

# FOI Circular # 8

## Request Outcomes



"Ms. Jones, there are a number of big questions here to see you. They say they won't leave until they have some answers."

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## **Making a Decision on an FOI Request**

Among other duties, Information Managers respond to and make decisions on FOI requests. Section 21(k) of the FOI (General) Regulations states that an Information Manager shall:

Examine records to which access has been applied for to determine whether-

- (i) the record is exempt in its entirety;
- (ii) the record contains exempt matter;
- (iii) access should be granted; or
- (iv) the grant of access should be deferred under section 11 of the Law

There are many different outcomes to choose from, and when an application is received you must be aware of all possibilities and what each outcome really means. Careful consideration must be given to each request and each record that is examined. The Information Manager Basic Training course detailed the various decisions to be made, and the Guidance Manual on the Freedom of Information Law, 2007 and other documents produced by the FOI Unit provide additional resources and support. This circular seeks to address each possible outcome in detail to provide further guidance.

### **“Granted in Full”**

If you grant access to *all of the information* in *all of the records* that have been requested, and/or to *all information that is or may be relevant* to the applicant's request, then you are granting full access. If *any* information has been redacted or otherwise withheld from a record that is being disclosed to the applicant, *even if it is irrelevant to the request*, then the request has *not* been granted in full. When releasing a record in response to an FOI request, information can only be redacted or part of the record withheld if the information is exempt under or excluded from the FOI Law.

Applicants will not always know what to ask for or how to ask for it. If someone requests a specific record which you do not have, or information that you do not hold, you may still be able to grant their request in full using another record or set of records that you do hold. Read each request carefully to decide whether you are granting full access to records which fully satisfy the terms of the request.

Communication with the applicant is always the best way to understand what he or she really wants. You should contact the applicant to refine the terms of a request if necessary, and discuss what records you hold and how they can be used to answer the request. If the terms of the request change as a result of this clarification ensure that these changes are agreed to in writing by the applicant.

#### Example:

Q. “I work for your public authority and want to see copies of all complaints from any of my colleagues.”

A. The applicant would like to see any complaints on his or her personnel file. Even if there are no complaints on the file, you can still grant full access to this request by disclosing the entire personnel file, or if the file has a flyleaf or other list of contents by releasing this document to show that there are no complaints on record.

### **“Granted in Part”**

If you are *releasing some* records in response to an applicant's request *but withholding others*; if you are *redacting information* from or *withholding sections* of records that are being released; or if you are *not responding to the entirety* of the request, then you are granting partial access.

If you only grant partial access to a record you must have a valid reason under the FOI Law to not grant full access, i.e. the information withheld or redacted, or the remainder of the request, must be exempt, excluded, deferred or refused under section 9 of the FOI Law.

### Example:

Q. "I recently interviewed for a job with your public authority and want to know why I wasn't hired."

A. In responding to this request you may decide that it is appropriate to release the successful candidate's resume as one of the relevant records. If you do so but redact the home address and telephone number of the individual, exempting it under s. 23(1) of the FOI Law because releasing it would be an unreasonable disclosure of personal information, you have not granted full access to that record. The applicant is not likely to care where the successful candidate lives, and the redacted records that you release may fully explain why another individual was hired over the applicant, but you are still granting only partial access to the responsive records.

### **"Exempt"**

If you are using a section of Part III of the FOI Law to justify your decision to *not grant access* to *any records* requested by an applicant, then your decision is to exempt the information in full. A record is exempt from disclosure and need not be released if it falls within an exempt category as detailed in the FOI Law. The burden of proof is on the public authority to show why the record is exempt, and Information Managers have a duty to prove that a particular fact or situation exists.

Exemptions *allow* public authorities to keep records confidential; these provisions do not *require* that exempt records be withheld from public access. Most exemptions are also subject to the public interest test, so even if the record falls within an exempt category it must be disclosed if it would be in the public interest. Absolute exemptions do not require this consideration, and the FOI Law clearly states to which exemptions the public interest test applies in section 26. If the factors favouring disclosure and those favouring non-disclosure are equal, the doubt shall be resolved in favour of disclosure.

### **"Excluded"**

The FOI Law *wholly does not apply* to certain records, and if an applicant has requested such records then your decision must clearly explain that the records are excluded from the FOI Law. You, as Information Manager, are *unable to make a decision on access* because the FOI Law does not apply to the requested information. Specific exclusions are clearly listed in *section 3* of the FOI Law:

- The judicial functions of a court, the holder of a judicial office or other office connected with a court (FOI does, however, apply to judicial records of an administrative nature);
- Strategic or operational intelligence-gathering activities of security or intelligence services;
- Records belonging to the UK Government, no matter where they are created or held;
- Private holdings of the National Archives that by arrangement do not allow such access;
- Information that may not be disclosed under section 50 of the Monetary Authority Law;
- Information relating to the directors, officers and shareholders of a company registered as an exempted company under Part VII or VIII of the Companies Law; or
- Any other class of information or such statutory body or authority as the Governor in Cabinet may specify by Order.

Further, FOI explicitly does not abrogate provisions of any other law that restrict access to records. These restrictions still apply, and all Information Managers should check the laws and regulations which apply to their public authority to see if any provisions restrict access to records or disclosure of information.

The FOI Unit has commissioned a review of statutory provisions in Cayman Islands laws (the "FOIL Report"), which is available to Information Managers upon request. The report identifies all laws and regulations that contain provisions which bar access to information in any form or classify information as secret. If an applicant requests such records you are unable to disclose the information under FOI.

## **“Deferred”**

If you are relying on *section 11* of the FOI Law to *grant full access* to requested record *at a specified later date*, you are deferring access. Requests can be deferred only if the record is:

- Required by law to be published within a particular period;
- Prepared for presentation to the Legislative Assembly or another person or body; or
- Such that premature release would be contrary to the public interest.

## **“Refused”**

If you are citing *section 9* of the FOI Law to inform the applicant that you *will not comply* with his or her request *at all*, and *will not give a formal decision* on access, then you are refusing the FOI request.

The FOI Law clearly states 4 instances where a public authority can refuse to comply with a request:

- The request is vexatious (not the applicant!);
- You recently complied with a substantially similar request from the same person;
- Compliance would unreasonably divert your public authority’s resources; or
- The information is already available in the public domain.

You can only refuse to comply with a request under these circumstances. The FOI Law and FOI (General) Regulations also set out procedures that you must follow before deciding that a request would unreasonably divert your public authority’s resources and further guidance on this determination.

## **“No Records Found”**

If you are *unable to locate responsive records*, or if *no responsive records are held* by your public authority, then you have found no records or no records exist in relation to the request. FOI only applies to records held by public authorities. Information Managers are not required to create records to respond to requests, and the FOI Law also recognises that records may unfortunately be lost.

The FOI (General) Regulations mandate that Information Managers always make a reasonable effort to locate a record that is the subject of an FOI request. If you are unable to locate a record you must note the efforts made and detail this search and other relevant information to the applicant.

If you receive a request and hold no relevant records, but another public authority does hold such records, you must still make a formal decision and communicate it to the applicant. However, in this case you also have a duty to transfer the request to the appropriate public authority or authorities.

Remember, if an FOI request has been phrased in such a way that you do not hold the requested record, but can respond to the request with other records, you have responsive records. On the other hand, if an applicant’s request cannot be answered with records at all, it may not be an FOI request.

### **Example:**

Q. “I would like to know about public authorities currently renting office space. I am therefore requesting from your public authority a record that contains the following information: location being rented, square footage of the space being rented, cost per square foot per month, date of expiration of the lease agreement.”

A. The applicant has essentially requested your lease. Even if you do not rent your office space you can still grant this request in full by explaining to the applicant that your public authority owns the space or does not pay rent for some other reason, and releasing records which show this ownership or other arrangement.

## **“Public Domain”**

If the record requested by the applicant has been *proactively published* by your public authority and is *readily available to any person at no cost or for a fee*, the record is in the public domain. Requests for published information should not be handled as FOI requests and need not be entered in JADE.

Though Information Managers are *not required to comply with a request under FOI procedures* if the information is already available in the public domain, you should always be helpful. If you process the query as an FOI request, you are required by law to notify the applicant in writing where the records are held and how to obtain access. You may include a copy of the requested record with your decision, but this is not mandatory. If it is handled outside of FOI the response can be less formal.

If a requested record is only available to certain people, under certain circumstances, in particular formats, or for a specified fee, then that record is *not* in the public domain. These records should be accessed under relevant policies and procedures and the FOI request files administratively closed.

## **“Administrative Closure”**

If an application was accepted as an FOI request, or started being processed as an FOI request, but you later determine that *it does not fall under the provisions of the FOI Law*, this is an administrative closure. There are multiple instances where a request will be administratively closed, and you may still need to provide the applicant with the requested information or written instructions on how to otherwise obtain access.

1. *The information is otherwise available*: FOI supplements and complements existing statutory and administrative arrangements that allow the public to access information. A lot of information is routinely made available by Government, though access may be limited to certain people or formats and fees may apply. Information Managers should be aware of laws and policies for their public authority which allow access to information, and how such access is granted. The FOIL Report identifies provisions which allow access to information in an alternative form, and if the requested record is open to access pursuant to an enactment or available through administrative procedures you must inform the applicant of how to access the information. The publication schemes mandated by the FOI Law make information available, and requests for records within your publication scheme should not be dealt with under FOI.

2. *The query can be answered outside of FOI*: FOI is not intended to bureaucratise the routine release of information. If someone asks for information that could have been answered before FOI you should not follow procedures mandated by the FOI Law in order to answer the question. Even if an individual submits the query as an FOI request you can give him or her the requested information outside of FOI.

3. *The application has been explicitly withdrawn*: An applicant may withdraw an FOI request after you have begun processing the application. He or she may no longer be interested in the information, choose to access the records in another way, or have another reason to withdraw a formal FOI request. The reason is not relevant, but you should always receive written confirmation from the applicant that he or she is withdrawing the request before administratively closing the manual file and JADE entry.

4. *The application has been implicitly withdrawn because of lack of clarification*: If you have sought clarification and not received sufficient information to identify responsive records, the request has been implicitly withdrawn by the applicant. However, you must make reasonable efforts to contact the applicant and provide him or her with a fair deadline to respond before making this decision. You must also inform the applicant of when you will be closing the request if you do not receive a response, and if the applicant does reformulate the request at a later date it must be dealt with as a new request.

5. *The application has been implicitly withdrawn because the records have not been accessed or retrieved:* If the applicant requested to access records by inspection or otherwise but does not inspect or retrieve the records within a reasonable time period, the request has been implicitly withdrawn. The original outcome stands as communicated to the applicant, but instead of detailing method of delivery and closing the manual file and JADE entry as fully complete, the files should be administratively closed with a note that the records may be inspected or retrieved at a later date. You need not inform the applicant when you close the request if you have given clear instructions on how to access the records. If the applicant retrieves or inspects the records at a later date you should not create a new manual file or JADE entry, but the inspection or delivery should be noted in the original manual file.

6. *The applicant refuses to pay fees due:* If an Information Manager has quoted fees for the disclosure of records that are reasonable and in accordance with Schedule 3 of the FOI (General) Regulations, the applicant has refused to pay these fees or change the form of access, and the Information Manager or Chief Officer has refused to waive the fees, then the manual file and JADE entry should be administratively closed. The original outcome stands as communicated to the applicant, but the reason for closure of the files is non-payment of fees. Remember though, all Information Managers are encouraged to keep fees to an absolute minimum and waive fees for access wherever possible.

7. *The JADE entry is a duplicate request:* If a request has been created in JADE but it is a duplicate of another request, the entry should be closed as a duplicate request and no manual file created.