



Hearing 73-201900083/84

Decision

Workforce Opportunities & Residency Cayman (WORC)

Sandy Hermiston
Ombudsman

6 December 2019

Summary:

Two applicants made identical requests under the Freedom of Information Law (2018 Revision) to Workforce Opportunities & Residency Cayman (WORC) for the History and Culture Tests they completed as part of their application for Permanent Residency.

WORC claimed the exemption in section 20(1)(d), saying the disclosure of the tests would undermine its ability to apply the History and Culture Test in a fair manner in the future, and would therefore prejudice the conduct of public affairs.

The Ombudsman agreed with WORC and found that the public interest did not override the exemption. No further action is required on the part of WORC.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision) (FOI Law)

Freedom of Information (General) Regulations 2008 (FOI Regulations)

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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.

A. INTRODUCTION

[1] On 2 April 2019 two Applicants made identical requests under the Freedom of Information Law (2018 Revision) to Workforce Opportunities & Residency Cayman (“WORC”) as follows:

- (i) *Where the answers that he provided to the history and culture test that he sat are kept.*
- (j) *A copy of the test he sat.*
- (k) *A copy of the answers that he provided.*

[2] The responsive records consist of two completed History and Culture Tests (one per Applicant) used in the application process for Permanent Residency (“PR”).

[3] The Acting Chief Officer (“ACO”) responded identically to both applications, answering the first question, and granting partial access to the requested records, with certain parts redacted under the exemption in section 20(1)(d) relating to prejudice to the effective conduct of public affairs. The ACO redacted the questions and multiple-choice answers, leaving only the names of the respective Applicants, their dates of birth, the dates of the test, and the results/points scored unredacted.

[4] Given that the initial decision was made by the ACO, no internal review was possible and the requests were directly appealed to the Office of the Ombudsman on 14 May 2019. The Applicants requested that the matter proceed to a formal hearing before the Ombudsman.

[5] Given that both requests were identical, both Applicants were represented by the same legal counsel, and the arguments presented on behalf of the Applicants were the same, the requests form part of a single appeal and hearing.

B. CONSIDERATION OF ISSUES

a) Are the redacted parts of the requested records exempt under section 20(1)(d), and, if so, would access nonetheless be in the public interest?

[6] The Applicants asserted that the requested exams are used by WORC for its decision making on PR applications, and as such they fall within the application of section 5 and the Schedule to the FOI Law, which requires proactive publication of “records... used by [public authorities]... in making decisions... with respect to rights, privileges or benefits...”. If so, the Applicants argued that the records fall outside the general right of access granted in section 6 and no exemptions can apply to them.

[7] I disagree that section 5 and paragraph 1(d) of the Schedule to the FOI Law require the publication of the responsive records. The information required to be published by paragraph 1(d) is further specified in the ensuing paragraph (e), as:

- (i) manuals or other records containing interpretations, rules, guidelines, practices or precedents; [or]*
- (ii) records containing particulars of a scheme referred to in paragraph(d), not being particulars contained in an enactment or published under this Law.*

[8] I find that the responsive records are used by WORC in making decisions on PR but they do not match the description set out in subparagraph 1(e)(i) or (ii). Consequently, the responsive records are subject to the general right of access in section 6 and are capable of being subject to exemptions.

[9] I will now proceed to consider the exemption in section 20(1)(d):

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.

[10] In explaining the meaning of the exemption in section 20(1)(d) both parties quote from the UK Information Tribunal's decision in **McIntyre v Information Commissioner and Ministry of Defence (EA/2007/0068)**, relating the identically worded exemption in section 36(2)(c) of the UK's Freedom of Information Act, 2000 ("FOIA"):

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.²

[11] In paragraph 40 of the same decision the UK Information Tribunal clarified that the term "would" in this context means,

"more probable than not" that there will be prejudice to the specific interest set out in the exemption and the words "would be likely to" have been interpreted to mean that there is a "real and significant risk of prejudice" to the interest in the exemption...³

[12] The Applicants argued that the intent of the test, as expressed in the Immigration Regulations, is being undermined by WORC's own documentation about the exam, which states that PR applicants should prepare for the test by reading a number of identified study materials, and/or take a course offered by the University College of the Cayman Islands ("UCCI") at a cost of CI\$200. According to the Applicants, if the intention was truly to test whether PR applicants were integrated into Caymanian society, they should not be encouraged to study the books or attend the course since that "merely [tests]... their ability to memorize and regurgitate facts." The Applicants alleged that the course offered by UCCI appears to "teach the Test" rather than teaching a course, and said this undermined the integrity of the test.

[13] WORC called attention to the legal basis for the History and Culture Test in the Immigration Regulations (2017 Revision) dealing with the application process for PR. Factor 6 of Schedule 2 of the Immigration Regulations provides:

² *McIntyre* op cit para 25

³ *McIntyre* op cit para 40

History and Culture Test

An applicant's integration into the Caymanian society will be measured by reference to his knowledge of local history, tradition, customs and current events.

One half-point (1/2) shall be awarded for each question answered correctly

- [14] WORC expressed concern that the disclosure of the questions and answers relating to the History and Culture Test would undermine the purpose of the test because applicants would simply familiarize themselves with the questions and answers and not genuinely seek to learn the history and culture of the islands. Furthermore, WORC added that disclosure of the questions would “remove a proven and effective method of testing [PR applicants’] knowledge”. If the test was disclosed, “[PR] applicants would have an opportunity to practice the answers, thereby manipulating the outcome”, and this “would have far-reaching and detrimental effects on the Cayman Islands generally since it would significantly impact the success of future [PR] Applicants.”
- [15] I agree with WORC’s submissions in this regard. It is human nature to focus on learning (aka memorizing) the correct answers to a given set of questions rather than exploring the subject area more thoroughly. The higher the score on the test, the more points the applicant receives for their application, which improves their chances to be granted the privilege of permanent residency – a status coveted by many. By providing a list of resources such as study materials and available courses, rather than a list of questions and answers, the government is assisting applicants in identifying the appropriate material to learn in order to acquire the necessary information to demonstrate their knowledge of the history and culture of the islands. Reviewing the materials will undoubtedly result in the Applicant learning more than just a prescribed set of questions and answers.
- [16] The Applicants indicated that the questions and answers to the History and Culture Test are widely available online. They claim to have seen at least 2 sets of detailed questions and answers. The Applicants also provided me with a copy of the Quizlet questions and answers available online, purporting to be a full set of the Caymanian History and Culture Test.
- [17] It is clear that there are questions and answers available online which purport to represent the questions and answers actually included on the test, however, if those were the official questions and answers endorsed by WORC there would be no necessity for this appeal. I interpret WORC’s denial of these FOI requests to mean that the official test is not available online.
- [18] The Applicants pointed to similar immigration exams in the UK, as well as the Theory Test of the Cayman Islands Department of Vehicle and Drivers’ Licensing (DVDL) which are freely available. The similar exam in the UK is called “Life in the UK”. A search of the gov.uk website (<https://www.gov.uk/life-in-the-uk-test>) indicates that the UK government takes a similar approach to that in the Cayman Islands. I note the UK government goes one step further – it offers an official handbook for the test. I saw no evidence that the UK government provides a list of questions and answers. With respect to the DVDL’s test – the Applicants did not provide me with any evidence to support the assertion that the questions and answers are freely available. An online search indicates that the DVDL provides a list of resources to review to prepare for the test (<http://www.dvdl.gov.ky/portal/page/portal/vlthome/drivers/writtentest>).

- [19] The Applicants suggested that WORC had the option of requiring them to sign an agreement not to divulge the information further except to a legal advisor, the Immigration Appeals Tribunal (“IAT”) or the Grand Court. WORC argued that, although under the FOI Law disclosure is to the world at large, some future [PR] applicants would likely not get sight of the questions (if they were disclosed). The Applicants’ proposed solution is not practical. The enforcement of any such agreement would be so unwieldy as to make the agreement impossible to uphold.
- [20] WORC claimed that disclosure constitute an unfair disadvantage, undermine the security and integrity of the examination, and render it invalid for future use. WORC asserted that limiting disclosure of the questions to the PR applicant who actually answered that particular set of questions would not mitigate the risk of others circumventing the examination process, and would lead to the test no longer serving its intended purpose, which is to measure an applicant’s integration into Caymanian society.
- [21] I agree with WORC because each History and Culture Test is a selection of 40 questions from a larger pool of questions which get reused on an ongoing basis. Disclosure of any of the answers is likely to lead to wider distribution in the community which leads back to the concern I expressed in paragraph 15 about people learning the material as opposed to memorizing the answers. The fact that there are online resources currently available which purport to contain the questions and answers for the test is an example of the difficulty in maintaining the confidentiality of the test.
- [22] In a similar appeal involving a request for promotion examinations and a marking matrix of the Royal Cayman Islands Police Service (“RCIPS”) the former Information Commissioner found that section 20(1)(d) was engaged. While previous decisions are not binding upon me, consistency in decision-making is an important component of fairness. I agree with the following:
- ... disclosure would be likely to damage the ability of the RCIPS to conduct exams and grant promotions according to standards deemed desirable by senior management and the Training Unit. As such, disclosure would be likely to undermine the credibility of the examination and promotion processes, and might discredit the entire Police force.⁴*
- [23] The Applicants raised a number of arguments which are not relevant to the determination of the question before me:
- The Applicants indicated that they have made the FOI requests in the context of their respective immigration appeals. Unsuccessful PR appellants under the Immigration (Transition) Law, 2018, may appeal to the IAT on the basis of an error of law or a decision at variance with the Immigration Regulations. The Applicants argued it is imperative that they have a complete understanding of the decision-making process, especially in regard to the granting of points under the Immigration Regulations.
 - They claimed to know of a number of refusals of PR which were reversed due to errors in scoring applications for PR. Since errors have allegedly occurred in the scoring of other factors (in other cases), the Applicants stated that it is logical to assume errors are

⁴ Information Commissioner’s Office *Hearing Decision 14-00711 Royal Cayman Islands Police Service* 22 July 2011 para 36

also being made in scoring the History and Culture Test. However, without access to the appellants' exams such errors would remain undiscovered and go unchallenged.

- The Applicants quoted the ruling of the Chief Justice in **Hutchinson Green and Racz v Immigration Appeals Tribunal [2015] CILR 96** in regard to the obligation on the part of parties to immigration cases to,

present the facts in a full and transparent manner. Not only must all decisions and acts of public officials be lawful, rational, proportionate and procedurally fair, they must manifestly appear to be so.

In withholding the requested records the Applicants argue WORC acted unreasonably and in breach of natural justice, as well as in contravention of section 19 of the Bill of Rights in the Cayman Islands Constitution Order, 2009, which addresses lawful administrative action, demanding that it be "lawful, rational, proportionate and procedurally fair".

- On the 21st of November 2019 the Applicants made further submissions expressing concerns about a course run by the University College of the Cayman Islands (UCCI) which suggests at least one instructor "is aware that there are questions being asked in the History and Culture Test which the correct answer is in fact incorrect". They advise that the instructor is providing students with the answer which "while factually incorrect will lead the student to receive points". WORC responded by indicating that two of the three questions given as examples of this issue were in fact not part of the pool of questions used for the test.

I am not empowered to consider the quality of the History and Culture Test or the manner in which it is conducted by WORC. I cannot decide whether it meets the stated objectives of the Immigration Regulations. Nor am I am empowered to consider whether the IAT meets its obligations under the Constitution. These are matters for WORC and the IAT.

[24] **Consequently, I find that the responsive records are exempt under section 20(1)(d).**

[25] Since I have found that the exemption in section 20(1)(d) applies to the responsive records, I must now consider whether the records should, nonetheless, be released in the public interest, as required by section 26(1).

[26] WORC listed a number of public interest factors in favour of disclosure:

- Public scrutiny of the History and Culture Test to ensure the questions are consistent with the intent of the Immigration legislation governing PR; and,
- Greater public understanding of the examination process.

[27] WORC also identified the following factor against disclosure:

- Government's ability to examine PR applicants' knowledge of the history and culture of the Cayman Island as required by the Immigration Regulations, in order to determine their integration into Caymanian society.

[28] When applying the public interest test, I must consider the public good. This does not include what is of interest to the public or the private interests of the requester.

[29] In my opinion, it is in the public interest to keep the questions and the answers to the History and Culture Test confidential. This will help to ensure that applicants meet the requirement to demonstrate their integration into Caymanian society by showing their understanding of Caymanian history and culture in their test answers.

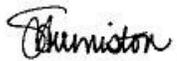
[30] **Therefore, it would not be in the public interest to disclose the responsive records.**

C. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following findings and decisions:

- The responsive records, i.e. the two completed and graded History and Culture Tests, are exempt pursuant to section 20(1)(d) of the Freedom of Information Law (2018 Revision), and it is not in the public interest to disclose them.

No further action is required on the part of WORC.



Sandy Hermiston
Ombudsman