DECISION 4 – 02109

Information Commissioner's Office

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The Cabinet Office

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
20 May 2010

Summary:

An Applicant was refused access by the Cabinet Office to a copy of the transcripts of the three rounds of constitutional negotiation talks between representatives of the Cayman Islands and the United Kingdom Foreign and Commonwealth Office.

The Information Commissioner found that the requested record was not exempt from disclosure under the *Freedom of Information Law, 2007* and ordered the Cabinet Office to release a copy of the requested record to the Applicant.

Statutes Considered:

Freedom of Information Law, 2007, sections 15(a), 15(b), 20(1)(b) and 20(1)(d).
Freedom of Information (General) Regulations, 2008, section 2.

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A. INTRODUCTION

[1] On 6 March 2009, the Applicant requested from the Cabinet Office "*a copy of the transcripts of all three rounds of constitutional negotiation talks between the Cayman Islands Government, the United Kingdom Foreign and Commonwealth Office, the Human Rights Committee, the Cayman Ministers Association, the Cayman Islands Conference of Seventh Day Adventists and the Cayman Islands Chamber of Commerce on 29 September – 2 October 2008 [first round], 13-16 January 2009 [second round] and 2-5 February 2009 [third round]*".

[2] The Cabinet Office refused access to the transcripts citing section 15(a) of the *Freedom of Information Law, 2007* ("FOI Law"). An internal review of the request was conducted by the Cabinet Secretary, who upheld the decision of the Information Manager to withhold the responsive record. The Applicant appealed the matter to my office at the end of July 2009, and as per the procedures of the Information Commissioner's office ("ICO") an attempt was made to resolve the matter through mediation. The issues were not resolved, and the matter proceeded to a formal Hearing before me.

B. PROCEDURAL MATTERS

[3] The timeline of events in this appeal, as set out in the Fact Report dated 18 March 2010, indicate that it took a considerable amount of time for this matter to come before me. This was due in part to delays by the Public Authority in dealing with the request.

[4] It is important to note that while the Applicant's initial FOI request was submitted and responded to by the Public Authority within one week, it took over 100 days for the Internal Review of this request to be completed.

[5] On 19 June 2009, the Applicant originally wrote to the ICO asking to appeal the matter because the Cabinet Office had not yet responded to their request for an Internal Review made on 23 March 2009. Section 34 of the Law definitively sets out that an Internal Review of the original decision by the Chief/Principle Officer of the Public Authority, which in this case was the Cabinet Secretary, shall be made within 30 calendar days of the notification. The ICO Appeals staff contacted the Cabinet Office and following that contact, on 1 July 2009, the Applicant was notified that an Internal Review had been completed and the earlier decision to withhold the records under section 15(a) was being upheld.

[6] On 24 July 2009, the Applicant made an application to my office to appeal the decision of the Internal Review. This is the hearing that is currently before me.

[7] Further delays in this matter can also be attributed to scheduling conflicts with both the Public Authority and the Applicant. The ICO uses an informal mediation process as a first step in all appeals made to my office. When mediation in this case failed to offer an acceptable solution, efforts were made by my staff to set the dates for a formal hearing. In November 2009, it was agreed by both parties that a hearing in this matter would be scheduled for the first quarter of 2010.

C. ISSUES UNDER REVIEW IN THIS HEARING

[8] The issues to be decided in this Hearing are:

1. **Section 15(a) -** Would the disclosure of the records prejudice the security, defence or international relations of the Islands?

2. **Section 15(b) –** Do the records contain information communicated in confidence to the Government by or on behalf of a foreign government or by and international organization?

3. **Section 20(1)(b) –** Is the record exempt from disclosure in that its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation?

4. **Section 20(1)(d) –** Is the record exempt from disclosure in that its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs?

D. THE CAYMAN ISLANDS CONSTITUTIONAL NEGIOTIATION TALKS

[9] Constitutional negotiation talks between representatives of the Cayman Islands and the United Kingdom Foreign and Commonwealth Office ("FCO") took place over the course of 5 months between September 2008 and February 2009. During the 3 separate meetings, delegates from Cayman discussed various items highlighted in their position papers, which included feedback from individuals and groups collected during wide public consultation.

[10] These meetings resulted in a draft Constitution, which, following an extensive public education campaign, was adopted by a Referendum on 20 May 2009. Close to 63% of participating voters agreed to adopt the new Constitution, which subsequently came into effect on 6 November 2009.

[11] Transcripts of the public consultation meetings held in each district, along with a number of other documents relating to the development of the new Constitution are already in the public domain and available online.

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 15(a) OF THE FOI LAW?

[12] The Cabinet Office has denied access to the requested record on the grounds that it is exempt pursuant to section 15(a) of the FOI Law. This sections states that records are exempt from disclosure if the disclosure thereof would prejudice the security, defence or international relations of the Islands.

1(a) The position of the Cabinet Office

[13] In its submission, the Public Authority sets out in some detail a general analysis of key terms used in this exemption. It also offers a general analysis of what might constitute prejudice to international relations. With respect to this particular request, it claims that "the Foreign and Commonwealth Office stated that all negotiations between themselves and the Cayman Islands Government (were) to be held in confidence". They also make reference to the fact that the Applicant made a similar request to the FCO under the *Freedom of Information Act* in the UK which was also refused.

[14] However, the Cabinet Office advises that subsequent to these decisions, on 26 November 2009, the FCO informed His Excellency the Governor of the Cayman Islands that it no longer objected to the release of the transcripts. Despite this, in their submission the Public Authority contends that:

> *"the FCO's consent to disclosure does not remove the application of the section 15(a) of the FOI Law as the Islands ability to access information of a confidential nature from other governments and international organizations, towards formulating and developing policies and laws generally would be significantly undermined if the record requested is disclosed".*

1(b) The Applicant's position

[15] The Applicant declined to make any further submission and chose instead to reply on the arguments offered in their initial request for appeal in which it stated that it "remains of the view that the disclosure of these records … cannot prejudice the security, defense or international relations of the Island". The Applicant also notes that the Referendum of 20 May 2009 resulted in the adoption of the Constitution.

1(c) Discussion and finding – Is the record requested exempt from disclosure under section 15(a) of the FOI Law?

[16] While the section 15(a) exemption sets out security, defence or international relations of the Islands as the basis for withholding records, the Public Authority has argued only on the issue of international relations.

[17] Section 15 is a harms-based exemption. The harm required is whether the disclosure of the record "would prejudice", in this case, international relations of the Islands. The test is that disclosure "would" result in one of the articulated harms. It is worth noting that the harms test for some other exemptions in the Law is whether disclosure "could reasonably be expected to" which appears to be a lower standard than "would". In this context, the term "would" implies something that is likely, whereas the term "could" expresses possibilities.

[18] I would not take this to mean that the Public Authority must provide evidence that the anticipated harm is absolutely going to materialize if the records are disclosed, but that the evidence must be more than plausible or speculative.

[19] The Cabinet Office has stated that the disclosure of the requested records will affect the Islands' "ability to access information of a confidential nature from other governments and international organizations" but it has not succeeded in indicating how, or why, this would occur. It has also failed to draw any correlation between the release of these records and any type of prejudice. The only foreign government or international organization involved is the FCO and they have since advised that they have no objection to the release of the record.

[20] **I therefore find that the document requested is not exempt from disclosure under section 15 (a) of the FOI Law.**

2. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 15(b) OF THE FOI LAW?

[21] **The public authority has abandoned reliance on section 15(b) of the FOI Law.**

3. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 20(1)(b) OF THE FOI LAW?

[22] The Cabinet Office is also refusing access to the requested record on the grounds that it is exempt pursuant to section 20(1)(b) of the FOI Law. This sections states that records are exempt from disclosure if the disclosure thereof would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

3(a) The position of the Cabinet Office

[23] The Public Authority again sets out a thorough "general analysis of prejudice to free and frank disclosure and effective conduct of public affairs". It states that "the persons who participated in the Constitutional talks participated on the basis that the discussions would be held in confidence" and that "the disclosure of information given in confidence would or would be likely to suppress or inhibit the free and frank sharing of opinions and views that would better inform the decision making process".

[24] The Public Authority submits that in this case the passage of time would not remove the adverse effect disclosure in these circumstances may cause. It states that the Cabinet Office is in constant discussions with various parties on matters that affect policy formulation and development, and that, disclosure of the responsive record would lead to participants in these discussions not being confident that opinions and views shared may not be disclosed.

3(b) The Applicant's position

[25] The Applicant declined to make any submission on the use of this exemption.

3(c) Discussion and finding – Is the record requested exempt from disclosure under section 20(1)(b) of the FOI Law?

[26] As required under section 20(2)(b) of the Law, the initial decision regarding the use of subsection 20(1)(b) was made by the Chief Officer of the Public Authority.

[27] It is my view that this section is intended to foster full and frank discussions on policy matters within the public service, and prevent the harm which would occur if the deliberative process were subject to excessive or premature scrutiny. The application of this section must relate to the record in dispute on a case-by-case basis.

[28] In exempting a record under this section, relevant considerations may include[1]:

(i) the age of the record;

The last round of constitutional talks took place on 2-5 February 2009. Following a Referendum held on 20 May 2009, the Constitution was effected on 6 November 2009. The age of this record is therefore moot and its release is not likely to change what has already been completed.

(ii) the currency or controversy of the subject matter;

The subject matter, that is, talks on the revised Constitution, is no longer current or controversial.

(iii) whether the subject matter is routine or non-routine in nature;

While the subject matter is not routine in nature for the Cayman Islands, the FCO has held similar talks with other Overseas Territories, and have confirmed that they now have no objection to the release of the document.

(iv) the extent of public knowledge of the subject matter; and

The public has been fully consulted on the subject matter, and the resulting document has been widely circulated and approved by a majority of the electorate of the Cayman Islands. It is also reasonable to conclude that as a result of public consultation, some of the subject matter is already public knowledge.

(v) whether the subject of the deliberations has been implemented.

The subject of the deliberations has been implemented as the Constitution is firmly in place.

[29] The Public Authority has not provided me with even anecdotal evidence to indicate how the disclosure at this point in time, of the transcripts of the Constitutional talks, would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberations. I have not been provided with any affidavit evidence from any of the participants regarding how they might view their willingness to take part in such a venture in the future. I have not been provided with any evidence that participants were informed that their comments would be confidential. The talks were recorded and

[1] David Loukidelis, *Office of the Information & Privacy Commissioner of British Columbia, Order No. 325-1999*, http://www.oipc.bc.ca/orders/Order325.html (October 1999).

transcribed and they should therefore be a part of the public history of the Cayman Islands

[30] The Cabinet Office makes the assumption that disclosure of this document would affect future deliberations on other issues that the Cabinet Office may be involved in. It is my opinion that it was not the intention of the FOI Law to exempt a record of deliberations on the grounds that disclosure would adversely affect any future deliberations on any topic. The Cabinet Office has not convinced me that free and frank discussions by participants in future deliberations on different matters, are likely to be inhibited by the release of the transcripts of the Constitutional Talks.

[31] **I find that the record requested is not exempt from disclosure under section 20(1)(b) of the FOI Law.**

4. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 20(1)(d) OF THE FOI LAW?

[32] The Cabinet Office is also refusing access to the requested record on the grounds that it is exempt pursuant to section 20(1)(d) of the FOI Law. This section states that a record is exempt from disclosure if the disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

4(a) The position of the Cabinet Office

[33] The Public Authority states that:

> *"this exemption is a "prejudice-based exemption" and depends on the effect that disclosure of information would have, rather than the type of information or nature or content of the record itself. The effective conduct of public affairs is not restricted solely to the functions of a public authority and its ability to perform those functions. Harm to public affairs can apply where a public authority's ability to offer an effective public service or to meet its wider objectives or purpose is disrupted by the disclosure of information and/or the diversion of resources to manage the impact of disclosure".*

[34] The Public Authority goes on to state that in deciding to exempt a record under section 20(1)(b) or (d):

> *"the Chief Officer cannot give conclusive evidence that disclosure of information will have a certain effect; this opinion is a hypothetical judgment. However, for these sections to be reasonably applied the process of reaching the decision should be supported by evidence that all relevant factors were taken into account. An opinion will be considered overriding[ly] reasonable if a wide-ranging and severe prejudicial effect on the ability of a public authority to carry out a core function would occur, but a reasonable decision could also be made if a subsidiary or support function is likely to be affected".*

[35] The Public Authority submits that "not only is it more probable than not but there is a real and significant risk of the occurrence of prejudice to the effective conduct of public affairs where the document requested is disclosed under the FOI Law".

4 (b) The Applicant's position

[36] The Applicant declined to make any submission on the use of this exemption.

4(c) Discussion and finding – Is the record requested exempt from disclosure under section 20(1)(d) of the FOI Law?

[37] As I have already stated while assessing the applicability of the other sections of the FOI Law, the Public Authority has neglected to provide me with even minimal evidence as to the "how" and "why" of any possible prejudice. Despite its assertions above, the Public Authority has not provided any suggestions as to how its ability to offer an effective public service or to meet its wider objectives or purpose would be disrupted by the disclosure of information, and/or the diversion of resources to manage the impact of disclosure. It has also not indicated how a subsidiary or support function is likely to be affected.

[38] **The Cabinet Office has failed to persuade me that the disclosure of the transcript of the Constitutional Talks could reasonably be expected to prejudice, or would be likely to prejudice, the effective conduct of public affairs.**

[39] **I find that Section 20(1)(d) of the FOI Law does not apply to the requested record.**

F. DISCUSSION

[40] The Public Authority is aware that the exemptions to disclosure in sections 20(1)(b) and 20(1)(d) are subject to the public interest test. In their submission, they include a list of factors, set out by Ministry of Justice in the UK, which consider reasons to disclose and reasons to withhold information that may prejudice the conduct of public affairs.

[41] It is important to note that in the UK the term 'public interest' is not defined. However the Information Commissioner's Office in the UK summarizes that the test entails:

> *"a public authority deciding whether, in relation to a request for information, it serves the interest of the public either to disclose the information or to maintain an exemption or exception in respect of the information requested. To reach a decision, a public authority must carefully balance opposing factors, based on the particular circumstances of the case. Where the factors are equally balanced, the information must be disclosed."*[2]

[2] Information Commissioner's Office (UK), *The public interest test*, 3 July 2009,http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep038_public_interest_test_v3.pdf (accessed 20 May 2010)

[42] The Cayman Islands FOI Law does not call for a weighing of factors in favour of disclosure against those in favour of withholding information. The Law firstly, under Section 4, grants the public "a general right of access to records held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information". Section 26 goes on to say that even if a document is exempt from disclosure under certain sections, including 20(1)(b) and 20(1)(d), access should be granted if such access would nevertheless be in the public interest. Examples of factors that may be in the public interest are given in section 2 of the *Freedom of Information (General) Regulations, 2008* ("Regulations"), which states:

> *"public interest" means but is not limited to things that may or tend to-*
>
> *(a) promote greater understanding of the processes or decisions of public authorities;*
> *(b) provide reasons for decisions taken by Government;*
> *(c) promote the accountability of and within Government;*
> *(d) promote accountability for public expenditure or the more effective use of public funds;*
> *(e) facilitate public participation in decision making by the Government;*
> *(f) improve the quality of services provided by government and the responsiveness of government to the needs of the public or of any section of the public;*[3]
> *(h) Deter or reveal wrongdoing or maladministration;*
> *(i) Reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or*
> (j) *Reveal untrue, incomplete or misleading information or acts of a public authority.*

[43] Despite the fact that it is not necessary for me to weigh the factors in favour of disclosing or not disclosing, I have considered the general arguments in favour of withholding a record that were set out in the Ministry of Justice of the UK guidelines and quoted in the Public Authority's general analysis.

> - *Ministers and their officials need space in which to develop their thinking and explore options in communications and discussions with other ministers and officials.*
>
> - *There needs to be a free space in which it is possible to 'think the unthinkable' and use imagination, without the fear that policy proposals will be held up to ridicule.*
>
> - *Ministers and their officials need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects.*

[3] Misnumbering of the subsections, omitting (g), is as it appears in the original.

- *Premature disclosure of preliminary thinking may end up closing off better options because of adverse public reaction.*
- *Disclosure of the process of interdepartmental consideration may undermine the collective responsibility of the government.*
- *The decision-making process may not be properly recorded so as to avoid creating information which is disclosable.*
- *Appropriate expert advice is not sought because of the reluctance of those who might supply it to engage in a debate where their contribution might be disclosable.*[4]

[44] In considering factors which may support the withholding of information, I note the case before the UK Information Tribunal between the Department for Business, Enterprise and Regulatory Reform (BERR) and the Information Commissioner[5].

[45] BERR argues that there is need for a private "thinking" space for the formulation and development of policy. The Tribunal has recognized that government needs such a safe or private space for ministers and civil servants' deliberations as it formulates and develops policy. However, it goes on to say that the need for this "space" is strongest at the early stages of policy formulation and development. The need to withhold information in the public interest will diminish over time as policy becomes more certain and a decision as to policy is made public.

[46] Also, BERR asked to extend this private space to deliberations with third parties outside government. The Tribunal determined that it could accept that a similar private space should be extended to third parties who are genuine advisors to government such as external consultants or experts called upon to advise neutrally on policy options being considered by ministers and civil servants, and whose professional services would normally be paid for. However, BERR was asking in this case to consider that significant lobbyists and influencers be placed in the same category.

[47] The Tribunal took the view that there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government, so that other supporting or counterbalancing views can be put forward to help ministers and civil servants make best policy.

[48] With respect to premature disclosure, while it may be in the public interest to withhold a document because premature disclosure of preliminary thinking may have an undesired affect, this is not the case with the Constitutional talks as discussions are in effect over and the final decisions have been made.

[49] As to the final point above, I cannot reasonably conclude that the disclosure of the transcripts from the Constitutional talks would result in a reluctance of future experts to

[4] Ministry of Justice, *Freedom of Information Guidance: Exemptions Guidance Section 36 – Prejudice to effective conduct of public affairs*, 14 May 2008, http://www.justice.gov.uk/docs/foi-exemption-s36.pdf (accessed 20 May 2010)

[5] Information Tribunal (UK), *The Department for Business, Enterprise and Regulatory Reform (BERR) v. Information Commissioner*, EA/2007/0072, http://www.informationtribunal.gov.uk/Documents /decisions/DBERRvIC_FOEfinaldecision_web0408.pdf (accessed 20 May 2010)

supply advice. This is especially in light of the valid and legal exemptions to disclosure that are built into the FOI Law and which can be used when necessary.

[50] The FOI Regulations set out a definition of public interest, and I find the following points to be most applicable in this case:

- *promote greater understanding of the processes or decisions of public authorities;*
- *provide reasons for decisions taken by Government;*
- *promote the accountability of and within Government;*
- *facilitate public participation in decision making by the Government.*

[51] Allowing the public to read the transcripts regarding the development of the Constitution will surely allow it to have a greater understanding of the processes and decisions of the Government. It will also allow the public to see some of the reasoning behind certain sections of the Constitution, as well as hold the Government accountable to what they have said in the public domain about the Constitution. Issues that are this significant to the country should be scrutinized by the people affected. The last point mentioned above is operative in this circumstance because if people can be assured that they were represented adequately and are satisfied with how these negotiations played out, it will encourage public participation in future decision making by the Government.

[52] It is my opinion that in the case of the Constitutional negotiation transcripts, a strong public interest for disclosure exists.

[53] Having considered all of the above I find that in this case, even had I concluded that the requested records were exempt from disclosure under Section 20(1)(b) and 20(1)(d) of the FOI Law, I would be required to order the disclosure of the record in the public interest.

G. FINDINGS AND DECISION

Under section 43(1) of the FOI Law, I make the following findings and decision:

Findings:

The transcripts of all three rounds of constitutional negotiation talks between the Cayman Islands Government, the United Kingdom Foreign and Commonwealth Office, the Human Rights Committee, the Cayman Ministers Association, the Cayman Islands Conference of Seventh Day Adventists and the Cayman Islands Chamber of Commerce, held on 29 September – 2 October 2008 (first round), 13-16 January 2009 (second round) and 2-5 February 2009 (third round) are not exempt from disclosure under sections 15(a), 15(b), 20(1)(b) or 20(1)(d) *of the Freedom of Information Law, 2007 .*

Decision:

I require the Cabinet office to provide the Applicant with a copy of the responsive record requested within 45 calendar days of the date of this Order, unless an appeal is filed on

or before 4 July 2010 to the Grand Court by way of judicial review of this Decision. Upon expiry of 45 calendar days, and should the Cabinet Office fail to provide the Applicant with the document, I will certify in writing to the Grand Court the failure to comply with this Decision and the Court may consider such failure under the rules relating to contempt of court.

Concurrently, the Cabinet Office is required to forward me a copy of the cover letter together with a copy of the record it supplies to the Applicant.

Jennifer Dilbert
Information Commissioner
20 May 2010