

Hearing 97-202200318

Decision

Ministry of District Administration and Lands

Sharon Roulstone

Ombudsman

28 April 2023

Summary

An applicant made a request to the Ministry of District Administration and Lands (the Ministry) under the Freedom of Information Act (2021 Revision) (the FOIA), for records relating to beach access signage for Cayman Shores Development.

The Ministry searched for responsive records, and disclosed a number of records, but it could not locate other records, and the matter was elevated for a formal decision by the Ombudsman on the following questions:

- whether a reasonable search was conducted by the Ministry;
- whether the Ministry made a record of its search efforts; and,
- whether the Ministry's Information Manager (IM) had conducted interviews with the applicant in order to locate appropriate records.

The Ombudsman considered these questions and concluded that the Ministry met its obligations under regulations 6(1) and (2) respectively to "make reasonable efforts to locate" responsive records, and to "make a record of its efforts". While the IM could have conducted further interviews with the applicant, in the circumstances of this case there was little to be gained by doing so as the request was communicated in great detail and was well-understood.

There was no need for the Ministry to take any corrective steps.

Statutes¹ considered

¹ 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.

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A. INTRODUCTION

[1] On 24 December 2021 the applicant made a request to the Ministry under the FOIA, for records relating to signage for rights of way on property developed by Cayman Shores Development Ltd., as follows:

West Bay Beach South, Block 12 E, Parcels 84 and 107, Cayman Shores Development Ltd.

- [1] *Signage for the Two (2) Registered Right of Way on Parcels 84 and 107.*
- [2] *Signage erected for a Right of Way on the South boundary of Parcel 84, this Rights of Way is not shown on the parcel map.*

Please release all records in any way connected with the;

- 1. *Status of erection for the two (2) registered Rights of Way signs for the Rights of Way on Parcels 84 and 107.*
- 2. *Erection of a Rights of Way sign on the Southern Boundary of Parcel 84 when the Registered Land Map does not show a registered Rights of Way in this part of the parcel of land.*
- 3. *The effects on all of the government [in] regards to Rights of Way pursuant to any conditions contained in the December 15, 2011 Dart/NRA Agreement, as amended by various amendments.*

The records requested include but are not limited to all records held in. by any government department/ statutory authority, government company or other government entity...

[2] On 25 January 2023, the IM acknowledged receipt of the request, and, pursuant to section 7(4) of the FOIA, extended the period for the initial decision, stating that the search had not been successful so far and that the records were held by a former employee and were “voluminous”.

[3] On 18 February 2022 the IM disclosed records, amongst which one was redacted without specific reasons.

- [4] On 7 March 2022 the applicant asked for an internal review in accordance with section 33 of the FOIA. He claimed that he had not received an acknowledgment or initial decision. In response, the Acting Chief Officer (ACO) provided a copy of the notice of extension of 25 January 2022, and advised that he followed up with the IM to confirm the status of the request.
- [5] In response to a query from the applicant, the ACO responded to the applicant confirming that the Ministry had, indeed, sent emails on previous occasions, i.e. the acknowledgment on 11 January, the initial decision on 18 February, and a follow-up email on 8 March 2022.
- [6] The applicant later confirmed receipt of the emails and made an appeal to the Ombudsman on 8 June 2022, on the basis of a deemed refusal. After confirming our jurisdiction, we accepted the appeal on 27 June 2022, and attempted to resolve this dispute informally.
- [7] After various communications and meetings between ourselves and the two parties, on 19 July 2022 the Ministry confirmed that it contacted the National Roads Authority and the Lands and Survey Department, who confirmed that no further outstanding records were held.
- [8] On 14 October 2022 the Ministry broadened the scope of its search and found a total of 1,084 emails relating to “Cayman Shores Development”. It invited the applicant to narrow the scope of the request, but the applicant declined the invitation. The Ministry then invoked section 9(c), stating that compliance with the request would unreasonably divert its resources. That claim was later withdrawn in the immediate lead-up to the present hearing.

B. CONSIDERATION OF ISSUES

- [9] In this formal hearing decision, I am considering, and deciding on, the following questions:
- Did the Ministry make reasonable efforts to locate records subject to an application for access, in accordance with regulation 6(1) of the Regulations?
 - Did the Ministry make a record of search efforts, in accordance with regulation 6(2) of the Regulations?
 - Did the Ministry conduct an interview with the applicant to ensure that the appropriate records were located, in accordance with regulation 21(b) of the Regulations?
- [10] Since the first two of these questions relate to regulation 6, I will consider them in tandem.
- a) Did the Ministry make reasonable efforts to locate records subject to an application for access, and did it make a record of search efforts, in accordance with regulation 6 of the Regulations?**

- [11] Regulation 6 states:

Reasonable search

6. (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), the information manager shall make a record of the efforts that information manager made.*

[12] The question of reasonableness of a search under the UK's FOIA was addressed in the appeal to the Information Tribunal in *Bromley v Information Commissioner* in which the Tribunal concluded that,

...the standard of proof to be applied... is the normal civil standard, namely, the balance of probabilities.... [since] there can seldom be absolute certainty that the information relevant to a request does not remain undiscovered somewhere within the public authority's records...

[13] Furthermore, the Tribunal confirmed that a number of factors are relevant to this test, namely:

- *the quality of the public authority's initial analysis of the request,*
- *the scope of the search that it decided to make on the basis of that analysis and*
- *the rigour and efficiency with which the search was then conducted...²*

[14] Given the extensive similarities between the UK and Cayman Islands FOIA, I will apply the same standard and factors.

[15] In its submission for this hearing, the Ministry explained that the applicant was granted full access to all the relevant records in its possession, but that no further records are held.

[16] The Ministry provided a detailed chronological account of the steps it took to search for responsive records. In general, the Ministry took the following approach:

- a) The IM contacted two individuals with extensive knowledge of land records, namely the Acting Chief Officer and the Senior Policy Advisor for Lands;
- b) These individuals in turn asked others, including individuals in the National Roads Authority;
- c) The IM also contacted various individuals in the Ministry, the Lands & Survey Department (L&S), and the Public Lands Commission (PLC); and,
- d) The IM had verbal conversations with additional individuals who were thought to know of any additional records.

² *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072) [2011] 1 Info LR 1273 paras 12-13.

- [17] In return, the applicant's submission stated that the Ministry had not explained how and by whom the beach access signage was installed, nor did it disclose the actual emails between the IM and the various parties that were claimed to have been contacted in the search for records.
- [18] In view of the three criteria identified by the UK Information Tribunal in relation to the quality of search efforts made by public authorities, the Ministry clearly understood what records were requested and acted accordingly. The quality of its analysis of the request seems adequate, as do the scope of the search that was undertaken, and the rigour and efficiency with which the search was conducted.
- [19] The applicant appears to be correct in his statement that the Ministry has not explained how the beach signage came to be placed in its current location. The reasons for this are not known, but it does not appear to be because of any deficiencies in the search for responsive records that was undertaken.
- [20] Regulation 6 only requires that a record of the search efforts is made where no records are located. Therefore, the Ministry was obligated to describe its search efforts, which it eventually did in great detail. However, public authorities are not required to provide detailed evidence such as emails with third parties, to back up that description.
- [21] The Ministry made a detailed record of its search efforts available in the submissions to the present hearing. Of course, this should have been provided without such a lengthy delay, at the very least during the informal stage of the appeal.
- [22] The applicant pointed to alleged inconsistencies in the Ministry's account of its search efforts, e.g. where L&S told the IM that they were not involved in any signage for beach access prior to the formation of the PLC (by means of the Public Lands Act, 2017), and that, consequently, no records were found. The applicant interprets this as meaning that L&S records might exist dated after the formation of the PLC.
- [23] However, in this regard it is reasonable to infer from the statement by L&S that, in addition to not holding records prior to the formation of the PLC, it did not hold responsive records once the public lands were being managed and/or regulated by the PLC.
- [24] **Given the explanation of the efforts that were made to locate relevant records (which was eventually disclosed as required), the IM demonstrated a good understanding of the request, and the quality of her analysis was satisfactory, especially considering the historical nature of the requested records. The scope of the search was suitable, the search was carried out rigorously, and the IM exhausted all reasonable search efforts.**
- [25] **Consequently, the Ministry has met its obligations under regulations 6(1) and (2) respectively to "make reasonable efforts to locate" responsive records, and "make a record of its efforts".**

b) Did the Ministry conduct an interview with the applicant to ensure that the appropriate records were located, in accordance with regulation 21(b) of the Regulations?

[26] Section 7(3)(a) states:

Application for access

7. ...

(3) A public authority to which an application is made shall —

(a) upon request, assist the applicant in identifying the records to which the application relates;

...

[27] Regulation 21(b) states:

Functions of information managers

21. An information manager shall —

...

(b) conduct interviews with applicants to ensure that the appropriate records are located;

...

[28] The Ministry stated the following:

... the request was clear and did not require further clarification. ... The Applicant's FOI application was sufficient for the [Ministry] to identify the requested records. ... There was no need for the Public Authority to consult the Applicant and permit him to reformulate the Application under section 7(3)(a) or conduct an interview under regulation 21(b).

[29] I have reviewed the application and the search record, and I find the request was very detailed and clear, indicating, for instance, the exact block and parcel numbers that were relevant to the application. It is also clear that the IM communicated adequately with the applicant, as partially detailed in the above chronology of the background.

[30] While good communications are in many cases key to the well-functioning of the FOIA, in this case it is unclear how further communications with the applicant could have produced a different outcome, e.g. by locating more records. This is particularly so, since I have found that the IM demonstrated a good understanding of the request, and the quality of her analysis was satisfactory, especially considering the historical nature of the requested records. The scope of the search was suitable, the search was carried out rigorously, and the IM exhausted all reasonable search efforts.

[31] **Therefore, while the IM could have conducted further interviews with the applicant, in the circumstances of this case there was little to be gained by doing so as the request was**

communicated in great detail and was well-understood. There is no need for the Ministry to take any corrective steps.

Other Issues

- [32] The applicant expressed his view that some of the responses received from the Ministry indicate that its record-keeping system is lacking. Certainly, the fact that no record could be found regarding the placement of the signage and that the location of board minutes was uncertain remains unexplained, and may indicate a violation of section 6(1) of the National Archive and Public Records Act (2015 Revision)(NAPRA), which states:

General duties as to public records

6. (1) Every public agency shall make and maintain full and accurate public records of its business and affairs, and such public records shall be managed and maintained in accordance with this Law.

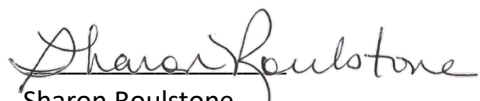
- [33] I wish to emphasize once again that compliance with the NAPRA, and this provision specifically, is vital to the well-functioning of the FOIA. Without records being created, maintained, managed, and, eventually, disposed of in accordance with the applicable legislation, there will inevitably remain gaps in the records that government needs for its own operational needs, and for its accountability to the broader public under the FOIA.
- [34] The applicant’s claim that the Ministry had violated sections 119 (neglect of duty) and 121 (disobedience of lawful duty) of the Penal Code (2022 Revision) fall outside my jurisdiction.

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:

- Given the explanation of the efforts that were made to locate relevant records, which was eventually provided in the course of this hearing, the IM demonstrated a good understanding of the request, and the quality of her analysis was satisfactory, especially considering the historical nature of the requested records. The scope of the search was suitable, the search was carried out rigorously, and the IM exhausted all reasonable search efforts. Consequently, the Ministry has met its obligations under regulations 6(1) and (2) respectively to “make reasonable efforts to locate” responsive records, and to “make a record of its efforts”.
- In the circumstances of this case there was little to be gained by conducting further interviews with the applicant, as adequate communications took place, and the request was communicated in great detail and was well-understood.

- There is no need for the Ministry to take any corrective steps.


Sharon Roulstone
Ombudsman