

Hearing 84-202000834

Decision

Portfolio of Legal Affairs

Sandy Hermiston

Ombudsman

25 March 2021

Summary

An applicant requested information under the Freedom of Information Law (2020 Revision) (the FOI Law) relating to the circumstances in which the employment of a former employee at the Cayman Islands Law School came to an end.

The Portfolio of Legal Affairs (the Portfolio) released the dates of employment of the former employee, but withheld correspondence under the exemption in section 23(1) of the FOI Law, claiming that the correspondence consisted of personal information the disclosure of which would be unreasonable. Another part of the request was for the personal data of the applicant, and was considered separately under the Data Protection Law, 2017 (DPL).

The Ombudsman found that the Portfolio applied the exemption in section 23(1) appropriately. The correspondence was the personal information of the former public officer as it related to her personal life, not to her public duties as a civil servant. The legitimate interests of the applicant did not outweigh the prejudice to the legitimate interests of the data subject that disclosure of the personal information would cause. Therefore, the disclosure would be unreasonable, and the exemption in section 23(1) was appropriately applied. There was no overriding public interest that would require that access nevertheless be granted.

No further action was required on the part of the Portfolio.

Statutes¹ considered

Freedom of Information Law (2020 Revision) and (2021 Revision) (FOI Act)

Freedom of Information (General) Regulations, 2008 and (2021 Revision) (FOI Regulations)

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A. INTRODUCTION

[1] On 26 May 2020 the applicant made a request to the Portfolio under the FOI Law, for the following information relating to a third-party individual who is a former employee of the CILS (the former employee):

- i) The dates which [the former employee] was employed by the CILS.*
- ii) Details as to why [the former employee] is no longer employed by the CILS, whether [the former employee] resigned from her post or if she was terminated from employment by the CILS.*
- iii) In the event that [the former employee] employment was terminated by the CILS, could you please provide me with reason/s as to why [the former employee] was terminated and any/ all documentation regarding the termination of [the former employee]'s employment with the CILS.*

[2] On 25 June 2020, the Portfolio disclosed a partially redacted screen shot from the HRIRIS human resources system in response to the first part of the request (point i above), indicating the dates of the former employee’s employment at the CILS. In its decision letter to the applicant, the Portfolio stated that the redactions to this document were made “to remove certain personal information relating to [the former employee] which does not fall within the scope of [the] request.”

[3] The Information Manager (IM) also informed the applicant that unspecified other responsive records were exempted under section 23(1), since their release “would involve the unreasonable disclosure of personal information relating to another individual”, in particular because of the Portfolio’s obligations under the DPL which had to be considered pursuant to the recently amended section 23(5) of the FOI Law.

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.

- [4] The applicant requested an internal review of the IM's decision in relation to the second and third part of the request (ii and iii), and also added a new request for:

iv) ... any/all documentation involving principals of the University of Liverpool deliberating on the complaint that was submitted to them on the 1s August 2012.

v) ... all communications that [the CILS Director] may have had with [a named individual] concerning [the latter] directing [the former] to sabotage [the applicant's] Legal Career.

- [5] The internal review was conducted by the Solicitor General, who agreed with the IM's initial decision, and informed the applicant that the new request was being treated as a request for the applicant's own personal data under section 8 of the DPL. As such, the fourth and fifth parts of the request (points iv and v above) fall outside the scope of the present appeal under the FOI Law, and will be dealt with separately under the DPL.

- [6] The applicant made an appeal to the Ombudsman in relation to the second and third parts of the request (points ii and iii above), i.e. the circumstances in which the individual's employment with the CILS came to an end.

- [7] One of the responsive records consisted of a printout from the payroll system. This record confirmed the dates of employment of the former employee, and was relevant to the first part of the original request only. Since that part of the request had already been answered by the IM, and the appeal was made in regard to the second and third part of the request only, the payroll records are not relevant to the present appeal.

- [8] The responsive record under consideration in this appeal consists of correspondence relating to the circumstances in which the former employee's employment relationship with the CILS came to an end (the correspondence).

B. CONSIDERATION OF ISSUES

Is the correspondence exempt because its release would involve the unreasonable disclosure of personal information of any person, whether living or dead, pursuant to section 23(1), and, if so, would disclosure nevertheless be required, as it would be in the public interest under section 26(1)?

[9] Section 23 states,

23. (1) Subject to the remaining provisions of this section, a record is exempt if its disclosure would involve the unreasonable disclosure of personal information of any natural person, whether living or dead.

...

(5) In determining whether the disclosure of third-party personal information would be reasonable, consideration shall be given as to whether the disclosure would be permitted under the Data Protection Law, 2017.

[10] The exemption in section 23 involves two tests: firstly, whether the exempted information is “personal information”, and secondly, if so, whether the disclosure would be unreasonable. When determining the latter, consideration must be given to the DPL.

Is the correspondence personal information?

[11] Regulation 2 defines “personal information” as,

... information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion ...

[12] Regulation 2 also lists examples of “personal information”, such as the individual’s name, home address, telephone number, etc., but it excludes the following:

(i) where the individual occupies or has occupied a position in a public authority, the name of the individual or information relating to the position or its functions or the terms upon and subject to which the individual occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of those functions;

[13] The Portfolio referenced two decisions from the UK, in which the Information Commissioner (ICO) found that information in a resignation letter had a direct connection to the individual’s personal life and did not relate to their official role as a public officer.² I note that the ICO took a similar approach to other types of end-of-employment information in other decisions as well.³

² Information Commissioner’s Office (UK), Decision Notice. Pirton Parish Council, 26 September 2017, FS50671554, and Information Commissioner’s Office (UK), Decision Notice. Pitington Parish Council, 27 March 2017, FS50624012

³ See, for instance: Information Commissioner’s Office (ICO), Decision Notices. Somerset Partnership NHS Foundation Trust, 17 October 2011, FS50349391; Teignbridge District Council, 9 January 2012 FS50419393;

- [14] The Portfolio contended that the correspondence was not excluded from the definition in regulation 2, quoted above, and, since it identified the former employee, it was “personal information”.
- [15] The applicant, on the other hand, argued that the information was not personal in nature. He stated that the Portfolio’s internal review decision “did not make any reference to a specific section of [the definition of ‘personal information’ in regulation] 2 of the FOI [Regulations] that related to the nature of the information that [the applicant] was requesting leaving obvious room for ambiguity and unclarity for those seeking specific legal reference/s”.
- [16] It is not necessary for information to match any of the specific examples listed in the definition in order to qualify as “personal information”. The definition indicates that it “includes” the examples, and the list is therefore not exhaustive. Arguably, the requested information is about the individual’s employment history, as listed in point (g) of the definition (paragraph 1(i) of schedule 1 of the revised Regulations). In any event, the correspondence focuses on the individual, and matches the general definition of “personal information”, since it contains recorded information “... about an individual whose identity is apparent ... from the information”.
- [17] The applicant also pointed to the intention of the FOI Act, which he described as the promotion of “Fairness, Transparency and the Integrity of Government in general”. He claimed that his FOI request was not for the personal information of the former employee, but instead related to her “carrying out her duties as a Civil Servant serving the public”. Since the applicant argued that the correspondence fell within the exclusion concerning public officers, quoted above, he argued that it should not be considered “personal information”. Therefore, according to the applicant, the exemption in section 23(1) was not engaged and the information should be disclosed.
- [18] The Regulations treat individuals who occupy positions in a public authority differently in that their names, information about their positions and the terms upon which they are occupied, and anything written or recorded by them for the purpose of performing their functions is not considered personal information. There is no discretion given to expand these factors. The information requested is correspondence containing end-of-employment information which relates to the former employee as an individual, but not to the position or any other of these factors.
- [19] I find that the information requested would identify an individual and that it is about an individual’s employment history, and is therefore personal information. The individual’s

South Kesteven Council, 20 May 2020, FS50894930. For a full discussion of this question, see: Information Commissioner’s Office (UK), Requests for personal data about public authority employees, 22 May 2013, Version 1.2

employment in a public authority does not alter the personal nature of the information because the information does not fit into the exceptions listed in the regulation.

Would the disclosure be unreasonable?

[20] Section 23(5) stipulates that determining whether a disclosure of personal information would be unreasonable requires a consideration whether the disclosure would be permitted under the DPL. This involves establishing whether the processing (in the form of the disclosure) meets one of the conditions in schedule 2 of the DPL, in accordance with the first data protection principle.

[21] The Portfolio claimed that disclosure of the correspondence would be unreasonable under the exemption in section 23(1), since it,

... would constitute an unwarranted invasion of the [individual's] personal privacy. In order to counter-balance this expectation of privacy, there would need to be a justifiable reason for disclosure.

[22] The sixth data procession condition in schedule 2 states:

Processing for legitimate interests

6. The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except if the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

[23] In conducting the balancing exercise implicit in this processing condition, the Portfolio again was guided by the two UK decisions on resignation letters of public officers, referenced above. In parallel to the Cayman Islands provision, the UK FOI exemption also requires a consideration of the disclosure under the UK's Data Protection Act.

[24] The data subjects in the two ICO decisions did not have a reasonable expectation that their end-of-employment information would be disclosed to the public at large. This was because disclosure would be likely to cause distress to the individuals due to the incursion into their privacy. The balancing exercise in the sixth data processing condition in schedule 2 of the UK's FOIA, therefore, came down in favour of withholding the information under the personal information exemption.

[25] The Portfolio argued that the same reasoning applied in the present appeal. The data subject would not have a reasonable expectation that her personal data about the end of her employment with the CILS was publicly disclosed, and such disclosure would cause distress to the individual. Therefore, the Portfolio concluded that disclosure of the

correspondence under the FOI Law would not meet the requirements of the first data protection principle.

[26] For his part, the applicant alleged that the Portfolio erroneously used the DPL “as a legal instrument to ‘trump’ the aims and intentions of the FOI Law”, since “The spirit of the DPL is that it is a legislative tool that is to be used to protect the private lives of individuals”. However, this contention disregards section 23(5) which clearly mandates that a consideration of the potential unreasonableness of disclosing personal information is subject to a determination under the DPL.

[27] **In conclusion, the correspondence is the personal information of the former public officer, which relates to her personal life, not to her public duties as a civil servant. The legitimate interests of the applicant do not outweigh the prejudice to the legitimate interests of the data subject that would be caused by the disclosure of the personal information. The disclosure would therefore be unreasonable, and the exemption in section 23(1) applies.**

Public interest test

[28] Section 26(1) states:

Granting access to exempt information

26. (1) Notwithstanding that a matter falls within sections 18, 20(1)(b) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.

(2) Public interest shall be defined in regulations made under this Act.

[29] “Public interest” is defined in regulation 2 as follows:

“public interest” means but is not limited to things that may or tend to-

(a) promote greater public 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;

(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.

- [30] A public interest test involves weighing up the public interest arguments for and against disclosure to determine whether, considering all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the requested information. A public authority should explain to the applicant what arguments for and against disclosure it has considered.
- [31] Public interest can include a wide range of values and principles relating to the public good or what is in the best interests of society. It is something that is of serious concern and benefit to the general public, not just something of interest to an individual. It serves the interests of the public at large, although it does not necessarily relate to the entire population. However, public interest is not the same as “something the public is interested in”. It is what is in the interest of the public good or society at large.⁴
- [32] The Portfolio stated that “there is no public interest in disclosing the record to the applicant”, a conclusion it said it reached after considering a number of factors, including:
- whether the information was sensitive personal data
 - the possible consequences for the individual
 - the reasonable expectations of the individual
 - the nature of the information and the circumstances in which it was obtained
 - whether the information has been or remains in the public domain
 - whether the individual would be likely to object to the disclosure
- [33] The Portfolio reiterated that “there is a necessity for preserving the privacy of the information that outweighs the necessity for disclosure in the public interest”. Although the applicant has sought to provide reasons for disclosure for his particular interest, according to the Portfolio he did “not provide any evidence to prove that there is sufficient wider legitimate public interest” to balance the public interest test in favour of disclosure.
- [34] The Portfolio did not provide many details on the outcome of its consideration of the above factors. The public interest test in section 26(1) is similar to the balancing exercise already undertaken under the first data protection principle, but it also requires that the accountability of public authorities be taken into consideration, as per the definition.

⁴ Information Commissioner’s Office (UK), The Public Interest Test: Freedom of Information Act, Version 2.1, 19 July 2016.

- [35] Having said that, the ICO clarified that “the interest in disclosure must be a public interest, not the private interest of the individual requester. The requester’s interests are only relevant in so far as they may reflect a wider public interest. This is because, when information is disclosed under the FOIA, it is effectively disclosed to the world at large, and not only to the requester.”⁵
- [36] The applicant raised the fact that he had made a maladministration complaint in 2012 involving certain professors at the CILS, including the subject of the correspondence. However, he did not clarify why this would be relevant to the present appeal, and there appears to be no discernible connection between the 2012 complaint and the correspondence.
- [37] In the circumstances of this case, I am satisfied that there is no public interest in disclosure. The correspondence does not appear to relate to any of the factors listed in the definition in regulation 2, but is rather a private matter relating to the former employee.
- [38] **Consequently, for the reasons stated above, having previously found that the correspondence is exempted under section 23 of the FOI Act, I find that there is no overriding public interest that would require that access nevertheless be granted.**

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:

- The Portfolio applied the exemption in section 23(1) appropriately. The correspondence is the personal information of the former public officer as it relates to her personal life, not to her public duties as a civil servant. The legitimate interests of the applicant do not outweigh the prejudice to the legitimate interests of the data subject that disclosure would cause. Therefore, the disclosure would be unreasonable, and the exemption in section 23(1) is engaged.
- There is no overriding public interest that would require that access nevertheless be granted.
- No further action is required on the part of the Portfolio.



Sandy Hermiston
Ombudsman

⁵ Information Commissioner’s Office (UK), Pitington Parish Council, op.cit., para 33.