

PRACTICAL GUIDELINES FOR A WRITTEN HEARING

09 April 2018

Contents

1. PURPOSE.....	1
2. PREPARING FOR A WRITTEN HEARING.....	1
3. FORMAT OF SUBMISSIONS.....	2
4. IN CAMERA SUBMISSIONS.....	3
5. LATE SUBMISSIONS.....	4
6. EXEMPTIONS.....	4
7. CORRESPONDENCE.....	4
8. EVIDENCE.....	5
9. AFFIDAVITS.....	5
10. HEARSAY EVIDENCE.....	5
11. REFERENCE MATERIAL.....	6
12. EXPEDITED HEARINGS.....	6

1. PURPOSE

Practical Guidelines for a Written Hearing should be used to prepare for a hearing before the Ombudsman, in conjunction with the *Appeals Policies and Procedures*. Both these documents have been developed under the Freedom of Information Law (2018 Revision) and the Freedom of Information (General) Regulations, 2008.

2. PREPARING FOR A WRITTEN HEARING

The preparation required depends on the nature of the hearing, and the role of the participant, whether as an applicant or a public authority.

It is the responsibility of the public authority to show why a record should not be disclosed under the FOI Law. As per section 43(2) of the FOI Law, the burden of proof is on the public authority to show that it acted in accordance with the Law.

While the FOI Law stipulates that the burden of proof shall be on the public authority, all parties are encouraged to make submissions. This allows the Ombudsman to understand the issues from both sides, which may be especially important when deciding a matter where the public interest is involved.

The FOI Law stipulates that an applicant is not required to provide reasons for requesting a record; however an applicant can choose to share their reasons voluntarily.

Whilst hearing decisions do not set legal precedent, they do provide useful guidance on applying exemptions under the FOI Law in future appeals. Participants are encouraged to consult previous decisions to determine how similar inquiries may have been decided in the past and on what basis. Where there are no relevant decisions, parties are encouraged to look to other jurisdictions where there may be FOI decisions and rulings which are relevant.

The Notice of Hearing and decision do not normally identify applicants or third parties who are individuals. The Notice of Hearing and the decision, identify the public authority involved and any interveners, as well as the applicant and any third parties when these are corporate entities. The Appeals & Compliance Analyst will confirm with the applicant and any other individuals involved in the hearing if they wish to remain anonymous prior to the commencement of the hearing process.

The OMB does not make written submissions available to the public.

The Ombudsman's decision in a hearing is published on the OMB website.

All participants must make their Initial Submissions no later than the date set out in the Notice of Hearing. Submissions are to be sent to the Appeals & Compliance Analyst and not to the Ombudsman. At no time during a hearing should any of the parties correspond directly with the Ombudsman.

3. FORMAT OF SUBMISSIONS

Initial Submissions and Reply Submissions can be sent to the Appeals & Compliance Analyst via email, or faxed directly to the OMB. Hard copy submissions sent by mail need to reach the OMB on or before the deadlines for submissions as set out in the Notice of Hearing, it is therefore advisable to deliver any hard copies by hand.

Participants should include the OMB file reference on all correspondence. Each party should also identify themselves on their submission.

Any *in camera* material must be clearly marked in accordance with OMB instructions on submission of *in camera* material – see below.

Initial and reply submissions should be:

- (a) no longer than 30 pages each (excluding affidavits)
- (b) in 12-point type or clear and legible handwriting
- (c) divided into numbered paragraphs

4. IN CAMERA SUBMISSIONS

A participant may ask the Ombudsman to receive part or all of a submission *in camera*. This means that such material is submitted privately and kept from the other participants. As noted above, all submissions are also withheld from the general public. *In camera* material will not be disclosed in a decision.

A participant who wishes to submit *in camera* material must explain in writing why the material submitted *in camera* should be accepted as such by the Ombudsman and should limit the *in camera* material to the absolute minimum necessary to protect the information in question.

The Ombudsman may accept *in camera* material, including where it discloses the contents of a record in dispute in the hearing or discloses information that might be withheld under the FOI Law. However, before making a final decision about whether the *in camera* material will be accepted, the Appeals & Compliance Analyst/Ombudsman will review the *in camera* material and consider the participant's written explanation and may request further information from the participant.

If a participant intends to submit *in camera* material in a hearing, the participant must, no later than 3 calendar days* before the due date for initial submissions, provide to the Appeals & Compliance Analyst the following:

- (a) one copy of their Initial Submission containing any material that is submitted *in camera*; and,
- (b) a separate explanation supporting why the material should be submitted *in camera*.

The material proposed for *in camera* submission must be clearly marked, for example, by bolding, underlining or boxing the *in camera* text or by highlighting the *in camera* text in a different colour. It is not acceptable to provide one complete (unsevered) copy and one severed copy of the material being submitted *in camera*. If the material is submitted

in camera with respect to only some of the other participants in the hearing, then this must also be clearly indicated.

5. LATE SUBMISSIONS

The Appeals & Compliance Analyst will only accept late submissions under extenuating circumstances. Requests for an extension of time must be made in writing to the Appeals & Compliance Analyst 3 calendar days* before the applicable deadline, and must include reasons why the extension is required.

6. EXEMPTIONS

There are several reasons why new exemptions should not be added to a hearing once the proceedings have commenced:

- (a) The public authority is given the opportunity at the first instance to provide reasons for applying exemptions when it originally responds to the Applicant's request.
- (b) In most instances, the public authority is given an additional opportunity to add additional reasons during the internal review process.
- (c) Upon appeal to the OMB, and during the appeal process that precedes a formal hearing, the public authority is again given the opportunity to make changes to its original response.
- (d) Once the Notice of Hearing has been distributed, the parties begin preparing their submissions. The addition of late and new exemptions is burdensome and may be unfair to the other parties.

In rare and very limited circumstances, the Ombudsman may, at her discretion, consider including further grounds for exemptions once the Hearing process is underway. Public authorities should **not** rely on this, and should identify all grounds for exemptions before the hearing commences.

The public authority should not wait until the hearing has commenced to notify or contact any third parties. All grounds for exemption must be submitted by the public authority, not by any third party.

7. CORRESPONDENCE

All correspondence relating to the hearing is shared with all parties unless accepted by the Appeals & Compliance Analyst *in camera*. This ensures that the principles of natural justice are adhered to and that all parties are treated fairly.

*Please note that the OMB takes into consideration public holidays and weekends when calculating all proposed submission dates.

When correspondence and/or requests other than formal submissions are received by the Appeals & Compliance Analyst, each party will be reminded that the material will be shared with the other parties and the submitting party may either:

- (a) withdraw the correspondence entirely;
- (b) rewrite the correspondence with the knowledge that this version will be shared with the other parties; or,
- (c) consent, in writing, to disclosure of the original correspondence. A failure to consent in writing will result in the forced withdrawal of the correspondence by the Appeals & Compliance Analyst.

8. EVIDENCE

A participant's Initial Submission should contain arguments and evidence that support its views on the access status of the records in dispute. This should include an interpretation of how the relevant sections of FOI Law apply in the specific circumstances of the case, and explain how the evidence presented supports the participant's respective position. Parties may also refer to relevant decisions or rulings.

9. AFFIDAVITS

Evidence consists of assertions of fact on which a participant relies and is generally submitted in the form of affidavits or other documents containing factual information that supports a participant's argument. If a participant wishes to rely on evidence from another person, the evidence from that person should generally be provided in the form of an affidavit.

Affidavits prepared as part of a submission must be certified by a Justice of the Peace or Notary Public and include their name and signature.

10. HEARSAY EVIDENCE

It is not generally appropriate for participants to submit an affidavit that includes hearsay evidence. Wherever possible, the person with direct knowledge of the facts, or who made the statements, should be the one to attest to those facts.

11. REFERENCE MATERIAL

A participant must provide a list of orders, court cases, statutes and other legal authorities mentioned in the participant's submission and must cite the sources relied on.

In addition to this list, the participant must provide the following:

- (a) For all published Cayman authorities referred to, the full name of the order, decision or legislation referred to and a full citation, as well as a web reference where appropriate;
- (b) For all unpublished or foreign authorities referred to, a copy of the order, decision or legislation; and,
- (c) For all other material referred to, including books, articles and academic journals, a copy of the relevant section, chapter or article and full bibliographic citation.

The submitting party is responsible for ensuring that the materials and citations referred to, or provided, are accurate and complete.

12. EXPEDITED HEARINGS

The process for expedited hearings must be read in conjunction with the OMB's general policy regarding written hearings above.

The purpose of the expedited hearing process is to provide a fast track option for issues which are of less complexity than the application of exemptions.

Before an appeal is selected for the expedited hearing process the OMB will ensure that the applicant has requested an appeal on an issue only related to a failure to comply with an obligation under the FOI Law or one of the exceptions under section 9(b), (c) or (d) has been applied. Or, where the applicant has made an appeal where an exemption or exclusion has been applied and there is also an issue related to the failure to comply with an obligation under the law which, in the opinion of the OMB, can reasonably be separated from any other issues. For example, if a public authority has stated it wants to apply a fee to the records, to which the applicant objects, and has also stated that it would apply an exemption to some of the records the OMB will decide if it is possible to conduct an expedited hearing on the matter related to fee only so that the matter of the exemption is not unduly held up by the fee issue.

If the OMB is satisfied that it is reasonable to conduct an expedited hearing then the Appeals & Compliance Analyst will set dates for the hearing, taking into consideration the overall schedule of hearings and the calendars of all the parties while recognizing that it may not be possible to accommodate all parties to their satisfaction.

A Notice of Hearing is prepared and sent to the public authority, the applicant and any appropriate persons the same way as in a regular hearing.

The public authority and any appropriate persons have 7 calendar days* from the date the Notice of Hearing is issued to make a submission to the OMB. Upon receipt of the submission from the public authority or other appropriate persons the Appeals & Compliance Analyst will provide a copy of the submission (if any) to the applicant.

The applicant has 2 calendar days* to send a reply submission. Upon receipt of any reply submission from the applicant, the Appeals & Compliance Analyst will provide a copy of that reply (if any) to the public authority.

The public authority has 2 calendar days* to respond to the applicant's reply submission.

After receiving all submissions the Appeals & Compliance Analyst will inform the parties that the hearing is closed. After closing the hearing, the Appeals & Compliance Analyst will not accept any further submissions.

After receiving all submissions, the Ombudsman will make a decision within 30 calendar days and will advise the parties of her decision in writing. Parties to the hearing will be informed in writing of any time extension taken by the Ombudsman before the expiry of the original 30 calendar days.

*Please note that the OMB takes into consideration public holidays and weekends when calculating all proposed submission dates.