

Hearing 70 - 201800316

**Decision**

Ministry of Health, Environment, Culture & Housing

Sandy Hermiston  
Ombudsman

6 June 2019

**Summary:**

The Applicant requested details of any payment/settlement with the Director of Environmental Health in relation to his resignation/retirement from the civil service, including salary, pension, healthcare and any other financial settlement.

The Ministry initially denied the request on the basis that disclosure would constitute an “unreasonable disclosure of personal information” under section 23(1) of the FOI Law. In their written submissions, the Ministry raised an additional argument – that disclosure of the requested record would constitute an actionable breach of confidence under section 17(b)(i) of the FOI Law.

The Ombudsman agreed with the Applicant that the requested record involves the expenditure of public funds and that there is a legitimate public interest in the expenditure of public funds. She acknowledged the Applicant’s argument that this matter is of ongoing interest to the public. She also agreed that a public authority should not be allowed to side step the FOI Law by inserting confidentiality clauses in agreements. However, she found that the FOI Law does not impose a public interest test on actionable breaches of contract. The exemption for actionable breach of confidence in section 17 is absolute.

The Ombudsman examined the “Deed of Compromise and Release” and identified a confidentiality clause in the agreement. The Ombudsman found that the information in the agreement was confidential and the result of private negotiations between the parties and only known to those parties. The information was shared in circumstances importing an obligation of confidentiality which was expressly stated in the confidentiality clause, thereby creating a strong expectation of confidentiality. Disclosure of the information in the agreement by either party would open them to a claim by the other party that it was unauthorized, given the explicit statement in the confidentiality clause.

The Ombudsman found that the disclosure of the record would constitute an actionable breach of confidence, and the exemption in section 17(b)(i) was engaged.

**Statutes<sup>1</sup> Considered:**

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

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

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**A. INTRODUCTION**

[1] On 18 September 2018 the Applicant made a request to the Ministry of Health, Environment, Culture & Housing (the Ministry) under the Freedom of Information Law (2018 Revision) (the FOI Law) for:

*Details of any payment/settlement with Director of Environmental Health Roydell Carter in relation to his resignation/retirement from the civil service including but not limited to salary, pension, healthcare and any other financial settlement...*

[2] On 18 October the Ministry’s Information Manager (IM) denied the request on the basis of the exemption in section 23(1), claiming that disclosure would constitute “unreasonable disclosure of personal information”. The IM then applied the public interest test and found that “non-disclosure outweighed disclosure of the information”. No further details were provided as to the factors that may have been considered.

[3] On the same day the Applicant asked for an internal review by the Chief Officer who “upheld the original decision” without providing any further reasons or details.

[4] The Applicant then appealed to the Office of the Ombudsman. We accepted the appeal on 24 October 2018 and started an attempt at informal resolution of the dispute regarding a “Deed of Compromise and Release” (the requested record).

[5] In the course of the appeal the Ministry decided to rely on an additional exemption, namely section 17(b)(i) which exempts records, the disclosure of which would constitute an actionable breach of confidence.

[6] In its submission, the Ministry added a further exemption (section 20(1)(d) relating to prejudice to the conduct of public affairs).

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<sup>1</sup> 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. CONSIDERATION OF ISSUES**

**Is the Deed of Compromise and Release exempted under section 17(b)(i)?**

[7] The Ministry points out that the dispute between the government and Mr. Carter was conducted in private, and the requested record contains a confidentiality clause which states that,

*The parties agree that the terms and conditions of the Deed shall remain strictly confidential and between themselves unless disclosure is required as a matter of law. This requirement for confidentiality shall extend to all negotiations, correspondence and discussions in relation thereto and which additionally may (in part) be legally privileged in any event. The [parties] further expressly agree that this Deed contains information that is private and highly personal to [Mr. Carter]. Further, if any application is made to disclose this Deed through operation of Law, any party with notice of such application must protect (so far as is possible) the other parties [sic] rights under this Deed and or as a matter of law generally.*

[8] The Ministry submits all three parts of the test relating to breach of confidence in **Coco v A.N. Clark (Engineers) Ltd [1969] R.P.C. 41 at 47** have been met:

1. The information must have the “necessary quality of confidence about it”;
2. The information must have been imparted in circumstances importing an obligation of confidence; and
3. There must have been an unauthorized use or disclosure of that information.

[9] The Ministry also argues that according to **Clerk & Lindsell on Torts**<sup>2</sup> an obligation to treat information as confidential may be expressly imposed by contract. In other cases, the courts have been willing to imply a term of confidentiality in circumstances where this is clearly called for in the context of the relationship existing between the parties. The Ministry believes the requested record is confidential by its very nature, and that there is both express and implied confidentiality in this case.

[10] Furthermore, **Carey and Turle**<sup>3</sup> express the view that,

*Information protected by confidentiality will depend largely on the circumstances in which it was obtained and whether, at the time, the authority expressly agreed to keep it confidential. Special considerations apply if the information in question is personal data. If information is disclosed in breach of a duty of confidence, then the authority may be liable to a claim for damages. ...*

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<sup>2</sup> *Clerk & Lindsell on Torts* London, Sweet & Maxwell, 2003, paras 27-08 to 27-10

<sup>3</sup> Peter Carey and Marcus Turle (eds.) *Freedom of Information Handbook* The Law Society n.d. pp 99-100

[11] The Applicant argues:

- The requested record is about the resignation or retirement of high-ranking civil servant, and that it involves the expenditure of public funds.
- The disclosure of any details of the resignation/retirement cannot be considered detrimental for Mr. Carter.
- There is a legitimate public interest in the expenditure of public funds.
- A public authority should not be allowed to side step the FOI Law by way of a non-disclosure agreement (NDA). Any NDA should be overruled by the FOI Law.
- The resignation/retirement of Mr. Carter remains a matter that is of ongoing interest to the public.

[12] I agree with the Applicant that the requested record involves the expenditure of public funds and that there is a legitimate public interest in the expenditure of public funds. I acknowledge the Applicant's argument that this matter is of ongoing interest to the public. I also agree that a public authority should not be allowed to side step the FOI Law by inserting non-disclosure or confidentiality clauses in agreements to subvert the FOI Law.

[13] Section 26 of the FOI Law imposes a public interest test on the exemptions in sections 18, 19(1)(a), 20(1)(b)(c) and (d), 21, 22, 23 and 24. Section 17 is not included in that list and therefore is not subject to a public interest test. The exemption in 17 is absolute. **Carey and Turle**<sup>4</sup> state that,

*In assessing whether an absolute exemption applies, the only question is whether the information falls within one of the categories. If it does, then it is exempt. There is no test of public interest or prejudice. If an absolute exemption applies, then the public authority does not have to disclose the information...*

[14] Having examined the confidentiality clause in the agreement, I find that the 3-part Coco test for breach of confidence has been met, namely:

- The information is confidential in nature. It is the result of private negotiations between the government and Mr. Carter which is only known to those two parties.
- The information was imparted in circumstances importing an obligation of confidentiality. This obligation has been expressly stated in the confidentiality clause of the agreement, thereby creating a strong expectation of confidentiality.
- The disclosure of the information in the agreement by either party would be open to a claim by the other party that it was unauthorized, given the explicit statement in the confidentiality clause.

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<sup>4</sup> Peter Carey and Marcus Turle (eds.) *Freedom of Information Handbook* The Law Society n.d. pp 86-87

- [15] Therefore, I find that the disclosure of the requested information would constitute an actionable breach of confidence, and the exemption in section 17(b)(i) is engaged.
- [16] Having said this, a confidentiality clause must be used in good faith and in appropriate circumstances. There is a risk that public authorities may be tempted to use contractual agreements containing confidentiality clauses in order to remove controversial or embarrassing information from public scrutiny. The marking of a document as “confidential” by a public authority, or the addition of a confidentiality clause in a contractual agreement, does not place it outside the reach of the FOI Law, or automatically mean that it is exempt from disclosure. The strong public policy interest in openness, transparency and accountability expressed in the FOI Law requires a review of whether the expression of confidentiality is appropriate and in good faith. Public authorities should carefully consider whether confidentiality is necessary and appropriate before agreeing to sign an agreement containing a confidentiality clause, and should not use such clauses unless absolutely necessary, such as may be the case in the course of litigation.
- [17] In this case, the agreement prevented potential litigation which could have involved the assertion of blame by one party against the other and the expense of litigation. In those circumstances, it is permissible public policy to end the dispute and impose a condition of confidentiality as part of the finality of the compromise.
- [18] Since I have found that the requested record is exempted under section 17(b)(i), there is no need for me to consider the other exemptions claimed by the Ministry, i.e. sections 20(1)(d) and 23(1).

**C. FINDINGS AND DECISION**

- [19] Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following recommendations, findings and decisions:
- (1) The disclosure of the record would constitute an actionable breach of confidence, and it is therefore exempted under section 17(b)(i).
  - (2) No further action is required.



Sandy Hermiston  
Ombudsman