

**The Cayman Islands Freedom of Information Law, 2007:  
Sensitisation of Boards and Committees  
Frequently Asked Questions & General Advice**

**ARE THE RECORDS OF BOARD MEETINGS COVERED UNDER FOI?**

The Freedom of Information (FOI) Law<sup>1</sup> applies to all public authorities and all records that they hold. Section 2 of the Law defines “public authority,” and “hold,” which clearly includes the records of all Boards and Committees within government.. This does not mean that all of your records will be disclosed. But it does mean that a Freedom of Information request can be made for your records.

**WHO MAKES THE DECISIONS ON WHAT TO RELEASE?**

Information Managers (IM) have been appointed for each public authority and thoroughly trained. They are responsible for reviewing applications for information and making most decisions on whether or not records can be released under the FOI Law. However, they do not always make the decisions. Section 20, which will be relevant to your records, cannot be asserted by the Information Manager alone. He or she will still accept and review the application, but if Section 20 is thought to apply then the decision must be made by the Chief Officer or Minister who heads the public authority. This decision is not subject to an internal review.

**HOW ARE EXEMPTIONS TO BE APPLIED E.G S.20 OF THE FOI LAW?**

Although only persuasive in the Cayman Islands, guidance has been provided by the UK Parliament, UK Ministry of Justice and UK Information Commissioner on the interpretation of Section 36 of the UK Freedom of Information Act 2000 which has similar wording to the Cayman Islands Freedom of Information Law 2007 Section Twenty (s.20).

*20(1)(a): a record is exempt if its disclosure would prejudice the maintenance of the convention of collective responsibility of Ministers*

This sub-section of the exemption applies to deliberations of ministers and is the exact wording of the UK Freedom of Information Act 2000 (FOIA). The concept of collective responsibility enables ministers to argue freely and frankly in private whilst maintaining a united front once decisions have been reached, with all ministers properly accepting collective responsibility for government decisions. Though a literal reading of the exemption covers only Ministers, information revealing differences between departments may be covered as well if it will indicate differences at a ministerial level. Additionally, information does not need specifically to mention a minister in order to be exempt; the information in question could provide enough evidence for the particular opinion to be deduced. The decision to exempt information under 20(1)(a) can be made only by the relevant minister in question

*20(1)(b): a record is exempt if its disclosure would inhibit the free and frank exchange of views for the purposes of deliberation.*

If the disclosure of information would deter people from expressing themselves openly, honestly and completely, or from exploring extreme options during deliberations it is exempt under this sub-section if the information is not otherwise in the public interest to release. The Law acknowledges

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<sup>1</sup> The Freedom of Information Law was passed in 2007 and will come into effect in January 2009. The full text can be downloaded from [www.foi.gov.ky](http://www.foi.gov.ky) and sections which are discussed at length, referred to or quoted from are included at the back of this handout.

that the disclosure of information revealing internal thinking processes may be detrimental to decision-making and undermine the quality of government. This exemption is subject to the public interest test and requires a decision be made by the Chief Officer or Minister.

“Inhibit” is not defined in the Law or Regulations, but the Information Commissioner of the UK has taken the view that in the context of the FOIA it means “**to restrain, decrease or suppress the freedom with which opinions are expressed.**”<sup>2</sup> This information may be contained in minutes, submissions, etc which contain the exchange of views before reaching a decision. It does not need to be the full record of advice or exchange of views to be capable of having an inhibiting effect. Though the Law does not specifically include “advice,” it may be interpreted as included under “views.” The UK Ministry of Justice exemption guidance states that provision of advice should be “interpreted widely and may be internal within the authority... or external – the authority either receiving advice from outside or itself providing advice to third parties.”<sup>3</sup> This shows that external sources of advice and views, including private sector members of boards and committees, are covered under the Law so far as decisions being made apply to public authorities and records are held by public authorities.

Finally, the UK Information Commissioner reasons that “deliberation” refers to “the evaluation of the competing arguments or considerations that may have an influence on a public authority’s course of action.” The exchange of views is limited only by being for the purposes of decision-making. It is likely to exclude very casual or trivial exchanges but even informal notes of meetings or exchanges of information will be covered when these relate to deliberation of a relevant matter.

*20(1)(c): a record is exempt if it is legal advice given by or on behalf of the Attorney-General*

More narrowly defined than the UK FOIA, the Cayman Islands Law refers only to legal advice from the Attorney General’s chambers. Section 20(1)(c) is related to 17(a)(b) and is subject to the public interest test. The decision to apply it must be made by the Chief Officer or Minister.

*20(1)(d): a record is exempt if its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs*

This part of Section 20 is the exact wording of the UK FOIA. This is not a “catch all” exemption; the UK has indicated in parliamentary debates on their FOI Bill that “the intention of the section was to cover those rare situations which could not be foreseen and which cannot be covered by another exemption, where it would be necessary to withhold information in the interests of good government, rather than catching anything and everything which is not otherwise going to be exempt.”<sup>4</sup> In most cases where effective conduct of public affairs would suffer as a result of disclosure those circumstances are addressed in a more specific provision of the FOI Law.

The effective conduct of public affairs is not restricted solely to the functions of a public authority and its ability to perform those functions. Harm to public affairs can apply where a public authority’s ability to offer an effective public service or to meet its wider objectives or purpose is disrupted by the disclosure of information and/or the diversion of resources to manage the impact of disclosure. The function of boards and committees are considered part of the functioning and wider purpose of the public authority that they fall under. The public interest test does apply to Section 20(1)(d) and the decision must be made by a Chief Officer or Minister, not the Information Manager.

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<sup>2</sup> References to and quotations from the UK IC taken from *Awareness Guidance 25 - Section 36: Effective conduct of public affairs*, updated 11 September 2008 and available at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/effectiveconductofpublic%20affairs.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/effectiveconductofpublic%20affairs.pdf).

<sup>3</sup> See *Freedom of Information Guidance: Exemptions Guidance Section 36*, 14 May 2008. Available at <http://www.justice.gov.uk/docs/foi-exemption-s36.pdf>.

<sup>4</sup> Quoted within the UK IC *Awareness Guidance 25 - Section 36: Effective conduct of public affairs*.

## **WHAT IS THE PUBLIC INTEREST TEST?**

For some exemptions, including Section 20(1)(b),(c),&(d), a “public interest test” must be conducted before a decision can be made on the refusal of access. “Public interest” has an open definition under the FOI (General) Regulations, giving guidelines for what should be taken into consideration by an Information Manager. Public interest means that there is a **benefit** to the public in certain information being made available.

- It does not mean “**of interest to the public**” but “**in the interest of the public**”
- It is a balancing exercise and the decision maker may be called to provide evidence for what are the adverse consequences of release.

## **WHAT IS A REASONABLE APPLICATION OF SECTION TWENTY?**

The Chief Officer or Minister cannot give conclusive evidence that disclosure of information will have a certain effect; this opinion is a hypothetical judgment. However, the process of reaching the decision should be supported by evidence that all relevant factors were taken into account. An opinion will be considered *overridingly* reasonable if a *wide-ranging and severe* prejudicial effect on the ability of a public authority to carry out a *core function* would occur, but a reasonable decision could also be made if a *subsidiary or support function* is *likely* to be affected.

## **HOW LONG DOES THE EXEMPTION LAST?**

As stated in Section 6(2), information is no longer exempt twenty years after the record was created. The only exception is information exempt under Section 22 due to perceived harm to historical, archaeological, anthropological or environmental resources (exempt for 75 years), or under Section 23 which bars unreasonable disclosure of personal information (exempt indefinitely). Information may also cease to be exempt before twenty years has passed, as circumstances may change and information will often become less sensitive over time.

## **COULD OTHER EXEMPTIONS AND EXCLUSIONS APPLY?**

Your meetings may be on a range of matters, so almost any exemption could be relevant to minutes, agendas, submissions, etc. More than one exemptions can apply to any one record in addition to or separately from Exemption 20, and they are all detailed in Part III of the Freedom of Information Law. Further, Section 2(5) of the Law outlines information that is excluded from the Law (i.e. is not covered in the right of access). Even if large parts of a record are exempt the whole record should not automatically be withheld. Information Managers should release any information which does not fall within an exempt category or which passes the public interest test for disclosure, while redacting exempt material.

## **GENERAL ADVICE FOR PUBLISHING RECORDS OF BOARDS AND COMMITTEES<sup>5</sup>**

For some meetings, public authorities may routinely produce minutes for publication as these minutes would generally contain information that is not exempt. Minutes could be approved by the Chairperson and then could be published on relevant websites. Other public authorities whose minutes contain exempt material could consider each set of minutes on an individual basis and redact only those sections which are exempt from disclosure in order to publish the minutes. In this case it should be made clear that the minutes published include redacted material.

In nearly all cases it will be possible to give dates and times of meetings and names of persons/organisations represented. In most cases you can also give broad headings of what was discussed. In many cases, it will be fair to give the names of individuals who attended the meeting in a professional capacity, but it may not always be possible to attribute specific comments or opinions to named individuals.

As a general rule, public authorities should publish:

- minutes and agendas of public meetings
- documents required to be made public by other legislation in the Cayman Islands
- minutes of board and committee meetings (as much as they can and unredacted where possible)
- any background documents referred to in the agenda or minutes or circulated in preparation
- as much as possible!

They do not need to include:

- information that would be excluded from or exempt under the Freedom of Information Law (not just Section 20) or barred from release by another law in the Cayman Islands
- personal information covered under Exemption 23, or which would be unfair to disclose
- older records which fall within the public authority's records disposal schedule
- lower-level internal meetings which would be of less interest to the public

## **GENERAL ADVICE FOR CONDUCTING MEETINGS**

When a meeting or part of a meeting is dealing with sensitive or potentially confidential issues it is good practice to state this at the meeting. This will ensure that all attendees have the same understanding about whether the meeting or certain parts of it are private. Note-takers should always record these discussions but should mark the sections which are confidential so that these can be redacted from any published minutes. However, this will not guarantee confidentiality in all circumstances, and it should be made it clear that information may still be requested under the Freedom of Information Law.

Information Managers may receive requests for minutes or agendas which are published in an edited or summarised form. They are obliged to consider these requests in the normal way. Remember, even if the IM has already decided that the record cannot be released, he or she will have to consider it again when receiving a new request. In many cases, information which would have been exempt at the time it was created will become less sensitive over time and new circumstances may also have arisen which affect the public interest in disclosure.

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<sup>5</sup> Advice on publishing based on *Freedom of Information Act Environmental Information Regulations – Practical Guidance* updated 31 July 2008 by the UK ICO and available at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/minutesandagendas.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/minutesandagendas.pdf).

## **Relevant Excerpts from the Cayman Islands Freedom of Information Law, 2007:**

2. In this law-

“exempt matter” means matter that is exempt from disclosure, whether or not the rest or part of the rest of the record is liable to disclosure;

“exempt record” means a record referred to in Part III;

“hold”, in relation to a record that is liable to production under this Law, means in a public authority’s possession, custody or control;

“public authority” means-

- (a) a ministry, portfolio or department;
- (b) a statutory body or authority, whether incorporated or not;
- (c) a government company which -
  - (i) is wholly owned by the Government or in which the Government holds more than 50% of the shares; or
  - (ii) is specified in an Order under section 3 (2);
- (d) any other body or organization specified in an Order under section

“record” means information held in any form including-

- (a) a record in writing;
- (b) a map, plan, graph or drawing;
- (c) a photograph;
- (d) a disc, tape, sound track or other device in which sounds or other data are embodied, whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
- (e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom, held by a public authority in connection with its functions as such, whether or not it was created by that authority or before the commencement of this Law

3. (1) Subject to subsection (2), this Law applies to-

- (a) public authorities;
  - (b) records, regardless of the date when they were created;
- but paragraph (a) shall not be read so as to allow access to records containing information-
- (c) that may not be disclosed under section 50 of the Monetary Authority Law (2004 Revision);
  - (d) relating to the directors, officers and shareholders of a company registered as an exempted company under Part VII or VIII of the Companies Law (2004 Revision);
  - (e) any other class of information which the Governor in Cabinet may, by Order, specify.

(2) The Governor in Cabinet may after consulting the entity concerned where he considers such consultation appropriate, by Order, declare that this Law shall apply to-

- (a) such companies, in addition to those specified in paragraph (c) (i) of the definition of “public authority”, as may be specified in the Order;
- (b) any other body or organization which provides services of a public nature which are essential to the welfare of the Caymanian society, or to such aspects of their operations as may be specified in the Order;
- (c) any other body or organization which receives government appropriations on a regular basis.

(3) An Order under subsection (2) may be made subject to such exceptions, adaptations or modifications, as the Governor in Cabinet may consider appropriate.

(4) The Governor in Cabinet may, by Order, declare that the application of this Law in relation to any government company specified in paragraph (c) (i) of the definition of “public authority” shall be subject to such exceptions, adaptations or modifications as the Governor in Cabinet may consider appropriate and such Order shall be subject to negative resolution.

(5) This Law does not apply to-

- (a) the judicial functions of-
  - (i) a court;
  - (ii) the holder of a judicial office or other office connected with a court;
- (b) the security or intelligence services (as defined in subsection (8)) in relation to their strategic or operational intelligence-gathering activities;
- (c) such statutory body or authority as the Governor in Cabinet may specify by Order;

- (d) records that belong to the Government of the United Kingdom of Great Britain and Northern Ireland whether they are created or held in the Cayman Islands or elsewhere and a certificate to that effect issued under the hand of the Governor or the Secretary of State shall not be subject to any judicial or quasi-judicial proceedings;
- (e) private holdings of the National Archives where the contract or other arrangements under which the holdings are held do not allow disclosure in the circumstances prescribed under this Law.
- (6) This Law applies to records of an administrative nature held in a registry or other office of a court.
- (7) Nothing in this Law shall be read as abrogating the provisions of any other Law that restricts access to records.
- (8) In subsection (5) "security or intelligence services" includes-
- (a) the Cayman Islands Police Service;
  - (b) the Special Constabulary within the Cayman Islands Police Service;
  - (c) the Department of Customs.
6. (1) Subject to the provisions of this Law, every person shall have a right to obtain access to a record other than an exempt record.
- (2) The exemption of a record or part thereof from disclosure shall not apply after the record has been in existence for twenty years unless otherwise stated in this Law.
- (3) An applicant for access to a record shall not be required to give any reason for requesting access to that record.
- (4) Where a record is-
- (a) open to access by the public pursuant to any other enactment as part of a public register or otherwise; or
  - (b) available for purchase by the public in accordance with administrative procedures established for that purpose, access to that record shall be obtained in accordance with the provisions of that enactment or those procedures.
20. (1) A record is exempt from disclosure if-
- (a) its disclosure would, or would be likely to, prejudice the maintenance of the convention of collective responsibility of Ministers;
  - (b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;
  - (c) it is legal advice given by or on behalf of the Attorney-General; or
  - (d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.
- (2) The initial decision regarding-
- (a) subsection (1) (a) shall be made not by the information manager but by the Minister concerned;
  - (b) subsection (1) (b), (c) and (d) shall be made not by the information manager but by the Minister or chief officer concerned.
26. (1) Notwithstanding that a matter falls within sections 18, 19 (1) (a), 20 (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.

## **Relevant Excerpts from the Cayman Islands Freedom of Information (General) Regulations, 2008**

### 2. In these Regulations-

“public interest” means but is not limited to those 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.