OMBUDSMAN
CAYMAN ISLANDS

Freedom of Information Appeals
POLICY AND PROCEDURES
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CONTENTS

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CAYMAN ISLANDS

1. PURPOSE

These policies and procedures provide guidance to members of the public and public authorities on the process of filing an appeal under part VII of the Freedom of Information Act (2021 Revision) (the FOI Act or the Act) and the Freedom of Information (General) Regulations (2021 Revision) (the Regulations).

This document is intended to support fairness, certainty, transparency, and efficiency throughout the appeal process.

2. INTRODUCTION

There are three stages in the appeal process under the FOI Act:

- Stage 1: initial assessment
- Stage 2: informal resolution
- Stage 3: formal hearing.

During the initial assessment, the appeals analyst (the analyst) assesses whether the Office of the Ombudsman has jurisdiction and gathers basic information about timelines and details of actions taken. If we do have jurisdiction, the appeal is accepted and progresses to the informal resolution stage, in which we attempt to resolve the appeal amicably between the parties. If the dispute cannot be resolved informally, it advances to the third and final stage, in which the Ombudsman considers the appeal and issues a decision that is binding on the parties.

If an applicant has a limited ability to understand English, has difficulty reading or writing, or has a disability that impairs their ability to make an appeal in writing, we will provide assistance, as necessary.

Please use the appeal form[1] on the ombudsman.ky website or send us an email on info@ombudsman.ky if you would like to make an appeal.

[1] https://ombudsman.ky/images/pdf/FOI_Appeal_Form.pdf

3. STAGE 1: INITIAL ASSESSMENT

Grounds for appeal

An applicant has the right to apply to the Ombudsman for a decision on whether a public authority has failed to comply with an obligation under the Act, specifically if the applicant believes that the public authority has:

- failed to indicate whether it holds a record;
- failed to communicate the information contained in a record within the time allowed by the Act, or at all;
- failed to respond to a request for a record within the time limits established in the Act;
- failed to provide a notice in writing of its response to a request for a record;
- charged a fee that is in contravention of the Act; or
- otherwise failed to comply with an obligation imposed under the Act.

The applicant must let us know what the grounds for the appeal are.

Conditions for appeal

An appeal must meet certain basic requirements. The request has to be made in writing within specified timelines, and all other means of redress must have been exhausted.

In writing

An appeal must be made in writing, for instance in the form of a letter or email, or using our appeal form.

Timelines

An appeal must be made within 30 calendar days:

- of the date when the applicant was notified of the initial decision made by the minister responsible, chief officer or principal officer;
- of the date when the applicant was notified of the internal review decision; or
- of the date when either of the abovementioned decisions should have been taken (but were not taken).

An appeal may be made later if the Ombudsman is satisfied that the delay is reasonable. This is further explained below.

Other means of redress – internal review

Before making the appeal, the applicant must have exhausted all other means of redress provided for in the FOI Act. In most cases, this means that the applicant must ask the public authority for an internal review if the initial decision was:

- to refuse access to a record (or if the request has not been answered);
- to grant only partial access to a record;
- to defer access to a record; or
- to charge a fee for action taken, if the applicant believes that the fee is incorrect.

On all other matters, an appeal can be made without an internal review, including when:

- the initial decision was made by the minister responsible, chief officer or principal officer;
- the time to make an initial decision and carry out an internal review has lapsed, with no response from the public authority; or
- if the initial decision was that no records were held.

Documentation required from the applicant

When an applicant makes an appeal to us, it is important that they explain the grounds for the appeal and provide us with all the relevant documentation. The applicant must:

a. explain the grounds for the appeal; and
b. provide a copy of all the relevant documentation, including of:
    - the applicant's original request;
    - the public authority's acknowledgement;
    - the public authority's initial decision;
    - the applicant's request for an internal review (if applicable);
    - the chief officer's internal review decision (if applicable);
    - a copy or list of any responsive records received from the public authority; and
    - any other relevant information, as needed.

Late appeals

If an appeal is made outside the normal 30-day period, the applicant must give written reasons for the delay and provide us with any supporting evidence.

We would also invite the public authority to give us its views in writing, together with any supporting evidence.

The Ombudsman will decide whether it is reasonable to accept the request for a late appeal.

Acceptance of appeal

When an applicant makes an appeal, the analyst:

- verifies whether we have jurisdiction; and, if so,
- notifies both parties in writing that the appeal has been accepted.

Refusal of appeal

At any time after receiving an appeal, we may decide not to consider the appeal, or to stop considering the appeal if it is frivolous or vexatious.

4. STAGE 2: INFORMAL RESOLUTION

Once we have accepted an appeal, the appeal progresses to the informal resolution stage.

Purpose and general considerations

The purpose of the informal resolution process is to resolve the appeal amicably, in a manner acceptable to both parties. This process starts by exploring the positions taken by the two parties, including:

- clarifying or narrowing down the applicant's request;
- clarifying and assessing the public authority's reasons for withholding the requested records; and
- exploring whether any common ground can be found between the parties.

In any appeal, the burden of proof is on the public authority to show that it acted in accordance with its obligations under the FOI Act. In most appeals, we start by clarifying and probing the public authority's reasons for withholding records.

Applicants do not have to give reasons for requesting access under the FOI Act. However, we encourage applicants to explain the circumstances of their appeal if they are comfortable doing so. This may help to resolve the dispute, particularly in cases where the public interest needs to be considered.

If the appeal cannot be resolved amicably, it is advanced for a binding decision by the Ombudsman in a formal hearing. This is further explained below.

Timelines

We generally aim to resolve matters informally within 30 days. However, if the parties are cooperating and it appears likely that the matter can be resolved, we will continue to work towards resolution even if this will take more than 30 days rather than transition to the formal appeal process.

If it seems unlikely that the appeal will be resolved amicably, or on the request of either party, at any time during the informal resolution stage, the appeal can be progressed to a formal hearing before the Ombudsman (see Stage 3, below).

Cooperation with the Office of the Ombudsman

The burden of proof in any appeal is on the public authority. We rely on the full and timely cooperation of the public authority's staff so that we can investigate the appeal and bring it to a close.

The Ombudsman has statutory powers to:

- require the production of evidence;
- compel witnesses to testify; and
- call for and inspect an exempt record.

It is important that any relevant records and documentation are provided to us in a timely manner. We may also ask chief officers, information managers or other staff members to provide their views in writing about any relevant issues, such as how records are kept and used.

Documents required from the public authority

To resolve the appeal, we need unrestricted access to all relevant records, in redacted and unredacted form. The FOI Act explicitly grants us the power to "examine any record to which this Law applies, and no such record may be withheld from the Office of the Ombudsman on any grounds", unless the Governor certifies that the examination of such records would not be in the public interest.

In limited circumstances (e.g. in the case of certain records of the Cabinet Office), we will inspect redacted and unredacted records on-site, at the public authority's offices.

We recognize that there may be extraordinary circumstances when records may have to be inspected on-site, e.g. if responsive records are vulnerable or exceptionally extensive. In such cases, the public authority may propose alternative practical arrangements. However, these must be agreed to by our office.

In the exceptional event that the Office of the Ombudsman agrees to inspect records on-site, the public authority must provide photocopies of selected records when requested to do so. During the inspection, our office may employ recording and copying devices as it sees fit.
After the appeal has been accepted, we will ask the public authority to provide the analyst with the following relevant records and documentation within 10 calendar days:

- a copy of any redacted records disclosed to the applicant, showing the redactions and the exemptions applied in each instance;
- a copy of the same records in unredacted form; and
- any additional reasons for applying the exemptions, including any prejudice and/or public interest tests that were conducted.

If the public authority claims that no records are held, it must give the following documentation to the analyst within 10 calendar days:

- a record of the search efforts undertaken to locate responsive records, including details of physical locations, paper and electronic files searched, dates, staff involved and any other steps taken to conduct a reasonable search.

The analyst may also need the public authority to provide additional relevant information, including (as applicable):

- a listing of all responsive records, indicating:
    - which records were disclosed to the applicant in full;
    - which records were disclosed to the applicant in part; and
    - which records were withheld from the applicant;
- copies of communications from third-party individuals in relation to the disclosure of their personal information; and
- copies of communications from other third parties, e.g. in relation to commercial interests.

We may take any copies, whether they are provided by the public authorities or made by our office for examination. These may be taken from the on-site location and are kept in confidence and safety within the Ombudsman offices.

Confidentiality

The Office of the Ombudsman does not disclose responsive records either during or after an appeal.

Any other documentation or information provided to us during an appeal, unless otherwise stated in this policy, is kept in confidence. It will not be divulged to the other party or parties involved in the appeal to the extent that, in our opinion, doing so would be likely to prejudice the discussions

between the parties or the negotiating position of either party.

The FOI Act does not apply to the Office of the Ombudsman's operational records. However, it does apply to our administrative records.

Where reasonable and necessary, either party may indicate the confidential nature of specific documentation or information provided to our office and may submit such documentation or information explicitly *in camera* (i.e. in private).

Appeals involving personal information

When an appeal involves a public authority's use of section 23(1) of the FOI Act, the exemption relating to personal information of one or more third-party individuals, the Office of the Ombudsman may require that the public authority notify the third-party individual(s) whose information is at issue.

Without revealing the name of the applicant, this notification should:

- state that an application has been made under the FOI Act for access to a record containing personal information of the third-party individual;
- describe the contents of the request and the record concerned;
- state that the matter is currently in appeal with the Office of the Ombudsman;
- invite the third-party individual to express their views on the disclosure of the personal information as soon as practicable, but within 28 days from the date of the notice;
- state that the record(s) will be withheld until the third party's time for responding has expired; and
- explain that their views will be taken into account, but will not dictate the final decision on disclosure.

The third-party individual's representations should be sent to the public authority and passed on to our office without delay.

Legal counsel

If a public authority wishes to seek legal advice, it is encouraged to do so without delay, and not to wait until the informal resolution process or hearing stage of an appeal.

The FOI Act requires that the reasons for refusing or deferring access to a record must be stated in both the initial decision and the internal review. This process may be delayed considerably if a public authority waits until the matter is appealed, or until a hearing has commenced, before it determines its legal position and provides full reasons for refusing or deferring access to a record.

In particular, during the hearing stage of the appeal both parties are expected to meet strict deadlines and delays must be minimized.

Introducing new exemptions

During the appeal, the public authority may be encouraged to reconsider its position on the reasons for withholding records. This may involve abandoning certain exemptions and introducing others. While new exemptions are allowed, raising new reasons for withholding records late in the appeal is burdensome and may be unfair, particularly after the formal hearing process has started.

5. STAGE 3: FORMAL HEARING

If the appeal cannot be resolved informally, it moves towards a formal hearing. Under the FOI Act, the Ombudsman must decide on an appeal after giving both parties an opportunity to provide their views in writing.

An FOI hearing involves a number of steps, including:

- setting the hearing calendar.
- issuing the notice of hearing;
- providing initial submissions;
- the exchange of initial submissions;
- providing reply submissions; and
- the exchange of reply submissions.

Once an appeal moves to a hearing, all parties are informed. The analyst is responsible for the administration of the hearing.

Written hearings before the Ombudsman are the norm, but the Ombudsman may decide to hold an oral hearing, in which case separate instructions would be issued.

The Ombudsman makes a decision as soon as practicable but not later than 30 calendar days after the hearing closes, i.e. after the views of both parties have been received, as described below. Parties to the hearing are informed in writing before the expiry of the original 30 calendar days of any extension taken by the Ombudsman.

Setting the hearing timetable

The analyst contacts both parties to set an appropriate timetable. Every effort is made to work within the confines of the schedules of the parties involved. However, the final decision on hearing dates is made by the analyst in consultation with the Ombudsman. It is imperative that all parties follow the timelines set out in the hearing calendar.

Notice of hearing

The analyst provides all parties with a notice of hearing which explains what the hearing is about and how it is expected to proceed. At the written request of a participant and with the parties' consent, or when appropriate and reasonable in the circumstances, the analyst may make changes to the content and timelines set out in the notice of hearing. If changes are made, all parties are provided with amended copies.

The amount of preparation required depends on the nature of the hearing and the role of the participant, i.e. whether they are an applicant or a public authority.

The notice of hearing typically contains the following information (as appropriate):

- a synopsis of the request;
- the records in dispute;
- the sections of the FOI Act under consideration;
- the issues under review; and
- the key dates in the hearing (e.g. the due dates for submissions and reply submissions).

Preparing for a written hearing

While the FOI Act stipulates that the burden of proof is on the public authority, all parties are encouraged to look to other jurisdictions for relevant FOI decisions and rulings.

The notice of hearing and decision do not identify applicants or third parties who are individuals, but they do identify the public authority involved and any interveners that are corporate entities.

In the case of an anonymous applicant, the analyst will confirm whether the applicant wishes to remain so before the start of the hearing process.

We do not make written submissions available to the public. The Ombudsman's final decision is published on our website.

All participants must make their submissions on time and no later than the date set out in the notice of hearing. Submissions must be sent to the analyst and not to the Ombudsman. At no time during an appeal should any of the parties correspond directly with the Ombudsman.

Format of submissions

Initial submissions and reply submissions should be sent to the analyst via email. Hard copy submissions or reply submissions sent by mail must reach the Office of the Ombudsman on or before the deadlines set in the notice of hearing. Therefore, it is advisable to deliver any hard copies by hand.

Participants should include the Office of the Ombudsman's case file reference number on all correspondence and clearly identify themself or our organization in all correspondence or submissions.

Initial and reply submissions should be:

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

Shared correspondence

All correspondence relating to the hearing is shared with all parties unless we have accepted it *in camera*.

When correspondence and requests other than formal submissions are received by the analyst, each party will be reminded that the material will be shared with the other parties, and the submitting party may:

- withdraw the correspondence entirely;
- rewrite the correspondence with the knowledge that this version will be shared with the other parties; or
- 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 analyst.

Any *in camera* material must be marked in accordance with our instructions on submission of *in camera* material (see below).

Reference material

Hearing participants must cite any sources that they rely on, including orders, court cases, statutes or other legal authorities, books or academic articles, and provide us with copies.

The submitting party is responsible for ensuring that the sources and citations referred to are accurate and complete.

Initial submissions

During the hearing, all correspondence relating to the hearing and submissions are shared with all parties, unless they are submitted *in* camera. This ensures that the principles of natural justice are followed and that all parties are treated fairly.

Hearing participants must send or deliver a copy of their initial submission and any additional documentation to the analyst on or before the dates set out in the notice of hearing.

Initial submissions should address the issues set out in the notice of hearing and include relevant evidence and arguments.

On the date set out in the notice of hearing, the analyst exchanges the submissions received, so that each party receives a copy of the other party's submissions.

Reply submissions

Participants have an opportunity to reply to the other party's initial submission. Reply submissions are due on the date specified in the notice of hearing.

Reply submissions are optional and may not be necessary if a party feels that they have nothing more to add to their initial submission, and it is not necessary to respond to issues raised in the other party's initial submission.

If a party does not intend to provide a reply submission, it should advise the analyst in writing as soon as possible, before the deadline specified for reply submissions.

The analyst exchanges the reply submissions between the parties. In exceptional circumstances, participants may need to provide a further submission after the reply submission. A request for submitting a sur-reply should be sent to the analyst. It may be granted if new and significant issues

were raised late in the process.

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 submissions will not be disclosed in a decision.

A participant who wishes to submit in camera material must explain in writing why the material should be presented *in camer*a to the Ombudsman. In camera material should be limited to the absolute minimum necessary to protect the enhanced confidentiality of the information in question. The explanation and material should be provided to the analyst no later than 3 calendar days before the initial submission is due.

The Ombudsman may accept in *camera* material, including where it may disclose the contents of a record in dispute or disclose information that might be withheld under the FOI Act. However, before making a final decision about whether the *in* camera material will be accepted, we will review it and consider the participant's written explanation. When needed, we will request further information.

When submitting *in-camera* material, it is not acceptable to simply provide a complete (unsevered) and a severed copy of the material in question. Instead, the material proposed for submission *in camera* must be clearly marked, for example by making it bold, underlining or highlighting it, or including it in a box. If the material is submitted in camera with respect to only some of the other participants in the hearing, this must also be clearly indicated.

Late submissions

We accept late submissions only under extenuating circumstances. Requests for an extension of time must be made to the analyst in writing as soon as possible, no later than 3 calendar days before the applicable deadline, and it must include reasons. Acceptance is at the discretion of the Ombudsman.

6. BURDEN OF PROOF

In an appeal, the burden of proof is on the public authority to show that its actions comply with the requirements of the FOI Act. The default position in the FOI Act is that all records are open to the public, except where the Act provides a reason for not disclosing them. In the appeal, the public authority has an opportunity to present factual evidence and legal arguments that support its views on the access status of the records in dispute. This should include an interpretation of how the relevant sections of the FOI Act apply in the specific circumstances of the case. In most cases, this means that the underlying reasons for any exemption or exception that is relied on must be explained. It is not appropriate to only state the exemption, without further explanation or reasons. If no or insufficient reasons are given, the Ombudsman may find that the exemption (or other reasons for withholding a record) in a specific case does not apply.

Parties should not rely on hearsay evidence. Whenever possible, the person with direct knowledge of the facts, or who made the statements, should be the one to attest to those facts, as necessary.

7. EXPEDITED HEARINGS

The expedited hearing process is a fast-track option for resolving issues that are less complex than the application of exemptions.

Before starting an expedited hearing, the analyst ensures that the applicant has requested an appeal related to:

- a failure to comply with an obligation under the FOI Act, other than a denial of access on its own; or
- one of the exceptions in section 9 (vexatiousness, recent compliance with a similar request, unreasonable diversion of resources, or information already in the public domain).

The expedited hearing process works as follows:

- If we are satisfied that it is reasonable to conduct an expedited hearing, the analyst sets dates for the hearing in consultation with the parties.
- A notice of hearing is prepared and sent to the public authority, the applicant and – in exceptional cases – other appropriate persons, in the same way as in a normal hearing.
- The public authority (and – in exceptional cases – other appropriate persons) has 7 calendar days from the date that the notice of hearing was issued to make a submission.
- On receipt of the submission from the public authority (and other appropriate persons), the analyst provides a copy of the submission to the applicant. The applicant then has 2 calendar days to send us their reply submission.
- The analyst forwards the applicant's reply submission to the public authority.
- The public authority then has 2 calendar days to respond to the applicant's reply submission.
- If the public authority raises any new reasons in their reply submission, the applicant may have the right to reply a second time.

After receiving all the submissions, the analyst informs the parties that the hearing is closed and no further submissions are accepted.

The Ombudsman will issue a binding decision within 30 calendar days. Parties will be informed of

the decision in writing. Before expiry of this time period, we will also inform parties of any extension taken by the Ombudsman, although this will be unusual for an expedited hearing.

8. CLOSE OF HEARING

Once all submissions and supporting evidence have been received and reviewed by the analyst, the Ombudsman's virtual binder is assembled. It contains all the documents related to the hearing and needed to make a decision, including:

- the initial FOI application;
- the public authority's initial decision;
- the application for internal review (if any);
- the public authority's internal review decision (if any);
- the appeal to the Office of the Ombudsman and our acceptance of the appeal;
- the pre-hearing investigation report written by the analyst;
- the notice of hearing;
- the initial submissions and reply submissions of all parties, including supporting evidence, arguments and case law;
- any additional correspondence, for instance about procedural issues or objections, adjournments and other relevant points;
- redacted and unredacted copies of the records in dispute; and
- any other material relevant to the hearing.

After the hearing is closed, no further submissions are accepted from any party. However, we may request further clarifications at any time if the Ombudsman requires it.

9. BINDING DECISION

The Ombudsman issues findings and orders in a binding decision no later than 30 calendar days after all relevant information and submissions are provided to us. This time period may be extended by another 30 days for good reason.

The Ombudsman may require a public authority to take steps to ensure compliance with its obligations under the Act. The decision will specify the timeline required for compliance.

The Ombudsman may accept or reject the reasoning of the public authority or substitute their own decision.

Records released under the FOI Act are usually disclosed to the world at large. However, in some cases the Ombudsman may specify that records be disclosed only to the applicant.

When a decision is reached, we first send it to each party, before posting it on our website and issuing a press release (if needed). Throughout the appeal process, the applicant remains unnamed.

A decision of the Ombudsman is binding and the relevant public or private body has 45 calendar days to apply to the Grand Court for a judicial review.