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**Freedom of Information Law 2007**  
**Guidance Document: Freedom of Information Law 2007 and Human Resource**  
**(HR) Information**

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**Introduction**

The Freedom of Information Unit and the Portfolio of the Civil Service have created this Guidance Document on the Freedom of Information Law and Human Resource Information to assist Information Managers and HR managers in making decisions on requests for personal information. The FOI law requires applications for records to be considered on a case by case basis. The guidance provided will not always apply to the request received by each public authority but is intended to provide some guidelines on handling requests for specific categories of information. In no way is this guidance a substitute for individual decision making and there is no intention to provide legal advice. It is however essential that HR and Information Managers understand that each request for disclosure of HR information **must be considered on its individual merit** and that guidance in relation to disclosure or non-disclosure cannot be prescriptive.

**Background**

The Cayman Islands Freedom of Information Law 2007 provides the public with a general right of access to records held by the Cayman Islands Government.

Section 6 (1) "Subject to the provisions of the law, every person shall have a right to obtain access to a record other than an exempt record"

Any refusal to grant access to information must be based on an exemption with a clear rationale to support the decision to refuse a request. The overall emphasis of the law is consequently about the promotion of disclosure.

Section 6 (5) "Where the factors in favour of disclosure and those favouring non-disclosure are equal, the doubt shall be resolved in favour of disclosure ."

However, some information is more sensitive in nature than others and decisions surrounding HR information must be made in light of the various specific clauses within the FOI Law and Regulations and the impact that disclosure of information would have on the individual concerned.

This guidance relates specifically to the disclosure of HR information and should be read in conjunction with the "Guidance Manual on the Freedom of Information Law 2007" issued by the FOI Unit.

The guidance contained herein identifies:-

- The various areas of the law and regulations that are pertinent to decisions relating to disclosure of HR information
- Specific information that is subject to disclosure
- General Principles relating to disclosure of personal information
- Recommendations on disclosure relating to specific types of HR information

### **Context**

In relation to HR information there are several questions that should be considered when making decisions:

1. Is the request vexatious or repetitive? If YES then the request can be refused.
2. Would the work involved in processing the request be an unreasonable diversion of resources? If YES the procedures outlines in Regulations s.10, which invite the applicant to narrow the request, should be followed.
3. Is there an exemption due to the information being requested being “personal information”?
  - a. If YES, would its disclosure be unreasonable?
  - b. If YES, ask if disclosure would nonetheless be in the public interest?
  - c. If YES, are there any third party implications?
4. Are there any other exemptions which apply?
  - a. Was the information given in confidence?
  - b. Could its release without consent be an actionable breach of confidence? (s.17(b)(i))
  - c. Is it in relation to an investigation or law enforcement issue? (s.16)
  - d. Could its release endanger a person’s life or safety?

It should be noted that no one exemption “taking precedence” over another. If ANY exemption applies, then the information is not released. If however no exemptions apply, then the information should be released.

### **What does the FOI Law and Regulations Say?**

#### **What is Personal Information?**

The FOI Regulations define personal information in section2 as “information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identify is apparent or can reasonably be ascertained from the information or opinion including but not limited to:

1. the individual’s name, home or business address or home or business telephone number;
2. the individual’s race, nationality or ethnic origin, colour or religious or political beliefs or associations;
3. the individual’s age, sex, marital status, family status or sexual orientation;
4. an identifying number, symbol or other particular assigned to the individual;
5. the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics;

6. information about the individual's health and health care history, including information about a physical or mental disability;
7. information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given;
8. anyone else's opinion about the individual; and
9. the individual's personal view or opinions, except if they are about someone else."

The above list of records that may come within the category of personal information is not exhaustive. It is an indicative list only to give some guidance to the decision maker as to the type of information that may properly be considered as personal.

However, it is important to note that the definition of personal information **does not include:**

1. Information of a public servant acting in his or her official capacity:

In a case where the individual occupies or has occupied a position in a public authority:

- the name of the individual or
- information relating to the office or position or its functions or
- the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or
- anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid

2. Information of an individual providing a service under contract to a public authority:

In a case where the individual is or was providing a service for a public authority under a contract for services with the body:

- the name of the individual, or
- information relating to the service or the terms of the contract, or
- anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service.

3. The views or opinions of an individual about a public authority, its business or performance:

The views or opinions of the individual in relation to a public authority, the staff of a public authority, or the business or the performance of the functions of a public authority;

**What does the FOI Law say about Personal Information?**

The FOI Law specifically identifies that, **where exempt, Personal Information**, which would include personnel records relating to employee before, during and after employment, **is protected against disclosure, without limit of time.**

Section 23(1) Subject to the provisions of this section, a public authority shall not grant access to a record if it would involve the unreasonable disclosure of personal information of any person, whether living or dead.

(2) Subsection (1) shall not apply in any case where the application for access is made by the person to whose affairs the record relates.

(3) Records relating to personal information shall be exempt without limitations of time.

(4) The extent to which third party rights are to be protected shall be set out in the regulations made under this Law.

The Law further specifies that information can be withheld if it is likely to endanger the safety or health of an individual if released.

Section 24. A record is exempt from disclosure if its disclosure would, or would be likely to:-

- (a) endanger the physical or mental health of any individual: or
- (b) endanger the safety of any individual

This provides for non-disclosure based on the individual assessment of the impact of disclosure on an employee and gives further reassurance and protection to individuals working in areas of the organization such as covert operations within the police and customs.

**In some exceptional circumstances, where the information requested meets the public interest test, personal information may be disclosed. However, civil servants should feel assured that personal information about them will not be randomly disclosed.**

Section 26. (1) Notwithstanding that a matter falls within section 18, 19(1)(a), 20(b),(c) and (d), 21, 22, 23, 24, access shall be granted if such access would nevertheless be in the public interest.

### **What is in the public interest?**

The FOI Regulations determine the public interest by disclosures which “may or tend to

- promote greater public understanding of the processes or decisions of public authorities,
- provide reasons for decisions taken by government,
- promote the accountability of and within government,
- promote accountability for public expenditure or the more effective use of public funds,
- facilitate public participation in decision making by government,
- improve the quality of service provided by government and the responsiveness of government to the needs of the public or any section of the public,
- deter or reveal wrongdoing or maladministration,
- 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,
- reveal untrue, incomplete or misleading information or acts of a public authority.”

Where it is felt that the public interest is best served by disclosure, information can be disclosed even if the information requested is personal information. The relevant public interest factors will change depending on the facts of each case.

It is more likely that information created in, or related to, an employer's official capacity will be subject to disclosure than information that is non-employment related. For example disclosure of a Lawyer's legal certification is more likely to be disclosed than the same lawyer's qualification as a former accountant, as one is a requirement for their current Government role.

### **What are third party rights?**

The FOI Regulations specifies a third person as "a person referred to in a requested record other than the applicant." Third party rights are to be protected in relation to the release of personal information. A third party has the right to appeal to the Information Commissioner where a request has been made for their personal information by an applicant and the public authority intends to release such information" A third party who has objected to the release of their own personal information may appeal to the Information Commissioner within thirty calendar days after the date of decision to release the personal information (s.12(2) FOI Regulations).

This means that an individual will be notified if a decision is being made to disclose information relating to them to a third party, before that information has been released. And they will have the right to challenge the decision to the Information Commissioner to overturn that decision.

### **What is confidential information?**

The FOI Law contains a clause relating to confidential information which may also be a reason to exempt information.

Section 17 An official record is exempt from disclosure if -

- (a) it would be privileged from production in legal proceedings on the grounds of legal professional privilege : or
- (b) the disclosure thereof would-
  - (i) constitute an actionable breach of confidence:**
  - (ii) be in contempt of court: or
  - (iii) infringe the privileges of

If an employment agreement has a contractually binding non-disclosure clause defensible by law then it is exempt from disclosure. This is highly rare with pre-existing employment agreements and IS NOT to be included in future agreements (it is recommended that future changes to PSML will prevent arbitrary addition of a confidentiality clause). Any existing clause will have to be reviewed by the Legal Department to see if it is "legally binding".

General statements relating to confidentiality on some reference request forms are unlikely to be "legally binding". Refer to Personnel Circular Guidance (to be issued) on template statements for application forms and reference request forms.

## **Protection from Liability**

All officers who make decisions in good faith under the FOI Law are protected from any legal liability which may arise from the release of the information.

Section 54 (1) Nothing in this Law shall be construed as authorizing the disclosure of any official record –  
(a) **Containing any defamatory matter:** or  
(b) The disclosure of which would be in breach of confidence or of intellectual property rights.

This means that the Law does not permit a person who receives information to publish it without regard for the legal consequences. Defamatory information may be released if it is not exempt. The FOI officers are protected from any legal action in respect of that publication. However the FOI applicant who received it is NOT protected and is liable for any legal action, including in defamation or breach of copyright.

## **Personal Information subject to disclosure**

This section contains recommendations relating to disclosure of specific information:-

<b>Type of Information</b>	<b>Recommended Decision</b>	<b>Rationale</b>
Employee Name and Position Title	Disclose for all employees unless subject to section 24 of the FOI Law provided it does not endanger physical or mental health or safety of the employee.	It is in the public interest for citizens to know who is providing public services provided it does not endanger the safety of the employee.
Salary Information	Publish a list of all position title and associated band/grades with current salary scale.  Queries relating to individual remuneration amounts (point placement) should be considered with reference to “third party rights”	PSML, 2005 requires that all vacant roles be advertised. Consequently information about the band/grade of a role is in the public domain.
Information relating to the employee (current or former) making the request	As a general principle, disclose to the individual, redacting any information relating to another employee or third party. However, information relating to on-going investigations, such as victim statements and areas subject to “third party rights” should not be disclosed.	Disclose under Section 23 (2) of the FOI Law 2007.

**Questions to ask to help guide the decision making process**

Question	General Principles	Example of requests and disclosure decisions
<p>Does the information relate to the individual making the request?</p>	<p>Disclose to the individual redacting any information relating to another employee or third party.</p>	<p>Request: Employee wishes to see everything in their HR file. Decision: Disclosed but information relating to other staff or a third party should be redacted if exempt. However, if there is material on file in the nature of a complaint / allegations / grievance etc other exemptions may apply even though it is about the employee themselves.</p>
<p>Has the employee been generally notified that the information is subject to disclosure?</p>	<p>The threshold for disclosure of information where the employee had been notified that information is subject to disclosure is lower than where employees have not been notified.</p>	<p>On a survey seeking employees' work locations and work phone numbers, for example, they could be advised: "This information will be made available to the public on the web and in response to any FOI requests. If you object to this, please advise XXX in writing with your reasons, which will be considered before a final decision is made." Although some people may object, the only kind of reasons which would be valid would be fear of harassment (with a proper foundation), need to remain undercover. When seeking a reference about an employee, the statement could say: "The information you provide will be released only to those officers involved in the selection process, and to the employee themselves." There would be very few instances where there would be a stronger public interest in disclosure to a third party than the privacy of the employee, other than the very rare cases such as corrupt conduct or fraud.</p>

<p>Will the release of information endanger the physical or mental health or safety of any individual?</p>	<p>If YES, do not release (but public interest test still applies)</p>	<p>There are very few cases in other jurisdictions under this exemption. One is protecting the identity of staff involved in animal experimentation (due to threats from protestors); another is to protect the location of and identity of staff in an abortion clinic. Undercover law enforcement officers' identities would also be protected. In terms of the physical or mental health of the individual being harmed by disclosure, this is mainly applicable for mental health patients who have no insight into their condition or whose treatment would be hampered by release of information to them. (It is highly unlikely that any employees would be in this category, although documents relating to an invalidity retirement could contain this) There are almost no physical conditions, even terminal illnesses, where the patient is unaware of the prognosis, although if this is the case then an exemption could be applied.</p>
<p>Is this information about the employee's professional life or is it personal data?</p>	<p>The threshold for disclosure of information relating to an employee in their official capacity is lower than that for information that is truly personal in nature.</p>	<p>Request: The amount of money spent by the Minister of Tourism on entertainment and travel during 2007 and why the Minister was off sick for 2 days in August.  Decision: The information relating to expenditure on entertainment or travel would be disclosed as it relates to decisions taken in their official capacity.  Information relating to the reason for sickness absence would not be disclosed.</p>



<p>How senior in rank/position is the employee in the Government?</p>	<p>The threshold for disclosure of information is lower for employees at the most senior level of the organization, as this is more likely to meet the public interest test.</p>	<p>Request: Information relating to the pecuniary interests of a senior employee such as the Financial Secretary as opposed a junior member of staff such as the clerk in the Treasury Department Decision: Disclose would be more likely for the FS who may be in a position to make a decision affecting the company in which they have an interest) whereas the shareholding activities of a junior employee would probably not be relevant to their role consequently would be of less public interest in disclosing their financial details.</p>
<p>Can the information requested be edited to remove personally identifiable information without reducing the value of the information?</p>	<p>Redact information identifying individuals and release the information.</p>	<p>Request: To see what courses Caymanians are sent on to see if they are being disadvantaged. Decision: Disclose the training course details for Caymanian staff redacting any personal details that identify the member of staff who went on the course.</p>
<p>Will the timeliness of the release of information have an impact on a process?</p>	<p>The threshold for disclosure is lower where the impact on a process is diminished.</p>	<p>Request: Who was the successful candidate for a specific job in the Civil Service? Decision: Disclose when the position has been filled. Do not disclose at the "preferred candidate" stage.</p>
<p>Is this request relating to somebody successful within a process?</p>	<p>You are more likely to disclose information about somebody successful in a process than information relating to individuals unsuccessful in a process.</p>	<p>Request: Who were all the candidates for a job and on what grounds were those not selected unsuccessful? Decision: Disclose the successful candidate and how he/she met mandatory criteria for selection. Do not disclose names or identifying information relating to individuals who failed to be appointed.</p>

<p>Is the individual, about which the information applies, unhappy with personal information being released about them?</p>	<p>The decision should be made initially without consideration of the individual's views. However consultation with the person affected would be necessary in some cases (eg. the Hep B case discussed opposite)</p>	<p>Request: Who recommended a specific HR policy change? Decision: Even if the author is unhappy that they would be associated with the policy, release the name of the individual (i.e. all Civil Servants are accountable).</p> <p>Request: Request for names of individuals affected by an outbreak of Hep B. Decision: Do not release unless in the public interest e.g. the individual, while undertaking their Government role, may have infected other people.</p>
<p>Is the information in summary form where individuals cannot be identified?</p>	<p>The threshold for disclosure is lower where information is in summary form and the identity of individuals cannot be ascertained from the information provided.</p> <p>Note: Summaries should be aggregated upwards so that at least five individuals are contained within a grouping.</p>	<p>Request: Sickness levels for each Ministry/Portfolio.</p> <p>Decision: If available in a list of people who have been absent, do not disclose. If available in the format of % absence by Department, disclose.</p>

**Disclosure to a third party of specific HR processes/documentation**

The following documents are specified in the HR Policy and Procedures Manual to be held on the personnel file under Personnel Regulations 45(1)(a). A general principle about disclosure to a third party relating to these mandatory documents is included below.

Documentation	Sub-Set	Recommended Decision regarding disclosure to a third party
Appointment Information	Application Forms	No
	Proof of qualifications	You may deem it relevant to disclose if the qualification is mandatory for the role, redacting any information other than that which confirms proof (redact class of degree or individual subject marks)

	References, background checks,	No
	Medical reports	Generally No but subject to the public interest test or work-place health and safety considerations
	Birth Certificate, Marriage Certificate, Spouse's Birth Certificate, Child/Children Birth Certificate	No, there is currently a process to access birth certificates relating to Caymanians through General Registry
	Police & Immigration Clearances	No, other than in the exceptional circumstance that a public interest test would necessitate it (e.g. for reasons of protecting children in someone else's care)
	Declaration of Secrecy signed by Civil Servants	Yes
Employment Agreements	Employment Agreements, renewed Employment Agreements, any revisions or amendments to Agreements	Disclose, redacting relevant personal information, unless in the rare case of a confidentiality clause that is legally binding
	Letters of appointment to acting or interim positions	Yes redacting remuneration amount
Remuneration & Payroll Information	Salary	Direct query to internet site which will contain a list of positions and grades for Government.
	Allowances and entitlements that go with a position	Disclose the standard entitlement for the position
	Authorisation to make deductions	No
	Salary Advance agreement	No
Performance Management	Annual Performance Agreements	Yes – for output and ownership information as this is already in public domain. Redact training and behaviour requirements
	Interim Performance Assessments	No, except in the case of a very strong public interest related to output ownership
	Annual Performance Assessment	No, except in the case of a very strong public interest related to output ownership
Training & Development	Annual Staff Development Plan	Yes (redact individual names)
	Bonding Document or Training Support Agreement	No
	Training Courses Attended	Yes (redact individual names and aggregate (minimum of five in a grouping) where necessary)

Discipline		As a general principle disclosure should be limited to individuals actively involved in an investigation
	Letters and warnings provided as part of disciplinary, dismissal or other termination processes	No, although there may be a case for partial disclosure to a complainant if the discipline/ dismissal was as a result of their complaint
	Grievances filed by the staff member and letters of resolution	No, although there may be a case for partial disclosure to a complainant
	Appeals filed by the staff member and letters of resolution	Refer to the Appeals Commission for decision under their disclosure rules
	Correspondence to and from the staff member relating to their employment, remuneration, terms and conditions, training, development or performance	Generally No

### **Other Processes**

<b>Documentation</b>	<b>Sub-Set</b>	<b>Recommended Decision</b>
Recruitment	Appointment decision and reasons (panel papers etc)	Yes (redacting individual names and identifying characteristics). Especially the requestor relative to the successful candidate
	Vacancies	Yes
	Job Descriptions	Yes
Health & Safety	Accident Reports	No - unless in the public interest. Data applicable to individuals and third party issues may need to be considered
Performance	Medical Assessment	No – unless in the public interest where it impacts capability to undertake a publicly significant role.
	Loss of qualification, license or certification	Yes - if mandatory for a role
Succession Plan		Yes for an organisation (redact individual names)
Staff Administration	Attendance	No – unless in the public interest
	Leave	No – unless in the public interest
	Contract Expiration	No – unless in the public interest. Note, it is a PSML requirement to determine if any other suitable candidates are available at contract renewal stage.

	Official Travel	Yes, redacting partial items not reimbursed by Government
Civil Servants Code of Conduct	Conflict of Interest	Yes (e.g. ownership of alternate employment business relating to a Government employment)

**However, even with the recommended decisions outlined above it must be emphasized that decisions about every request must be made on its individual merits and circumstances.**

### **Viewing Personnel Records**

The FOI Law gives employees the right to request to view all information about them in their personnel file, although third party rights have to be protected.

Section 23 (1) Subject to the provisions of this section, a public authority shall not grant access to a record if it would involve the unreasonable disclosure of personal information of any person, whether living or dead.

(2) Subsection (1) shall not apply in any case where the application for access is made by the person to whose affairs the record relates.

The employee can request the information to be provided in any format which should be granted (e.g. scanned documents, photocopies etc although there is a cost associated with this service).

Section 10 (2) "...where an applicant requests that access be given in a particular form, access shall be given in that form"

However if the method for disclosure is not specified, it is recommended that the employee be given access to view the file. The process:

1. Employee to make an appointment to inspect (i.e. view) the file.
2. Before the appointment time the file must be checked and any third party information redacted, but do not remove any information.
3. Employee must produce identification.
4. Employee must be supervised when viewing file to ensure information is not removed, amended, added or destroyed.

### **Amending Personnel Records**

The FOI Law places the emphasis on keeping accurate and timely personal information, by providing the requestor an avenue for having their personal data updated if it is incorrect or incomplete.

Section 28 (1) Where a person seeks or has been granted access to a record but claims that the record relating to his application contains personal information about himself that-

- (a) Is incomplete, incorrect, out of date or misleading; and
- (b) Has been used, is being used or is available for use by a public authority for administration purposes

the person may apply to the public authority for an amendment or an annotation of that record.

Each public authority should consequently have a procedure in place to deal with requests for changes to information held within personnel files.

### **Fees**

Section 13 (1) “The communication of information may be made conditional upon the payment by the person making the request of a reasonable fee which shall not exceed the actual cost of searching for, reproducing, preparing and communicating the information”

Note – employees are not charged for inspecting personal files, however charges may be applicable for producing required copies – refer to the Guidance Manual for the Freedom of Information law, and FOI Regulations.

### **Non-Provision of Information**

The FOI Law does make provision for non-disclosure of information for requests, other than that with specific exemptions, and consideration regarding disclosure of HR information should take account of provisions outlined below.

Section 9. A public authority is not required to comply with a request where:

- (a) the request is vexatious;
- (b) the public authority has recently complied with a substantially similar request from the same person;
- (c) compliance with the request would unreasonably divert its resources;
- (d) if the information requested is already in the public domain.

