

# INFORMATION COMMISSIONER'S OFFICE CAYMAN ISLANDS



## *Freedom of Information Law (2007)*

# Interim Policies and Procedures—Appeals

March 9, 2009

### 1. OVERVIEW OF THE LAW AND THE ROLE OF THE INFORMATION COMMISSIONER

The Information Commissioner's Office ("ICO") is independent from Government and monitors and enforces Cayman's new *Freedom of Information Law, 2007* ("the Law"). The Law is intended to make public authorities more accountable and transparent by giving individuals the right to request records held by each public authority, including personal information about the individual. The Law generally requires public authorities to respond to a freedom of information request within 30 calendar days, but allows them to withhold information in limited circumstances. Where the public authority has withheld information, it is required to identify its legal authority for doing so and advise the applicant of other avenues of redress, including the right to both an Internal Review and an appeal to the Information Commissioner.

The Law attempts to strike a balance between the public's right to know and the legitimate need, in limited circumstances, for government to keep information confidential in the interest of the public good. Although that balance must be struck on a case-by-case basis, the Law clearly states that where the factors in favour of disclosure and those favouring non-disclosure are equal, the doubt shall be resolved in favour of the public's right to know.

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## **2. PURPOSES OF THESE INTERIM POLICIES AND PROCEDURES**

The Information Commissioner has established these Interim Policies and Procedures to advise members of the public and public authorities covered by the Law how she will be guided in exercising her duties and authorities under the Law. These Interim Policies and Procedures explain the process by which the Information Commissioner will accept and rule upon an appeal, and what is expected of public authorities and appellants during this time. These Interim Policies and Procedures are intended to provide certainty, transparency and efficiency in the dispute resolution and appeal processes.

For all types of appeals, the Information Commissioner's overriding policy is to seek a resolution of the appeal first by investigating and attempting to mediate the dispute without having to resort to a formal hearing and issuing a decision.

## **3. POWERS AND RESPONSIBILITIES OF THE INFORMATION COMMISSIONER**

Under section 39 of the Law, the Information Commissioner is generally responsible for monitoring how the Law is administered. Under section 39, the Information Commissioner may:

- (a) hear, investigate, and rule on appeals filed under this Law;
- (b) monitor and report on the compliance by public authorities with their obligation under this Law;
- (c) make recommendations for reform both of a general nature and directed at specific public bodies;
- (d) refer to the appropriate authorities cases where it appears that a criminal offence has been committed; and
- (e) publicise the requirements of this Law and the rights of individuals under it.

## **4. GROUNDS FOR APPEAL**

Under section 42(1), an applicant who has made a request for access to information and who has exhausted the other means of redress provided for in the Law may ask the Information Commissioner to review and rule on their belief that, in relation to their request, a public body:

- (a) failed to indicate whether or not it holds a record;
- (b) failed to communicate the information contained in a record within the time limits established in this Law or at all;
- (c) failed to respond to a request for a record within the time limits established in this Law;
- (d) failed to provide a notice in writing of its response to a request for a record;
- (e) charged a fee that is in contravention of this Law; or
- (f) otherwise failed to comply with an obligation imposed under this Law.

## **5. HOW TO FILE AN APPEAL**

5.1 An appeal must be in writing, which includes email. However, an appeal may be made orally where an applicant has a limited ability to read and write, or a physical disability which impairs the ability to file an appeal.

5.2 Where an applicant makes an oral appeal, the ICO will put it in writing. After the applicant has reviewed it, he or she must acknowledge and sign the document.

5.3 Where an applicant, other than a third party applicant, has not given the public authority an opportunity to respond to and attempt to resolve the issue framed in the appeal, including by conducting an Internal Review, the ICO will normally refer the applicant to the public authority before it will take any further action. If, after that, the applicant believes the public authority has not adequately dealt with the matter, the ICO will consider whether further action is warranted.

Where the ICO determines it would not be appropriate to refer the applicant to the public authority, it may decide to open an appeal file.

5.4 An appeal must provide enough information for the ICO to identify the issues involved. Specifically, an applicant should provide:

- (a) the applicant's name and email and/or postal address, (supplying phone or fax details if available for ease of contact);
- (b) a copy of the request made to the public authority;
- (c) a copy of the public authority's decision;
- (d) a request to the Information Commissioner for a review of the matter and a brief explanation of what the applicant wants reviewed;
- (e) the Internal Review decisions if applicable;
- (f) the remedy the applicant is seeking from the Information Commissioner.

An applicant requiring assistance or information to help them file an appeal should contact the ICO directly. In addition to the list above, applicants are encouraged to provide the ICO with as much relevant information as possible.

5.5 The applicant must file an appeal to the ICO within 30 calendar days of being notified of the public authority's decision. The Information Commissioner may allow a longer period of time to file an appeal where it is fair and reasonable to do so.

## **6. HOW TO FILE AN APPEAL IF YOU ARE A THIRD PARTY APPLICANT**

6.1 A third party applicant who has been notified by a public authority that it intends to release the third party's personal information may file an appeal. It is not necessary for the third party to exhaust all other remedies before filing an appeal.

6.2 A third party applicant must provide enough information for the ICO to identify the issues involved. Specifically, a third party applicant should provide:

- (a) the third party applicant's name and email and/or postal address, (supplying phone or fax details if available for ease of contact);
- (b) a copy of the decision made by the public authority;
- (c) a request to the Information Commissioner for a review of the matter and a brief explanation of what the applicant wants reviewed;
- (d) any information and correspondence or decisions between the third party applicant and the public authority with respect to the matter;
- (f) the remedy the applicant is seeking from the ICO.

A third party applicant requiring assistance or information to help them file an appeal should contact the ICO directly. In addition to the list above, third party applicants are encouraged to provide the ICO with as much relevant information as possible.

6.3 The third party applicant must file an appeal to the ICO within 30 calendar days after being notified of the public authority's decision. The Information Commissioner may allow a longer period of time to file an appeal where it is fair and reasonable to do so.

## **7. NOTICE OF APPEAL**

7.1 A copy of the request to the Information Commissioner for an appeal will be provided by the ICO to the public authority concerned and any other person that the Information Commissioner considers appropriate.

7.2 When the ICO receives an appeal from a third party it will immediately notify the public authority that it has received the appeal, and direct the public authority to notify the original applicant that an appeal has been filed and not to release the records in dispute until the appeal has been resolved.

## **8. MEDIATION**

8.1 The Information Commissioner may direct that staff from the ICO investigate the appeal and attempt, through mediation, to assist the parties to settle the dispute. Not all files will be appropriate for referral to mediation.

8.2 The mediation process is separate from a subsequent formal hearing by the Information Commissioner. All information provided by the parties during mediation is treated on a "without prejudice" basis, which means each party can engage in free and frank discussions without fearing damage to their case should the matter proceed further. Therefore, the details of the mediation discussions will not be shared with the Information Commissioner to ensure that, if the matter proceeds to a formal inquiry, the Information Commissioner remains impartial. Furthermore, any other information provided during mediation will not be disclosed to any other party unless the party providing the information consents to its release.

8.3 The role of the mediator in this regard is not to act as an advocate for either side, but to impartially discuss the matter to ensure that the applicant has received all of the information he or she is entitled to, and/or seek a remedial solution to the issue that satisfies both parties and is consistent with the Law. Through mediation, any number of outcomes could occur, including more information provided to the applicant, an explanation of a decision or factors which were considered, a reduction in a fee, an agreement to reduce the scope of the request, a record found, or ensuring an exemption or exclusion is better understood.

8.4 Where an appeal is not settled, the applicant may request the matter proceed to a formal hearing before the Information Commissioner under section 43 of the Law.

8.5 The mediation process may continue after a Notice of Hearing has been issued.

## **9. HEARINGS BEFORE THE INFORMATION COMMISSIONER**

9.1 Before a hearing, the ICO staff assigned to investigate and attempt to settle the appeal will prepare a brief report to the Information Commissioner and the parties. The purpose of the report is to provide a chronology of the issue under appeal, outline the facts of the case, set out any facts which are in dispute, describe the records in dispute if applicable, describe what records or issues remain and/or are no longer in dispute as a result of mediation and outline the provisions of the Law which are in issue. The report will not include details about any attempt to settle the matter informally other than factual details about the scope of the issue.

9.2 A Notice of Hearing will be issued to all parties. The Notice will describe the issue(s) under review, instructions for submissions and a schedule for the parties to provide submissions, when those submissions will be exchanged and provided to the other party, and when reply submissions are due.

9.3 A party will have the opportunity to object in writing to any of the contents of the fact report or the Notice of Hearing within five days.

9.4 The Information Commissioner will make all findings of law and fact in an inquiry. Where the fact report contains an agreed statement of facts, the Information Commissioner may accept those facts as evidence.

9.5 A hearing must be completed within 30 calendar days after the Information Commissioner has given the parties the opportunity to provide submissions and reply submissions as outlined in the Notice of Hearing. The Information Commissioner may extend this time period for an additional 30 days and will provide notice of this extension and reasons for the extension before the expiration of the first 30 calendar days.

9.6 The parties to a hearing are the applicant, the public authority and any third party applicant whose information may be contained in the records under review.

9.7 The Information Commissioner may grant intervener status by sending a Notice of Hearing to any person or organisation she considers appropriate. The ICO may request comments from the parties before giving notice to an intervener. Interveners are expected to bring a broader perspective than the parties to the issues in dispute.

9.8 Most hearings will be conducted in writing. However, the Information Commissioner may convene an oral hearing if:

- (a) material facts are in dispute,
- (b) credibility is an issue,
- (c) the issues are complex,
- (d) the review raises significant policy issues, or
- (e) the person who requested the review has a limited ability to read and write, or a physical disability which impairs the ability to make a written submission.

9.9 Where the Information Commissioner is of the view that both written and oral representations are necessary to assist her to decide a matter, she may require each party to file a written submission before an oral inquiry.

9.10 The Information Commissioner may receive an *in camera* (*private*) submission (in whole or in part) from a party where it may disclose the contents of the record in dispute or where it contains information which may be subject to an exemption or exclusion under the Law. A party making an *in camera* submission must give reasons to the Information Commissioner as to why it should be received *in camera*.

9.11 Where a party makes part of its written submission *in camera*, it should provide the Information Commissioner with one full submission containing the *in camera* sections, with those sections identified, and a second submission with the *in camera* portions severed, suitable for distribution to the other parties.