

Hearing 65- 201800212

**Decision**

Ministry of District Administration, Tourism and Transport

Sandy Hermiston  
Ombudsman

27 November 2018

**Summary:**

An Applicant requested information under the Freedom of Information Law (FOI Law) about taxi operators such as the number of operators, how many are also employed by the Cayman Islands Government (in particular how many are employed by the Royal Cayman Islands Police Service and Her Majesty's Prison Service) and how many are Caymanian/status holders.

The Ministry of District Administration, Tourism and Transport (DATT), whose Information Manager handles requests under the FOI Law for the Public Transportation Unit (PTU), argued that while the PTU holds records which may be responsive, the PTU does not keep statistics on the occupation or the place of birth of the operators. The Ministry argued that retrieving the responsive records would constitute an unreasonable diversion of resources under section 9(c) of the FOI Law.

The Ombudsman concluded that the FOI Law does not require the creation of new records such as the requested statistics. She also concluded that providing redacted copies of the application forms and supporting documentation would be excessively costly, particularly in terms of the time required to adequately redact the records and would therefore unreasonably divert the resources of the Ministry and PTU under section 9(c). No further action is required in response to this request on the part of the Ministry or PTU.

The Ministry has committed to update its electronic system in order to include relevant data on public transportation operators and produce related statistics in the future.

The Office of the Ombudsman has flagged the Ministry for an audit of its information handling practices.

**Statutes<sup>1</sup> Considered:**

*Freedom of Information Law (2018 Revision)*

*Freedom of Information (General) Regulations 2008*

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**A. INTRODUCTION**

[1] On 30 April 2018 the Applicant submitted the following request to the Ministry of District Administration, Tourism and Transport (“the Ministry”):

- 1) *How many taxi drivers are there on Grand Cayman*
- 2) *How many taxi drivers are also employed by CI Government*
- 3) *How many taxi drivers are police officers*
- 4) *How many taxi drivers are prison officers*
- 5) *How many taxi drivers are Caymanian-born*
- 6) *How many taxi drivers are Caymanian status holders/right to work particularly by way of marriage to a Caymanian*
- 7) *How many taxi drivers originate from Jamaica*

[2] On 28 May 2018, the Ministry answered that there were 285 taxis in Grand Cayman. In response to questions 2 - 7 the Ministry stated that the Public Transportation Unit (“PTU”) does not keep statistics on the requested information. The Ministry confirmed that all public transport operators are required to be Caymanian under the Traffic (Public Passenger Vehicles) Regulations (2014 Revision).

[3] On 22 June 2018, the Ministry advised the Applicant that since the Ministry did not hold the records requested, the response was not subject to an internal review under section 33 of the FOI Law. The Ministry advised the Applicant to appeal the response directly to the Office of the Ombudsman. The Applicant then submitted an appeal request to the Ombudsman.

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<sup>1</sup> In this decision all references to sections are to sections of *the Freedom of Information Law (2018 Revision)*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

[4] On 29 June 2018 the Office of the Ombudsman accepted the appeal and investigated the matter. The following facts were established:

- The 285 paper taxi operator files are kept in filing cabinets, each file representing a single operator;
- Four storage bins contain additional paper records, some of which may include taxi operation applications for individuals who are no longer active as taxi operators;
- There are also over 200 electronic files for taxi operators, each with yearly subfolders, some of which date back to the 1990s. These files relate to the vehicles used as taxis, such as their make, node and seating capacity, and form the basis of the statistics currently produced by PTU;
- Starting in 2013, while individuals applying for a taxi operator license must prove that they are Caymanian, they were no longer required to provide their place of birth, as this was perceived to be potentially discriminatory and in contradiction to the applicable laws.

[5] The Ministry relied on section 9(c) of the Law claiming that complying with the request “would unreasonably divert its resources”. The Ministry supported this decision with quantitative arguments which are further described below. The Office of the Ombudsman further investigated the quantities of files involved.

[6] Since this dispute could not be resolved amicably, the Applicant requested that the matter be formally decided by the Ombudsman in a hearing.

## **B. ISSUES**

**(1) Did the Information Manager (IM) make reasonable efforts to locate a record that is the subject of an application for access (regulation 6(1))?**

**(2) Would complying with the request unreasonably divert the Ministry’s resources (section 9(c))?**

## C. CONSIDERATION OF ISSUES UNDER REVIEW

### (1) Did the Information Manager (IM) make reasonable efforts to locate a record that is the subject of an application for access (regulation 6(1))?

#### The position of the Ministry:

[7] The Ministry states that the “information being sought... is contained on the Taxi Application Form, however; it’s not kept as part of the PTU’s statistical data”. According to the Ministry, this explains their responses in relation to questions 2 to 7, namely that “PTU does not keep statistics [on these points]”.

[8] The Ministry added that PTU intends to update its practices and will henceforth keep statistics on some of the points requested by the Applicant. Specifically, the Ministry states that PTU will update “their electronic records during the renewal period of the Taxi licenses, which begins in December 2018 and ends in March 2019.”

#### The position of the Applicant:

[9] The Applicant states:

*The failure to provide the information is not because it does not exist, but simply because the information that is a mandatory part of the qualification process has never been converted to statistics; the conversion itself is not a very complicated process.*

[10] The Applicant believes that PTU should have compiled the data as requested, especially since so much time has passed since the passing of the FOI Law in 2009.

[11] According to the Applicant the records are not kept “in a manner that would provide meaningful information to the public”, and PTU should have seized this opportunity to “adhere to the law and show itself a transparent and accountable department”.

#### Discussion:

[12] The standard test whether reasonable efforts have been made to locate a record consists of three parts: (1) the quality of the public authority’s initial analysis of the request, (2) the scope of the search that it decided to make on the basis of that analysis, and (3) the rigour and efficiency with which the search was then conducted. This test is decided on the balance of probabilities.<sup>2</sup>

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<sup>2</sup> Information Tribunal (UK) EA/2006/0072 *Linda Bromley et al v Information Commissioner and The Environment Agency* 31 August 2007 para 13. See also: Information Commissioner’s Office *Hearing 35-01213 and 35-01313 Ministry of Education, Employment & Gender Affairs* 5 December 2013

[13] The Ministry properly understood the initial request. Its search was efficient and appropriately scoped since they located the records that contained the source data in the taxi operator application forms.

[14] **On the question of the reasonableness of the search, since the responsive records were located, I conclude that the IM made reasonable efforts to locate the records, as required under regulation 6.**

**(2) Would complying with the request unreasonably divert the Ministry's resources (section 9(c))?**

**The position of the Ministry:**

[15] The IM states that the Ministry,

*values the spirit of the FOI Law and is more than willing to provide the requesting information if it is available. However, in this instance whilst the information is contained on the Taxi application it is not kept as statistical data or attached to the Taxi profile. Therefore, it would require months of manual labour to extract the information from each file and provide the same to Appellant.*

[16] The Ministry's IM argues that complying with the request would unreasonably divert its resources, based on the number of responsive files and the efforts it says would be required to provide a full response under the FOI Law:

- (a) There are 285 taxi operators;
- (b) Each operator is represented by a paper file containing between 25 and 75 pages, including the application form which contains at least some of the requested information;
- (c) The paper records are contained in two four-drawer lateral filing cabinets. The IM claims there are also a number of additional files in a back room which are in "boxes, piles, etc". The IM has provided photographs of a number of paper records in disarray;
- (d) The information contained in each file is confidential and sensitive, as it contains medical and police records;
- (e) The PTU is understaffed, with one Director, one Administrative Board Secretary, one clerical officer, and five inspectors. The Ministry notes that only two of these positions provide administrative support to the Unit;
- (f) The YTD workload statistics for PTU as of August 2018 indicates a heavy workload in terms of regulatory and administrative services, monitoring and investigations, and managing the omnibus depot. The numbers reported in the August 2018 monthly billing

report to the Cabinet indicate that PTU has already exceeded its annual output measures in a number of categories (although this is in part due to the cyclical nature of the annual registrations – put this later in the discussion, not here);

- (g) The IM estimates that it would take between 6 and 8 months for the current staff to compile the information contained in the paper files, which she claims would cause “a tremendous strain on their current workload”;
- (h) Alternatively, the Ministry argues that additional staff would have to be found to respond in full to the request for a period of 3 to 6 months at a salary range of a clerical officer, which is CI\$27,612 to CI\$37,140 per annum.

[17] In its reply submission the IM increases the number of files that would have to be examined manually to over 1,000, which apparently includes the disorganized files in the back room.

[18] The IM says there are also electronic copies but these are not up to date and cannot be relied upon.

[19] The IM believes it is not her responsibility to be the “keeper of the information”, and she quotes section 49 and regulation 21 in support of this assertion.

[20] The IM says that the Applicant should have requested the information regarding government employees or police officers from other public entities such as the Portfolio of the Civil Service or the Royal Cayman Islands Police Service. By not doing so, the Applicant raised this request to the level of a formal hearing before the Ombudsman, rather than seek the information through “an open records request, which is available to her under the FOI Law.” The IM calls this “without doubt an unreasonable allocation [sic] of resources, because [the IM] does not feel [the IM] should have to seek the information from any other agency...”.

**The position of the Applicant:**

[21] The Applicant believes that PTU lacks a proper information system for operator application process, and that this demonstrates the inefficiency of the Unit, rather than any unreasonable diversion of resources. This is not a matter of diversion of resources, but of making the effort to obtain the information from the available records.

[22] The circumstances of this case are quite different from those described in Hearing Decision 12-01011/01211 in which the former Information Commissioner indicated what would qualify as an unreasonable diversion of resources. In the present case there is an IM tasked with answering requests under the FOI Law; the data are not sensitive or complicated; and a junior staff member could conduct the required data extraction if the IM cannot do it.

[23] The Applicant argues that the number of forms to be checked is relatively small, and that most of the information requested is readily available in the files and would not require complicated research or in-depth analysis.

- [24] The Applicant compares the level of analysis required to go through the PTU files with her own work experience, concluding that the Ministry's Submission exaggerates the length of time and costs required to compile the requested data. The Applicant proposed that she, herself, create a spreadsheet that would help in the process.
- [25] The Applicant points out that the photographs of the records in the back room are of the same stacks of paper files, taken from different angles. She says there is no evidence the photographs show operator files. If they are operator files, the Applicant states there is no excuse why so much filing has remained undone. In any event, the poor condition of these files does not constitute an excuse for not generating the requested information.
- [26] The Applicant believes the answers to questions 2 to 4 should be easily available since each Government employee requires approval from their departmental Head which should be attached to the application form.
- [27] The Applicant emphasizes the importance of local people for the Cayman Islands as a tourist destination and explains that questions 5 to 7 are historical in nature and not aimed at asking "if Caymanians were refused the right to own a taxi license".
- [28] The Applicant makes the point that, by the time the Decision Hearing is due, more than six months will have passed since the request was first made, which the Applicant says is "more than enough time to have compiled the data" if the IM had chosen to do so.
- [29] The Applicant believes PTU has neglected its duties towards transparency and accountability, as expected under the FOI Law. Unlike the statements made by the IM, the information required to compile the requested statistics exists. However, it has not yet been put together, despite the passage of sufficient time since the FOI Law has come into effect.
- [30] As well, the Applicant states the amount of money spent in defending the Unit's decision to withhold the information, itself, has been an unreasonable diversion of resources. This money itself could have funded a summer intern to compile the information without interrupting the duties of the regular staff.

**Discussion:**

- [31] The IM's suggestion that the Applicant should have requested the information on taxi operators who are civil servants or police officers from the Portfolio of the Civil Service or the RCIPS is misplaced. Section 8 of the FOI Law provides a mechanism for transferring a request to a more relevant public authority, where that authority holds the requested record or has functions which are more closely connected with the subject matter of the request. Neither of these conditions is met in the present case, and a request for information on taxi operators clearly is for the PTU/Ministry to answer. In any event, a request must be transferred within fourteen calendar days after receiving the request, not at the end of a lengthy appeal.

- [32] The Ministry has answered question 1 (the overall number of taxi operators) and provided ancillary information on some of the other points, e.g. that certain information is no longer requested from taxi operator applicants, and the fact that all taxi operators are required to be Caymanian by law.
- [33] The Ministry argues that the requested information in questions 2 to 7 is not held under the Law because they do not keep the requested statistics as part of their normal course of business. It must be noted that the Ministry holds records which contain the information required to create the requested statistics however, the FOI Law does not require a public authority to create any record that is not already created in the normal course of business. Furthermore, the Ombudsman has no power to order the creation of a new record. Therefore, the Ministry's arguments regarding the time it would take to find the relevant information and enter it into a spreadsheet is not relevant since I do not have the power to order them to do so.
- [34] Since the Ministry does not, in the normal course of business, keep the requested information in statistical form, and I have no power to order them to do so, I must determine whether to order the Ministry to release the records which could be used by the Applicant to create those statistics herself.
- [35] In this case, the Ministry has identified that PTU holds records which contain the information requested by the Applicant. The records include Form 17A (the Application Form) and supporting documents such as birth certificates, passports and marriage certificates.
- [36] Some of the information regarding each operator's employment status is found in Section A on the first page of the Application Form:
- Are you currently employed? Yes  No .
- If Yes, state name of your employer \_\_\_\_\_
- Phone# \_\_\_\_\_
- [37] The rest of the information on the first page of the Application Form is not responsive and much of it is personal information such as: name; date of birth; address; telephone numbers; background information (driving and criminal offenses); health information; pension and health care companies.
- [38] To fully answer the Applicant's questions regarding employment status (Questions 2,3 and 4 listed above), every file where the CIG is named as the employer would need to be examined to locate the permission letter from the Head of Department (which is required for all government employees) in order to determine where the operator works because an Applicant employed by the RCIPS or Prison Service could indicate that they are employed by the CIG rather than the specific entity.



- [39] With respect to the questions about status and place of birth (Questions 5,6 and 7 above), Section F of the Application Form marked “FOR OFFICIAL USE ONLY” contains information regarding whether the applicant has provided a birth certificate and/or a status certificate. In order to provide the records required to create the statistics for Questions 5, 6 and 7, highly sensitive information contained in birth certificates, marriage certificates, passports and status certificates would have to be located and appropriately redacted. This exercise would require an unreasonable amount of time and effort to properly redact the personal information of each operator to isolate their place of birth.
- [40] Therefore, while the Ministry does not hold the responsive records (the statistics), it does hold the source records that could be used to compile the requested statistics. The Ministry could extract selected records from the taxi operator files and disclose them in redacted form. This would involve the following process:
- pull each file;
  - remove each application form;
  - redact any irrelevant or exempted information from each form, i.e. all information except the information on additional employment (on page 1 of the form) and tick boxes indicating that a birth certificate and/or status certificate has been submitted (on page 2 of the form);
  - copy each form so as to render the redaction irreversible; and
  - check each file for copies of further responsive records, and, if they exist, redact those, removing any irrelevant and/or exempted information such as a name, address, and other identifiable data.
- [41] While I disagree with the premise and mathematics proposed by the Ministry, I do agree that the amount of work required to respond to the Applicant is substantial.
- [42] Their argument about the lack of staffing resources is unpersuasive and irrelevant to the question of whether the records ought to be produced. If records are required to be produce under the FOI Law, the government is expected to find the resources. Lack of resources is not the same as an unreasonable diversion of them.
- [43] I estimate, in the best-case scenario, that it would take the Ministry up to 30 minutes per operator file and potentially considerably longer based on the redactions required. This amounts to at least 20 working days or almost a month of work using the most optimistic estimate of the work required.<sup>3</sup>
- [44] **I find this cost excessive. Therefore, compliance with the request would unreasonably divert the Ministry’s resources, and the exclusion in section 9(c) applies.**

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<sup>3</sup> 30 minutes per file = 2 files per hour.  $285/2 = 142.5$  hours or 20 days (at 7.5 hrs per day)

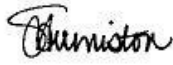
## **Additional Issues Raised in this Appeal**

- [45] During this appeal, the PTU Director explained that since 2013 applicants are no longer required to provide their place of birth, as this was perceived to be potentially discriminatory and in contradiction to regulation 4 of the *Traffic (Public Passenger Vehicles) Regulations (2014 Revision)*, which lays down the conditions for granting operator licenses. The Ministry and PTU should pay specific attention to ensure that the personal data collected on taxi and other operators is not excessive and can be justified within the requirements of the applicable legislation. This will become particularly important once the *Data Protection Law, 2017* comes into force.
- [46] As a result of submissions made by the IM, it appears that the PTU's electronic system has not been kept up to date and is unreliable. This revelation is troubling. It was explained that the system, while searchable by the name of the taxi operator, is aimed primarily at managing information on the vehicles used by operators, not about the operators themselves. The Ministry expressed its intention to update the system by tracking some of the information requested by the Applicant. This would allow the production of statistics in the future. Specifically, the Ministry stated that PTU will update "their electronic records during the renewal period of the Taxi licenses, which begins in December 2018 and ends in March 2019."
- [47] I commend the Ministry for agreeing to create a record containing statistics which would be expected to be produced in the ordinary course of their business. I will expect the Ministry to live up to this promise, so that relevant statistics on taxi operators will be produced in the future and proactively published.
- [48] I am flagging the Ministry/PTU for audit in respect of its record keeping practices, the modification of its electronic system and the proactive provision of relevant statistics, as described above.

## **D. FINDINGS AND DECISION**

- [49] Under section 43(1) of the Freedom of Information Law (2018 Revision), I make the following findings and decisions:
- (1) The Ministry has made reasonable efforts to locate the records that contain the requested information.
  - (2) It would be an unreasonable diversion of resources for the PTU/Ministry to provide the requested information to the Applicant.
  - (3) The Ministry has made a commitment to update its electronic system to include relevant data on public transportation operators and produce related statistics and this office will follow up to ensure the Ministry honours its commitment.

[50] No further action is required on the part of the Ministry or the PTU.

A handwritten signature in black ink that reads "Sandy Hermiston". The signature is written in a cursive, slightly slanted style.

Sandy Hermiston  
Ombudsman

27 November 2018