



Hearing 76- 201900087

Decision

Commissions Secretariat

Sandy Hermiston
Ombudsman

27 May 2020

Summary:

An applicant asked the Commissions Secretariat (the Secretariat) for a variety of records under the Freedom of Information Law (2018 Revision) (FOI Law), related to their appeal with the Civil Servants Appeals Commission (CSAC).

The Secretariat granted the applicant full access to the majority of the requested records, with the exception of two communications which were exempted.

The Ombudsman reviewed the matter and found that the exemption applies and that releasing the records would not outweigh the public interest in maintaining the exemption.

No further action is required on the part of the Secretariat.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision) (FOI Law)

Freedom of Information (General) Regulations 2008 (FOI 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] On the 21st of March 2019, the applicant made a request under the FOI Law for records related to their appeal with the CSAC from 2014 to present date, including correspondence between the CSAC and several government entities, among the members of the CSAC, as well as meeting minutes.
- [2] The Secretariat granted full access to a variety of records, but exempted two emails under section 20(1)(b) (free and frank deliberations) and (d) (prejudice to the effective conduct of public affairs).
- [3] During the FOI appeal process, the applicant felt that a number of additional records were still being withheld. However, the Secretariat provided a record of their search efforts, and this issue was not pursued further.

B. CONSIDERATION OF ISSUES

- a. **Whether the requested records are exempt because their disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, pursuant to section 20(1)(b). If so, whether disclosure would nevertheless be required in the public interest, under section section 26(1).**
- [4] The Secretariat explained that the request was granted in full except for the two exempt records which contained personal and individual views expressed by two members of the CSAC after an initial review of the appeal submission.
- [5] In regard to the emails in dispute, the Secretariat explained that they contained a free and frank preliminary dialogue between two members of the CSAC.
- [6] The Secretariat wrote,

The records were exempted in accordance with s.20(1)(b) given that CSAC members must have the ability to have "...free and frank exchanges of views for the purposes

of deliberation..." in order to properly consider appeals at hand and for consensus to be reached. In addition, given that CSAC is a quasi-judicial body it is of the utmost importance that the deliberative process must remain intact so as not to impede or "...prejudice...the effective conduct of public affairs..." in accordance with s.20(1)(d).

- [7] Under section 59 of the Public Service Management Law (2017 Revision) "*the role of the CSAC is to hear appeals from civil servants made under sections 33, 34 and 54 of the Law.*"
- [8] The Secretariat pointed out that "*It is important to remember that in all cases the PSML places the onus of proof on the Appellant by requiring evidence to support the appeal...*", and explained that the CSAC does not engage in any form of dialogue with a public authority until they have officially accepted the appeal.
- [9] The Secretariat emphasized that;

The exempt record has not been shared with any third parties and solely relates to the deliberative process of CSAC as a body. Given that the applicant's submission did not demonstrate any grounds on which his appeal could be accepted by the CSAC (in accordance with the Law), the appeal submission was not shared with [the] Chief Officer or any other person within the [Cayman Islands Government] (or outside of persons at the Commissions Secretariat responsible for the administrative processing of appeals).

- [10] Without providing supporting evidence the applicant expressed the view that,

Besides the exempted record(s), I believe that there is more information than what they conveyed to us regarding my matter which includes but [is] not limited to their overall views and a change to their initial views if there is any, in the various stages of the appeal process of my matter.

- [11] Section 20(1)(b) of the FOI Law provides:

20. (1) A record is exempt from disclosure if-

...

(b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;

- [12] The exemption in section 20(1)(b) has been considered in a number of previous hearing decisions. In particular, detailed guidance was provided by the former Information Commissioner in Hearing Decision 9-02210:

[39] ... the exemption in section 20(1)(b)... intends to protect against disclosure which would result, with a certain degree of probability, in restraining the

unimpeded, open and honest exchange of views expressed for the purpose of evaluating competing arguments or considerations with a view to making a decision of an issue before a public authority.²

- [13] This was also emphasised in Decision 46;

[97] The protection of a “safe space” for open, uninhibited discussions is equally important between public authorities as between public officers acting in their public capacity. Therefore, “free and frank” deliberations and comments can occur in meetings or communications between public authorities or officers as well as between individuals, and the exemption in section 20(1)(b) may apply to both.³

- [14] For the exemption to apply, the disclosure “would, or would be likely to” inhibit the free and frank exchange of views for the purposes of deliberation”. In McIntyre the UK Information Tribunal clarified, in relation to similar wording in the UK’s Freedom of Information Act, 2000 (FOIA) that,

The words “would prejudice” have been interpreted by the Tribunal to mean that it is “more probable than not” that there will be prejudice to the specific interest set out in the exemption and the words “would be likely to” have been interpreted to mean that there is a “real and significant risk of prejudice” to the interest in the exemption.⁴

- [15] The former Information Commissioner also noted:

It is important to note that the FOI Law clearly recognizes the legitimate need for public authorities to conduct candid and robust discussions, make hard choices, and conduct business in the secure knowledge that an exemption to disclosure is available where applicable. Section 20(1)(b) offers necessary and appropriate protection where public authorities legitimately require it.⁵

- [16] The meaning of “likely” has been considered on a number of occasions, including by Munby J in R (on the application of Lord) v Secretary of State for the Home Office:

In my judgment “likely” ... connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The

² Information Commissioner Hearing Decision 9-02210 Cayman Islands National Insurance Company (CINICO) 24 March 2011 para 39

³ Information Commissioner Hearing Decision 46-00914 Ministry of Education, Employment and Gender Affairs 22 April 2016 para 97

⁴ Information Tribunal (UK) *McIntyre v I.C.O & MoD*. EA 2007/2008 – paragraph 40; *Office of Government Commerce v Information Commissioner*, EA 2006/0068 & 0080, paragraphs 40 & 48

⁵ Information Commissioner Hearing Decision 28-02112 *The Governor’s Office* 5 March 2013 para 30

degree of risk must be such that there “may very well” be prejudice to those interests, even if the risk falls short of being more probable than not.⁶

This interpretation has been consistently relied on by the UK Information Commissioner and the UK Information Tribunal under the FOIA, and forms part of the guidance issued by the former.

- [17] In Decision 28, the former Information Commissioner considered the following questions to determine whether the exemption in section 20(1)(b) applied:⁷

i) **Do the responsive records contain views freely and frankly expressed for the purposes of deliberation?**

The responsive records being considered in this Hearing form a part of the deliberations of the CSAC, and contain the views of two individuals, freely and frankly expressed for the purpose of obtaining additional details necessary for the formal meeting of the CSAC.

ii) **What is the probability that disclosure of the redacted records would restrain the unimpeded, open and honest exchange of views?**

In my view there is a real and significant risk of prejudice that the disclosure of the responsive records would inhibit the free and frank exchange of views for the purposes of deliberation in the future, since future parties being asked to express their views may feel that no safe space exists in which they can articulate their opinions without public scrutiny.

- [18] **Consequently, the exemption in section 20(1)(b) applies to the responsive records.**

- [19] Pursuant to section 26, this exemption is subject to a public interest test:

26. (1) Notwithstanding that a matter falls within sections 18, 19 (1) (a) 20[1] (b), (c) 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 Law.

- [20] I must now consider whether disclosure of the exempted records is nonetheless required in the public interest.

- [21] Regulation 2 defines the public interest as follows:

⁶ *R (On the Application of Alan Lord) v The Secretary of State for the Home Department [2003] EWHC 2073 (Admin) paras 96-100. Information Tribunal John Connor Press Associates Ltd v Information Commissioner EA/2005/0005 25 January 2006 para 15*

⁷ *Hearing Decision 28-02112 op cit* paras 29-30

"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.

- [22] The exemptions in the FOI Law themselves represent important public interests. The exemption in section 20(1)(b) specifically protects the "safe space" needed for the free and frank expression of views in deliberations, which is an essential component of the decision making process of public authorities, in this instance of the CSAC. There is an important public interest in protecting the free and frank views of public officers taking part in deliberations from public scrutiny, in order not to inhibit the free and frank nature of future deliberations.
- [23] The applicant stated that he believes the disclosure of the responsive records would demonstrate whether or not his appeal was treated fairly by the CSAC.
- [24] Having read the responsive records I find that they would not provide any further insight with respect to whether the applicant was treated fairly in the decision made by the CSAC.
- [25] Additional factors in favour of disclosure are the promotion of greater public understanding of the processes and decisions of government, and the promotion of accountability of government. However, neither of these override the important principle of collective decision making by means of the maintenance of a safe space for free and frank deliberation represented by the exemption.
- [26] **In conclusion, the public interest in favour of disclosure, including those factors listed in regulation 2, do not override the important public interest represented by the exemption in section 20(1)(b).**
- [26] Since I have found that the exemption in 20(1)(b) applies, and it would not be in the public interest to disclose the records, I am not required to consider the exemption in section 20(1)(d).

C. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I find that the responsive records are exempted under section 20(1)(b). The public interest in disclosure does not outweigh the maintenance of the exemption.

No further action is required on the part of the Commissions Secretariat.



Sandy Hermiston
Ombudsman