

Hearing 59-00517

Decision

Lands and Survey Department

Sandy Hermiston
Ombudsman

14 December 2017

Summary:

An Applicant made a request to the Lands and Survey Department for records relating to a parcel of land under the *Freedom of Information Law (2015 Revision)*. The Department located approximately 50 pages of documents, which were partially withheld to the extent that they contained personal information (section 23).

The Ombudsman found that the records contained personal information, but that it would not be unreasonable to disclose most of them, except for three short passages which contain sensitive personal information. It was not in the public interest to disclose those short passages. Accordingly, the Ombudsman ordered the disclosure of the responsive records in redacted form.

Statutes¹ Considered:

Freedom of Information Law (2015 Revision)
Freedom of Information (Amendment) Law 2017
Freedom of Information (General) Regulations 2008

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¹ In this decision all references to sections are to sections under *the Freedom of Information Law (2015 Revision)* and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified. Where several laws are discussed in the same passages, the relevant legislation is indicated.

A. INTRODUCTION

- [1] On 26 August 2016 an Applicant made a request to the Lands and Survey Department (“the Department”) for:

All records relating to the recommendation from the Lands and Survey Department, to the Executive Council considering, a Land Grant for Block 74A Parcel 89 and clarification in regards to a Survey of that land and a map of that area in East End.

- [2] As the request was made by mail, it was only received on 6 September 2016. On 6 October 2016 the Department informed the Applicant that it needed an extension of 30 calendar days under section 7(4) of the Law because the search was taking longer than expected and more time was needed to review all of the responsive documents, and also because it was possible that legal advice would have to be sought.
- [3] On 3 November 2016 some records were disclosed in full, while other records were partially redacted or wholly exempted by reason of section 23(1) relating to personal information. The Department also informed the Applicant that some additional records were available for purchase. Additional information was also provided about the survey of the land.
- [4] On 28 November 2016 the Applicant requested an internal review.
- [5] Not having received a response to the request for an internal review, the Applicant requested an appeal on 24 January 2017.
- [6] As there were delays in the provision of required documentation to the Information Commissioner’s Office (ICO), the appeal was not accepted until 9 March 2017.
- [7] On 19 May 2017 the Department disclosed three additional records, but continued to withhold the other records, 17 of which were withheld in part and 33 in their entirety.

B. PRELIMINARY ISSUE

Waiver of fees prescribed under the *Registered Land Law (2004 Revision)*

- [8] The Applicant argues that he “should be given full access to all files [held by the Department and available for inspection for a fee] ... at no cost as they are public documents”.

- [9] The Applicant is referring to cadastral records held by the Department relating to the same land parcel which is the subject of this request. Those records are available for inspection and copies may be obtained upon payment of a fee. The fees are authorized under section 156(1) of the *Registered Land Law (2004 Revision)* and Schedule 4 of the *Registered Land Rules (2003 Revision)*, which establish a fee of \$50 for an official search, \$10 per page for a certified copy of any register or instrument and \$7 for an uncertified copy.
- [10] Section 6(4) of the FOI Law states that where a record is available for purchase by the public, access to that record must be obtained through the applicable Law. I have no authority to waive fees established in other enactments.
- [11] **Access to the records covered by Schedule 4 of the *Registered Land Rules (2003 Revision)* and associated fees established in accordance with the *Registered Land Law (2004 Revision)* are not matters for me to decide.**

C. ISSUES

- [12] The issues in this Hearing are:

Whether the responsive records are exempt from disclosure under section 17(b)(i), 20(1)(d) or 23(1) of the FOI Law and, if so, whether access shall nonetheless be granted in the public interest under section 26 of the Law.

D. CONSIDERATION OF ISSUES

SECTION 17(b)(i) – ACTIONABLE BREACH OF CONFIDENCE

- [13] The Department claims:
- an actionable breach of confidence exists due to the confidential nature of the information which was gathered by a public authority with statutory powers of compulsion, and that “the disclosure of the records would undermine the integrity of the [Department]”, citing Coco v. A.N. Clark Engineers Limited 1968 WL23472 (ChD) in support
 - the courts have recognized that a duty of confidence may arise due to the confidential nature of the information itself or the circumstances in which it was obtained and this type of information is worthy of protection and should remain inaccessible (as it is not in the public domain nor a matter of public knowledge)

- in this instance the records were provided to the Department in the course of its duties and in confidence
- disclosure would erode the public perception of trust in the Department leading to potential difficulties in the future where information of this nature is required

[14] The Applicant clarifies that he wishes to unravel the land ownership and registration history of the land parcel in question, which some time ago belonged to his great-grandfather. In addition, the Applicant advises that he is already in possession of a large number of records previously provided to him concerning the parcel of land in question.

[15] In *Coco, supra*, the court outlined three essential elements to for a cause of action for an equitable breach of confidence to be established:

- the information must have a quality of confidence about it
- the information must have been imparted in circumstances importing an obligation of confidence, and
- there must be an unauthorized use of that information to the detriment of the party communicating it

[16] In this case I will focus on the second necessary element – that the information must have been imparted in circumstances importing an obligation of confidence.

[17] The Department has not referred to any evidence to support a finding that the information in question was imparted in circumstances importing an obligation of confidence.

[18] An examination of the records in question does not reveal any explicit conditions regarding subsequent use or disclosure.

[19] With respect to any implicit conditions on disclosure of the information, the test to be applied is set out in *Coco, supra*:

... if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.

[20] The responsive records are comprised of:

- correspondence between various members and representatives of the Applicant's family and various representatives of the Government regarding the ownership of the parcel
- deeds purporting to convey the parcel
- Government memos outlining the history of the ownership of the parcel
- Government memos addressing the administration of the claim for ownership
- maps (including an extract from the Government Registry)

- documents recorded in the Public Record of the Cayman Islands
- Probate Inventory
- Memos from the Registrar of Lands regarding the issue of ownership of the parcel
- a birth certificate from 1888
- Letters of Administration dated 21 April 1976 and 12 March 1956
- Will and Testament dated 20 December 1955

- [21] Any reasonable person would expect that the documents which are already in the Public Record, such as birth certificates, letters of administration and maps would not attract a duty of confidence.
- [22] The balance of the records are documents which deal with a claim for ownership of land. Land ownership is a matter of public record in the Cayman Islands.
- [23] I find that the responsive records are not the type of document that imparts an implicit duty of confidence and therefore the second essential element for an actionable breach of confidence is missing.
- [24] **The claim for exemption under section 17(b)(i) is dismissed.**

SECTION 23 – PERSONAL INFORMATION

- [25] As explained in ICO Guidance and applied in a number of previous ICO Decisions, determining whether the exemption in section 23(1) is engaged involves a three-part test. In deciding whether to disclose personal information, the following three questions must be answered:
- is the information “personal information”?
 - if so, would it be unreasonable to disclose the information?
 - does the public interest nonetheless require disclosure?²
- [26] There is no dispute that the responsive records contain personal information in the form of names, addresses and other identifying or private data.
- [27] In Hearing Decision 9-016104³, the Information Commissioner laid out the questions that should be considered in deciding whether disclosure would be unreasonable under section 23(1).

² See part 10 of ICO Guidance on Personal Information:
<http://www.infocomm.ky/images/IM%20Seminars%20Series%20I%20Personal%20Information%20Handout%20-%20June%202013.pdf>

³ Information Commissioner *Hearing 8-01610 Decision Health Regulatory Services (HRS)* 4 March 2011 pp10-11

(i) Is the information sensitive?

With very minor exceptions, I do not consider that the information contained in the responsive records to be sensitive. As set out above, the focus of these records (both the ones in dispute in this Decision, and those already in the possession of the Applicant) is not on the individuals, but on the ownership history of a parcel of land.

Many of the individuals mentioned in the records are either known to be, or due to the age of the records can be assumed to be, deceased.

Since the responsive records are primarily about historical land ownership and current information is available to anyone who can afford the fee, I do not find that the responsive records are sensitive in nature.

Pages 8, 14 and 28 of the documents contained in the package of responsive records provided by the Department contain personal information on a single individual, which is sensitive in nature.

(ii) Would disclosure prejudice the privacy of an individual?

The personal information contained in the responsive records relates to the interaction of various individuals over many decades with the land parcel in question. The focus of these records is on the cadastral history and adjudication of the land parcel and the various competing claims of ownership over many decades, not on the individuals.

While this subject matter includes some information regarding personal matters, and can be linked to specific individual land owners over time, many of the individuals are known to be, or can (due to the age of the records) be assumed to be, deceased.

The disclosure of historical information, which can be seen to be less invasive of privacy than the disclosure of current information, would not prejudice the privacy of the individuals in question.

(iii) Would disclosure prejudice the public authority's information-gathering capacity (e.g. as a regulator)?

The Department's ability to gather information is not contingent on the voluntary cooperation of individuals, but is rather mandated in the *Registered Land Law (2004 Revision)* and related legislation.

Therefore, disclosure would not prejudice the Department's (or any other regulator's) ability to gather information.

(iv) Has the information “expired”?

The responsive records date from 1888 to 1993, with a majority of the records ranging between 1980 and 1993. The subject matter of the records goes even further back, to at least the 1860s. While some of the individuals identified in the most recent of those documents may still be land owners, most of the information is about earlier events in the 20th century or even in the 19th century. Therefore, I consider that most of it is no longer current and can be considered to have expired.

(v) Is the information required for the fair determination of someone's rights?

The Applicant is seeking the requested records in order to support an ownership claim over his great-grandfather's land, and that matter has been the subject of his and his family's investigations for several decades. I believe the disclosure of the responsive records would likely assist in resolving that larger question.

(vi) Would the social context render disclosure reasonable?

It is accepted practice for land registration and ownership information to be open to the public. There is a continuing interest in the fairness and lawfulness of land adjudication, and it would be beneficial for society to resolve any outstanding land issues, like the one of interest to the Applicant.

(vii) Is there any suggestion of procedural irregularities or wrongdoing?

The Applicant believes the land has been misappropriated, and in that context wishes to find out the circumstances which lead to the various changes in ownership of a particular land parcel over time. The responsive records would assist in that regard.

[28] **In conclusion, with the exception of the sensitive personal information on pages 8, 14 and 28, it is not unreasonable to disclose the personal information contained in the responsive records.**

SECTION 20(1)(d) – PREJUDICE TO THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS

[29] The Department submits that the records should be exempted from disclosure because disclosure would (or would be likely to) prejudice the conduct of public affairs.

- [30] The Department cites McIntyre v Information Commissioner and Ministry of Defence EA2007/0068 in support of its argument that withholding the information is necessary in the interests of good government.
- [31] According to the Department “there is a real and significant risk of the occurrence of prejudice to the effective conduct of public affairs” and, further, the “disclosure of records would indicate to the public that confidential and personal information submitted to the Department would be disclosed if requested”. The Department also asserts that it would erode public confidence in the Department and may affect the functioning of the Authority.
- [32] The Department does not provide any specific information on how those functions might be affected.
- [33] I note that the Registrar’s powers in the *Registered Land Law (2004 Revision)* are significant. The Registrar has the power to compel production of documents, summon any person to appear and give information, administer oaths and order costs. The Registrar does not depend on the willingness of the public to provide information to the Registrar.
- [34] **On the basis of the above, I do not accept that the disclosure of these documents would prejudice the effective conduct of public affairs.**

Section 26 – DOES THE PUBLIC INTEREST NONETHELESS REQUIRE DISCLOSURE?

- [35] Section 26(1) requires that a public interest test be applied in order to determine whether, notwithstanding that an exemption applies to parts of the responsive record, “such access would nevertheless be in the public interest”. “Public interest” is defined in Regulation 2.
- [36] The public interest test “involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining the exemption.” The test assumes the form of a balancing exercise between the factors in favour of disclosure and the factors in favour of maintaining the exemption.
- [37] The personal information that I have found to be unreasonable to disclose (under section 23 of the Law) on pages 8, 14 and 28 of the responsive records is of a private and personal nature. I am not aware of any public interest factors that would support its disclosure, as it does not touch upon government accountability, public understanding of government, public expenditure, the promotion of public participation in decision-making or the deterrence or revealing of wrongdoing or maladministration, or have any bearing whatsoever upon public matters.
- [38] **Therefore, I find that it would not be in the public interest to disclose the personal information which I found to be unreasonable to disclose.**

F. FINDINGS AND DECISION

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

1. In this case, the second essential element to establish an actionable breach of confidence has not been established. Therefore, the claim for exemption on the basis of section 17(b)(i) is dismissed.
2. The responsive records contain personal information. However, except for three short passages, it would not be unreasonable to disclose that personal information. The public interest does not override the exemption of the three short passages, which therefore must be redacted.
3. The disclosure of the responsive records would not prejudice the conduct of public affairs. The claim for exemption under section 20(1)(d) is dismissed.

Therefore, I require that the responsive records, which relate to a land parcel, be disclosed with the redaction of three short passages on or before 15 January 2018.

Sandy Hermiston
Ombudsman

14 December 2017