FOIA) to the Cayman Islands Airports Authority (CIAA) for records relating to ground handling services (GHSs), including authorisations and agreements. The applicant narrowed the request, excluding “the commercial terms of licence fees or rent payable under leases”, focusing instead on “the licences, rights and services that the CIAA has authorised to be provided at Cayman’s two airports since 2008”. The applicant also questioned whether an additional agreement with a specified provider should exist.

The CIAA disclosed records in three batches, including a final release after this hearing had already commenced, applying the exemption relating to commercial interests to specific information in authorisation letters to ground handling service providers (GHSPs), and deferring draft ground handling agreements until their completion in August 2022.

The Ombudsman found that the exemption relating to commercial interests did not apply to the authorisation letters, and that it would in any event not be in the public interest to withhold the redacted information. Therefore, the authorisation letters must be disclosed. The Ombudsman also found that the deferral was correctly applied to the draft agreements, and that the CIAA did not hold any additional agreement with the specified provider.

Statutes¹ considered

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

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

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.

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A. INTRODUCTION

[1] On 1 July 2021 the applicant made a request under the FOIA to the CIAA for the following:

1. *Complete copies of all written permission, licenses or authorization, including any historic permissions issued by the Cayman Islands Airport Authority for the provision of fixed base operations of any nature , including:*
 - i. *Marshalling and parking of all aircraft using the General Aviation apron (ORIA);*
 - ii. *Provision of fuel in keeping with the aircraft operators' request;*
 - iii. *Assist aircraft crew with the entry and exit process;*
 - iv. *Assist aircraft crew with the Flight Planning process;*
 - v. *Provide any other service required by visiting or locally based aircraft;*
 - vi. *Provide passenger handling services for commercial operators.*
2. *Complete copies of any handling licence or permission of whatsoever nature;*
3. *Complete copies of any Ground Handling Policy that is currently in place having been approved by the Cayman Islands Airport Authority board; and*
4. *Complete copies of any other regulations or policies issued in respect of any of the above mentioned services.*

[2] On 15 July 2021 the Information Manager (IM) responded, exempting some records pursuant to the exemptions in sections 21(1)(b) (commercial interests) and 17(1)(a) (legal privilege), as follows (using the same numbering as above):

1. *In respect of your 6 areas in #1, letters have been issued to each Ground Handling Service Provider indicating the services they have been given permission to provide. These records would be exempt from release under S21 (i) (b) of the FOI Law.*
2. *At this time, we only have the letters mentioned in 1 above. The draft Ground Handling agreement has not been finalized/signed as yet. This record would be exempt from release under S17 [(1)] (a).*

3. *The Ground Handling policy approved by the CIAA Board (attached) has been issued to each Ground Handling Service Provider.*
4. *There are no other documents issued specifically to Ground Handling Service Providers (from a commercial perspective) other than those listed above.*

- [3] The applicant was not satisfied and on 9 August 2021 provided a clarification narrowing down the initial request to records from 2008 onwards, after which the IM clarified the position of the CIAA.
- [4] The applicant requested an internal review. In the internal review decision, the CEO disclosed some additional records and provided further clarifications. The exemptions were maintained on some of the records. The applicant then made an appeal to the Ombudsman, which we accepted on 4 November 2021.
- [5] We engaged with both parties and raised the following points:
- The intended exemptions were sections 21(1)(b) (commercial interests) and 17(1)(b)(i) (actionable breach of confidence), not (apparently) section 17(1)(a) (legal professional privilege).
 - Some specified records (letters and licences) could be disclosed in whole or in part, while others could potentially be partially disclosed and/or deferred (draft agreement).
 - The confidentiality clauses in the agreements would have to be studied more closely.
- [6] On 22 February a number of records were disclosed in whole or in part, and the disclosure of a draft ground handling agreement was deferred until August 2022.
- [7] In March 2022 the applicant clarified that he was not interested in “the commercial terms of licence fees or rent payable under leases, but rather the licences, rights and services that the CIAA has authorised to be provided at Cayman’s two airports since 2008”. The applicant also confirmed that he was still awaiting the “historic [ground handling service providers] letters/agreements”, as “only... the redacted ones from 30 June 2021” had been provided.
- [8] Upon our advice, in March 2022 the CIAA disclosed additional records, including ground handling agreements since 2008, and confirmed a question about one of the ground handling services providers.
- [9] Finally, on 12 May 2022, after this hearing had commenced, the CIAA disclosed another record which had been overlooked in its previous responses.

B. CONSIDERATION OF ISSUES

- [10] During this request and appeal the CIAA disclosed a number of records outright. Other records were redacted, and some of the redactions were subsequently retracted, resulting in the disclosure of additional information at three different times. In addition, the disclosure of one record was deferred.
- [11] In the course of the appeal, the applicant narrowed the request, as described above. In his submission for this hearing, he also specified the parts of the initial request that are no longer part of this appeal:
- The FBO licence (2009) - disclosed on 18 October 2021;
 - The Rubis agreement;
 - The Joint Fuel Concession Agreement;
 - The GHSP Policy – also disclosed on 18 October 2021.

These records are no longer part of the appeal, and therefore they and the exemptions that were applied to them will not be considered in this decision.

- [12] This leaves the following records as the subject of this appeal:
- Authorisation letters to GHSPs;
 - A draft ground handling agreement;
 - The SOL agreement.
- [13] For clarity, the generic term used in this decision for the types of services documented in the responsive records is “ground handling services” (GHS), and an entity which provides such services is referred to as a “ground handling services provider” (GHSP).
- [14] The initial request included a number of records pertaining to the provision of “fixed based operations”, or FBOs. The applicant said this was a globally used term that meant “a specific type of authorisation to operate on airport grounds in order to provide services to the airport including ground handling, fuelling services, tie-down, hangar services, repair and maintenance services, etc.”. For its part, the CIAA acknowledged that it used this term in the past, but it does not appear in any current CIAA policies or agreements. No entity currently held such a licence.

- [15] In accordance with section 43(12):

(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.

EXEMPTION OF AUTHORISATION LETTERS

- a) Are the authorisation letters to GHSPs exempt under section 21(1)(b) because they contain information concerning the commercial interests of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.

[16] The exemption in section 21 states:

Records relating to commercial interests

21. (1) Subject to subsection (2), a record is exempt from disclosure if —

(a) its disclosure would reveal —

...

(ii) any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(b) it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.

[17] The UK Information Tribunal clarified that the term “would” means:

“more probable than not” that there will be prejudice to the specific interest set out in the exemption...²

[18] The term “commercial interests” is not defined in the FOIA. Therefore, this phrase should be given its ordinary meaning, in accordance with the principles of statutory interpretation.

[19] The former Ombudsman defined the term “commercial interests” in a previous decision, as:

interests that relate to trading such as the sale or purchase of goods which are undertaken for the purpose of revenue generation and normally take place within a competitive environment.³

[20] For this prejudice-based exemption to apply the information must represent a commercial interest, and secondly its disclosure must prejudice that interest.

² UK Information Tribunal *Ian Edward McIntyre v Information Commissioner and Ministry of Defence* 11 February 2008 EA/2007/0068 para 40

³ Ombudsman, Hearing Decision 72-201800330/72-2018000337, Ministry of Commerce, Planning and Investment, 18 October 2018, para. 17(iii)

[21] As noted above, the applicant narrowed the appeal to specific types of information in the requested records, as follows (my emphasis):

*For clarity it is only the **list of services and the location of services** that the CIAA has authorised the GHSPs operating at either ORIA and/or CKIA to carry out that are in issue in this appeal. The Applicant does not seek any information related to the commercial activities, contracts or revenue generation or the financial interests or financial arrangements of any of the GHSPs with the CIAA or vice versa. Neither does the Applicant seek any information regarding the fees payable by the GHSPs to the CIAA in respect of the services which the GHSPs provide at the Airports: it merely seeks to understand what services each GHSP is authorised to provide.*

Does the redacted information represent “commercial interests”?

[22] Without elaborating, the CIAA claimed that all the redacted information in the authorisation letters was “clearly” commercial in nature, and characterised it as “very sensitive” in nature, particular at this particular point in time, as further explained below. The CIAA stated that its CEO was “very well placed to assess what is and is not information of a commercially sensitive nature, not only for the CIAA, but also the GHSPs”.

[23] Given the reduced scope of the appeal in relation to commercial information, as explained above, the applicant denied that the redacted information represents commercial interests at all, since he was “merely [seeking] to understand what services each GHSP is authorised to provide.” The applicant noted that the CIAA had already disclosed the identities of the GHSPs, and that the number of services that could possibly be offered, and the airports in which the services could be provided, was limited.

[24] The CIAA disclosed the body of the authorisation letters, including the name of the addressee company in each letter, but it redacted the following information in each letter:

- a) The name of the GHSP executive in charge (CEO, president, managing director, etc.) to whom the letter was addressed;
- b) The location of a planned meeting (i.e. an airport code or name).
- c) The airport(s) where the GHSP is allowed to operate;
- d) The services allowed to be carried out, and (in a few cases) not permitted to be carried out;

[25] Many of the letters simply consist of a general authorisation for the addressee to continue providing services at a specified airport, based on previous arrangements. Therefore, not all the letters list the nature of the authorised or prohibited services. The letters that are current tend to list the services the addressee is authorised or (in a few cases) prohibited to provide.

- [26] The names of CEOs, presidents, managing directors, and other executives of these companies (point a, above) are not “commercial interests”. This information is public knowledge that can be found on the website of the company in question, in trade publications, or in other publicly available documents.
- [27] Equally, meeting locations (point b, above) do not represent “commercial interests”, and can, therefore, not be exempted under section 21(1)(b), contrary to the claims of the CIAA.
- [28] This leaves only two types of information redacted in the letters representing potential “commercial interests”: the location of the services in one of two airports (Owen Robert International Airport (ORIA) or Charles Kirkconnell International Airport (CKIA)) (point c, above), and the services that are authorised/not authorised to be delivered (point d, above). These are the two types of information the applicant is specifically interested in. I will refer to these as “the remaining redacted information”.
- [29] I consider that the latter two elements – the nature of named GHSs at specified airports in the Cayman Islands - represent “commercial interests”, as defined above. This is because the relationship between the parties is commercial in nature, since it involves the trading of services for the purpose of revenue generation within a competitive environment, as per the definition above.

Would the disclosure of the remaining redacted information prejudice the “commercial interests”?

- [30] According to the CIAA, the disclosure of the redacted information “will harm not only those entities’ commercial interests, but also those of the CIAA”. CIAA claimed that the GHSPs themselves “do not wish to have the details of their commercial affairs disclosed and/or brought into the public domain” and would “strenuously object” to the disclosure. The CIAA said these sentiments were inspired by a desire “to protect existing commercial interests in what is a very competitive industry.”
- [31] The CIAA stated that the disclosure of the permitted services “would give rise to the GHSPs seeking to renegotiate the permissions that they respectively hold (or that that they do not currently hold but that they may wish to hold) to the detriment of the CIAA’s commercial interests.” The CIAA claimed that this would cause “a real possibility of prejudice to the CIAA’s bargaining position” as well as harm to its “commercial interests and activities” which it does not further specify. The CIAA did not answer why, in this scenario, greater openness would not result in greater competitiveness, which might work to the benefit of the CIAA and the general public.
- [32] The CIAA also stated that the redacted information was “particularly sensitive” at this point in time, because negotiations with the GHSPs were currently ongoing in accordance with new procedures. The CIAA called the negotiations “fiercely competitive” and said that it

hoped “that the negotiations will be concluded by the end of May or possibly June [2022]”. The CIAA deferred the draft GHS agreement until August 2022, after which the disclosure would be reconsidered, as further explained below.

[33] The CIAA did not expand on the new procedures, but stated:

... the CIAA is now requiring GHSPs sign up to a full GHSP Agreement which will replace the licences contained within the Letters. The GSHP Agreements are required under the CIAA’s new GHSP Policy (which has already been disclosed to the Applicant).

...the CIAA is currently working to finalise and agree Ground Handling Agreements ... with the existing GHSPs. The disclosure of the information redacted from the letters may well stymie, or even derail, that entire process. If this occurred it would be to the serious detriment of the CIAA’s commercial interests.

[These are] ... matters of an extremely commercially sensitive nature at this time. The CIAA has been carefully developing the draft GHSP Agreement and GHSP Policy over a significant period of time and any delay to (or a derailment of) the implementation process would be very costly and extremely damaging to the CIAA from a commercial, and other, perspectives.

[34] The CIAA stated that disclosure of the redacted parts of the letters,

... will lead to one licensee having access to commercial information regarding another competitor which will lead [to] that licensee having a commercial advantage over the other in the current negotiations. Such disclosure would not only prejudice the commercial interests of the CIAA with regard to the best possible commercial terms it may be able [to] agree with each [of] the various licensees but it will also risk derailing the whole GHSP negotiation process. If that were to happen it would, at a minimum, lead to a delay in the grant of new licences in the form of GHSP Agreements which will also have an effect on the CIAA’s revenue. Such a situation would be very disadvantageous indeed to the commercial operations of the CIAA particularly in the light of the fact that it has taken years of efforts to get this process to where it currently stands.

[35] The applicant’s request was for authorisation letters from 2008 to present, and most of them are dated between 2014 and 2022, with a majority ranging from 2020 to 2022. Therefore, most of the letters have expired, in the sense that they relate to arrangements that are no longer in force. Given the non-current status of the vast majority of the letters under consideration, I find it highly unlikely that the disclosure of the historical letters would in any way prejudice the commercial interests of either of the parties, including the CIAA’s own interests.

[36] There seems to be some uncertainty whether the arrangements between the CIAA and the GHSPs are subject to the Procurement Act, 2016. In any event, regulation 19 of the Procurement Regulations (2021 Revision) requires that certain information on awarded contracts is made public within 30 days or 1 year, depending on the value of the contract. That information consists, amongst other things, of “a brief description of the goods or services being procured” and “the name of the successful bidder”, which appear to be the same data elements that have been requested by the applicant and redacted by the CIAA. Whether or not the Procurement Act applies, it seems clear that the same elements which the CIAA claims would seriously damage commercial interests, are expected to be published under procurement rules in the name of accountability and transparency.

[37] The CIAA pointed to a previous decision of the Ombudsman, in which letters of intent, amongst other things relating to arrangements for the birthing of cruise ships, were found to be exempted on the context of ongoing negotiations. In that decision the Ombudsman wrote:

The letters of intent were composed and agreed in the context of negotiations, and form an intrinsic part of the broader procurement exercise relating to the CBF. Consequently, I consider it is highly likely that their disclosure would prejudice the commercial interests represented in the records.⁴

[38] The CIAA’s authorisation letters resulted from, previous negotiations, but their relationship to the presently ongoing negotiations is not clear. The CIAA has not clarified how the authorisation letters are “composed and agreed in the context” of the present negotiations, or “form an intrinsic part of the broader procurement exercise”, or why – given the general nature of the redacted information - “their disclosure would prejudice the commercial interests represented in the records”, as was the case in the older hearing decision. It seems unlikely that the remaining redactions (of company names and the services each company is currently authorised to provide) have relevance to the present negotiations, and the CIAA has not convincingly explained how, exactly, the redacted information would be more likely than not to prejudice those negotiations. In fact, it seems logical that greater openness will promote greater and fairer competition between providers interested in GHSPs, which should reduce the costs to the public purse.

[39] In addition, the following considerations tend to weaken the arguments of the CIAA, that disclosure is more likely than not to harm the commercial interests involved:

- The remaining redacted information is general in nature and does not provide sensitive details of commercial operations, such as financial revenues or costs, operating methods, trade secrets, and the like.

⁴ Ombudsman, *Hearing Decision 74-201900014, Ministry of District Administration, Tourism and Transport*, 12 November 2019, para. 17

- The GHSPs operate at the airport in plain view of the public and their competitors. Their employees visibly display company logos/names on their uniform shirts in plain sight while conducting their company’s business.
- Most of the GHSPs promote their services on their company websites, and those services are also openly discussed and promoted in trade articles.

[40] **For the above reasons, I do not consider that it is “more probable than not” that the disclosure of the remaining redacted information would prejudice the commercial interests of either the GHSPs or the CIAA. As a result, the exemption in section 21(1)(b) does not apply to the remaining redactions in the GHSP authorisation letters.**

Public interest test

[41] Because I have found that the exemption does not apply, I am not required to conduct a public interest test under section 26. However, I want to address the public interest to leave no doubt as to the appropriateness of disclosure.

[42] Regulation 2 defines the public interest as:

- “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;*
 - (h) deter or reveal wrongdoing or maladministration;*
 - (i) 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*
 - (j) reveal untrue, incomplete or misleading information or acts of a public authority.*

[43] In addition, section 6(5) states:

(5) Where the factors in favour of disclosure and those favouring non-disclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26.

- [44] The CIAA highlighted the public interest intrinsic in the exemption relating to commercial interests, and the public interest in protecting the revenue stream it secures on behalf of the public, emanating from the relationship with the GHSPs. The CIAA states that these factors outweigh the factors identified in the definition of the public interest in the FOI Regulations.
- [45] The applicant pointed to the intent of the FOIA in section 4, and to the public interest in “healthy competition”, as well as the accountability and transparency of public authorities such as the CIAA, and stated that points (a), (b), (c), (e), (f), (g) and (i) of the above definition are relevant to the balancing of the public interest.
- [46] **For clarity’s sake, I find that the public interest intrinsic in the exemption (which I have found not to apply) and the other factors identified by the CIAA, are outweighed by several applicable factors from the definition above, including the promotion of public understanding of processes and decisions of public authorities, the promotion of the accountability of public authorities, and the deterrence of maladministration, all of which will be enhanced by disclosure of the redacted information.**

DEFERRAL OF GROUND HANDLING AGREEMENTS

b) Were the ground handling agreements (GHAs) correctly deferred under section 11(2)(c)?

- [47] Section 11(2)(c) states:

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

...

(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.

- [48] The CIAA explained that it is currently finalising new agreements with the GHSPs, in a new format under its new GHSP Policy. I have been provided with a draft model agreement which was being worked on at the time the request was made.
- [49] As noted above, the negotiations are expected to be completed “by the end of May or possibly June [2022]”. The CIAA stated that it “relies on section 11(c) to defer disclosure of GHSP Agreement pending finalisation of all agreements [sic]”, which it estimates will be in August 2022, “at which point the request will be considered afresh”. The CIAA has indicated that “it will likely be content to disclose GHSP Agreements, either in full or in part, subject to any applicable exemptions arising at that time. “

- [50] **I find that disclosure would likely disrupt the ongoing negotiations and finalisation of the agreements, and this would likely harm the commercial interests of both the GHSPs and the CIAA. Therefore, considering that the new GHSP agreements were still being negotiated at the time the request was made, and that process is not expected to be completed until August 2022, I find that the premature release of the draft agreements would be contrary to the public interest, and the deferral was correctly applied.**
- [51] The CIAA's submission also claimed the exemption in section 17(1)(a) relating to legal professional privilege in regard to these agreements. This does not seem to serve any purpose, and I take it that this argument was intended to support the deferral being relied on. Therefore, I will not consider this exemption here.

EXISTENCE OF A FURTHER SOL AGREEMENT

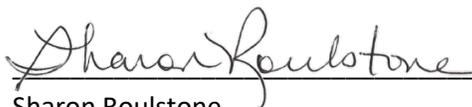
- [52] The applicant pointed to an agreement from 2010 between the CIAA and Esso, which was disclosed. Amongst other things, this agreement authorised SOL to provide "refueling services to commercial aircraft on the... main apron only and for no other purposes whatsoever". Esso was subsequently sold to SOL, which operates under the Esso licence.
- [53] After this hearing had commenced, the CIAA made a final disclosure of an email dated in 2019, in which the Airport Operations Manager wrote to SOL, stating: "... that SOL Aviation has equal access to any aircraft which chooses SOL as their fuel provider, regardless of the parking location."
- [54] Pointing to the apparent discrepancy between these two statements, the applicant argued that "some other document or record which records the CIAA's position" must exist, which has not yet been disclosed, and called this an example of "undocumented, backroom dealing" which is "precisely the type of mischief the FOI regime is designed to prevent".
- [55] However, the CIAA answered that it does not hold any further agreement with SOL, either in the form of a novation agreement (an agreement made between two contracting parties to allow for the substitution of a new party for an existing one) or a subsequent agreement between CIAA and SOL.
- [56] The CIAA insisted that its IM conducted a thorough search, resulting in the disclosure of many records in whole or in part. It was an administrative oversight that the email from 2019 was omitted from earlier disclosures. When the error was discovered, the email was immediately disclosed, without redactions. It formed part of an email chain which, the CIAA said, was otherwise unconnected to this issue. However, for the sake of transparency, CIAA nonetheless disclosed the entire chain. The CIAA confirmed that there had not been any formal amendment to the Esso/SOL licence, and that the email "merely confirmed the [CIAA's] position with respect to SOL".

- [57] My office communicated extensively with the CIAA about this email and the search undertaken, and we were assured that no further responsive records (including any additional agreements with SOL) exist.
- [58] To the extent that the nature of the services which SOL was licenced to provide changed over time, and given the CIAA's assurances that a thorough search was undertaken, this absence of documentation may be in violation of section 6 of the National Archive and Public Records Act (2015 Revision), which requires that "Every public agency shall make and maintain full and accurate public records of its business and affairs...".
- [59] **Given the assurances of the CIAA on this question, and the apparently thorough search that was eventually undertaken, I am satisfied, on the balance of probabilities, that no further documentation is held on this issue.**

C. FINDINGS AND DECISION

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

- For the reasons explained above, I find that the exemption in section 21(1)(b) does not apply to the remaining redactions in the GHSP authorisation letters, as it is not "more probable than not" that the disclosure of the remaining redacted information would prejudice commercial interests.
- For clarity, although I am not required to do so, I have conducted a public interest test, and I have found that the public interest in maintaining the claimed exemption is outweighed by public interest factors relating to the promotion of public understanding of processes and decisions of public authorities, the promotion of the accountability of public authorities, and the deterrence of maladministration.
- For the reasons stated above, I find the deferral under section 11(2)(c) to be correct, since the premature release of the draft agreements before their finalisation, expected to be completed in August 2022, would be contrary to the public interest.
- I am satisfied, on the balance of probabilities, that the CIAA holds no further documentation on the question of the SOL agreement.
- I require the CIAA to disclose the authorisation letters in full within 10 days.



Sharon Roulstone
Ombudsman