

Hearing 61 - 201800191

Decision

Department of Immigration
(now known as Workforce Opportunities and Residency Cayman)

Sandy Hermiston
Ombudsman

21 February 2019

Summary:

The Applicant made four separate requests to the Department of Immigration for records relating to various topics, including policies, procedures and guidelines on the handling of applications for permanent residency. No initial response was given, and no internal review was conducted.

During the appeal various records were disclosed, including policies relating to applications for permanent residency. The Department advised that these policies were not in use. The Applicant asked whether there were any policies that were in use relating to applications for permanent residency but did not receive a response.

The Ombudsman found that the Department failed to respond to the requests within the time limits established in the FOI Law. The Ombudsman also found that the Department failed to indicate whether it held the records requested by the Applicant. The Department also failed to publish “records used in making decisions” as required by the *Freedom of Information Law (2018 Revision)*.

The Ombudsman directed the Department, now known as Workforce Opportunities and Residency Cayman (WORC), to provide a full answer to the Applicant, and publish its guiding documents related to the making of decisions.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision)

Freedom of Information (General) Regulations 2008 (Regulations)

¹ 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.

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A. INTRODUCTION

- [1] Between 17 October and 30 November 2017, the Applicant made four requests to the Department of Immigration (the Department) under the Freedom of Information Law (2018 Revision) (FOI Law).
- [2] The requests were for a wide variety of records, including statistics, policies and guidance relating to removal directions, a Memorandum of Understanding (MOU) between the government of Cuba and the Cayman Islands, and the immigration file of a named individual on whose behalf the Applicant was acting.
- [3] One request, dated 1 November 2017, was for policy, guidance and staff training documents used to process applications for permanent residence (PR) including by persons of independent means, visitor permission, residence certificates for persons of independent means, certificates of direct investment, certificates of specialist caregiver, certificates of substantial business presence, work permits (including temporary, business and visitor work permits), the right to be Caymanian, and deportation orders.
- [4] The Department did not respond to the requests and the Applicant appealed all four cases. The appeals were accepted between 24 January and 1 March 2018, and merged into a single appeal for administrative convenience.
- [5] My staff had numerous communications and meetings with two consecutive Information Managers (IMs) to determine the position of the Department vis-à-vis the requests. When no progress was made by the end of March 2018, the Applicant requested that a formal hearing be commenced.
- [6] In April, I hosted a meeting with the new IM, senior departmental and ministerial staff to express my concerns about the Department’s failure to respond to these and a number of other outstanding requests. The Department and Ministry admitted to an acute lack of resources available for FOI Law requests and promised to make the Applicant’s requests a matter of priority.
- [7] By the first week of May the requested immigration file was disclosed. A decision on the other parts of the requests was promised by 13 June 2018.
- [8] On 11 May a press release was issued in which the Chief Immigration Officer and the Chief Officer of the Ministry responsible for Immigration apologized publicly for the delays encountered in responding to FOI requests. As a result, the Applicant agreed to put the hearing of the appeal on hold.

- [9] On 20 June the Department disclosed policies and procedures relating to business staffing plans, Caymanian Status and PR, but also stated that these policies and procedures were not in use. The same day, the Applicant asked the Department to confirm “whether there are any policies in use in regards to the PR system as of today?”
- [10] Over the next several months the Department disclosed additional records such as a redacted version of the MOU, as well as unsigned Group Companies Directions (2016).
- [11] At the end of October 2018 the Applicant asked that the hearing be reconvened due to the lack of response to the question about which policies and procedures were currently in use by the Department.

B. ISSUES

- [12] Two issues are under review:
- (a) Whether the public authority failed to respond to the application within the legislated timelines; and**
 - (b) Whether the public authority failed to indicate that it holds a record.**

C. CONSIDERATION OF ISSUES UNDER REVIEW

- (a) Whether the public authority failed to respond to the application within the legislated timelines.**

- [13] Section 7(4) requires that public authorities respond to applications under the FOI Law,

... as soon as practicable but not later than –

(a) thirty calendar days after the date of receipt of the application;

- [14] The Department acknowledges that it responded outside the statutory timelines, and refers to the explanation provided to the Applicant on 10 April 2018, which pointed out several contributing factors, including:

- Due a shortage of staff the outgoing IM had been assigned to a high-level project while also fulfilling the duties of Immigration Appeals Coordinator, and “FOI matters eventually became stagnant [around] September 2017”;
- Although the outgoing IM had announced her departure from the Department in advance, proper replacement arrangements were delayed until February 2018, due to strained resources;
- The handover process between the outgoing and incoming IMs was too short; and
- The Applicant’s requests were very detailed and took a considerable amount of time to complete.

- [15] The incoming IM emphasized that she did “provide to the Applicant records as they became available”, namely on 24 June, 25 July and 26 October 2018, but pointed to limited human resources in the light of the organizational changes underway at the Department.

- [16] There were significant delays throughout the request, internal review and appeal. For instance, delays of several months occurred in providing the MOU. It took over seven months for policies and procedures to be provided. To date the Department has not responded to the question of whether there are any additional or current policies regarding PR status.
- [17] Section 34(3) provides that an internal review must take place within thirty calendar days after the receipt of the application for review. The Applicant submitted a request for internal review to the Chief Officer. There is no evidence that the Chief Officer responded to the request.
- [18] I recognize that throughout the period in question the Ministry (and consequently the Department) were experiencing significant organizational changes with the creation of a new Customs and Border Control agency merging portions of customs and immigration as well as the establishment of Workforce Opportunities and Residency Cayman. However, these challenges do not exempt the agencies affected from the requirement to adhere to the law.
- [19] **Consequently, I find that the Department and its Chief Officer failed to respond to the Applicant within the statutory timelines.**
- (b) Whether the public authority failed to indicate that it holds a record.**
- [20] The Applicant pointed to the importance of understanding how a public authority reaches its decisions, as confirmed by the Chief Justice in *Hutchinson Green & Racs v Immigration Appeals Tribunal* [2015] 2 CILR 91 para 69:
- In its reliance upon the logistical materials without affording the applicant the opportunity of responding to its intended application of them to her detriment, the [Immigration Appeals Tribunal] clearly failed to satisfy the requirements of procedural fairness imposed by the foregoing principles of natural justice.*
- [21] The Applicant argued it is incumbent upon the Department to make its policies freely available to the general public and noted such operational guidance is, for instance, available in the UK in relation to immigration, British citizenship and British Overseas Territories citizenship.
- [22] The Applicant listed a substantial number of important questions relating to the PR application form and process, which they asserted were poorly explained in the PR guidance, including for example the indeterminate nature of some of the key concepts and questions used in the application process. They claimed that a lack of published policies by the Department increases the risk that PR applications are assessed subjectively, and decisions are made inconsistently.
- [23] Against this background the Applicant asserted that it is important for the public to know whether all existing policies were disclosed by the Department. The Applicant pointed to the IM's communication of 20 June 2018 which stated that the provided business staffing plans, Cayman Status and PR policies were "not in use".
- [24] The Applicant pointed out that PR grant letters issued by the Caymanian Status and Permanent Residency Board since 2 May 2018 refer to "current Board policy" relating Permanent Residents who sell their property. The Applicant claimed that it is not clear what policies are referred to in these letters, since the ones disclosed were said to be "not in use".

- [25] The statement that the disclosed policies are “not in use” provokes more questions than it answers. This ambiguity is exacerbated by the unexplained reference to “Board policy” in the PR letters. The Department’s failure to explain what, if any, other policies, procedures or guidelines may exist – or may not exist – contravenes the requirement to respond to a request for records.
- [26] The sequence of events in this case demonstrates the need, not only for openness and transparency according to the letter of the law, but also in the spirit of the law. The Applicant and the public are entitled to know whether or not additional policies exist which have not yet been disclosed and also to be given a clear indication where no policy has yet been developed.
- [27] **I find that the Department failed to indicate whether or not it holds a record.**

D. ADDITIONAL MATTER

- [28] In large part, the Applicant’s requests were for records that should have been readily at hand and easily disclosed. However, certain of these records should also – by law – have been published in accordance with section 5 which provides that the principal officer of each public authority must publish certain information and update it annually. The FOI Law’s Schedule specifies what types of information must be published and kept up-to-date in the publication scheme, namely (my emphasis):

(d) a statement of the records specified in subparagraph (e) being records that are provided by the public authority for the use of, or which are used by the authority or its officers in making decisions or recommendations, under or for the purposes of, an enactment or scheme administered by the authority with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled or subject;

(e) the records referred to in subparagraph (d), namely -

(i) manuals or other records containing interpretations, rules, guidelines, practices or precedents; and

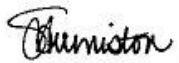
(ii) records containing particulars of a scheme referred to in paragraph(d), not being particulars contained in an enactment or published under this Law.

- [29] Members of the public have a reasonable expectation that policies, procedures and guidelines that steer decisions of public authorities be made publicly available. This is particularly true when their decisions have the potential to greatly affect the lives and livelihoods of individuals, such as the Department’s decisions under the *Immigration Law*.
- [30] **Therefore, I find that the Department has not satisfied its statutory obligation in section 5 to publish “records ... used ... in making decisions,” as required.**

E. FINDINGS AND DECISION

[31] Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following recommendations, findings and decisions:

- (a) The Department failed to respond to the Applicant within the statutory timelines.
- (b) The Department failed to indicate whether or not it holds a record. I require the Department to provide a full answer to the Applicant within 30 days.
- (c) The Department has not satisfied its statutory obligation in section 5 to publish “records ... used ... in making decisions”. I require the Department, now known as WORC, to meet its obligations under section 5 within 90 days.



Sandy Hermiston
Ombudsman