
ICO Hearing 17 – 01711
Decision
Royal Cayman Islands Police Service

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
10 November 2011

Summary:

An Applicant was refused access by the Royal Cayman Islands Police Service (RCIPS) to records relating to a number of complaints and investigations pertaining to the Applicant as well as personnel records of the Applicant.

The Information Commissioner overturned the decision of the RCIPS to partially withhold the responsive records and required the RCIPS to disclose to the Applicant all the responsive records that have been provided to the Commissioner.

The Information Commissioner also required the RCIPS to conduct a further search for files previously identified by the Professional Standards Unit of the RCIPS and respond to the Applicant as per the provisions of the *Freedom of Information Law, 2007*.

Additionally, the Information Commissioner required the Chief Officer to take such steps as may be necessary or expedient to bring the RCIPS into compliance with its obligations under the *Freedom of Information Law, 2007*.

Statutes¹ Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008

Exclusions & Exemptions Considered:

Sections 6(1), 16(b)(i) and 16(b)(ii) of the *Freedom of Information Law, 2007*

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¹ In this Decision all references to sections are to sections under the FOI Law, unless otherwise specified.

A. INTRODUCTION

- [1] The Applicant made a request to the RCIPS on 13 January 2011 for the following records:
1. *Comp.[named individual "A"] (2004)*
 2. *Comp.[named individual "B"]*
 3. *Other files investigated and completed by the department up to March 2010*
 4. *Performance assessment for the years 2005 thru to 2008*
 5. *Copy of the application made to appear before the Sergeants promotion board (2009)*
 6. *Copy of my contract in its entirety*
- [2] On 4 February 2011, the RCIPS provided the Applicant with a number of responsive records but failed to provide a reason for not disclosing the withheld records. On 7 February 2011, the Applicant confirmed his desire to gain access to all the requested records, and submitted a request for an Internal Review to the Chief Officer.
- [3] The Applicant asked the RCIPS for an update on 22 February 2011 and was told by the Chief Officer that the Internal Review had not yet started, and that a response would be provided as soon as possible. On 20 April 2011, the Applicant informed the Information Commissioner's Office (ICO) that no response to the request for Internal Review had been provided. On the same day the ICO contacted the Chief Officer, the Deputy Chief Officer and the RCIPS' Information Manager (IM) to inquire about the status of the Internal Review.
- [4] On 15 June 2011, the then Acting Chief Officer released a bundle of records to the Applicant which in fact consisted of less files than had already been released. The RCIPS withheld the remaining records but did not apply any sections of the *Freedom of Information Law, 2007* (FOI Law). Instead he quoted an email to the Applicant from the FOI Coordinator of the FOI Unit, dated 6 September 2010 (several months prior to the formal FOI request).
- [5] On 16 June 2011, the Applicant appealed the matter to the ICO. The matter could not be resolved through mediation, and a formal Hearing was commenced on 15 July 2011.

B. BACKGROUND

- [6] The Professional Standards Unit (PSU) of the RCIPS is responsible conducting investigations into complaints against staff or complaints about the policy and procedure of the RCIPS. A majority of the responsive records in this Hearing relate to the former.
- [7] At the time this request was made the Applicant was no longer employed by the RCIPS.

C. PROCEDURAL MATTERS

- [8] The response of the RCIPS in this matter was characterized by numerous breaches of statutory procedures and requirements.

Applicant's right to make an application under the Law

- [9] Several months prior to the formal FOI request, the Applicant contacted the PSU requesting access to the responsive records. It appears that when the Applicant did not receive what they requested, they contacted the FOI Coordinator at the Freedom of Information Unit (FOI Unit) for help. The response from the FOI Unit is further discussed below.
- [10] It is unclear why the Information Manager (IM) was not informed of this request at this initial stage. All public servants, including RCIPS staff, should be able to recognize an FOI request, and be knowledgeable about referring an applicant or potential applicant to their respective IM.
- [11] On 13 January 2011, the Applicant made a formal request for access under the Law, using the standard FOI request form. However, the responses from the IM and the Chief Officer throughout this case remained seemingly oblivious to this fact. Even in their Hearing submission the IM referred to a previous, informal request for information which did not cover exactly the same 6 points outlined in the actual FOI request.
- [12] Public authorities and their staff should consider any request for information made by a member of the public as a potential FOI request. If full access to records is being granted in a timely manner (i.e. within 10 calendar days), a public authority may choose to respond to the request outside of the formal FOI process. However, even then an Applicant should be informed of their right to appeal to the Information Commissioner. Whenever access is denied or partially denied, the request must be considered under the provisions of the FOI Law. When an Applicant is not satisfied with the initial decision of the IM, any complaint or expression of dissatisfaction should clearly be regarded as a request for an internal review.
- [13] Not a single one of these legal requirements and best practice rules were followed in this case.

Inadequacy of the initial response

- [14] The RCIPS' initial response to the Applicant on 4 February 2011 resulted in partial disclosure of the responsive records. However, the RCIPS did not provide any justification under the FOI Law why some of the responsive records were being withheld, and did not inform the Applicant of their right to appeal.
- [15] This is a breach of section 7(5) which provides that:

The response of the public authority shall state its decision on the application, and where the authority or body decides to refuse or defer access or to extend the period of thirty calendar days, it shall state the reasons therefor, and the options available to an applicant.

Tardiness and inadequacy of the Internal Review

- [16] The request for Internal Review, which was filed on 7 February 2011, was not completed until 15 June 2011, more than three months after the legal deadline, and only after repeated reminders by the Applicant and intervention by the ICO.

[17] On 9 May 2011, the Applicant agreed to an extended response time, but only under the understanding that a response would “shortly” be forthcoming, which turned out to be a false promise on the part of the RCIPS.

[18] Finally, on 15 June 2011, the Applicant was given access to a number of records. However, these were all part of a larger group of records which had already been made available on 4 February 2011. Not all the records that were initially disclosed were again released upon Internal Review. The reason for this discrepancy remains unclear, but it appears to me that the then Acting Chief Officer did not adequately communicate with the IM during their review. Indeed, given that a complete search appears not to have been done at this stage, it is not clear whether the then Acting Chief Officer himself was aware which records were, in fact, being withheld.

[19] This course of action breached a number of legal provisions.

[20] The tardiness of the Internal Review breached section 34(3)(b), which provides that:

A person who conducts an internal review-

...

(b) shall take that decision within a period of thirty calendar days after the date of receipt of the application.

[21] When the Applicant was finally informed of the decision of the Internal Review, the then Acting Chief Officer quoted directly from the FOI Coordinator’s email to the Applicant of 6 September 2010 (before the formal FOI request was made). In this email, the Coordinator had advised the Applicant that, while under the FOI Law a request may be made for any government records including the listed records, at least some of the listed records would “probably not be released”.

[22] The FOI Unit was initially responsible for overseeing the implementation of the FOI Law, and currently provides training and advice to public authorities. However, the Law does not assign any duties to the FOI Unit to respond to an Applicant on behalf of a public authority, but assigns this role to the IM. While in this situation, the Applicant chose to contact the FOI Unit, the complaint should have been immediately redirected to my Office.

[23] I consider it inappropriate for the then Acting Chief Officer to have relied on a communication from the FOI Coordinator as the sole justification for withholding some of the responsive records. Instead, the then Acting Chief Officer was under a legal obligation to reach his own conclusions and communicate to the Applicant, in a clear and timely manner the specific reasons under the Law for withholding records. If no such reasons existed, to disclose should have been disclosed in full.

Delays during the Hearing

[24] The Notice of Hearing, which is the notification to both parties that a formal Hearing is being undertaken by the Commissioner, was initially issued on 15 July 2011, but had to be amended because the RCIPS was unable to complete its submission by the initial deadline, despite this deadline previously having been agreed upon by both parties.

[25] The RCIPS was again unable to meet the new deadline of 17 August 2011. After several reminders by the Registrar of Hearings a submission was received on 1 September 2011.

[26] Even after all this extra time, the RCIPS submission is very disjointed and counter-productive, and seems to question not only the basic facts of this case as laid out in the Notice of Hearing, but even to some extent the conclusions of the then Acting Chief Officer in the Internal Review, and the ICO's investigation of the matter. It is important to note that if the RCIPS disagreed with any of the material facts set out in the Hearing documents, they had an opportunity to file their objections. No such objections were received.

Identification and examination of the responsive records

a. The legal provisions:

[27] The FOI Law and Regulations contain specific requirements relating to the identification of the responsive records.

[28] Regulation 6 states that:

(1) An information manager shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information manager has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

[29] Regulation 21(k) provides that an IM is obliged to:

examine records to which access has been applied for to determine whether-

(i) the record is exempt in its entirety;

(ii) the record contains exempt matter;

(iii) access should be granted; or

(iv) the grant of access should be deferred under section 11 of the Law;

[30] The FOI Law itself does not specify in detail what steps a Chief Officer must take while conducting an internal review, but section 34(3)(a) provides that:

A person who conducts an internal review-

(a) may take any decision in relation to the application which could have been taken on an original application;

[31] I consider that, in order to conduct an internal review, a Chief Officer must examine the responsive records closely, as specified for the IM in regulation 21(k).

[32] A close and meaningful analysis of the responsive records is essential in determining whether access is to be granted or not, firstly by the IM of a public authority, secondly by the Chief Officer in the internal review process, and thirdly by the Information Commissioner upon appeal. These officers would be remiss in their duties under the Law if they did not conduct a close analysis of the responsive records.

b. The manner in which access was provided to the responsive records

- [33] As already indicated above, at the time of the initial decision the RCIPS released 12 complaint files to the Applicant, while withholding other, unspecified records. At the time of the Internal Review decision only 8 of these 12 files were again released. There is no satisfactory explanation for this illogical and inconsistent course of action.
- [34] The Notice of Hearing clearly states that a copy of the records in dispute must be provided to the Commissioner by no later than the deadline set for initial submissions. The RCIPS failed to meet this deadline, and the records were not properly submitted to my Office. Following several reminders from the Registrar of Hearings, an incomplete set of responsive records was eventually received.
- [35] Without a complete set of records to review, I was forced to issue a formal Order under section 45 of the FOI Law to compel the production of the responsive records to my Office. This Order was issued to the Chief Officer on 23 September 2011, with a deadline of 7 October 2011. This deadline was not met, and the RCIPS did not provide my Office with the records (that could be found) until 11 October 2011. This was not, in fact, a full set of responsive records, as is further explained below.

c. The identification of the responsive records

- [36] Having finally received a bundle of responsive records from the RCIPS, I continue to have concerns relating to their completeness. As brought to my attention by the Registrar of Hearings, during the investigation of this appeal a Memorandum from PSU dated 20 September 2010 was produced. The Memo contains a list and brief description of 13 relevant complaint files relating to the Applicant. After spending a considerable amount of time sorting through the various haphazard submissions of the RCIPS, it appears that 9 of these 13 files were not included in the bundle of responsive records provided to me.

d. Record keeping issues

- [37] During the course of this Hearing, it has become obvious that there are some very serious record-keeping issues within the RCIPS. There seems to be total confusion as to what files exist, do not exist, cannot be found, or have not yet been found. A proper paper trail of investigations is obviously not being maintained in all cases.
- [38] It appears that over the last few years some improvements have been made in the way complaint files are logged, in part through computerization of the process. However, given the manner in which this request and appeal were handled by the RCIPS, I can only conclude that the vital importance of record keeping is insufficiently understood and acted upon within the Service. It appears that not all RCIPS officers, particularly in PSU, are cognizant of the requirements of the FOI Law in order to deal with requests for information. Proper records management is essential to the operational functions and success of the RCIPS in dealing with its crime-fighting responsibilities.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [39] As explained above, neither the IM's initial decision, nor the Internal Review decision, provided legal reasons for denying access to the Applicant, which in both cases constitutes a breach of the Law. As a consequence, the Fact Report attached to the Notice of Hearing unprecedentedly did not list any specific issues under review, but instead stated that the Commissioner will consider and decide whether the RCIPS has contravened section 6(1), which grants a general "right to obtain access to a record other than an exempt record."
- [40] It was not until the Hearing had started did the RCIPS for the first time raise the application of the exemptions in section 16(b)(i) and 16(b)(ii). The RCIPS has not put forward any reasons why these exemptions were not raised in the initial decision, or in the Internal Review. Nor have they raised any arguments to indicate why the late exemptions should apply, nor clarified any circumstances that would reasonably justify why the two late exemptions should be considered.
- [41] Nonetheless, with some reluctance, I feel compelled to consider the exemptions in section 16(b)(i) and 16(b)(ii)², since these constitute the only legal arguments the RCIPS has managed to raise in this case.
- [42] With respect to the bundle of files before me, records from the Applicant's personnel file that respond to this FOI request are not protected from disclosure by any of the exemptions raised.
- [43] Therefore, the issues to be decided in this Hearing are:
1. **Section 16(b)(i)** – Are the responsive records exempt from disclosure since their disclosure would, or could reasonably be expected to affect the conduct of an investigation or prosecution of a breach or possible breach of the law?
 2. **Section 16(b)(ii)** – Are the responsive records exempt from disclosure since their disclosure would, or could reasonably be expected to affect the trial of any person or the adjudication of a particular case?
 3. **Section 6(1)** – Subject to the provisions of the FOI Law, did the RCIPS deny the Applicant's right to obtain access to a record other than an exempt record?

² It their submission, the RCIPS refers to the exemption in "section 16(b)(i)(ii)". This is an obvious error since there is no such subsection, and either subsection 16 (b)(i) and/or 16(b)(ii) may apply. I have taken this to mean that the RCIPS claims that both the exemptions apply.

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Section 16(b)(i)

[44] This section provides that:

16. Records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to-

...

(b) affect-

(i) the conduct of an investigation or prosecution of a breach or possible breach of the law

The position of the Royal Cayman Islands Police Service:

[45] The RCIPS believes two investigations of complaints against the Applicant, while currently inactive, should remain suspended *sine die* until such time as the Applicant rejoins the RCIPS. The RCIPS invokes the exemption in section 16(b)(i) in the belief that the disclosure of these two files would, or could reasonably be expected to affect the conduct of an investigation or a prosecution.

[46] The submission of the RCIPS states that “the investigation in relation to the matter... has been suspended, and will resume should the Applicant rejoin the Service.” They go on to state that the Applicant “resigned from the RCIPS... and it is possible that [the Applicant] could rejoin the RCIPS. Hence the investigation in relation to the matter mentioned... has been suspended.” By way of context, the submission adds that “several officers have left and rejoined the Service... the exact number... is not available at this time. However, I know of seven.”

The position of the Applicant:

[47] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

[48] The Applicant’s submission addresses some of the issues raised by the RCIPS in respect of the investigation files (numbers 1-3 of the request), as follows:

These files cannot be deemed exempt because these files are reports that were made against me of which I had prior knowledge of. The fact that the RCIPS is holding onto the files and hoping that I should return to the service will show a miscarriage of justice and an abuse of process. Simply put in layman’s term “I dare you to return to the service”. Under the Penal Code, a case file is deemed to have expired after six months, but after six years, I’m being told that the file is open and being investigated. In one conversation I had with a member of the Financial Crimes Unit, I was told that the file in question has been closed and placed in the archives.

[49] Furthermore,

In May of 2010 I made a request to the Professional Standards Unit and was told... that a disclosure could not be made since I was a serving member of the RCIPS, but on the other hand in August of the said year, was told by the same person that I could not get the disclosure since I was no longer a member of the service.

Discussion

[50] The RCIPS' submission provides very little reasoning in support of the application of the exemption in 16(b)(i).

[51] The RCIPS has not demonstrated how the investigation or prosecution of these complaints would or could reasonably be affected by the disclosure of the files. No evidence has been submitted to support the claim that future prosecution of these matters could occur. In fact, it is incomprehensible to me why the RCIPS would wish to keep files – some of which are already over 5 years old - open, or pending, in the seemingly unlikely event that the Applicant might rejoin the Service at some unspecified time in the future. In my view this is not a reasonable assumption, and the exemption in the FOI Law cannot be applied to these records.

[52] The notion that the progression of a potential criminal matter would have to wait until that Officer rejoins the RCIPS is absurd, as this would mean that a police officer who commits an offence would have to do no more than resign from the RCIPS to gain immunity from prosecution. Either the RCIPS has a case against the Applicant, or it does not: if it does, then it should have been investigated and concluded; if it does not, the file should be closed.

Even where no criminal case can be made, there might still be a disciplinary case to be answered. However, I question how in fact the RCIPS could take disciplinary action against an officer who has resigned from the Service? While the RCIPS should conceivably still investigate a complaint against a former officer in order to bring finality on the part of the complainant, it is plainly impossible to discipline a former employee.

[53] **I find that the exemption in section 16(b)(i) does not apply to the responsive records, and that the disclosure of the responsive records would not, or could not reasonably be expected to, affect the conduct of an investigation or prosecution of a breach or possible breach of the law.**

2. Section 16(b)(ii)

[54] This section provides that:

16. Records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to-

...

(b) affect-

(i) the trial of any person or the adjudication of a particular case

The position of the Royal Cayman Islands Police Service:

- [55] As explained above, the RCIPS' submission does not distinguish between the exemption in section 16(b)(i) and 16(b)(ii). The submission does not contain any arguments that are specific to section 16(b)(ii). As such, I refer to the details of the RCIPS position in relation to section 16(b)(i) above.

The position of the Applicant:

- [56] For the details of the Applicant's position, I refer to the section above, relating to the exemption in section 16(b)(i).

Discussion

- [57] In the course of this Hearing, I have been advised that some files pertaining to this request cannot be found (i.e. where a file was signed over to another department and not returned to the PSU), or simply does not exist (i.e. for years when performance assessments were not conducted). Other files have been "closed", are listed as "subjudice", are "pending ruling", have been "suspended", or their "outcome cannot be determined".
- [58] However, from the records before me, and from the submission of the RCIPS, there is no evidence to suggest that the trial of any person or the adjudication of a particular case is underway or eminent.
- [59] In the response to this request, the RCIPS should have identified all the files relevant to the request and undertaken a detailed review of the files to determine if all or parts of them needed to be withheld for any legitimate purpose, either under the FOI Law or according to RCIPS policies and procedures. This was not done during the initial request or the Internal Review. Neither was this careful review done at the time of the Hearing. The submissions from the RCIPS are totally lacking in substance, and do not address any of the possible reasons for withholding records from the Applicant.
- [60] **Therefore, I find that the exemption in section 16(b)(ii) does not apply to the responsive records, and that the disclosure of the responsive records would not, or could not reasonably be expected to, affect the trial of a person, or the adjudication of a particular case.**

3. Section 6(1)

- [61] This section provides that:

6. (1) Subject to the provisions of this Law, every person shall have a right to obtain access to a record other than an exempt record.

The position of the Royal Cayman Islands Police Service:

- [62] Despite the fact that this provision was identified as the matter at issue in the Fact Report for this Hearing, the RCIPS has not addressed it directly.

The position of the Applicant:

[63] The Applicant has not addressed this issue directly.

Discussion

[64] The provision in section 6(1) grants every person a general right to obtain access to records held by a public authority. However, it also puts forward the essential balance that has to be struck between the general right to access and the legal provisions that allow certain records to be exempt from the application of this right, and within the procedural rules defined in the FOI Law.

[65] I will not go into detail in respect of this point, as it should be clear from the long list of serious procedural breaches and the inadequate and almost nonsensical reasoning of the RCIPS in respect of the exemptions claimed, that the RCIPS has indeed breached the Applicant's right to obtain access the responsive records.

[66] **I find that the RCIPS is in contravention of section 6(1) of the FOI Law.**

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

Findings:

- a) The Royal Cayman Islands Police Service has breached the *Freedom of Information Law, 2007* in numerous and significant ways, including denying the Applicant's rights as set out under section 6(1).
- b) The responsive records submitted to me are not exempt under section 16(b)(i) of the *Freedom of Information Law, 2007*.
- c) The responsive records submitted to me are not exempt under section 16(b)(ii) of the *Freedom of Information Law, 2007*.
- d) The Royal Cayman Islands Police Service does not have sufficient resources, policies and procedures in place in relation to the manner in which it keeps its records.
- e) The Royal Cayman Islands Police Service does not have adequate resources, policies and procedures in place to support its Information Manager.

Decision:

I overturn the decision of the Royal Cayman Islands Police Service to partially withhold the responsive records, and require the RCIPS to provide the Applicant with a copy of the full bundle of records submitted to me in this matter.

Under section 43(3)(b), I require the Royal Cayman Islands Police to conduct a search for the 9 complaint files identified in the Memorandum of the Professional Standards Unit, dated 20 September 2010, which were not included in the responsive records made available to me on 11 October 2011. I require the Chief Officer the Royal Cayman Islands Police Service to consider the information in these files under the *Freedom of Information Law, 2007*, and advise the Applicant of his decision within 30 calendar days of the date of this Decision. If dissatisfied with the Chief Officer's Decision, the Applicant will have the right to appeal to me as set out in section 42(1).

In the event that any of these files cannot be found, I require the Royal Cayman Islands Police Service to present me with a detailed account of the search attempts undertaken, as per Regulation 6, within the said 30 calendar days above.

I require the Royal Cayman Islands Police Service to take such steps as may be necessary or expedient to bring it into compliance with its obligations as per section 44(2)(b) of the *Freedom of Information Law, 2007*, and recommend the making of certain changes to the practices of the Royal Cayman Islands Police Service in relation to the keeping and management of records. Further, under section 44(2)(c), I recommend the provision of training to relevant Royal Cayman Islands Police Service officials, including the Professional Standards Unit, the Human Resources Department and the Deputy Chief Officer on the right to access records.

As per section 44(2), I require the Chief Officer of the Royal Cayman Islands Police Service to advise me within 3 months of the date of this Decision as to what steps have been taken to comply with the above requirements.

As per section 47 of the *Freedom of Information Law, 2007*, the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.



Jennifer P Dilbert
Information Commissioner
10 November 2011

