

Hearing 62-00618
Preliminary Decision

Cayman Islands Institute of Public Accountants

Sandy Hermiston
Ombudsman

9th July 2018

Summary:

On 12 February 2018 an individual made a request to the Cayman Islands Institute of Public Accountants (the CIIPA) for access to information including policies and procedures, and his own personal information. In its response the CIIPA stated that it is not a public authority, and is not subject to the Freedom of Information Law (FOI Law).

On 23 March 2018 the same individual contacted the Ombudsman in order to make an appeal under s.42 of the FOI Law, asserting that the CIIPA is a statutory body, and therefore falls within the definition of public authority in s.2 of the FOI Law.

In this hearing decision the Ombudsman considered the preliminary question whether she has jurisdiction in this matter, and whether the application consequently falls within the ambit of the FOI Law, or not.

The Ombudsman concluded that the CIIPA is not a public authority under the FOI Law. Consequently, the FOI Law does not apply to it, and there is no legal right under the FOI Law to request and access records held by the CIIPA, or to appeal a denial of access to the Ombudsman.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision)
Freedom of Information (General) Regulations 2008
Accountants Law, 2016
Public Authorities Law, 2017

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A. INTRODUCTION

- [1] On 12 February 2018 the Applicant made a request under the Freedom of Information Law (“FOI Law”) to the Cayman Islands Institute of Public Accountants (“the CIIPA”), asking for a variety of policies and procedures relating to practitioner licensing and firm registration, as well as a broad range of records relating to his own and his company’s license applications and assessments.
- [2] He was concerned because the CIIPA had initially granted him a public accounting license for the year 2018, which was subsequently withdrawn. He was not satisfied with the information provided to him by the CIIPA regarding the decisions made so he filed a request for information under the FOI Law.
- [3] The CIIPA responded to the FOI request, saying that the "CIIPA is not a public authority and is therefore not subject to the Freedom of Information Law".
- [4] On 23 March 2018 the Applicant contacted the Ombudsman in order to make an appeal under s.42 of the FOI Law, arguing that CIIPA is a statutory body, and therefore falls within the definition of public authority in s.2 of the FOI Law.

¹ In this decision all references to sections are to sections of *the Freedom of Information Law (2018 Revision)*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

B. ISSUES

- [5] This issue to be considered in this decision is whether CIIPA is a public authority under the Freedom of Information Law (2018 Revision).

C. CONSIDERATION OF ISSUES UNDER REVIEW

The position of the CIIPA:

- [6] The CIIPA states that its views are not provided in response to the Ombudsman's "purported notice" and should not be taken for a submission pursuant to such notice. The FOI Law, Regulations, and the Appeal Policies and Procedures do not make reference to any "preliminary hearing" process. The CIIPA rejects the jurisdiction of the Ombudsman to decide in this matter, since she only has jurisdiction over an organization which is a "public authority", which the CIIPA claims it is not. If the CIIPA were to participate in an appeal under the FOI Law, the CIIPA states:

...that could be taken as an admission that the FOIL applies to CIIPA, which is denied. CIIPA has a right to a fair hearing on the issues of whether it is a "public authority" under the FOIL which right is not met by the process which the Ombudsman is seeking to pursue.

- [7] The CIIPA points out that the request made by the Applicant referred to an attachment which was not enclosed.

- [8] The CIIPA states that the FOI Law does not apply to a private professional organization such as the CIIPA, which is:

- privately owned by its members, without any government ownership;
- self-governing, without any outside representation from government or otherwise on its governing Council, or other bodies; and,
- self-funded through annual membership and licensing fees, without any government or public funding.

- [9] The CIIPA argues the fact that an organization is established and operates under a statutory framework does not render it a public authority unless that organization is also "governmental" in nature, in accordance with the three criteria outlined above.

- [10] According to the CIIPA, the FOI Law is intended to hold government and governmental agencies, bodies and authorities accountable to the public. Bearing in mind this principal purpose of the Law, and the placement of point (b) in the definition of public authority,

alongside (a) and (c) in s.2 which clearly cover governmental entities, the meaning of (b) must be to encompass governmental statutory bodies and authorities, not private ones.

- [11] The CIIPA points out that the FOI Law does not contain a definition of a statutory body, and the Interpretation Law (1995 Revision) requires a plain reading should be applied, as “an organization created under a law/statute by a parliament”.
- [12] In legislating the FOI Law for “public bodies” the Legislative Assembly must have had in mind the various statutory bodies and authorities that are subject to the Public Management and Finance Law, which are wholly or partially funded by the Cabinet, whose board or governing body is appointed and dismissed by the Governor or the Cabinet, and whose financial statements are audited by the Auditor General.
- [13] The CIIPA is a limited liability, not-for-profit company incorporated under section 80 of the Companies Law, incorporated in 2007. The CIIPA states that it was not created under the Public Accountants Law, 2004 (PAL), but under the Companies Law in force in 2007, as testified by the copy of the certificate of incorporation which was provided.
- [14] The CIIPA states that s.3(2) of the PAL refers to the “former society”, by which is meant the Cayman Islands Society of Professional Accountants (“CISPA”), which was licensed in 1970 under the Companies Law, 1960. According to the CIIPA, this too is evidence that the CIIPA was not created by the Legislative Assembly, but by natural persons under the Companies Law.
- [15] The CIIPA points to the different legal language used in creating the Cayman Islands Monetary Authority (CIMA) and the CIIPA. The former is the product of s.5 of the Monetary Authority Law (2018 Revision) which provides “There is established an Authority to be called ...”, whereas in respect of the CIIPA s.3 of the Public Accountants Law states “There shall be established...” (emphasis added by the CIIPA). The CIIPA concludes that CIMA’s existence is clearly the result of a specific statute, and deduces that the Legislative Assembly would have used identical language if it intended the CIIPA to derive its existence from the PAL or the Accountants Law, 2016.
- [16] Simply because an organization has statutory powers does not mean it is a statutory body. CIIPA sees itself as analogous with the Law Society in England and Wales, and the Financial Reporting Council (FRC) in England and Wales, stating that neither of these two organizations is a statutory body, although both have been given certain functions under statutes of regulation.
- [17] The CIIPA believes there is an important policy consideration at stake. The Legislature could not have intended for the FOI Law to apply to private organizations such as the CIIPA, since “Members of the public have no legitimate interest in having access to documents and deliberations of a private organization, particularly where access would disclose private information about members ... and their firms or even the CIIPA personnel.” The CIIPA considers that “such disclosure could be very damaging and in the case of a private organization cannot be justified by public interest concerns.”

- [18] The CIIPA observes “carve outs” in the FOI Law for the Cayman Islands Monetary Authority (CIMA) and the Auditors Oversight Authority, and speculates that “perhaps the absence of a similar carve out for [the CIIPA] is a further indicator that the FOI Law was not intended to apply to it.”
- [19] The CIIPA adds that it “conducts itself in a fair, open and transparent way in its dealings with its members and practitioners”, and advises that the proper course of action for the Applicant is to appeal the matter under the Accountants Law.
- [20] Finally, the CIIPA points to the listing of public authorities under the FOI Law, regularly published and updated by the Cayman Islands National Archive, which does not contain the CIIPA or any organization that is “a privately formed company consisting of members who join voluntarily”.

The position of the Applicant:

- [21] The Applicant believes the Ombudsman has jurisdiction to determine whether or not the CIIPA is a public authority under the FOI Law. Quoting a number of local legal precedents, the Applicant concludes that,

... where a jurisdictional issue arises in the course of Court proceedings, the relevant Court determines whether or not it has the jurisdiction to determine the issue. While the Ombudsman is not a Court it is apparent that the same process would apply.

- [22] The Applicant admits that the attachment to the request was not sent at the time the request itself was made. However, the application letter to the CIIPA contained sufficient information concerning the requested records. In any event, the CIIPA did not request that further particulars be provided, and the Applicant believes that at “this late stage” this argument should not be allowed to proceed.
- [23] The Applicant rejects the comparison between the CIIPA and the Law Society and the FRC of England & Wales. The FRC is a materially different body to the CIIPA, “as the source of CIIPA’s powers does lie in statute”, unlike FRC whose powers were conferred by the FRC’s Accountancy Scheme of 2013. For its part, the Law Society of England & Wales was not established by statute, and in contrast to the Law Society “CIIPA’s regulatory, investigatory and disciplinary powers are derived solely from statute which sets out clear procedures to be followed”.
- [24] According to the Applicant, the FOI laws and procedures in the Cayman Islands and in England and Wales are materially different, and the definition of a “statutory body” in England and Wales is in any event of limited assistance.
- [25] The Applicant argues that the CIIPA and its predecessor CISP were created by statute, respectively by the Accountants Law, 2016 and the PAL. With some minor variations, both laws:

- mandated the objects of the organization;

- mandated how it was to be funded;
- mandated who the membership was to be made up of;
- created three bodies within CISPA/CIIPA, namely the Council, the Investigation Committee and the Disciplinary Tribunal, and defined their respective powers and roles; and,
- created certain offences in relation to licenses and registrations issued by CISPA/CIIPA.

[26] According to the Applicant, the CIIPA's powers, functions and duties are prescribed by statute, and the orders of the bodies created within the CIIPA are enforceable as if they were ordered by the Court. Therefore, it follows that the CIIPA is a body established by statute. By virtue of being a statutory body, the CIIPA is a public authority as intended in point (b) of the definition in s.2 of the FOI Law.

Discussion:

[27] The first task before every decision-maker is to satisfy herself of her jurisdiction over the subject matter before considering the merits of a case. The CIIPA asserts that I do not have jurisdiction in this matter because it is not a public authority pursuant to the FOI Law. If I accept this argument, I would be allowing the CIIPA to decide a question over which it has no legal authority, about which it has no expertise and in which it has a direct interest.

[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.

[29] Section 3 of the FOI Law states that the FOI Law applies to public authorities.

[30] A public authority is defined in section 2 of the FOI Law 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 50% 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);*

[31] There is no argument that paragraphs (a) (b) or (d) in the above definition apply in this situation. The parties agree that the answer to this question centers on whether the CIIPA is a "statutory body". This term is not defined in the FOI Law.

[32] The CIIPA argues it is not a statutory body because it was initially incorporated as the Cayman Islands Society of Professional Accountants as an ordinary (non-profit) company under the Companies Law in 2007. I do not accept this argument. While the original entity was

incorporated under the Companies Law it was clearly continued under the Public Accountants Law, 2009 and subsequently continued again under the Accountants Law, 2016.

- [33] I find that the current CIIPA is a statutory body in the general sense of that term. It exists by virtue of a law enacted by the Legislative Assembly of the Cayman Islands and therefore is a type of statutory body.
- [34] The Applicant would have me stop there, however; 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.
- [35] The other entities specifically mentioned in the definition of public authority include government ministries, portfolios or departments and government companies. The fact that all those entities are part of the public sector supports a narrow interpretation of statutory body as being limited to public statutory bodies.
- [36] The objects of the FOI Law are set out in section 4:

4. The objects of this Law 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.

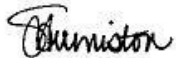
- [37] As seen above, the objects of the FOI Law are to reinforce and give effect to the accountability and transparency of the Cayman Islands Government, and to public participation in national decision-making. The focal point of the FOI Law is clearly on the public sector.
- [38] A focus on the government and the public sector permeates the entirety of the FOI Law, for instance in several of the exemptions under the Law, which relate to "government's ability to manage the economy" (s.18), "government's deliberative processes" (s.19), "the effective conduct of public affairs" (s.20), "recommendations for reform both of a general nature and directed at specific public bodies" (s. 39).
- [39] While none of the parties brought the *Public Authorities Law, 2017* (PA Law) to my attention, I have determined that it is helpful to my interpretation of the term "public authority" in the FOI Law.
- [40] The purpose of the PA Law is set out in section 4. It is to "*provide uniform regulation of the management and governance of public authorities*". While "public authority" is defined more narrowly (meaning only a statutory authority or government company) for the purposes of the PA Law, I find it helpful to refer to the definition of "statutory authority" in the PA Law:
- "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 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,

- [41] This definition further clarifies the Legislature's view of what a statutory authority or body means in the context of public authorities.
- [42] A review of the *Accountants Law, 2016* reveals that the members of the CIIPA's governing body are not appointed or dismissed by the Governor, or the Cabinet. The CIIPA is not funded or owned by the government. Therefore I find that the CIIPA cannot be considered to be part of the public sector.
- [43] Based on the above, I conclude that the CIIPA is not a public authority under the FOI Law.

D. FINDINGS AND DECISION

- [44] The CIIPA is not a public authority under the FOI Law. Consequently, the FOI Law does not apply to it, and the Applicant does not have a legal right to request access to records held by the CIIPA under the FOI Law, or to appeal a denial of access to the Office of the Ombudsman.



Sandy Hermiston
Ombudsman

9th July 2018