

Hearing 108-202500461
Decision

Judicial Administration

Sharon Roulstone
Ombudsman

10 April 2026

SUMMARY

This hearing decision concerns an appeal under the *Freedom of Information Act (2021 Revision)* (“FOI Act”) involving a request for records relating to the expenditure of public funds by the Director of Legal Aid in connection with Cause No. G2024-0277. The Applicant sought four categories of information concerning funds allocated, paid, or agreed upon for services by KSG Attorneys-at-Law, together with related correspondence.

The Judicial Administration (“the Public Authority”) initially refused access on the grounds of legal professional privilege under section 17(1)(a) of the FOI Act. During the appeal, however, the Public Authority altered its justification, later invoking commercial value and interest exemptions under section 21(1)(a) and (b) while simultaneously abandoning its original reliance on the professional privilege under section 17(1)(a). This shifting position became a central procedural issue.

The Ombudsman’s investigation was significantly and unnecessarily delayed due to repeated failures by the Public Authority to respond within deadlines, a pattern of non-responsiveness that required escalation and multiple extensions. Despite the Public Authority’s legal obligation to cooperate under the FOI Act, records required for the Ombudsman’s review under section 45 were unnecessarily withheld for extended periods.

The Ombudsman was required to determine:

1. Whether the Public Authority appropriately applied sections 17(1)(b)(i), 21(1)(a)(ii), or 21(1)(b);
2. Whether the shifting of refusal grounds and persistent delays amounted to procedural defects; and
3. Whether the Public Authority met its burden of proof under section 43(2).

Following a full review of the evidence and submissions, the Ombudsman finds that the Public Authority has failed to demonstrate that the requested records are exempt from disclosure under

sections 17(1)(b)(i), 21(1)(a)(ii) or 21(1)(b) of the FOI Act. The Ombudsman further finds that the Public Authority did not discharge its burden under section 43(2) to justify the refusal decision, and that the manner in which the request and appeal were handled raises material procedural concerns. The appeal is therefore allowed, and the Public Authority is required to disclose the responsive records, subject only to any lawful redactions permitted under the FOI Act.

Statutes¹ considered:

Freedom of Information Act (2021 Revision) (FOIA)

Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)

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A. INTRODUCTION

[1] This hearing decision concerns an appeal under the *Freedom of Information Act (2021 Revision)* (“FOI Act”) regarding a request made to the Judicial Administration (“the Public Authority”) seeking detailed information about the expenditure of public funds by the Director of Legal Aid in connection with Cause No. G2024-0277. The Applicant requested four categories of information:

“1. The figure for monies airmarked/allocated for services rendered or to be rendered by KSG Attorney-at-Law and/or their agents.

2. The figure for monies paid thus far to KSG Attorney-at-Law and/or their agents for preliminary legal services connected to Cause# G2024-0277

3. The figure for monies paid thus far for service rendered by KSG Attorney-at-Law and/or their agents for services up to the date of this request not considered preliminary legal services

4. A copy (redacted if necessary) of correspondences between the Legal Aid Director and KSG Attorney-at-Law and/or their agents agreeing to any sum of monies for the purposes of Cause# G2024-0277 or equally a simple revelation of the figure/s.

[2] The Information Manager (IM) acknowledged the request and later issued a decision after taking an extension. The IM provided some information in response to the request, whilst other information was asserted to be exempt, under section 17(1)(a) of the FOI Act, citing

¹ In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision) as amended, and all references to regulations are to the Freedom of Information (General) Regulations 2021, unless otherwise specified.

legal professional privilege. The Applicant appealed directly to the Ombudsman since an internal review was not available to the Applicant in circumstances where the IM also acted in the capacity of an Acting Chief Officer.

[3] The Applicant's request for appeal sought,

"A copy (redacted if necessary) of correspondences between the Legal Aid Director and KSG Attorney-at-Law and/or their agents agreeing to any sum of monies for the purposes of Cause# G2024-0277 or equally a simple revelation of the figure/s."

[4] In the course of the appeal, we attempted to mediate an amicable resolution, but the dispute could not be resolved, and the appeal progressed to the Ombudsman for a formal decision.

B. ISSUES UNDER REVIEW

[5] The issues for determination in this appeal are:

- (a) Whether compliance with the request would involve the disclosure of records subject to actionable breach of confidence, pursuant to section 17(1)(b)(i);
- (b) whether the correspondence and related records concerning expenditure of public funds are exempt from disclosure under **section 21(1)(a)(ii)** or **section 21(1)(b)** of the FOI Act;
- (c) whether the Public Authority complied with its statutory obligations in the handling of the FOI request and appeal, including during the Ombudsman's investigation; and
- (d) whether the Public Authority has met its burden of proof under **section 43(2)** of the FOI Act.

C. BURDEN OF PROOF

[6] Under section 43(2) of the FOI Act, the Public Authority bears the burden of proving that it acted in accordance with the FOI Act and that any claimed exemption applies. Where the Public Authority relies on more than one exemption — particularly where its position changes during the appeal — it must justify each ground fully.

D. CONSIDERATION OF ISSUES

a) **Are the records exempt under section 17(1)(b)(i) because their disclosure would constitute an actionable breach of confidence?**

[7] The Public Authority's initial refusal decision relied on **section 17(1)(a)** of the FOI Act, on the basis that it would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, our Notice of Hearing was issued under the assumption that arguments would be provided to support the professional privilege defence.

[8] However, in its submissions filed during the hearing process, the Public Authority no longer relied upon section 17(1)(a) as a basis for refusing disclosure. It submitted arguments concerning sections 17(1)(b)(i) (actionable breach of confidence), 21(1)(a)(ii) (trade secrets and commercial value) and 21(1)(b) (commercial interests), effectively abandoning its privilege claim under section 17(1)(a) without explanation.

[9] **The shifting reliance on exemption provisions is relevant to the Ombudsman's assessment of the procedural handling of the appeal and the question of whether the Public Authority has complied with its obligations under the FOI Act, including its burden of proof under section 43(2).**

[10] The Public Authority relies on section 17(1)(b)(i) of the FOI Act, which protects against disclosure that would breach confidence. It provides as follows:

17. (1) A record is exempt from disclosure if —

(b) the disclosure thereof would-

(i) constitute an actionable breach of confidence;

[11] In its initial submission, the Public Authority argued that the correspondence involved *"confidential negotiations, contractual terms, and pricing strategies, which are not only private but also of commercial value, and that revealing such details would diminish competitive advantage and bargaining power. The correspondence was exchanged under an obligation of confidence, and third-party consent was not given."*

[12] The Public Authority further argued:

...no funds had been earmarked or paid to KSG, that any retainer arrangement was at a discounted rate, and that correspondence concerning fees was withheld on grounds including legal privilege. The Authority has therefore already provided substantive information regarding the absence of payments and allocations. The remaining records sought consist of private communications concerning contractual and financial arrangements between Legal Aid and its external legal advisers.

[13] The Applicant submits:

The Appellant requested information relating to legal fees, including amounts paid, incurred, or agreed to be paid, by a public body for legal representation.

5. The request does not seek:

- legal advice,*
- confidential legal communications,*
- litigation strategy,*
- pleadings, or*
- privileged correspondence.*

6. The information sought is financial and administrative in nature, relating solely to public expenditure.

[14]The Applicant added:

...

19. Courts and information regulators in Commonwealth jurisdictions have repeatedly emphasised that the expenditure of public funds is a matter of legitimate public interest.

20. In Corporate Officer of the House of Commons v Information Commissioner [2008] EWHC 1084 (Admin), the High Court affirmed that transparency concerning public expenditure lies at the heart of freedom of information legislation and democratic accountability. Attempts to withhold financial information relating to public functions were rejected where disclosure served the public interest.

[15]The meaning of the “actionable breach of confidence” exemption in section 17(1)(b)(i) of the FOI Act has been considered in a number of hearing decisions. The following is a general interpretation of the wording:

[16]The meaning of “would”

In the *McIntyre* case, the UK Information Tribunal clarified, in relation to similar wording used in the UK FOI Act, that “would” is to be interpreted as “more probable than not”.²

[17]The meaning of “actionable”

As the UK Information Tribunal found in *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.*³ the meaning of “actionable” in the parallel exemption in the UK FOI Act is not unambiguous. However, in the parliamentary discussions relating to the UK FOI Bill, Lord Falconer, the sponsor of the UK Act, clarified that “the word ‘actionable’ does not mean arguable ...”, but that “[it] means that one can take action and win.”⁴

[18]Further, guidance from the UK Ministry of Justice supports this view, namely that the exemption may apply “if a person could bring a legal action and be successful.”⁵

[19]The meaning of “breach of confidence”

Both the Applicant and Public Authority reference the well-known case of Coco v. A. N. Clark, Megarry J⁶ which held that in order for a case of breach of confidence to succeed, three elements are required:

- the document must have the necessary quality of confidence about it;
- the information must have been imparted in circumstances importing an obligation of confidence; and

² *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068 para 40

³ *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.* EA/2009/0036 para 25

⁴ United Kingdom Hansard HL (Series 5) Vol. 618, col. 416 and Vol. 619 col 175-6; quoted in *HEFCE v ICO*

⁵ Ministry of Justice Freedom of Information Guidance.Exemptions guidance. Section 41 – Information provided in confidence p. 2

⁶ *Coco v. A. N. Clark (Engineers) Ltd* [1969] RPC 41

- there must be an unauthorized use of that information to the detriment of the party communicating it.

[20]Notably, even if these three criteria are met, a common law public interest defence still exists.

[21]This is corroborated by guidance from the UK Information Commissioner on the identically worded exemption in the UK's Freedom of Information Act 2000. **The duty of confidence is not absolute**, and the courts have recognised three broad circumstances under which confidential information may be disclosed. These are as follows:

- Disclosures with consent...
- Disclosures which are required by law...
- **Disclosures where there is an overriding public interest...** Much will depend on the circumstances of each case, but particular weight should be attached to the privacy rights of individuals. The weight of the wider public interest in confidentiality will also depend to some extent on the context. ... Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.

[22]The public interest defence is further confirmed in guidance from the UK Ministry of Justice on the same exemption, which states:

The courts have recognised that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence. So although the [FOI] Act requires no explicit public interest test, an assessment of the public interest must still be made.

[23]Consequently, I hold that the applicability of the exemption in section 17(1)(b)(i) of the Cayman Islands FOI Act will depend on the likelihood that legal action would be successful, and this determination requires a consideration of the common law public interest elements established in the *Coco* case above.

[24]In the first test, I must consider:

- i. **Does the information itself have the necessary quality of confidence about it?**

[25]The term "necessary quality of confidence" means that "it must be information which is worthy of protection – someone must have an interest in the information being kept confidential." The information cannot already be in the public domain or be trivial in nature. The courts will hold that information is subject to a duty of confidence where there is an express agreement to keep it confidential, or where there is an implied duty of confidence.

[26]The Applicant appears to have accepted the fact that some information would be withheld, especially where legal privilege applies. The Applicant's request focused on a specific case to which the Applicant is a party, and clearly asked for **correspondence between the parties agreeing on the sum of money for "cause# g2024-0277 or equally, a simple revelation of the figure/s"**.

[27]Administrative contracts with law firms (scope, cost, deliverables) are typically not confidential unless:

- the contract explicitly specifies confidentiality,
- the information is inherently confidential, and

- disclosure could realistically enable the law firm to initiate successful legal action.

[28]The FOI Act provides extensive access to records held by public authorities, and, as such, I, and my colleagues before me, have highlighted the public's right to access government-held information unless an exemption applies. Throughout the Cayman FOI framework, we have maintained that transparency and accountability are bolstered by the **proactive** publication of government records, particularly expenditure records.

[29]Financial details, such as fees paid to lawyers, are no exception.

[30]Having reviewed the records, I consider that a part of its contents is disclosable under the FOI Act, and is not "information which is worthy of protection".

[31]**I therefore do not find that all of the information in the responsive records has the necessary quality of confidence about it.**

[32]In the second test, I must consider:

- ii. **Was the information imparted in circumstances importing an obligation of confidence?**

[33]I accept that the Public Authority routinely handles many privileged and confidential matters. However, this does not, of itself, establish that correspondence of a general or administrative nature is confidential for the purposes of the FOI Act. Confidentiality is contextual, not categorical. The Public Authority speaks of concern that "*the surrounding contractual arrangements and prevailing professional standards reinforce the expectation that financial and retainer terms would remain confidential*" in accordance with KSG Attorneys-at-Law Terms and Conditions.

[34]The Applicant countered that the requested record involves the expenditure of public funds and that there is thus a legitimate public interest in such expenditure. I acknowledge and accept the Applicant's argument that "*Courts in common-law jurisdictions have recognised that legal professional privilege does not extend to the amounts of legal fees paid or incurred, absent disclosure of confidential legal advice.*" Legal fees paid by government entities are generally considered financial and administrative records and are prima facie disclosable under the FOI Act.

[35]I wish to hereby remind the Public Authority, and all public authorities for that matter, that the marking of a document as "confidential" by a public authority, or the addition of a confidentiality clause in a contractual agreement, does not automatically mean that it is exempt from disclosure and outside the reach of the FOI Act. Public authorities often rely on contracts containing confidentiality clauses to protect controversial or embarrassing information from public scrutiny. However, the authority of the FOI Act cannot be usurped by this practice. Public authorities should be mindful about how confidentiality clauses are used and set reasonable levels of expectation about what may require to be disclosed, in accordance with the provisions of the FOI Act.

[36]Upon reviewing the engagement letter between KSG and an email thread between them and the Public Authority, it appears obvious that the Public Authority had little to do with the formulation of the letter of engagement sent to them by KSG. It is however, important to note

that the fees charged MUST adhere to the Grand Court Rules and the Procurement Act. Knowing this, it is difficult to accept that either party had a realistic expectation that the financial and retainer terms would remain confidential.

[37] **Consequently, I find that the circumstances of the communication in this case do not import an obligation of confidence.**

[38] Lastly, I must consider:

iii. **Would disclosure of the responsive record constitute an unauthorized use to the detriment of the confider?**

[39] The Public Authority argues that KSG Attorneys-at-Law " *have not consented to publication of the correspondence or the financial details it contains. On the contrary, both KSG and the Legal Aid Director entered into the agreement on the basis that the information is confidential.*"

[40] Additional arguments from the Public Authority explained that, "*In circumstances where no public monies were in fact paid, and where the remaining records consist of confidential and commercially sensitive arrangements, disclosure would add little to public understanding or accountability. By contrast, it would undermine legitimate expectations of confidentiality and impair the ability of public authorities to negotiate effectively and economically for legal services in the public interest.*"

[41] While case law on breach of confidence relating to the privacy of individuals has evolved so that proof of detriment to the person whose information is at stake is no longer required for a potential breach of confidence to occur, **detriment must still be demonstrated where the confidences are of a commercial nature.**

[42] The Public Authority argues that disclosure of the responsive record would impair the ability of public authorities to negotiate effectively but does not provide arguments sufficient to show detriment that would justify invoking the exemption.

[43] Further, the exemption is not subject to the public interest test in section 26(1), however, the duty of confidence is subject to public-interest considerations. The public interest in disclosure is significant because it concerns the government's accountability for legal fees spent in a particular matter. Therefore, even if detriment was proven, the public interest in disclosure would likely outweigh any public interest in engaging the exemption.

[44] I do not consider that the disclosure of total fees would inherently be detrimental to the confider. Legal fees charged to government agencies must follow general rules through the Procurement Act and Grand Court Rules. They are generally considered administrative in nature and are usually disclosable.

[45] **I therefore find that the disclosure of the responsive record in redacted form does not constitute an unauthorized use harmful to the author.**

- b) Are the records exempt under section 21(1)(a)(ii) because their disclosure would reveal any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or section 21(1)(b) because it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.

[46] **Application of Section 21(1)(a)(ii)–(b): Commercial Interests**

[47] When the section 17(1)(a) professional privilege defence was abandoned, the Public Authority shifted its argument to rely on section 21(1)(a)–(b), asserting that disclosure would reveal commercially sensitive information about the rates or terms offered by KSG Attorneys. 21. (1) Subject to subsection (2), a record is exempt from disclosure if —

(a) its disclosure would reveal —

(i) trade secrets;

(ii) any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(b) it contains information (other than that referred to in paragraph (a))

concerning the commercial interests of any person or organisation

(including a public authority) and the disclosure of that information would prejudice those interests.

[48] The Public Authority asserted that the requested records are exempt from disclosure under sections 21(1)(a) and 21(1)(b) of the FOI Act on the basis that disclosure would reveal commercially sensitive information relating to KSG Attorneys-at-Law and/or prejudice the commercial interests of the firm.

[49] Section 21(1)(a), the FOI Act requires a public authority to demonstrate that disclosure would reveal trade secrets or information of a commercial value whose value would be destroyed or diminished as a result of disclosure.

[50] The Public Authority argued that, “The fee arrangements and retainer terms constitute information of commercial value under 21(1)(a)(ii). They reflect pricing structures, discount arrangements, and negotiated rates. Such information is valuable to both the legal advisers and Legal Aid in conducting present and future commercial negotiations. Disclosure would diminish that value by placing sensitive pricing information in the public domain.”

[51] The Public Authority further argued that, “service providers would be less inclined to offer preferential terms if such arrangements were liable to be placed in the public domain, as this

would expose their commercial strategies and pricing models to competitors and other clients. Over time, this would result in diminished bargaining power, increased costs, and reduced flexibility in the procurement of legal services, to the detriment of the efficient and economical use of public funds.”

[52]As in previous Hearing 88-202100094⁷, the terms “commercial value” and “commercial interests” are not defined in the Act. Therefore, these phrases should be given their ordinary meaning, in accordance with the principles of statutory interpretation. I accept the definition of “commercial value” as outlined in a decision of the Queensland Information Commissioner as follows:

...information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction.

[53]The term “commercial interests” means *“interests that relate to trading, such as the sale or purchase of goods, which are undertaken for the purpose of revenue generation and normally take place within a competitive environment.”*

[54]In general, for this exemption to apply, the information must have a commercial value or represent a commercial interest, and secondly, its disclosure must prejudice that value or interest. The threshold for the exemptions is that the commercial value “would, or could reasonably be expected to be destroyed or diminished if the information were disclosed” (section 21(1)(a)(ii)), or that disclosure “would prejudice those [commercial] interests” (my emphasis).

[55]Legal fees on their own do not typically have commercial value - they are not considered to be something a competitor can appropriate. Trade secrets on pricing strategy or retainer terms may be protected from disclosure but these are not records the Applicant requested.

[56]The Applicant's request for appeal sought,

“A copy (redacted if necessary) of correspondences between the Legal Aid Director and KSG Attorney-at-Law and/or their agents agreeing to any sum of monies for the purposes of Cause# G2024-0277 or equally a simple revelation of the figure/s.”

[57]In the circumstances, I do not find it reasonably likely, let alone more likely than not, that the commercial value of the information or the commercial interests of KSG Attorneys, the government or any other party would (or could reasonably) be harmed by disclosure of this information.

[58]The records I observed are not valuable for the purposes of carrying out a commercial activity, and do not represent an interest that relates to trading, such as the sale or purchase

⁷ Hearing 88-202100094 para 61- [Hearing_88-202100094_Min_Finance.pdf](#)

of goods; they are not exempt under sections 21(1)(a)(ii) or 21(1)(b). The Public Authority has not sufficiently explained how disclosure would destroy or diminish the value, or prejudice the commercial interests of KSG sufficient for the exemptions to apply.

[59]The Public Authority did not identify any trade secrets within the records, nor did it specify any information that possesses a commercial value of the nature contemplated by section 21(1)(a). No evidence was provided to explain how disclosure would destroy or diminish such value. Assertions of sensitivity alone are insufficient to satisfy the statutory test.

[60]In relation to **section 21(1)(b)**, the Public Authority was required to demonstrate that disclosure would, or could reasonably be expected to, prejudice the commercial interests of any person or organisation. The submissions made by the Public Authority did not explain the nature of the alleged prejudice, how it would arise, or why it would be likely to occur. On the other hand, the records relate to the engagement of legal services funded with public money, and there is a strong public interest in transparency and accountability with respect to such expenditure.

[61]I further note that, where limited portions of a record may legitimately engage commercial interests, the FOI Act permits partial disclosure through redaction under **section 12(1)**. The Public Authority neither proposed nor meaningfully considered this option.

[62]In all of the foregoing circumstances, I find that the Public Authority has failed to demonstrate that the records are exempt under **sections 21(1)(a) and 21(1)(b)** of the FOI Act.

Procedural Concerns

[63]I have significant concerns regarding the manner in which the Public Authority handled both the FOI request and the appeal.

[64]Despite repeated requests made pursuant to **section 45(2)** of the FOI Act, the Public Authority failed to provide my office with timely access to the responsive records. Multiple follow-ups were required, and the matter ultimately had to be escalated to senior leadership before the records were produced. These delays materially impeded the investigation and are inconsistent with the Public Authority's statutory duty to cooperate.

[65]The investigation was further hindered by a prolonged pattern of procedural non-compliance by the Public Authority. Despite multiple requests issued under section 45(2) of the FOI Act, the Public Authority repeatedly failed to provide the responsive records within statutory or extended deadlines. This again resulted in several follow-ups, a formal escalation to senior leadership, and a significant delay in progressing the investigation.

[66] This inconsistent and alternating reliance on the FOI Act exemptions raised substantial concerns about the fairness, coherence, and lawfulness of the initial refusal.

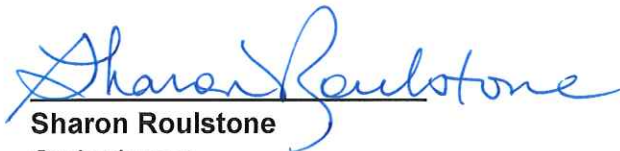
[67] Finally, there was a lack of clarity and consistency that hindered the efficient resolution of the appeal and undermined confidence in the lawfulness of the refusal decision.

[68] The Public Authority is therefore reminded that responsiveness, adherence to timelines, cooperation, and clarity are not discretionary; they are statutory obligations under the FOI Act.

E. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above, I make the following findings and decision:

- The Public Authority failed to establish that the requested records are exempt from disclosure under **sections 21(1)(a) or 21(1)(b)** of the FOI Act. However, I accept the arguments made, as they relate to actionable breach of confidence under section **17(1)(b)(i)**, to only parts of the responsive records.
- The Public Authority has not met its burden under section 43(2) to justify the refusal decision. The procedural deficiencies identified above further support the conclusion that the refusal was concerningly inconsistent with the requirements of the FOI Act.
- The Public Authority is required to disclose the responsive records in part, subject only to redaction of information that is demonstrably privileged or otherwise exempt under the FOI Act. Any remaining material must be released in part no later than **20 working days** from the date of this decision.


Sharon Roulstone
Ombudsman