



Hearing 94-202100076

**Decision**

Department of Planning

Sharon Roulstone

Ombudsman

11 November 2022

**Summary**

An applicant made a request under the Freedom of Information Act (FOIA) to the Cayman Islands Department of Planning (Department) for records relating to Block 67A Parcel 5. The Department initially could not locate responsive records. However, records were found after the applicant had provided a clarification of the request.

The majority of the responsive records were written, confidential communications between a professional legal adviser and their client, and they were prepared for the sole or dominant purpose of litigation. Consequently, the Ombudsman was satisfied that these records were subject to legal professional privilege, and the exemption in section 17(1)(a) applied to them.

A few other records were not legally privileged, and the Ombudsman ordered that they be disclosed within 14 days.

**Statutes<sup>1</sup> considered**

Freedom of Information Act (2021 Revision) (FOI Act)

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

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

**A. INTRODUCTION**

- [1] On 25 September 2020 the applicant made a request under the FOIA to the Department for records related to Block 67A Parcel 5, in the following terms:
  - a) Pre-excavation evaluation with the topography survey
  - b) Documents related to three applications for crown grant
- [2] On 5 October 2020 the Information Manager (IM) acknowledged receipt of the request, and on 21 October 2020 the applicant was informed that no responsive records were held.
- [3] The applicant was asked to clarify the request, and on 30 October 2020, he requested an internal review and clarified his request.
- [4] Since the Director was involved in the decision-making process, no internal review was done. On 19 January 2021 the applicant requested an appeal.
- [5] During the appeal process, we asked the Department to provide the applicant with a record of their search efforts. Based on the applicant’s clarifications, some records that were relevant and within the scope of the applicant’s revised request were located and subsequently disclosed.
- [6] Other newly located records were withheld in accordance with sections 17(1)(a) and (c) of the FOIA, because they were claimed to be subject to legal privilege and/or legal advice provided by the Attorney General or the Director of Public Prosecutions.
- [7] The dispute could not be resolved amicably, and the matter was escalated to a hearing before the Ombudsman.

**B. CONSIDERATION OF ISSUES**

**Are the records exempt because their disclosure would be privileged from production in legal proceedings on the ground of legal professional privilege (section 17(1)(a)), and/or because the records are legal advice given by or on behalf of the Attorney General or the Director of Public Prosecutions (section 17(1)(c))?**

[8] The responsive records under consideration consist of 8 pieces of correspondence, dated between August 2000 to July 2001. The first 7 items were provided to me in a single pdf file, and the 8<sup>th</sup> item was provided in a separate pdf.

[9] Since the two exemptions claimed are very similar, I will consider them simultaneously.

[10] Section 6(1) establishes a general right of access, subject to any exemptions that may apply:

***General right of access***

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

[11] Section 17 states:

*(1) A record is exempt from disclosure if —*

*(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege;*

*...*

*(c) it is legal advice given by or on behalf of the Attorney General or the Director of Public Prosecutions.*

*(2) Records protected from production in legal proceedings on the ground of legal professional privilege shall be exempt without limitation as to time.*

[12] Section 43(2) puts the onus squarely on the public authority to explain why it withholds records:

*(2) In any appeal under section 42, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Act.*

[13] Although the burden of proof rests with the public authority, and an applicant's arguments are generally not crucial to a hearing decision, I wish to remind all parties that it is important to provide me with clear, concise reasoning. Unfortunately, the applicant's rationale in this case was at times obscure and difficult to decipher, and the relevancy of a number of attachments remains unexplained.

[14] The applicant asked why it is necessary to exempt these records, when very similar records were previously disclosed to him in full. In this regard, I am mindful that legal professional privilege belongs to the client, and that a client can waive the privilege. However, there is no obligation to do so.

- [15] The Department argued that the responsive records were privileged, since they were “legal advice clearly made in circumstances analogous to a client approaching his solicitor for legal advice.”
- [16] The Department also clarified the general meaning of “legal professional privilege” as follows:

*...the Supreme Court of Canada in R. v. Campbell [1999] 1 S.C.R. 565 stated:*

*“where legal advice of any kind is sought from a professional legal adviser in his capacity as such the communication relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal adviser except the protection be waived.”*

*Additionally, in determining whether records should be released under the FOI Act, the Hon. Smellie CJ considered and applied Porter Shirley<sup>2</sup> where it was held at para. 34 that:*

*“Legal professional privilege is an important and substantive right that protects a client from having to disclose confidential communications passing between the client and his or her lawyer. It is ‘a fundamental human right long established in the common law,’ said Lord Hoffmann in R. (Morgan Grenfell & Co. Ltd.) v. Special Commr. of Income Tax . . . ([2003] 1 A.C. at 606). The modern case law on legal professional privilege has divided the privilege into two categories, ‘legal advice privilege’ and ‘litigation privilege.’ The two categories were authoritatively described in Three Rivers D.C. v. Bank of England . . . ([2005] 1 A.C. 610, at para. 10, per Lord Scott): ‘Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given.’”*

- [17] After the amendment of the FOI Act in 2018, all exemptions in section 17 became absolute, and are therefore no longer subject to a public interest test. This means that a responsive record only has to fall within the class of information described by the exemption for it to be exempt.
- [18] As indicated by the Department, the courts have recognized two types of legal professional privilege: litigation privilege and legal advice privilege<sup>3</sup>, which the UK Information Commissioner summarized as follows:

*Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the sole or*

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<sup>2</sup> Porter-Shirley (as executrix of the Estate of Kelly) v Whittaker and Briany Limited [2016] (1) CILR 140.

<sup>3</sup> As also confirmed by the UK Information Tribunal in: Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry, 4 April 2006, EA/2005/0023.

*dominant purpose of giving or obtaining legal advice or for lawyers to use in preparing a case for litigation. It can cover confidential communications between lawyers and third parties if they are made for the purposes of litigation. Litigation privilege can apply to a wide variety of information.*

*Legal advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.<sup>4</sup>*

- [19] The legal adviser must have given advice in a legal context, for instance where it is about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged unless it also covers legal concerns, such as advice on legal remedies to a problem.
- [20] A four-step test is used to determine whether legal advice privilege attaches to all or part of a document:
- (i) there must be a communication, whether oral or written;
  - (ii) the communication must be of a confidential character;
  - (iii) the communication must be between a client (or his agent) and a legal advisor; and
  - (iv) the communication must be directly related to the seeking, formulating or giving of legal advice.<sup>5</sup>
- [21] Close scrutiny of the responsive records confirms that **items 1, 2, 5 and 8** are confidential, written communications between a professional legal adviser and their client, and that they were prepared for the sole or dominant purpose of litigation in respect of an agreement with the respondent. These records are respectively dated 27 June 2001, 3 July 2001, 7 February 2001 and 29 December 2000.
- [22] **Item 3**, dated 3 July 2001, is a draft letter for discussion between the legal advisor and the client, in the context of the legal advice provided. This item forms an integral part of the communications between the advisor and the client relating to potential litigation, and was created for the dominant purpose of preparing for litigation.
- [23] **Item 4**, dated 26 June 2001, consists of a communication from a senior government official (not a lawyer) to a local company which later became the opponent in the potential litigation. It was created to remind the company of the outstanding fees, and threatens legal action in case of non-payment. However, I do not consider that it was prepared for the sole or dominant purpose of

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<sup>4</sup> Information Commissioner's Office (UK), *Legal Professional Privilege (section 42). Freedom of Information Act. Version 1.3*, 13 April 2016, paras 8-10.

<sup>5</sup> *B v Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.), as quoted in Ombudsman, *Hearing 82-202000528 Decision. Workforce Opportunities & Residency Cayman (WORC)*, 22 October 2020, para 13.

litigation, as its focus is the outstanding debt, which was openly being communicated to the potential opponent by a non-lawyer.

[24] The two remaining **items 6 and 7**, respectively dated 16 August 2000 and 28 August 2000, consist of correspondence between government and a local company about an agreement/application for planning permission. These communications are not between a legal advisor and a client, and they cannot be said to have been created for the sole or dominant purpose of preparing for proposed or contemplated litigation, as their focus is very much on the completion of a planning application.

[25] **Consequently, for the reasons above, I find that items 1, 2, 3, 5 and 8 are subject to legal professional privilege, and the exemption in section 17(1)(a) applies to them.**

[26] Since I have found that items 1, 2, 3, 5 and 8 are exempt under section 17(1)(a), I do not need to consider whether these records are also exempt as legal advice provided by, or on behalf of, the Attorney General or the Director of Public Prosecutions under section 17(1)(c).

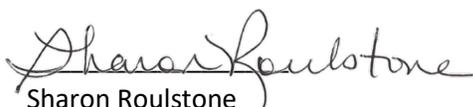
[27] **As well, for the above reasons, I find that items 4, 6 and 7 are not subject to legal professional privilege, and therefore the exemption in section 17(1)(a) does not apply to them.**

[28] I have also considered whether items 4, 6 and/or 7 are subject to the exemption in section 17(1)(c). However, none of these items consist of advice provided by or on behalf of the Attorney General or the Director of Public Prosecutions, and therefore the exemption in section 17(1)(c) is not engaged.

### C. 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:

- Records 1, 2, 3, 5 and 8 under consideration in this hearing decision are confidential, written communications between a professional legal advisor and their client, prepared for the sole or dominant purpose of litigation. As such, they are exempt under section 17(1)(a) of the FOIA.
- Records 4, 6 and 7 are not exempted and I require that the Department of Planning disclose them within 14 days.



Sharon Roulstone

Ombudsman