CAYMAN ISLANDS GOVERNMENT

GUIDANCE MANUAL ON THE

FREEDOM OF INFORMATION LAW, 2007

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Freedom of Information Unit
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FOREWORD

This Guidance Manual has been prepared by the Freedom of Information Unit to assist public authorities, Information Managers and all other Cayman Islands Government staff in the implementation and practical application of the Freedom of Information Law, 2007 (the "FOI Law").

This Guidance Manual recommends the best practices and procedures; amendments and additional material will be made available as necessary. The Guidance Manual can only deal with the provisions of the FOI Law in fairly general terms. When processing individual requests, it may be necessary for public authorities to seek further advice from their legal advisor or the Attorney-General's Chambers.

To ensure a consistent approach to implementation of the Law throughout public authorities, the Guidance Manual explains and gives further information about the FOI Law and Regulations and provides examples of freedom of information legislation from other jurisdictions with similar legislative provisions. The Manual provides guidance on the interpretation of the FOI Law by utilizing case law and decisions in other FOI jurisdictions which may be treated as persuasive within the Cayman Islands.

The Freedom of Information Unit encourages and welcomes all feedback.

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INTRODUCTION

A. Overview of Freedom of Information

What does "Freedom of Information" mean?

This manual is intended to provide advice to public authorities on the handling of requests for information under the Freedom of Information Law, 2007 (the "FOI Law"). The FOI Law gives the public a new right of access to information held by public authorities. It is a right to see the records held by a public authority. The FOI Law was created to ensure that the public has more access to records held in all forms by the Cayman Islands Government about their decisions, activities and services.

The FOI Law covers both responding to requests for information and public authorities taking the initiative to ensure that as much information as possible is published. The right is not unlimited; there are exemptions, which recognise that there are certain classes of information which Government should not disclose. For example, records affecting security, defence or international relations. These exemptions mean that it is not in the public interest to release certain types of information to the public. They also ensure the safety of the Cayman Islands and protect the privacy of individuals. Exemptions are a necessary balance between the right of public access to all records held by public authorities and the protection from disclosure of governmental, commercial or personal information. The FOI Law also specifies the circumstances in which an applicant is entitled to access records relating to their own personal information.

Public authorities have to embrace this new approach to openness while keeping in mind the substantive exemptions contained in the FOI Law. The FOI Law requires changes in internal operating procedures and relies on good records management within public authorities. The Information Manager in each public authority has the role of addressing requests and ensuring the public authority is prepared to implement the FOI Law. The Information Manager will

have to decide in each case what information can be disclosed. This manual is designed to provide practical guidance for public authorities to make decisions on requests for records under the FOI Law.

Objectives of the Freedom of Information Law

The objectives of the FOI Law are spelt out in an objects clause (section 4 of the FOI Law) in these terms:

> *"The objects of this Law are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely –*
>
> *a.) governmental accountability;*
> *b.) transparency; and*
> *c.) public participation in national decision-making"*

The objects clause sets out the way in which Information Managers should approach decisions about providing information under the FOI Law. All decisions should be consistent with the objectives of the FOI Law, by:

a) encouraging Government, at all levels, to take responsibility for its actions;
b) making Government processes as open as possible; and
c) enabling people to take part in decisions which affect everyone.

What does the FOI Law cover and what is excluded?

Included:

The duty to disclose applies to all records held by public authorities in connection with their functions. The FOI Law is intended to supplement or complement existing statutory and administrative arrangements already in place to allow the public to access information and not

to restrict them. Certain information is routinely made available by Government as a result of legislative requirements; for example, part of a public register. Other information is available for purchase by the public in accordance with good administrative practice. These arrangements will continue under the FOI Law.

In section 2 of the FOI Law:

> *"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 is was created by that authority or before the commencement of this Law.*

The definition also includes emails and information stored on a file in a computer, as the definition of record is "information held in any form". It will usually be clear whether or not something is a record. If in doubt, assume it is a "record": marginal comments and post-it notes are records.

The more challenging issue is determining whether the authority "holds" the record. In section 2 of the FOI Law:

"hold", in relation to a record that is liable to production under this Law, means in a public authority's possession, custody or control.

"Possession" in this context means an authority's own document, "custody" means someone else's document which the authority is looking after and "control" means a document held by someone else, but where the authority can decide what happens to it. In most cases, records are considered to be "held" by the authority who: (a) created the record; or (b) retained the record; or (c) succeeded to the functions of the authority who created or retained the record. Records stored off-site, but which are still under the "control" of a public authority, are considered to be "held" by that public authority. For further information, refer to Clause 8.16 of the Chief Secretary's Code of Practice on Records Management.

Records held on a computer will often be temporarily deleted and stored in such a way that it could easily be recovered, for example, from the *Deleted Items* folder in *Outlook*. Such information will continue to be "held" by the authority. An authority however will not hold data which it has deleted permanently, and this will be the case even if it remains technically possible to retrieve the information. Computer backup tapes usually contain copies of data which is more readily accessible from other information systems. It is not generally expected that data should be provided from backup tapes, except where there has been a severe breakdown in records management processes.

The FOI Law applies to records whenever they were created. This includes records held by public authorities which pre-date the coming into effect of the FOI Law.

Excluded:

The FOI Law does not apply to records belonging to the United Kingdom ("UK") Government, and this is so whether the records are created or held in the Cayman Islands or elsewhere[1]. If a question arises as to whether a record belongs to the Government this can be conclusively determined by a certificate issued either by the Governor or by the Secretary of

[1] FOI Law s. 3(5)(d).

State. *The Secretary of State* in section 3(5)(d) of the FOI Law means the UK's Secretary of State for Foreign and Commonwealth Affairs. If in doubt, an Information Manager should seek a certificate from the Governor's Office. If the Governor is in doubt, he can refer the matter to the Government. A person wishing to see a record may of course be entitled to see the information contained in the record under the UK Freedom of Information Act 2000. The Information Manager should point this out to the applicant. A certificate by the Governor or the Secretary of State cannot be challenged in Court.

The Cayman Islands Monetary Authority ("CIMA") is considered a public authority within the meaning of the FOI Law. However, the FOI Law does not allow access to records containing confidential financial information. This is achieved in section 3(1)(c) of the FOI Law where reference is made to section 50 of the Monetary Authority Law (2004 Revision). The Monetary Authority Law, originally enacted in 1996, set up CIMA to regulate and supervise financial services business carried on in or from the Islands. CIMA is a public authority within the meaning of the Law. Section 50 of the Monetary Authority FOI Law imposes a duty of confidentiality on those who work for CIMA. They are guilty of an offence and are subject to a severe penalty if they disclose any information relating to:

(a) the affairs of CIMA;
(b) any application made to the Government under the regulatory laws;
(c) the affairs of a licensee; or
(d) the affairs of a customer, member, client or policyholder of, or a company or mutual fund managed by, a licensee;

save in limited circumstances (e.g. law enforcement) which are specified in the section. The FOI Law does not allow access to records containing this information. Section 50 of the Monetary Authority Law (2004 Revision) may be referred to in detail. The text is as follows:

"50 (1) Subject to subsections (2) and (3), whoever is a director, officer, employee, agent or adviser of the Authority and who discloses any information relating to:-

(a) the affairs of the authority;

(b) any application made to the Authority or the Government under the regulatory laws;

(c) the affairs of a licensee; or

(d) the affairs of a customer, member, client or policy holder of, or a company or mutual fund managed by a licensee,

that he has acquired in the course of his duties, or in the exercise of the Authority's functions under this or any other law, is guilty of an offence and liable on summary conviction to a fine of ten thousand dollars and to imprisonment for one year, and on conviction on indictment to a fine of fifty thousand dollars and to imprisonment for three years.

(2) Subsection (1) shall not apply to a disclosure –

(a) lawfully required or permitted by any court of competent jurisdiction within the Islands;

(b) for the purpose of assisting the Authority to exercise any functions conferred on them by this Law, by any other law or by regulations made thereunder;

(c) in respect of the affairs of a licensee or of a customer, member, client or policyholder of, or a company or mutual fund managed by, a licensee, with the authority of the licensee, customer, member, client, policyholder, company or mutual fund, as the case may be, which consent has been voluntarily given;

(d) for the purpose of enabling or assisting the Governor to exercise any functions conferred on him under this Law, or regulations made thereunder or in connection with dealings between the Governor and the Authority when the Authority exercises its functions under this or any other law;

(e) if the information disclosed is or has been available to the public from any other source;

(f) where the information disclosed is in summary or in statistics expressed in a manner that does not enable the identity of any licensee, or of any customer, member, client or policyholder of, or company or mutual fund managed by, a licensee to which the information relates to be ascertained;

(g) lawfully made –

(i) to the Attorney-General or a law enforcement agency in the Islands, with a view to the institution of or for the purpose of criminal proceedings;

(ii) to a person pursuant to the money laundering regulations; or

(iii) to an overseas regulatory authority under subsection (3); or

(h) for the purpose of any legal proceedings in connection with –

(i) the winding-up or dissolution of a licensee; or

(ii) the appointment or duties of a receiver of a licensee.

The FOI Law also does not allow access to records containing information relating to directors, officers and shareholders of a company registered as an exempted private company under parts VII or VIII of the Companies Law (2007 Revision). An exempted company is one the objects of which are to be carried on mainly outside the Cayman Islands.[2]

The FOI Law applies to administrative records held in a Court Registry or Offices but not to the records of a Court's judicial functions. The distinction between a Court's judicial and administrative functions is easy to make: does the record relate to what the Court has to decide, or is it merely information about the way a Court is organised? For example, a judge's notes do not come within the FOI Law; however a list of when cases are to be heard does come within the FOI Law. Also excluded are the judicial functions of the holder of a judicial office or other office connected with a Court.

In common with most democratic jurisdictions which have FOI legislation enacted, the FOI Law does not apply to the security or intelligence services (which include the Royal Cayman Islands Police, the Special Constabulary and Customs Department) in relation to their strategic or operational intelligence-gathering activities. The security services and the police, whose other functions come within the FOI Law, also have the benefit of the exemptions in respect of records affecting security and relating to law enforcement.[3] Strategic and intelligence gathering exercises of these public authorities are, by their nature, secret. If an Information

[2] Companies Law (2007 Revision) s. 182.
[3] FOI Law s. 3(5)(b), 15 and 16.

Manager is uncertain whether, or how far, the FOI Law applies, the Information Manager should refer the matter to the Freedom of Information Unit in the Cabinet Office or the Attorney General Chambers.

The FOI Law does not apply to private holdings of the Cayman Islands National Archive ("CINA") where the arrangements under which the records are held do not allow disclosure in the circumstances prescribed under the FOI Law s.3(5)(e).

What public authorities are included?

A wide range of public bodies come within the definition of a "public authority". Section 2 of the FOI Law states:

"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 3(2).

The FOI Regulations refer to the CINA creating and maintain a current list of public authorities which are subject to the FOI Law for the ease of the public. They include the Governor's Office, the Cabinet Office, Cayman Airways, the Stock Exchange, Fire Services, the Legislative Assembly, the Petroleum Inspectorate, Postal Services, Radio Cayman, the Royal Cayman Island Police Service and the University College of the Cayman Islands. Information Managers should advise CINA of any pending changes to the administrative arrangements of a public authority, so that the list can be updated.

The Governor in Cabinet has overriding powers under the FOI Law. First, he can by Order, add to the public authorities defined in the FOI Law, companies or bodies or organizations which provide services of a public nature which are essential to the welfare of Cayman society or which receive government appropriations on a regular basis. The Order may be made subject to such exceptions, adaptations or modifications as are considered appropriate. The Governor in Cabinet can by Order do this, not only in respect of new public authorities but also in respect of Government companies which come within the definition of a *public authority* in section 2 of the FOI Law.

To balance this power, the Governor in Cabinet may by Order provide that the FOI Law shall not apply to a statutory body or authority. Information Managers must therefore regularly verify to see if any such Orders have been made by the Governor in Cabinet.

How do other laws and regulations impact on the freedom of information?

Enactments relating to non-disclosure of records

Section 3(7) of the FOI Law provides that nothing in the FOI Law should be read as abrogating the provisions of any other Law that restricts access to records; existing restrictions still apply. Information Managers should, therefore, check the Laws which regulate their authority and see if any of them restrict access to records. The Freedom of Information Unit is preparing a listing of all the Laws, apart from the FOI Law, which allow and restrict access to records. Information Managers should consult this listing.

B. Basic principles of Freedom of Information

Maximum disclosure

The first basic principle of Freedom of Information legislation is maximum disclosure. *Unnecessary secrecy in government leads to arrogance in governance and defective decision making*. These are the opening words of the United Kingdom White Paper "Your Right to Know: *The Governor's Proposals for a Freedom of Information Act" (cm3818), December*

1997 which led to UK Freedom of Information Act 2000. The introduction of a freedom of information law marks a definite change in the relationship between citizens and government.

The Cayman Islands' Law is firmly based on the democratic principle of open government; this means that individuals should have the right to see records held by public authorities unless there is a good reason for withholding the information. It is of the essence of a democracy that governments are accountable to their people.

Information belongs to the people

The principle of accountability means that information is held by governments and public authorities not for their own benefit, but for the benefit of the public. The principle was summed up by Lord Scott of Foscote (the Judge who presided over the Arms to Iraq Inquiry) in these terms:

> *At the heart of the principle of accountability lies the obligation of Ministers to give information about the activities of their departments and about the actions and omissions of their civil servants…unless there is an acceptable public interest reason for withholding information, the constitutional principle of accountability requires that if information about government or its activities is sought the information should be disclosed*[4].

The application of this principle to the Cayman Islands is made clear in the objects of the FOI Law at section 4.

Exemptions are necessary

A person making a request for information may not be entitled to have access to all of the information he wants: there are exemptions set out in Part III of the FOI Law.

[4] In his essay on confidentiality published in *Freedom of Expression and Freedom of Information*, Essays in honour of Sir David Williams (OUP, 2000).

Some exemptions, like the exemption for danger to public health, are clearly in everyone's interest. Others, like the national economy exemption, are included to ensure the effective running of the Government and to maintain a vibrant economy and trusted international relations.

Some of the exemptions are absolute and are therefore not subject to a public interest test, e.g. a record of consultations or deliberations arising during the course of proceedings of the Cabinet or a Cabinet committee. A record of Cabinet deliberations cannot be disclosed under section 19(1)(b) and is not subject to the public interest test specified in section 26(1) of the FOI Law; that is the end of the matter.[5]

Some of the exemptions only apply if disclosure will result in prejudice to a particular interest; if there is no prejudice, there is no exemption and the record must be disclosed. For example, an official record of monetary policy is exempt under section 18 of the FOI Law if its disclosure, or as the case may be its premature disclosure, would or could reasonably be expected to, have a substantial adverse effect on the economy of the Cayman Islands. If it will only have a slight effect, the applicant is entitled to see the record.

Seven exemptions are subject to the public interest test. This means that the record even though it falls within an exemption, must be disclosed if its disclosure is in the public interest. So, under section 21 of the FOI Law, a record is exempt if its disclosure would reveal a trade secret; however, as the public interest test applies to this exemption by virtue of section 26 of the FOI Law, the record must be disclosed if it is in the public interest to do so.

The burden of proof

The burden of proof is on the public authority to show why the record is exempt, not on the applicant to show why disclosure is in the public interest. *The burden of proof* means that one party (the public authority in the case of exemptions) has a duty in law to prove that a

[5] Contrast the position in the United Kingdom where the comparable exemption is not an absolute one and the Information Commissioner has ordered the release of some Cabinet Minutes, case reference FS50165372, 19 February, 2008.

particular fact or situation exists. In law, there are different standards that must be met in order to satisfy the burden of proof. These standards are applied in different situations. The one most people are familiar with is the standard of proof, *beyond a reasonable doubt*. This standard is applied in criminal cases.

Other cases, including cases before the Information Commissioner, have a lesser standard. That standard is proof *on a balance of probabilities*. The term *balance of probabilities* is difficult to define, but it has been taken to mean that the person deciding the case must find that it is more probable than not that a contested fact exists. In a freedom of information case, a party will have proved its case on a *balance of probabilities* if the Information Commissioner can say: "I think it is more likely, or more *probable*, that an exemption applies" or "I think it is more *probable* that a public interest exists". Section 6(5) of the FOI Law provides that where factors in favour of disclosure and those favouring non-disclosure are equal, the doubt shall be resolved in favour of disclosure (but subject to the public interest test).

4
AUTOMATIC DISCLOSURE

A. Brief overview

The FOI Law requires public authorities, in addition to providing information when asked to do so, to take the initiative in publishing information and records. The FOI Law is designed to encourage and promote open government.

Automatic disclosure is an important part of Freedom of Information. The information which is required to be published by public authorities is set out in the Schedule to the FOI Law. Public authorities will find that a well organised website which provides direct links to documents online or details about how to view or purchase published information, will reduce the volume of FOI inquiries from individuals. Documents that are automatically disclosed or published may include: research papers; reports; policy papers; guidelines; procedures; minutes; correspondence and budget information. A good publication scheme allows individuals to "self-service" their information needs. Requests for published information do not have to be handled as an FOI request under section 6(4) of the FOI Law.

Section 5 of the FOI Law requires public authorities to publish a statement of its organization and functions and to keep this statement up to date. Authorities are also required, by a combination of section 5 and the Schedule to the FOI Law, to publish a statement of the records kept by the authority which can be inspected by members of the public. The authority is then required to make these records available for inspection and purchase. Responsibility for doing this is placed on the Principal Officer of the authority.

The UK experience is instructive. The Ministry of Defence's publication scheme has been much admired even though the Ministry obviously has more genuine secrets than most other authorities. It works like this: someone asking the Ministry of Defence for information, for example about "Gulf War veterans", is offered, via the website, access to 20 research papers, 10 reports, 3 policy papers, correspondence and budget information. Information Managers in

the Cayman Islands will find a comprehensive website will produce dividends for their authority.

The Chief Secretary is required to publish a Code setting out minimum standards and best practice for public bodies publishing information under section 5 of the FOI Law. Information Managers must be familiar with this Code. The Chief Secretary is also under a duty to provide guidance for public authorities regarding their duty to publish, if they ask for it. Information Managers will need to refer to the Chief Secretary's Guidance on Publication Schemes for advice in terms of creation and amendment of their schemes.

B. Publication schemes

Details of the authority

First, the publication scheme must describe the functions of the authority. This means explaining in detail what area or areas the authority is responsible for, what work it does and how it sets about its tasks. This will explain the purpose of the authority and its major areas of responsibility or operational work.

Functions may be specified in a law which establishes the authority. Alternatively, if the authority has a file plan which meets the standards of CINA, the top level of this file plan and the accompanying scope notes can be used to describe the authority's functions. Other useful resources for determining the functions of the authority may include: a list of subjects, published in the Gazette; a mission statement or other strategic planning documents; Budget outputs; media releases. This part of the publication scheme must give a proper picture of the work which is done by the authority so that the public will know where to direct their questions.

The Fire Services, for example, might explain that their primary task is to extinguish fires and to protect the public from them. In order to do this, they have trained fire fighters, machinery and water available at all times to fight fires, if necessary they will organise ships or aeroplanes

to help put fires out, that they prevent fires breaking out through public education and advice on fire prevention measures.

Secondly, the publication scheme must list the departments and agencies of the authority. This includes units, sections, boards, tribunals, and committees which are part of the authority, or whose records are held by the authority. The scheme must identify the subjects handled by each department or authority, with the locations of the departments and agencies and the opening hours of all offices. It should also give the title and business address of the Principal Officer and other key officers within the authority.

As well as giving information about the authority itself, the publication scheme must list the sources of information held by the authority which are publicly available. It should act as an index and as a means of identifying how members of the public may obtain the particular information they want. The records which must be listed will include policies, annual reports, minutes, newsletters, operating and procedural manuals, budgetary information which is not exempt and correspondence on particular topics. This information is included in the publication scheme to allow individuals to make requests that are more specific. A very specific request will be quicker and easier for the Information Manager to process.

The best strategy to make this detailed information widely available is by means of a web based publication scheme. In order to facilitate these, the central Government website www.gov.ky has been designated as the key e-based Government tool that will be used for this purpose. Public authorities will need to submit standard information about their operations to the Government Information Services ("GIS") in order to ensure consistent content across the board. Some of the information will already be on websites and will only require to be updated. Other information will have to be supplied.

NOTE:

- Information Managers must remember that publication schemes are a critical tool as they can significantly reduce the number of FOI requests received by public authorities and the amount of time spent searching for records in response to requests.

The Freedom of Information Unit will be the central point of reference for submission of all electronic FOI requests. This means that the public will be given the opportunity to send all electronic requests for information through the www.foi.gov.ky website rather than having to search for the appropriate website and email address for each authority. Access to the Government's websites will be provided at libraries, and best efforts are to be made to ensure access to such websites within Government buildings.

The Cayman Islands is a highly connected country with a wide adoption of internet technology as evidenced by the proliferation of internet service providers, online banking and other local e-services. Internally, in the areas where the Cayman Islands Government has offered online services, such as the General Registry's Cayman On-line Registry Information Service (CORIS) or Lands & Surveys Cayman Land Information system, the response from the local and international customer base has been very positive. Expanding such services and improving the management of electronic records will support FOI and enable better access to information for both community and private sector business activities.

5
PROCESSING FOI REQUESTS

A. Brief overview

Clear procedures are essential if public servants and members of the public are to get the most out of the FOI Law. Simple, well understood procedures for requesting, retrieving and distributing information are the key to success. Information Managers in each authority are to ensure appropriate decision-making on requests for access to records. Experience in other countries suggests that good communication between the person seeking information and the person dealing with the request is very important. A phone call can often remove misunderstandings, clarify what the applicant is seeking and expedite the process.

Much information is already given out informally by public authorities on a daily basis, much of it in response to requests. This should continue. Some requests will, in future, be made under the FOI Law, others will not. Common sense will be required in dealing with these applications but all public officials should appreciate that the formal position is that the FOI Law applies to all requests for information, whether or not the FOI Law is specifically mentioned.

Public officials should, if they are in doubt, treat all applications for information as if they were made under the FOI Law subject to section 6(4) which provides that where a record is open to access by the public under any other Law, as part of a public register or otherwise, or is available for purchase by the public under administrative procedures established for that purpose, the public must obtain access to that record in accordance with that Law or those procedures and not under the FOI Law.

B. Essentials

How a person may apply

A request can be made by any person, anywhere in the world. An applicant does not have to give any reason for making an application.[6] An application may be made in writing or transmitted by electronic means other than telephone. Members of the public who try to request information under the FOI Law by telephone should be invited to make a written application and be sent the appropriate form to be used if the applicant prefers. Information Managers should always give a person as much help as possible over the telephone. Applications do not have to be in any particular form, though the FOI Unit has produced Freedom of Information Application Forms which are designed to help the public access documents held by the public authorities. Members of the public may find it easier to use such a form which can be obtained from the Information Manager of any public authority or they may prefer to send a letter or an email. Text messages are not acceptable.

Most requests are likely to be received via the authority's postal address, corporate email address, FOI email address or the Information Manager's corporate email address. Authorities should bear in mind that requests may also be received via other channels such as faxes, hand-delivered applications to office reception and applications delivered or emailed to other members of staff. Therefore, all staff should be aware of where to direct any FOI requests they may receive.

Valid applications

Whatever way the applicant decides to make his application, the applicant should include:

- Name of applicant;

[6] FOI Law s. 6(3).

- An address to which notices and information can be sent. The address should be a full postal address. An email address may not be sufficient if it is not possible to send the record to the applicant as an attachment to an email. If an email address is the only address which is supplied, the Information Manager should use this to obtain a full postal address in this case;
- The date the application is submitted;
- The subject matter of the information requested including, if relevant, the period and/or geographic area to which the information relates;
- The form of access preferred; and
- Where known, the dates relevant to the information needed, e.g. "the annual reports for 1995 & 1996" or the name of the document.[7]

The applicant should make it clear whether they are seeking public information or personal information. There is no Law in the Cayman Islands regulating the storage, retrieval and access to personal data. As such under the FOI Law, a person may request information about themselves and may request that that information is amended or annotated. A separate application is required under the FOI Regulations for amending or annotating a personal record. If a person makes an application for their own personal information, they must produce identification so that the public authority can be sure it is disclosing the information to the right person.

There is also a right to ask for information about another person; however whether that person's personal information is released or not depends on whether it is reasonable to disclose that information and the strength of the factors relating to public interest.

Applications made on behalf of another person

A person can make an application to amend personal information on behalf of another person only, if the applicant is authorised to do so or has the right to conduct business on behalf of

[7] See the Schedule to the FOI Regulations.

that other person. In either case, the applicant must provide sufficient proof to satisfy the public authority that he or she is authorised to make the application. For example, solicitors, stating in writing that they are acting on behalf of a client, are entitled to obtain any record their client would be entitled to see under the FOI Law.

Where a private company seeks information under the FOI Law, the application should be authorised by the company secretary or a director. In some cases the Information Manager may need to ensure by contacting the person to whom the personal information relates, that the authorisation is genuine and not coerced, for example in possible domestic violence or child abuse situations.

General duties of Information Managers

Under section 49 of the FOI Law, every public authority is required to appoint an Information Manager, who, under the supervision of the head of the authority, will promote in the authority best practices in relation to record creation, maintenance and disposal. Under section 52 of the FOI Law, these duties should be carried out in accordance with the Chief Secretary's Code of Practice on Records Management, and the National Archive and Public Records Law 2007 (the "NAPR Law").

Section 49 of the FOI Law also requires the Information Manager to receive requests for records, assist individuals seeking access to records, paying special attention to people with relevant disabilities, and receive complaints regarding the performance of the public authority relating to the disclosure of records. Although the FOI Law requires Information Managers to receive requests, requests may in fact be received in any part of the public authority, by any officer. It is that officer's duty to refer the matter at once to the Information Manager.

The FOI Regulations state that the functions and duties of the Information Manager shall include:[8]

[8] For the full list set out in the FOI Regulations see Chapter 9 below

- Making a record of all applications for access as required by the FOI Regulations and maintaining a disclosure log for the public authority of all requests granted;
- Assisting persons who have limited ability to read or write or with any mental or physical disability;
- Examining requested records to determine whether:-
    i. a record is exempt;
    ii. a record contains exempt matter;
    iii. access should be granted; or
    iv. the grant of access should be deferred;
- Maintaining knowledge of the FOI Law, the laws relevant to the administration of their public authority and the laws affecting records and information management.

Decision and grant of access

Section 7(3) of the FOI Law provides that:

(3) A public authority to which an application is made shall:

a) upon request, assist the applicant in identifying the records to which the application relates;

b) acknowledge receipt of every application made in the prescribed manner; and

c) grant to the applicant access to the record specified in the application if it is not an exempt record.

C. Assistance and acknowledging receipt of a request

Acknowledgment

Any officer in a public authority is under an obligation to receive an application for a record under the FOI Law. An officer who receives an application should pass it to the Information Manager in his or her authority as soon as possible but no later than two working days from receiving the application. The date of receipt of the application by the public authority is the date on which the application was initially received by the officer. Information Managers must ensure that all officers are aware that it is their responsibility to pass requests on in this way.

The form of letter for acknowledging receipt of an application which is prescribed in the FOI Regulations is Form 2 annexed hereto; for sample letters, see chapter 9 below. One of the questions frequently asked, is whether an authority should acknowledge a request where it does not contain all the information which the FOI Regulations require to make it a valid request. If the request is not clear, or insufficient particulars have been supplied by the applicant, the request should not be acknowledged, but the applicant should be told why his application cannot be accepted as a valid request. The applicant should then be invited to supply the information outstanding to the Information Manager to complete his application.

Consultation with applicants

If an applicant's request for information is not clear the FOI Law requires the authority to provide the applicant with an opportunity to consult with the authority with a view to providing additional information to complete his request.[9] This means giving the applicant advice and assistance. Save in the simplest cases, it is always good practice for an Information Manager to speak to an applicant about his request so that the Information Manager knows exactly what he wants and can discuss any problems. This should be done face to face or on the telephone. It should be made clear to the applicant that the purpose of the contact is to help meet the request in every way possible. In no circumstances should any attempt be made to dissuade the

[9] FOI Law s. 11(1).

applicant from pursuing his request. The Information Manager should keep a detailed record of all correspondence, being letters, emails and telephone conversations the Information Manager may have with applicants in the course of providing advice and assistance. Remember, a direct contact will usually save time and money.

Recording the request

The FOI Regulations provide that an Information Manager shall keep a register of applications in electronic form in the FOI monitoring and computer tracking system utilized by the Government, which shall include but not be limited to:

- the application registration number;
- the name of the applicant;
- the date of the application;
- a summary of the applicant's request;
- the date the response was provided to the applicant;
- where information was provided, a summary of the information provided;
- where the application was denied, the specific section of the FOI Law relied on to justify the denial with an explanation of the reasons; and
- whether an appeal was filed and the outcome of such appeal(s).

Action points on receipt of a request

- Any officer in a public authority is under an obligation to receive an FOI application for access to a record under the FOI Law.
- The recipient of the FOI request must date stamp the request on the date of receipt.
- The clock begins on the day after receipt.
- The request must be delivered to the Information Manager as soon as possible but not longer than 2 working days from receiving the application.
- The records officer must open a registered file for each request.

- Enter the details of the request on the FOI monitoring and tracking system.
- Note the deadline for reply on the front of the file.
- If the application is not clear or complete, the Information Manager must contact the applicant.
- Advise the applicant that the request cannot be processed if the information supplied is insufficient.
- Inform the applicant of the types of information held that relate to the matter.
- Discuss the scope of the request with the applicant.
- Agree with the applicant the additional details of the request.
- Acknowledge receipt of the request within 10 days as prescribed under the FOI Regulations and update the FOI monitoring and tracking system.

D. Transfer of request to and consultation with other public authorities

When transfers are appropriate

It is appropriate to transfer a request where the record is held by another public authority, or where the subject matter of the request is more closely connected with the functions of another public authority.[10] The FOI Law requires that in either case the request must be transferred to the other public authority no later than 14 calendar days after the date of receipt.[11] When this happens, the Information Manager is required by the FOI Regulations to inform the applicant, within 10 calendar days of the date of transfer, that the request and the relevant correspondence has been forwarded to the public authority in question and that all further correspondence will be with that authority. In all cases, the Information Manager should inform the applicant.

Checklist for dealing with transfers and partial transfers

The Information Manager should consider the following questions:

- Is the record held by their authority?

[10] FOI Law s. 8(1).
[11] FOI Law s. 8(2).

- Is the subject matter of the request more closely connected with the functions of another public authority?
- Is the record held by another authority?
- Is the information sought comprised in the records held by more than one authority?
- The Information Manager must determine which is the appropriate authority to deal with the request;
- The Information Manager must forward the request to the other authority no later than 14 calendar days after the date of receipt;
- The Information Manager must inform the applicant of the identity of the public authority to whom the request has been forwarded and inform him that that authority will acknowledge receipt within 10 calendar days;
- If the information requested is covered by records held by more than one authority, the Information Manager must deal with the part of the records which are held by his authority and forward the remainder of the request to the other authority no later than 14 calendar days after the date of receipt. The Information Managers must inform the applicant that this has been done;
- Normally, a public authority has to respond to a request within 30 calendar days after the receipt of the application. Where an application is transferred to another public authority, the 30 calendar days begins from the date on which the application is received by the second authority; and
- The Information Manager should make a record of all actions which have been taken, place copies of all correspondence on the registered file for the request and update the FOI monitoring and tracking system.

Case study

This case study deals with the appropriate procedures for the transfer between public authorities of a request for information about hurricanes and the times within which the various steps are to be taken.

A hotel keeper sends an email to a secretary in the Hazard Management Unit, asking for details of all the hurricanes which have threatened Grand Cayman in the past 5 years. The “date of receipt” is the day on which the email was received into the secretary’s inbox. The secretary, the next day, forwards the email to the Information Manager for the public authority. The Information Manager, six days later, searches the Unit’s records and ascertains that they do not include details of past hurricanes. The Information Manager therefore telephones the Department of Environment, and ascertains that they do hold such records. The Information Manager telephones the applicant and tells him that his request is being transferred to the Department of Environment and gives the applicant the Department’s contact details. On the seventh day after the receipt of the request, the Information Manager then forwards the request to the Department of Environment and sends a confirmatory official letter to the applicant telling him of the transfer. The Information Manager makes a record of his actions by placing copies of all correspondence on the registered file for the request and updating the FOI monitoring and tracking system with regard to the action which has been taken. The Department of Environment has 30 calendar days from receipt of the request in which to deal with the request. The Department of Environment must acknowledge the request with 10 days of receipt.

E. Time limits and extensions

Time limits for responding to a request

A public authority must respond to a request for information as soon as practicable but not later than 30 calendar days after the date of the application[12] (subject to extensions – see below).

Where an application is transferred to another authority, that authority must respond to the request within 30 calendar days of the receipt of the transferred request.[13]

An applicant can apply for an expedited service. Authorities have the discretion to expedite an application where there is shown to be a compelling need or urgency to deal with the applicant's matter before other requests. A non-exhaustive list of circumstances in which prioritization might be appropriate include the following reasons:

- Court or Tribunal proceedings where the information affects the applicant's health or liberty;
- If the information is required to protect public health or safety; or
- Any other circumstance deemed suitable at the discretion of the Information Manager.

Where an application is expedited it should be dealt with within 7 to 10 calendar days, though this period may have to be extended, if, for instance, third parties have to be contacted. There is no fee for an expedited request. The Information Manager must be satisfied that there are good reasons for expediting an application.

There are special time limits where an application relates to personal information which may affect a third party so that the third party can be informed.[14]

[12] FOI Law s. 7(4).
[13] FOI Law s. 7(4).
[14] See Chapter 4 below.

The prescribed time to acknowledge an application and dispatch the acknowledgement is not more than 10 calendar days from receipt; this also applies where the application is received after being transferred from another public authority.

Failure to comply with time limits

Information Managers should not leave their decisions until the last possible moment. The fact that they have 30 calendar days in which to respond does not mean they should wait until day 29. Decisions should always be made as quickly as possible. If a public authority gives no response, fails to make a decision or fails to communicate information within the time lines laid down, an applicant can apply for an internal review.[15] If the internal review is unsuccessful, the applicant can appeal to the Information Commissioner.[16] The Information Commissioner can make the decision which the authority should have made or can give fresh directions for the time within which the authority is to act.[17]

In the UK, a substantial proportion of applications to the UK Information Commissioner have been about time delays and the UK Information Commissioner has usually allowed a short extension of time. The Information Commissioner's decisions can be enforced either by a reference to a disciplinary authority[18] or he may refer the matter to the Court if his decisions are not complied with. The Court will then deal with the matter as if it was a contempt of court.[19] If the FOI Law is to be a success, it is very important that Information Managers ensure that applications are dealt with promptly and within the time limits set out by the FOI Law and the FOI Regulations.

[15] FOI Law s. 33.
[16] FOI Law s. 42.
[17] FOI Law s. 42(4) and 43(3)(b).
[18] FOI Law s. 43(3)(c) and 44(2)(d).
[19] FOI Law s. 48.

Extensions

Section 7(4) of the FOI Law allows a public authority to extend the period of 30 days for responding to applications for a further period not exceeding 30 days where there is a reasonable cause for such an extension. Good practice dictates that an Information Manager should inform the applicant before the expiry of the initial 30 days that the authority is going to extend the period for an additional 30 days. A reasonable cause for an extension would, for example, be where records are difficult to locate, or where there is a shortage of staff to carry out the work due to illness. However, this extension should only be used in rare circumstances.

An authority is not required to comply with a request if compliance would unreasonably divert its resources.[20] If the authority intends to refuse a request on this ground, the Information Manager should send a written notice to the applicant inviting consultation to narrow the scope of the request and given a reasonable opportunity for consultation. The Information Manager should always explain how the request is likely to divert its resources. Note: the 30 calendar day period for responding to the request is suspended from the time a notice of diversion of resources is sent until the applicant narrows the scope of his request.

Computation of time

The 2, 10, 14 and 30 day periods do not include the day on which the application is received.[21] Under section 8 of the Interpretation Law, unless a contrary intention appears, where the last day of the period is a Sunday or a public general holiday ("excluded days") the period shall include the next following day, not being an excluded day.[22] The FOI Law, however, refers to *calendar days*. This amounts to a contrary intention so as to exclude the definition in the Interpretation Law. *Calendar days*, therefore, means every day, whether or not it is a weekend,

[20] FOI Law s. 9(c).
[21] FOI Law s. 7(4) and The Interpretation Law (Cap 70 of the 1995 Revision) section 8(a).
[22] Ibid.

public holiday or other non-working day. Therefore 10 or 30 *calendar days* means 10 or 30 days, without any allowance for public holidays, weekends and other non-working days.

However, if the last day of the period is a Saturday, Sunday or a public holiday, the deadline becomes the next working day. The use of calendar days increases the time pressure on Information Managers, but a failure to meet the deadlines laid down in the FOI Law must be avoided at all costs. If there is a possibility that the deadlines will not be met, the applicant must be informed at every stage of the status of his request and the progress which has been made.

Flow chart of time lines

Ongoing efforts for Information Managers: • Know whether your authority is subject to the FOI Law (s.2): If yes, then use the procedures below; • Maintain publication scheme FOI Law (s.5), usually online; • Use good records management practices: keep only necessary records, and organise them to support rapid searches for information; and • Work with the authority's own web site and www.foi.gov.ky to make sure the public knows where and how to request information.			
Receipt of request (in any form):			
1	Is the information already publicly available? (s.6(4), 9(d))	**YES >**	Advise applicant where and how to obtain it.
	NO		
2	Is the request complete? • In writing • Full postal address • Sufficient description of information sought • Preferred form of access • For personal information, includes sufficient ID	**NO >**	Provide "advice and assistance" to help applicant complete the request. Often the missing information can be filled in during a quick phone call. As needed, assist applicants who have disabilities or face other barriers (e.g. language).
	YES		
3	Did the applicant request expedited service? • IM agrees there is a 'good reason' for putting this request ahead of others.	**YES >**	Follow all procedures, but conclude initial cycle within 7-10 days (instead of 30 days). Advise that there will still be delays if third parties need to be consulted.
	NO		
4	• Timestamp the request and enter it in a log of FOI requests; 30-day timeline starts the following day. • Pass to the IM within 2 days. • Create a file for the request.		
Initial assessment:			
5	Does this authority hold the record? (s.1(2))	**NO >**	• Transfer the request to the public authority which does hold the record(s). Advise applicant within 10 days. Complete the transfer of paperwork within 14 days; timeline starts over at new authority.

			• If a UK government authority holds the record, advise that application can be made under UK FOI Act. (If in doubt, ask for a certificate from the Governor or UK Secretary of State.) • If no record held at all, advise applicant of decision and rights of appeal.
	YES		
6	Is this a vexatious request? (s.9(a))	**YES >**	Advise applicant of refusal and rights of appeal.
	NO		
7	Has the applicant recently made a substantially similar request? (s.9.(b))	**YES >**	Information Manager's must assess need to repeat request i.e.: (If information was genuinely lost or if the information has changed.) If no extenuating circumstances, advise applicant of refusal and rights of appeal.
	NO		
8	Would complying with the request unreasonably divert resources? (s.9(c))	**YES >**	Advise applicant and work with applicant to narrow the scope of the request. Timeline suspended until the request is narrowed. If cannot reduce, then advise applicant of refusal and rights of appeal.
	NO		
9	Send an official acknowledgement letter to the applicant within 10 days.		
Processing (start as soon as possible, in case third parties are involved):			
10	• Search for records relevant to the request (in all possible locations) • Keep notes on all steps taken in searching		
11	Are any of the records the subject of an Exemption Certificate?	**YES >**	Advise applicant of exemption decision. If Governor's Certificate; no rights of appeal. If Minister's Certificate; right to seek judicial review by Grand Court.
	NO		
12	Tentatively decide upon full release, partial release, or full exemption, based on: • other laws that prevent release; • exemptions in the FOI Law; or • the public interest (as appropriate per exemption)	**ALL EXEMPT >>**	Prepare decision letter for applicant, giving reasons why records are not being released and information on the applicant's right of appeal.
	SOME OR ALL NOT EXEMPT		

13	If partial access is planned, make notes on records to be redacted (keep in request file).		
14	Does any of the material proposed to be released concern third parties?	**YES >**	By day 14, advise the third parties; they have 28 days to provide objections in writing. The decision on release will be delayed; see flowchart in Chapter 6 for full procedure.
	NO		
15	Is more than 30 calendar days total required to deal with this request properly?	**YES >**	Timeframe for response can be increased by 30 additional days for good cause. Notice must be given to the applicant.
	NO		
16	Determine mode of access and any associated costs. Within 30 days, send the applicant an official decision letter with these details and request for payment if appropriate. If records will be partially exempted (redacted), explain reasons. Keep a copy of the letter in the request file.		
Release			
17	Does applicant apply for a waiver of fees within 14 days of receiving the decision letter?	**NO >**	The opportunity to apply for a waiver of fees has expired.
	YES		
18	The Principal Officer determines whether a waiver of fees is appropriate. Is it granted?	**YES >**	Advise applicant of waiver and prepare documents as per step 21
	NO		
19	Advise applicant of refusal and of rights of appeal.		
20	Does applicant pay within 30 days of receiving the decision letter?	**NO >**	The request is deemed to have been withdrawn unless request for an extension is received.
	YES		
21	• If personal information will be released, confirm identity of applicant. • Within 14 days of receiving payment (or waiving fees), provide access to non-exempt portions of the		Note: As per third party procedure, access to disputed documents must be delayed until the third parties' appeal period has passed.

	records. • Make sure the file contains exact information about what was released (either copies of what was disclosed, or notes to allow it to be reconstructed). • Add this case to the authority's FOI disclosure log.		
	END		
Review/appeal:			
22	Applicant must appeal in writing and within the time limits (30 days – can be extended to 60 days).		
23	Information Manager's must: • Log the application for review on www.foi.gov.ky (on day of receipt) • Acknowledge the request for review • Provide the file associated with the original request to the person who will conduct the review • Be available to discuss the original decision if necessary		
24	Did the authority's Principal Officer or Minister sign the original decision letter?	**NO >**	Any higher officer can do internal review. Decision must be made within 30 calendar days
	YES		
25	The Information Commissioner conducts the review.		
	The person conducting the review may: • Review the application from the beginning; • Contact anyone involved in the original decision; and • Consult with the FOI Unit. The person conducting the review must: • Record the decision in the file(s); • Notify the applicant (including any further rights of appeal); • If additional material is to be released, inform the authority's Information Manager who will arrange release; and • Record data on the tracking system.		

F. Responses

Provision of documents

There is a variety of possible responses to a request for information under the FOI Law. First, a public authority may grant full access to the record which the applicant seeks if the authority holds the record, if it is a record which comes within the scope of the FOI Law and if the record is not subject to any exemption.

Partial access

Secondly, a public authority may grant partial access to a record which contains some information which can be disclosed and some information which is subject to exemption. Here the authority must grant access to a copy of the record with the exempted matter deleted or blocked out ("redacted"). Information should not be deleted or blocked out of the official (original) record. In each case the Information Manager must consider how much of the record falls within an exemption, specify which exemptions apply and be satisfied that the part of the record which is to be disclosed is not subject to any exemptions. If partial access is granted, the authority must tell the applicant that it is providing a redacted version of the record and must say which exemption it relies on to justify making the deletion (see s.12 of the FOI Law).

Deferral

Thirdly, a public authority may defer access:

a) where an enactment requires the publication of the record within a particular period, until the period has expired;

b) if the record was prepared for presentation to the Legislative Assembly, or for the purpose of being made available to a particular person or body, until the expiration of a reasonable time in which to allow that to happen; or

c) if the premature release of the document would be contrary to the public interest, until the occurrence of any event after which, or the expiration of any period beyond which, the release of the record would not be contrary to the public interest.

Where an authority decides to defer access for any of these reasons the Information Manager should, within 14 days of the decision, inform the applicant and where possible tell him how long the deferment is likely to last.

Refusal

Fourthly, the public authority may refuse the application where an exemption applies.[23]

Missing or destroyed records or records which do not exist

Before a request is refused on this ground, all reasonable steps to locate the records must have been taken. Such steps include:

- a search of the file plan, index or registry system;
- a physical search of the filing area, filing cabinets etc.; and
- enquiries of relevant staff.

If Information Managers cannot locate a record after a reasonable search they should, as a matter of good practice, be able to describe their records management system and explain how the records were created in the first place, know whether the records were active or dormant and know who has responsibility for those records, who searched, and where they searched and how. The search process should be thoroughly documented on the registered file for the request. Missing or destroyed files should be noted in the file plan, index or registry system.

[23] See chapter 4 below.

The Information Manager must inform the applicant that the record does not exist, is missing or has been destroyed and must set out the reasons for reaching this conclusion. It is good practice to give this information to the applicant on the telephone or face to face, but it must be confirmed in writing.

Records available elsewhere

If the requested records are available elsewhere (e.g. on a public register, published to a website, or available for purchase) the Information Manager must inform the applicant in writing where the records are kept and how he can obtain access to them. However, it must be remembered that s.6(4) of the FOI Law provides that where a record is open to access by the public under any other Law, as part of a public register or otherwise, or is available for purchase by the public under administrative procedures established for that purpose, the public must obtain access to that record in accordance with that Law or those procedures and not under the FOI Law.

Case studies

Partial access

The case of *The Foreign and Commonwealth Office and the Information Commissioner*[24] upheld the decision of the Information Commissioner that a draft of the September Dossier on "Iraq's Weapons of Mass Destruction", said to be prepared by Mr John Williams, should be disclosed because the balance of the public interest was in favour of disclosure, but ordered that marginal comments made on the draft should be redacted. The redaction was presumably ordered on the basis that it would prejudice relations between the UK and other states. The UK has an exemption similar to that in section 15 of the FOI Law ("disclosure would prejudice the international relations of the Islands").[25]

Deferral

[24] 22 January 2008, appeal number EA/2007/0047.
[25] Section 27 of the UK FOI Act 2000; the UK exemption is conditional exemption unlike the FOI Law s.15 which is not subject to the public interest test.

The following is a worked example.[26]

Information requested:
The incentive mechanism included in the contract for the refurbishment of government offices over a four year period, together with the value of any sums recovered in years 1 to 3.

Timing of the request:
Post contract award, in the fourth year of contract.

Discussion:
The incentive mechanism provides for sums being recovered if the refurbishment slipped against the agreed project plan. Sums recovered would be based on a percentage of the relevant stage payment, with the percentage increasing in defined increments determined by the number of days slippage. The supplier wants the incentive mechanism to be confidential, as they feel that revealing their financial risk would affect their share price and harm their commercial interests. They are also concerned that disclosing actual sums recovered by the authority would likewise affect their market position, until their accounts are officially published.

The authority acknowledges that in both cases section 21 of the FOI Law (records relating to commercial interest) is relevant. However, incentive mechanisms are a key element for managing risk and performance and there is a strong public interest in opening such mechanism to scrutiny. In this case, revealing all the details of the incentive mechanism could enable the sums recovered to be deduced. As the degree of harm to the commercial interests of the supplier would be greater if the actual sums were revealed, which is not outweighed by the public interest in disclosure, it is decided that limited details of the mechanism should be disclosed (e.g. remove one of the calculation elements).

[26] This example is adapted from an example in the guidance for employees of the UK Office of Government Commerce.

As the commercial sensitivity of sums recovered reduced significantly once accounts are published, the supplier acknowledges after consultation, that the sums for years 1 and 2 can be disclosed. The sums for year 3 will be withheld until the accounts for year 3 are published.

Decision:
Disclose incentive mechanism and sums recovered for years 1 and 2 with some information removed.

Withhold sums recovered for year 3 until the accounts for that year are published, citing sections 21 and section 11(2)(c) (premature release contrary to public interest) of the FOI Law.

G. Vexatious and repetitive requests and diversion of resources

Vexatious requests

A public authority is not required to comply with a request which is vexatious or where the authority has recently complied with a substantially similar request from the same person.[27]

There is no definition of "vexatious" in the FOI Law. Vexatious requests may be difficult to spot and an Information Manager should consider obtaining legal advice if he is considering treating a specific request as vexatious. Section 6(3) of the FOI Law provides that an applicant for access of a record shall not be required to give any reason for requesting access to that record. The motives of an applicant for making a request for inspection of record under the FOI Law cannot be inquired into; it is therefore the nature and effect of the request, rather than the intentions of the applicant, which should determine whether the request is an abuse of the right of access, or otherwise "vexatious".

Whether an application is vexatious needs to be assessed by reviewing all the circumstances of an individual case. If a request is not a genuine endeavour to access information for its own sake, but is aimed at disrupting the work of an authority or harassing individuals within it, then

[27] FOI Law s. 9(a) and (b).

it may well be vexatious. The use of abusive or threatening language will make an application vexatious. The request may also be vexatious if it clearly does not have any serious purpose or value. It may, however, be better just to answer such a request. The Hampshire Police Force answered an inquiry about the number of unmarried police officers employed in the force, though arguably it could have said the request was frivolous and therefore vexatious.

Repetitive requests are easier to deal with. The Information Manager should consider the content of the information previously provided and whether there has been any change in that information in the interval between the initial and the repeated request.

Diversion of resources

A public authority is not required to comply with a request if it would unreasonably divert its resources.

The Information Manager should make a determination on unreasonable diversion of resources on a case by case basis. He should take into account the nature and size of the authority, the number type and volume of documents falling within the request and the work time involved in fully processing the request. This includes time spent identifying, locating or collating documents, examining them, consulting with other people, and notifying the applicant of any interim or final decision on the request. It does not include time wasted when the document is not found in the place it ought to be located, or where the relevant filing system unreasonably fails to show the place in which the record ought to be located. Poor records management systems are not an excuse for failing to meet the requirements of the FOI Law.

Case Studies

These case studies show example of (i) a vexatious request which would require a diversion of resources and (ii) a repeated request.

(i) Case Study One:

An applicant seeks a record of all the holidays which members of the authority have taken in the last 10 years and the number of times each member of the authority has left the Island. The Information Manager concluded that this should be treated as vexatious because it was designed to cause the public authority inconvenience, harassment and expense, and he cited *Attorney-General v Barker* [2000] 1 FLR 759 where Lord Bingham said "*whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that involves an abuse of process*."

The Information Manager also concluded that it would require a diversion of the authority's resources which could not be justified. The Information Manager, however, asked the applicant whether he would like to make some narrower application which the authority might be able to grant.

(ii) Case Study Two:

The applicant says that he was supplied with the information he seeks when he made a previous request, but he has lost it and needs to be sent it again. In these circumstances the Information Manager might well conclude that though this is a repeated request, it is one which should be granted.

H. Fees and waivers

Charges

Section 13 of the FOI Law provides that the reproduction of information may be made conditional upon the payment of a reasonable fee which must not exceed the actual cost of searching for, reproducing, preparing and communicating the information. The Governor in Cabinet is given power to make fee regulations.

Charges for reproduction of records are set out in the Schedule to the FOI Regulations.

No fee is to be charged where the record is inspected within a public authority.

A public authority must provide the applicant with notice of the fee for reproducing the record(s). The fee should be paid to the authority after the decision has been taken to provide the information requested but before the copy is actually provided. Documents must be provided to the applicant as soon as practicable but not later than 14 calendar days from the date the fee is received by the authority.

A request should be deemed to be withdrawn where the applicant has not paid within 30 days of receipt of a notice of the fees to pay. The applicant may request an extension of an additional 30 days to make payment to the public authority once the initial thirty day period has not expired. The Information Manager shall make all reasonable efforts to contact the applicant prior to the expiry of the thirty days to inform the applicant that payment needs to be made within the time prescribed.

Where a fee should be charged, payment may be made in cash, cheque or bank draft, or other methods of payment at the discretion of the authority. Payment can be made in US Dollars or CI Dollars. Authorities must issue a receipt for these monies. This revenue is to be treated as Entity Revenue and should be set against the cost of reproduction.

Grounds for waiver or reduction of fees

No fee shall be charged where the Principal Officer of the authority determines that it is an appropriate case to grant a waiver, for example in the case of financial hardship. An application for a waiver should be made in writing setting out the grounds why it would be reasonable to waive the fees. An application for waiver should be made within 14 calendar days from the receipt of the fees to be paid.

Financial hardship

The applicant should be asked to provide evidence of financial hardship. Those in receipt of Government social welfare benefits or pensions should be asked to show proof of this. In other cases, the applicant could be asked to provide bank statements or payslips as evidence of their income. Income which is equivalent to Government benefits would usually qualify the person as in financial hardship.

I. Forms of access

Inspection, copies and transcripts

The FOI Law provides for access to the record to be given in various forms: inspection of the record; a copy of the record; listening to sounds; viewing visual images; or a transcript of the record. Inspection will be popular with applicants because it is free. Copies may be in writing or in electronic form. Where the record consists of a recording of sounds or images, an applicant should be given the opportunity to see or listen to the recording or image.

An applicant who asks to be given access to the record in a particular permissible way should be given access in that way. The final decision is, however, that of the Information Manager, and there may be reasons why some other method is to be preferred, either because it is easier, or in the case of a fragile record, because it will do less damage to the record, or because it would constitute an infringement of intellectual property rights subsisting in any matter

contained in the record. Where a breach of copyright can be avoided by showing the applicant a record rather than giving the applicant a copy, this is what the Information Manager should do[28] subject to the fair dealing provisions in the Copyright Act 1956.

The status of a record should be made clear to the applicant: if it is a copy or an incomplete document, the applicant should be told so.

The role of the officer supervising the inspection is to facilitate and supervise the access to the record, to protect them from damage and to return them as soon as the inspection is complete. The officer is not there to answer questions about the record, though the officer should note any questions which the applicant raises and the officer should in general be as helpful as possible. During the inspection, the applicant should not be permitted to write on, remove or deface any document

Sending documents

If copies of records are being sent by post, the Information Manager should satisfy himself as far as possible about the identity of the applicant, e.g. by checking that the signature matches that of the authority's records. It is good practice to send documents by registered post or courier. In the case of very sensitive personal records, collection at the public authority's office should be arranged so that the applicant's identity can be confirmed using a photo ID such as a driver's licence or passport or any other form of identification as authorized by the authority.

Preparation

If the request is for the entire contents of a file, each document in the file and each page of a document should be numbered in indelible ink. A mechanical paginator should be used to reduce errors in numbering; however if software, such as Adobe Acrobat and Redax are being used, there is a facility to automatically number each page using the software, which is

[28] See Chapter 9 below and FOI Law s. 10(3)(b).

satisfactory. Any documents exempt from release should be noted and a copy of the decision letter should be attached to the register file for the request (without any details identifying the applicant) showing which documents were released in full, in part or refused.

Where documents are of more than one page, each page of the document should be numbered continuously and the front and back numbered separately for a two sided document. The numbering of the documents in this way will serve two purposes: first, it will assist the Information Manager to maintain the sequence of the file; and secondly it will serve as a record of the documents released.

Prior to inspection of the records by the applicant the Information Manager should ensure that all relevant records are present and in sequence and have been numbered appropriately.

J. Notification of the decision

Recording the decision in writing with reasons

The applicant must be notified of the public authority's decision in writing and the notice must state the reasons for the decision. If the application is refused, the record of the decision must include:

- the reason(s) for the decision;
- a statement of the findings of any material issues or questions of fact;
- where relevant, the public interest factors taken into account;
- a description of the records without revealing any exempt matter: the description should state briefly what records are included; and
- details of the exemptions, including the section numbers under the FOI Law, under which disclosure of records or parts of records, is refused.

Case Study: An example of a decision with reasons

The information requested relates to the treatment of a patient at the Mercy Hospital and the information is contained in both medical and nursing notes.

The definition of "personal information" in the FOI Regulations includes: "information about the individual's health and health care history." This information is therefore the personal information of the patient. The information is not known to any member of the public, including the applicant, who is a sister of the patient.

The patient, who has been consulted under the provisions of the FOI Regulations, objects to the disclosure of any part of the information.

The finding is that there is no countervailing interest in the public, including the applicant, having access to any part of the information. Therefore providing access to any part of the information under the FOI Law to the applicant, would be unreasonable disclosure of the personal information of the patient

This is only an example. Each case must be considered on its own facts and the reason must be drafted accordingly. This manual also provides a standard letter of refusal.[29]

Authentication

Section 10(4) of the FOI Law provides that copies of records to which access is granted shall be authenticated by such persons and in such manner as may be determined by the Attorney-General. It is the Information Manager's responsibility to see that this is done in accordance with such guidance as is provided.

K. Frequently asked questions[30]

Question and answers:

1. When exactly do the provisions of the Freedom of Information Law 2007 take effect?

The FOI Law will take effect in January 2009. The Governor will be asked to bring the FOI Law into effect.

[29] See Chapter 11 below.
[30] These questions are based on and adapted from those in the Guidance Manual for the Irish Department of Social and Family Affairs.

2. What is the time limit for providing responses under the FOI Law and when does the clock start ticking i.e. is this the day the authority receives the request?

The time limit is 30 calendar days. The clock starts ticking on the day following receipt of a valid request which should therefore be day 1 in calculating the 30 days.

3. To what lengths do public authorities and Information Manager's need to go to establish the identity or motives of the applicant?

It is important to obtain a name and postal address for the applicant; an email address may not be sufficient, depending on the form of information requested. If a person is seeking personal information about himself, it is important to verify his identity. As regards motives, section 6(3) of the FOI Law provides that an applicant for access to a record shall not be required to give any reason for requesting access to that record. Motive is irrelevant.

4. How do we handle generalised requests e.g. "tell me everything about the government's computer system"?

This would be too vague for an accurate response and it would be appropriate to go back to the applicant and ask the applicant to be more specific. There is also a duty for the Information Manager to provide help and assistance to refine the request.

5. Can suitably sensitive documents that meet exemption criteria be noted "Not for disclosure under FOI"?

No. This would not be useful. The sensitivity of documents tends to decline with the age of the document; indeed many exemptions do not apply to records which are 20 years old, although some apply until the record is 75 years old, and personal information is exempt without limitation as to time. Such a marking is to be avoided as it pre-empts the considerations and judgments that have to be made on a case by case basis.

6. Will out of hours contacts have to be released? Some phone numbers could be ex-directory?

These could be withheld, as there is an exemption in section 23 of the FOI Law covering personal information. Section 23, however, is subject to the public interest test so there is a possibility that the contact details of senior staff might have to be disclosed.

7. Who will be responsible for responding to requests, especially those covering several subjects and authorities?

Responsibility for responding to requests lies with the owner of the information. It will be the responsibility of the Information Manager to liaise with other authorities and to pass on requests which apply to other authorities as well as the authority of the Information Manager.

8. If information we know exists cannot be found, do we simply say it is not available/can't be located?

Every effort should be made to track the record down and if unsuccessful, we should explain to the applicant exactly why the request cannot be dealt with fully and outline in detail the steps taken to search for the missing document.

9. Would an Information Manager be required to check the mailboxes and "my directories" of staff, or simply rely on them to provide the records? Will existing disciplinary procedures cover instances where staff fail to co-operate or destroy material deliberately to prevent disclosure?

This would not be a standard requirement but Information Manager's may need to ask them "where would I look if I wanted this information?" The FOI Law[31] makes it a criminal offence to deliberately tamper with or concealing information to prevent disclosure. When asking staff to search for relevant records under FOI, they should be advised of the broad meaning of the

[31] FOI Law s. 55.

term "records", and of the penalties for non-compliance under the FOI Law. Information Manger's can ask for their staff's response in writing, confirming that all relevant documents have been supplied, or that none can be found.

10. How are cases, where the release of information is refused, to be handled? Will this be handled by the Information Commissioner?

Any refusal of information must be made with the approval of the Information Manager who may consult other senior members of the authority and take legal advice where necessary. If the information is withheld, the applicant is advised why access to the records is being refused and he may then ask for an internal review to be carried out by a more senior officer who has not been involved in, or consulted about, the original decision. For certain exemptions, such as section 20, the decisions are made by the Minister or Chief Officer rather than the Information Manager. If the applicant is still unhappy, he can apply to the Information Commissioner who will determine the matter on appeal.

6
MAKING A DECISION

A. General issues to consider

The general rule

The general rule is that a person making a request has a right to obtain access to a record other than an exempt record.[32] A public authority has a duty to grant the applicant access if it is not an exempt record.[33] Where matters are finely balanced, including where the public interest test applies, doubts should be resolved in favour of disclosure.

Consideration Checklist

Here is a checklist of matters the authority should consider before reaching a decision:

- Does the FOI Law apply?
- Does the authority have the record?
- Does the request identify the record which the applicant seeks with sufficient clarity to enable it to be found?
- Is the record already in the public domain? Remember that section 6(4) of the FOI Law provides that if a record is open to access under any other enactment as part of a public register or is available for purchase in accordance with administrative procedures the record shall be obtained in that way.
- Does another Law exclude release?
- Have any Ministerial Certificates been issued which help to answer the questions the authority faces?
- Do any of the ten exemptions set out in Part III of the FOI Law apply?
- Does the public interest test apply?

[32] FOI Law s. 6(1).
[33] FOI Law s. 7(3).

B. Certificates of Exemption

Issued by the Governor in Cabinet

The Governor in Cabinet may issue a certificate to the effect that a record is an exempt record where he is satisfied that its disclosure would, or would be likely to, prejudice the maintenance of the convention of the *collective responsibility* of Ministers.[34] The certificate may apply to part of a record.[35] The certificate has to specify the basis of the exemption. Where such a certificate is issued under the hand of the Governor it is conclusive that the record is exempt, and no judicial proceedings or quasi judicial proceedings of any kind will be entertained in relation thereto.[36] There is no time limit on the certificate.

The meaning of *collective responsibility* was stated in absolute terms by Lord Salisbury in 1878:

> *For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably bound and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by colleagues. It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the essential principles of parliamentary responsibility established.*[37]

In 2005, Tony Blair, the UK Prime Minister, stated the doctrine in this way:

> *Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a*

[34] FOI Law s. 25(1).
[35] FOI Law s. 25(2).
[36] FOI Law s. 25(3).
[37] *Life of Robert, Marquis of Salisbury*, vol II, pp219-20.

united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and in Ministerial Committees be maintained.[38]

Issued by Ministers

The scope of this certificate is quite narrow, though it extends to Ministers who are not members of the Cabinet. A Minister, on his own, may issue certificates that a record is exempt, if the Minister is satisfied that it relates to a record to which the exemptions in section 15 (security, defence and international relations), section 16 (law enforcement), section 20(1)(b)(c) and (d) (prejudice to the effective conduct of public affairs or it is advice given by or on behalf of the AG) or section 22 (heritage sites and endangered species) apply. In each case, the Minister has to specify the basis of the exemption.[39] This means giving reasons for the decision. Such certificates, in contrast to certificates issued by the Governor in Cabinet, are subject to judicial review. Such certificates are good and may be relied upon, unless and until, they are set aside by an order of the Grand Court made on an application for judicial review because, for example the Grand Court decides that the reasons given by the Minister lack any rational basis.

C. Exemptions and the public interest test

Introduction

It should come as no surprise that legislation providing for the disclosure of information as a right contains extensive exemption provisions. The FOI Law is no exception. Part III of the FOI Law sets out exempt records. The exemption in section 19(1)(b) (records revealing Government's deliberative processes) is in effect an absolute one, protecting that class of records entirely. The other exemptions are conditional; they apply on the application of a prejudice test, or on other harmful consequences of disclosure. In each case therefore, the Information Manager has to consider whether there has been prejudice or whether there are

[38] Bradley and Ewing on *Constitutional and Administrative Law* 14th edition 2007 p110.
[39] FOI Law s. 25(10)(b).

other harmful consequences. If there is no prejudice and there are no harmful consequences, the information must be disclosed. For seven of the ten exemptions, there is also a public interest test; this means that notwithstanding that the record falls within one of the seven exemptions, access should be granted if it is in the public interest.

How many exemptions apply?

The record should not be disclosed if any one exemption applies, but in some cases more than one exemption may apply. It is good practice for the Information Manager to consider and identify all the exemptions which could apply. This is because:

a) authorities are under a duty to use their best endeavours to ensure that their decisions and the reasons for their decisions are made public (unless this would cause exempt information to be made public); and
b) because on an internal review or on an appeal to the Information Commissioner, a decision by the Information Manager that one particular exemption applies may be overturned yet the decision not to disclose the record may be upheld if additional exemptions were relied upon.

Summary of the exemptions:

Stated succinctly, the records which are exempt under the FOI Law are those relating to:

1. security, defence or international relations (section 15);
2. law enforcement (section 16);
3. legal privilege or where disclosure would constitute an actionable breach of confidence (section 17);
4. the national economy (section 18);
5. the government's deliberative processes (section 19);
6. prejudice to the effective conduct of public affairs (section 20);
7. commercial interests (section 21);
8. heritage sites and endangered species (section 22);

9. personal information (section 23); and
10. endangering health and safety (section 24).

How long do the exemptions last?

In general, the exemption of a record or part of a record does not apply if the record has been in existence for 20 years. This means that if a file contains documents that span a period of more than 20 years, most exemptions no longer apply to those documents 20 years old, or older. Records relating to any historical, archaeological or anthropological resources or anything which is eligible for placement on the Heritage Register under section 21 of the National Trust Law (1997 Revision) or any other Law relating to the preservation of the heritage of the Islands are exempt for 75 years.[40] Records which if released, would amount to the unreasonable disclosure of personal information, are exempt without any limit to time. Certificates of Exemption remain in effect until they are set aside by the Governor or the Grand Court.

The application of the public interest test

Under the FOI Law, the public interest test applies to the exemptions for:

1. the national economy (section 18);
2. opinions, advice or recommendations prepared for the Cabinet or Cabinet committees (section 19(1)(a));
3. prejudice to the effective conduct of public affairs; inhibiting the exchange of views; legal advice given by or on behalf of the Attorney-General; other prejudice to the conduct of public affairs; (section 20(1)(b)(c)(d));
4. commercial interests (section 21);
5. heritage sites and endangered species (section 22);
6. personal information (section 23); and
7. endangering health and safety (section 24).

[40] FOI Law s. 22(2).

Under the FOI Law, the public interest test does not apply to the exemptions for:

1. security, defence and international relations (section 15);
2. law enforcement (section 16);
3. legal professional privilege (section 17);
4. a record of consultations or deliberations arising during the course of the proceedings of Cabinet or Cabinet Committees (section 19(1)(b)); and
5. the maintenance of the convention of ministerial collective responsibility (section 20(1)(a)).

Responsibility for decision-making

The initial decisions as to whether the exemption in section 20 (*the effective conduct of public affairs*) applies, is not to be made by the Information Manager. In the case of subsection 20(1)(a) (*prejudice to the maintenance of collective responsibility)* the decision is to be made by the Minister concerned. In cases of subsections 20(1)(b)(c) and (d) (*inhibiting exchange of views, legal advice given by or on behalf of the Attorney-General and other prejudice to the conduct of public affairs)* the decision is to be made by the Minister or Chief Officer concerned.[41] The Information Manager should ensure that requests which raise questions about these matters are referred to the Minister or the Chief Officer concerned as soon as possible. All other decisions on exemptions may be made by the Information Manager.

The exemptions in common use

The exemptions, which Information Managers will most commonly have to consider, are likely to be those relating to commercial interests, personal information and legal professional privilege (which includes confidential information). Law enforcement will also occur regularly. In 2007, before the Information Tribunal in the UK, the exemptions which featured more than any others were personal information and legal professional privilege. Information

[41] FOI Law s. 20(2).

Managers have to consider every application on its merits and must be familiar with all the exemptions.

Redaction

A public authority may decide to mask parts of a document disclosed to an applicant on the basis that those parts of the document are exempt from disclosure. The blanking out process is called *redaction* and the document is said to be *redacted.* An Information Manager may choose to redact part of the record where only that part is subject to one of the exemptions. The Information Manager must make sure that the redacted document does not give a misleading impression of the record held by the authority. This can usually be done by adding a note which sets the redacted document in context. If in doubt the Information Manager should seek legal advice.

D. The Exemptions

Security, defence and international relations (section 15)

15. Records are exempt from disclosure if:

> *(a) the disclosure thereof would prejudice the security, defence or international relations of the Islands;*
> *(b) those records contain information communicated in confidence to the government by or on behalf of a foreign government or by an international organization.*

Before applying this exemption, Information Managers have to be satisfied as to (a) prejudice, and as to (b) information communicated in confidence. For the purposes of this exemption, any information from a government or international organisation is confidential at any time while the terms on which it was obtained require it to be held in confidence, or while the circumstances in which it was obtained make it reasonable for the government or organisation

to expect that it will be so held. The most obvious example of such confidential information is intelligence information shared with the Cayman Islands Government by another country's Government. The public interest test does not apply to this exemption.

Law enforcement (section 16)

Information Managers should be aware of the scope of the law enforcement exemption:

16. Records relating to law enforcement are exempt if their disclosure would, or could reasonably be expected to:-

a) endanger any person's life or safety;
b) affect
i) the conduct of an investigation or prosecution of a breach or possible breach of the law; or
ii) the trial of any person or the adjudication of a particular case;
c) disclose, or enable a person to ascertain the existence or identity of a confidential source of information, in relation to law enforcement;
d) reveal lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law, where such revelations would, or could be reasonably likely to prejudice the effectiveness of those methods or procedures;
e) facilitate the escape of a person from lawful detention; or
f) jeopardise the security of prison.

The FOI Law does not allow for the release of records which apply to the security or intelligence services (which includes the Royal Cayman Islands Police, the Special

Constabulary within the Royal Cayman Islands Police and Customs Department) in relation to their strategic or operational intelligence-gathering activities.[42]

NOTE:

- The public interest test does not apply to this exemption.

Under each of the headings of this exemption, the Information Manager has to consider whether disclosure of the record would have, or could reasonably be expected to have, the adverse consequences which the section identifies. If, on the facts of the case, the disclosure would not have the adverse consequences, the manager must disclose the record.

Section 16 (a) "Endanger any person's life or safety"

This has proven a difficult exemption in other jurisdictions because of the requirement for evidence to support the "reasonable expectation" of danger. A leading case in Australia where this exemption was upheld concerned the identity of people involved in animal experimentation. The judge in that case said:

> *... if it were assumed that experimenters are not to be visited with danger or risk to their physical safety either through harassment, pressure or some form of violent persuasion, there appears little value to anyone in their being identified in the way sought. ... It is not necessary to show that the risk to which s.31(1)(e)* [equivalent of section 16(a) of the FOI Law] *refers is from the respondent himself but rather from anyone should the information become generally known.*
>
> *It must also be acknowledged that exemption applies where it "would be reasonably likely" that there be a danger to physical safety, not that physical harm will occur.*

[42] FOI Law s. 3(5)(b) and s. 3(8).

The risk of endangerment might well be thought to be greater than that of physical harm. The risk to be guarded against is of an experimenter being placed under threat, that is, in a position where he or she might or might not be physically harmed.[43]

The evidence in this case included bomb threats. In other cases, evidence was brought as to the applicant's "severe verbal abuse, threats, property damage and physical abuse towards departmental staff"[44] and another where the applicant had "a history of violence, was serving a 13 year sentence for wounding with intent to do grievous bodily harm, and had a number of prior convictions including convictions for crimes involving physical violence".[45]

Section 16 (c) "Confidential source of information"

To determine whether a source of information is confidential, the decision-maker must be satisfied that that the information was supplied on the understanding, express or implied, that the informant's identity will remain confidential. There is case law in other jurisdictions to support that this section may also apply even if the information is old or wrong and the informant is untruthful or malicious.

It is not essential that the confidential sources provide the information under an express agreement. In some situations, an implied pledge of confidentiality can be made out from the circumstances surrounding the matter.[46] For example, the informant may have supplied the information under the reasonable expectation that their identity would be kept confidential. Even though a denunciation letter may not expressly indicate that it was both written and received in confidence, it may be possible to imply that it was written and received under the pledge of confidentiality. In some cases, confidentiality can be inferred from the practice of the authority to receive similar types of information in confidence. Where the informant was

[43] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836.
[44] *Re Matthews and Department of Social Security* (Commonwealth AAT, N90/363, 21 December 1990, Purvis J, unreported).
[45] *Re Mallinder and Office of Corrections* (1988) 2 VAR 566.
[46] *Re Department of Health and Bernard Vincent Mckay v Lois Jephcott* [1985] FCA 370; 8 FCR 85.

anonymous, the authority may be able to show that there was a pledge of confidentiality given.[47]

In *Alcock v Information Commissioner*[48] a case before the UK Information Tribunal, Mr Alcock was trying to identify a person who had made allegations against him to the police which had (as the Tribunal put it) "resulted in his being suspended from work, suffering health problems and eventually losing his job, his house, explosives licence and other unfortunate results which have had very significant negative effects upon him". Mr Alcock regarded the informant as malicious. The Tribunal received evidence that the informant had specifically requested that his/her identity be kept confidential for fear of reprisals. The Tribunal found, among other things, that the disclosure of information provided to the police on a confidential basis would be likely to deter others from providing information to them. It would have had an adverse effect on law enforcement. The information was not disclosed. Had it been a Cayman Islands case, it would have fallen under s.16(c) of the FOI Law.

Factors for assessing the "unreasonableness" of disclosure

- Whether the information is already in the public domain;
- The circumstances in which the information was obtained e.g. in confidence;
- The nature and sensitivity of the information e.g. bland versus information concerning criminal conduct;
- The impact of disclosure on the record-subject, particularly if there could be adverse consequences;
- Consideration of any objection by the third party;
- The purpose or motive of the applicant, i.e.: if there is any good purpose to be served by disclosure such as assisting the applicant to seek justice; and
- Whether the information relates to matters of personality, private characteristics or disposition.

[47] Extracted from the Australian Attorney-General's FOI Exemptions Memorandum at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Freedom_of_InformationFOI_memoranda.
[48] EA/2006/0022, 3 March 2007.

"in relation to law enforcement"

This would cover not only enforcement of the criminal law, but also enforcement of laws with regulatory penalties.

Section 16 (d) "Prejudice lawful methods or procedures"

> *A document may disclose methods or procedures either by specifically referring to or describing them or by providing information from the nature of which the methods or procedures employed may be capable of being inferred…*
> *Questions of prejudice are, I think, more likely to arise where the disclosure of a document would disclose covert, as opposed to overt or routine methods of procedures.*[49]

Legal professional privilege (section 17)

Section 17 of the FOI Law provides that:

17. An official record is exempt from disclosure if-

> *(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege; or*
> *(b) the disclosure would-*
> *(i) constitute an actionable breach of confidence,*
> *(ii) be in contempt of court; or*
> *(iii) infringe the privileges of Parliament.*

NOTE:

- The public interest test does not apply to this exemption.

[49] *Re Anderson and Australian Federal Police* (1986) 4 AAR 414.

Legal professional privilege

The Information Tribunal in the UK in *Bellamy v The Information Commissioner*[50] found:

> *In general the notion of legal professional privilege can be described as a set of principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his hers or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties if such communications or exchanges come into being for the purpose of preparing for litigation. A further distinction has grown up between legal advice and litigation privilege. Again in general terms the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which might be in contemplation, quite apart from where it is already in existence*

Communications which ordinarily attract legal professional privilege are:

- letters to lawyers seeking, and letters from lawyers providing, legal advice;
- briefs to counsel;
- drafts of documents subsequently filed in Court;
- statements of witnesses, obtained by solicitors or their agents, for the dominant purpose of use in legal proceedings; and
- communications with costs assessors made for the sole purpose of obtaining material for use in a pending proceedings or for advising the client.

Communications which do not ordinarily attract legal professional privilege are:

[50] [2006] UKIT EA 2005 0023.

- letters from client's lawyers to another party to Court proceedings, or an out-of-Court dispute;
- lawyers' bills of costs (except to the extent that they record prior communications which attract legal professional privilege); and
- witness statements or other investigative material, which would have been created for an authority's administrative purposes in any event, irrespective of possible legal proceedings.[51]

This exemption extends to records which would be privileged from production in legal proceedings. This means that if the information falls within the limited circumstances where legal professional privilege does not arise (for example, a document which came into existence in pursuance of fraud or crime or where the privilege has been "waived", see next paragraph) the record will not be exempt. The better view is that "without prejudice" documents are not exempt. This is because the special status accorded to without prejudice documents in litigation, is not based on legal professional privilege, but on the public policy of encouraging parties to settle disputes rather than litigate them to a finish.

Privilege will be lost if it is waived by a party. It should be noted that the privilege is that of the party and not of its legal adviser so that privilege can only be waived by the party itself. Whether a record is or is not privileged can raise difficult questions of law and information mangers should seek legal advice if they are uncertain about a particular record.

Claim for breach of confidence

A claim for breach of confidence is a claim whereby a party can, in some circumstances, restrain the disclosure of information by another party. There are two main bases for an actionable breach of confidence:

(i) a cause of action for breach of a contractual obligation of confidence; and

[51] Extracts from the Queensland Information Commissioner's FOI Concepts: Legal Professional Privilege at: http://www.oic.qld.gov.au/default.asp?p=13

(ii) a cause of action for breach of an equitable obligation of confidence.

Where a contractual obligation of confidence is found, its scope depends on the words of the contract.

A claim for an equitable breach of confidence is a claim whereby a party to whom a non-contractual obligation of confidence is owed, can, in some circumstances, restrain the use or disclosure of information by another party. There will be no express contractual language to establish the obligation but there are three requirements to be met for such a claim to be established:

> i.) that the information, the use or disclosure of which is to be sought to be restrained, has the necessary quality of confidence about it;
> ii.) that the information was imparted to the other party in circumstances importing an obligation of confidence; and
> iii.) that the use or disclosure of the information would be to the detriment of the party seeking to restrain disclosure.

In relation to personal information concerning individuals, it has been suggested that a test for the first requirement is that disclosure would be highly offensive to a person of ordinary sensibilities.[52] Another test is whether there is a private interest worthy of protection.[53] Information relating to a person's health, personal relationships or finances are likely to meet the requirements. However, trivial information will not meet the requirement of having the necessary quality of confidence about it.[54] Information which is already public knowledge, or in the public domain, will also not meet the requirement. Section 23 of the FOI Law contains specific exemptions in the case of personal information (see below).

The most straight forward way in which the obligation in the second requirement can arise is as a result of a contract. There are also certain relationships in which obligations of confidence

[52] *Australian Broadcasting Corporation v Lenah Games Meats property Ltd* (2001) 185 ALR 1, High Court of Australia.
[53] *A v B plc* [2002] QB 195, CA .
[54] *Attorney-General v Guardian Newspapers Ltd (N0 2)* [1990] 1 AC 109, HL.

will arise: husband and wife, employer and employee, doctor and patient, bank and customer, journalists and their sources, lawyers and their clients, priest and their supplicants and teachers and their pupils. Sexual relationships outside marriage will also give rise to obligations of confidence, although, the more stable the relationship the greater will be the significance to be attached to it. Even in the absence of such a relationship, if one person imparts information of a confidential nature to another person that other person may well come under an obligation of confidence in respect of it.

There has been some debate as to the extent to which the third requirement, that the disclosure of the information would be to the detriment of the party seeking to restrain disclosure, needs to be met. So far as private bodies or individuals are concerned the fact that information given in confidence is to be disclosed to persons whom the confider would prefer not to know of it is likely to be sufficient detriment in itself. Where the Crown (and presumably other public authorities) are seeking to restrain disclosure, it is likely that a more specific detriment will need to be shown

Even if the requirements discussed above are met, an action for breach of confidence will fail if disclosure is in the public interest. This is often referred to as the public interest defence to a claim for breach of confidence. Thus, although section 26 of the FOI Law does not apply the public interest test to section 17, Information Managers will have to consider the public interest question when considering whether a public interest defence would defeat a claim for breach of confidence. The public interest in the detection or prevention of wrongdoing, in preventing a miscarriage of justice or in the maintenance of public safety have all been recognised as public interests which can outweigh the public interest in protecting the confidence.[55] If any claim for breach of confidence brought against the public authority would be defeated by the public interest defence, the record will not be exempt from release under section 17(b)(i) of the FOI Law because it would not be actionable due to the public interest defence.

[55] See the summary given by Millett LJ in *Price Waterhouse v BCCI Holdings* (Luxembourg) SA [1992] BCLC 583, 601.

Examples of Confidential Information

- A secret recipe or formula known only to a particular company or firm: *De Beer v Graham* (1891) 12 LR (NSW) Eq 144.
- Secret mechanical processes and machinery: *Ansell Rubber Co Pty Ltd v Allied Rubber Industries JU Ltd* (1967) VR 37; *Seager v Copydex Ltd* (1967) 1 WLR 923.
- A new idea for a television programme: *Talbot v General Television Corporation Pty Ltd* (198) VR 224.
- Customer lists of a business: *Thomas Marshall (Exports) Ltd v Guinle* (1979) Ch2l.7; *Metrans Pty Ltd v Courtney-Smith* (1983) 8 IR 379.
- Information concerning secret designs developed by a company: *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd* (1986) 6 IPR 431; *Fractionated Cane Technology Ltd v Ruiz-Avila* (1988) 1 Qd R 51.
- Company or business accounts: *Evitt v Price* (1827) 1 Sim 483; 57 ER 659.
- General confidential company information: *Initial Services Ltd v Putterill* (1968) 1 QB 396; *Pioneer Concrete Services Ltd v Galli* (1985) VR 675; *Prebble v Reeves* (191) VIR 88.
- Secrets of a marriage: *Argyll v Argyll* (1961) Ch 32.
- Confidential material concerning computer software and/or computer data: *Apple Computer Inc v Mackintosh Computers Ltd* (1987) 8 IPR 89; *Computer Edge Ltd v Apple Computer Inc* (1986) 161 CLR 171.
- Information arising in a professional relationship: *Butler v Board of Trade* (1971) Ch 68 (solicitor and client); *Hunter v Mann* (1974) QB 767 (doctors); *Tournier v Provincial and Union Bank of England* (1924) 1 KB 461 (bankers).
- Product Information: *Castrol Australia Pty Ltd v EmTech Associates Ply Ltd* (198) 51 FLR 184; A.B, *Consolidated Ltd v Europe Strength Co Pty Ltd* (1978) 2 NZLR 515.
- Private etchings or lithographs: *Prince Albert v Strange* (1849) 1 H&T 1; 47 ER 13.2.
- A new variety of fruit: *Franklin v Giddins* (1978) Qd R 72.
- Matter in an applicant's psychiatric records that recorded information provided by other people to assist in the care of the applicant qualified for exemption. *Re "P" and Brisbane South Regional Health Authority* (1994) 2 QAR 159

Types of Detriment to the Confider:

- adverse comment, criticism or ridicule of a private individual: *Argyll v Argyll*;
- loss of profits suffered by owner of the information as a result of use by a competitor/former employee (refer to the above business cases generally);
- a potential risk to the health and safety of an individual e.g. informants, public servants, health professionals: *G v Day*;
- disclosure of details about a person's private affairs/finances to third parties or to the world at large (the disclosure itself may be seen as an implicit detriment, without more); and
- the appropriation and use in business/the arts of a "bright idea" developed by the owner of the information: *Talbot v General Television Corporation Pty Ltd*.

Contempt of Court

A public authority may be subject to a Court Order requiring it not to disclose particular information. In those circumstances, the disclosure of that information will be a contempt of court and the record will be exempt under section 17(b)(ii) of the FOI Law. It should be noted that, if the Court has granted an order against a party restraining it from disclosing information pending the trial of a claim, it may be a contempt of court for a third party, with knowledge of the Court Order, to disclose the information. This is so because the disclosure of the information may undermine the Court Order and thereby interfere with the administration of justice.

Privileges of Parliament

Section 17(b)(iii) of the FOI Law provides that an official record is exempt from disclosure if the disclosure would infringe the privileges of Parliament.

Section 45 of the Cayman Islands (Constitution) Order 1972 provides that a Law may determine and regulate privileges, immunities and powers of the Legislative Assembly and its

members, but no such privileges, immunities or powers shall exceed those of the House of Commons in the UK and of members thereof.

Parliamentary privilege is defined as "rights and immunities arising out of the law and custom of parliament claimed by the Houses of Parliament and their members to enable their functions to be carried out effectively and to safeguard them from outside interference. These include an MP's (Member of Parliament's) privilege of freedom of speech, parliament's right to determine its own composition and regulate its internal proceedings and parliament's power to punish for contempt."[56]

The privileges of the Legislative Assembly are set out in the Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision) and include:

- (3) *No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, the assembly of which he is a member or to a committee thereof or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion, or otherwise nor shall any such proceedings be instituted against any person in respect of such words broadcast or re broadcast by any broadcasting station licensed under the Broadcasting Law (1999 revision) or wholly owned by the Government of the Islands.*

- (11) (1) *No evidence relating to:*

  a.) debates or proceedings in the assembly; or

  b.) the contents of the minutes of evidence taken or any document laid before the assembly or a committee or any proceedings of or before, or any examination had before, the assembly or any such committee is admissible in any proceedings before a court or person authorised by law to take evidence unless the court or such person is satisfied that permission has been granted by the speaker for such evidence to be given.

[56] Osborn's *Concise Law Dictionary* 8th edition page 261.

(2) The permission referred to in subsection (1) may be given during a recess or adjournment by the Speaker.

- Section 12: *Where at any time, any question arises in the assembly or in the committee regard to:*

  a) the right or power of the assembly or a committee to hear,

  admit or receive oral evidence;

  b) the right or power of the assembly or a committee to peruse or examine any paper, book, record, or document or to summon, direct or call upon any person to produce any paper, book, record, or document before the assembly or a committee; or

  c) the right or privilege of any person (including a member of the assembly or committee) to refuse to produce any paper, book, record or document or to lay any paper, book, record or document before the Assembly or committee, that question shall, subject to this Law, and except insofar as express provision is made herein for the determination of that question, be determined in accordance with the usage and practice of the Commons House of Parliament of the United Kingdom.

To sum up, the relevant documents in relation to the proceedings of the Legislative Assembly, such as, debates or proceedings in the Assembly, or the contents of the minutes of evidence taken or any document laid before the Assembly or any proceedings (including unpublished reports) are exempt from disclosure if the disclosure would infringe the privileges of the Legislative Assembly unless the speaker, on behalf of the Assembly, consents to their disclosure. In the High Court, Mr. Justice Burnton on 11 April 2008, in *Office of Government Commerce v Information Commissioner & Her Majesty's Attorney-General (on behalf of the Speaker of the House of Commons*[57] decided that nothing said in Parliament – not even the answer to a parliamentary question - can be accepted as evidence unless both parties agree that it is uncontentious or is simply used to explain an issue's history. The Information Tribunal

[57] [2008] EWHC 737 (Admin).

had quoted a 2004 select committee report and this was found to constitute a breach of privilege.[58]

The national economy (section 18)

Section 18(1) of the FOI Law provides that an official record of a type specified in subsection 18(2) is exempt from disclosure if its disclosure or, as the case may be, its premature disclosure would, or could reasonably be expected to, have a substantial adverse effect on the Caymanian economy, or the Government's ability to manage the economy.

Section 18(2) of the FOI Law provides:

> *(2) The types of records referred to in subsection (1) include but are not limited to:*
>
> *a.) duties;*
>
> *b) monetary policy,*
>
> *or records that are not liable to disclosure under the Confidential Relationships (Preservation) Law (1995 Revision).*

NOTE:

- The public interest test applies to this section.

The two parts of section 18 of the FOI Law are not comprehensive. Subsection (1) says that an official record of a type specified in subsection 2 will be exempt. Subsection 2 includes three types of record but says that the section is not limited to that. There is no further guidance as to what other types of records (if any) are intended to be included in the section. If Information Managers are asked to disclose records, the disclosure of which will have substantial adverse effect on the economy, but they are not records about duties, monetary policy or exempted

[58] See Chapter 10 below.

from disclosure by the Confidential Relationships (Preservation) Law, they will have to seek legal advice. Information Managers should assume that those types of records may well be covered by the FOI Law.

Substantially adverse is not defined in the FOI Law. "Substantial" is defined in the Concise Oxford Dictionary as meaning *real and tangible rather than imaginary*. Substantially must be intended to add something to adverse. Information Managers should therefore be prepared to disclose economic records unless to do so will have a clearly measurable adverse effect on the economy. This is not a decision which Information Managers should take on their own.

The Confidential Relationships (Preservation) Law (1995 Revision)

Section 18 of the FOI Law includes a reference to "*records that are not liable to disclosure under the Confidential Relationships (Preservation) Law (1995 Revision)*". The Confidential Relationships (Preservation) Law makes the disclosure of confidential information in certain circumstances a criminal offence. It is a Law designed to give comfort to those who use the offshore financial services which are available in the Cayman Islands.

The Confidential Relationships Law states in section 3(1) that it applies to all confidential information with respect to business of a professional nature which arises in or is brought into to the Islands and to all persons coming into possession of such information. Section 3(2) then explains that the law has no application to the seeking, divulging or obtaining of confidential information in the situations defined in subsections 3(2)(a)(b) and (c).

Subsection 3(2)(c) is the crucial subsection. It provides that the Law has no application to the seeking, divulging or obtaining of confidential information in accordance with "this or any other law". People do not therefore commit a criminal offence under the Confidential Relations Law if they seek, divulge or obtain information under the FOI Law. This is confirmed by section 56 of the FOI Law which provides that where access to a record is granted in accordance with the FOI Law, the person who authorises such access and any other person

concerned in the granting thereof shall not by reason of so doing be guilty of a criminal offence.

The Government's deliberative processes (section 19)

19. (1) Subject to subsection (2), a record is exempt from disclosure if it contains-

a. opinions, advice or recommendations prepared for;
b. a record of consultations or deliberations arising in the course of,

proceedings of the Cabinet or of a committee thereof."

This exemption does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature. The exemption is in two parts. First, a record is exempt if it contains opinions, advice or recommendations prepared for proceedings of the Cabinet or a Cabinet committee; but this is subject to the public interest test. Second, there is an absolute exemption for records of consultations or deliberations arising in the course of proceedings of the Cabinet or a cabinet committee, so there is no right to see cabinet minutes; the public interest test has no application.

Prejudice to the effective conduct of public affairs (section 20)

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.*

The initial decision as to whether the exemption in section 20 of the FOI Law (*the effective conduct of public affairs*) applies, is to be made, not by the Information Manager, but in the case of subsection 20(1)(a) (*prejudice to the maintenance of collective ministerial responsibility)* by the Minister concerned, and in case of subsections 20(1)(b)(c) and (d) (*inhibiting exchange of views, legal advice given by or on behalf of the Attorney-General and other prejudice to the conduct of public affairs)* by the Minister or Chief Officer concerned.[59] Section 20(1)(a) is not subject to the public interest test. Sections 201(b)(c) and (d) are subject to the public interest test. The Information Manager should ensure that a request which raises questions about these matters are referred to the Minister or the Chief Officer concerned as soon as possible.

Section 20(1)(a) of the FOI Law is concerned with the maintenance of the convention of ministerial responsibility and subsection 20(1)(c) with advice given by or on behalf of the Attorney-General: these are discreet matters and will usually be easy to identify. Of more every day concern are subsections 20 (1)(b) and (d) which are concerned with disclosures which are likely to inhibit the free and frank exchange of views for the purpose of deliberation or otherwise prejudice the effective conduct of public affairs. Here two questions arise: first, would disclosure inhibit or prejudice, or be likely to inhibit or prejudice, deliberation or the conduct of public affairs and secondly, where does the public interest lie?

The UK Information Tribunal has had to consider these questions in *Foreign and Commonwealth Office v Information Commissioner*[60] decided on 22 January 2008. This is a

[59] FOI Law s. 20(2).
[60] EA/2007/0047.

useful example of the application of this exemption. Mr. Christopher Ames sought the disclosure of a Foreign Office draft of the dossier published by the UK Government on 24 September 2002 entitled "Iraq's Weapons of Mass Destruction". The Information Commissioner decided that the draft dossier should be disclosed. He concluded that the risk of public servants being deprived in the future of the necessary space for deliberation as a result of publication of draft documents was reduced in the case of Mr. Ames's request by two factors.

The first factor was during the time which had elapsed since the preparation of the draft; between the dossier being published in September 2002 and Mr. Ames making his request in February 2005, coalition forces had invaded Iraq in March 2003 and in May 2003 the US President had announced the end of the major combat operations.

The second factor was the amount of information which was already in the public domain in relation to the process of preparing the dossier. This was largely as a result of the Inquiry into the death of Dr. David Kelly CMG conducted by Lord Hutton in September and October 2003 and the publication of that report and the accompanying evidence in January 2004. The Information Tribunal upheld the decision of the Information Commissioner and decided that the publication of the draft would not have the chilling effect for which the Foreign and Commonwealth Office contended.

Commercial interests (section 21)

21. (1)Subject to subsection (2), a record is exempt from disclosure if-

a. its disclosure would reveal-

i. trade secrets;

ii. any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed;

b. it contains information (other than that referred to in paragraph (a)) concerning the commercial interest of any person or organization (including a public authority) and the disclosure of that information would prejudice those interests.

(2) Subsection (1) shall not apply where the applicant for access is the person or organization referred to in that subsection or a person acting on behalf of that person or organization.

There are three parts to this exemption. First it applies to trade secrets; secondly it applies to information of commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished and thirdly, it applies to any other information concerning the commercial interests of any person or organization where the disclosure of the information would prejudice those interests. The public interest test applies to this exemption.

"Trade Secrets"

Trade secrets is not defined in the FOI Law but it is an expression which is well understood at common law within the law of confidence, as being something that a business would consider as giving it a commercial advantage over its competitors. The exemption does not apply where the applicant is the person or organisation referred to in the section.[61]

Some factors which have been used to assist in determining whether or not something is a trade secret are:

- the extent which the information is known outside the business of the owner of that information;
- the extent to which the information is known by persons engaged in the owner's business;
- measures taken by the owner to guard the secrecy of the information;
- the value of the information to the owner and to his competitors;
- the effort and money spent by the owner in developing the information; and

[61] FOI Law s.21(2).

- the ease or difficulty with which others might acquire or duplicate the secret.

Trade secrets can include not only technical matters such as secret formulae for the manufacture of products, but also names of customers and what they purchase.

The Information Manager, when applying this exemption, has to consider whether it involves a trade secret or whether there has been prejudice. The Information Manager also has to apply the public interest test.

"Information of a commercial value"

This term would be used to cover two main types of information. One type is information that is valuable for the purposes of carrying on the commercial activity in which that authority or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending "one-off" commercial transaction.

The second type is that information has commercial value to an authority or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that authority or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a public authority that has come into possession of it, through disclosure under the FOI Law.[62]

An example of the way in which the exemption for commercial interest works is the UK case of *Derry City Council v The Information Commissioner*[63] in a decision of the Information Tribunal dated 11 December 2006. On 5 January 2005 a journalist working on the Belfast Telegraph asked the Derry City Council for information about its agreement with Ryanair regarding the use of Derry City Airport and in particular how much Ryanair pay Derry City

[62] *Re Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491
[63] Appeal number EA/200614

Council for the use of this facility. The City Council refused to give the information relying on the exemption in section 43(2) of the UK FOI Act that disclosure *would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).* The City Council also relied on the exemption for confidential information.

The City Council argued that its bargaining position with other airlines would be prejudiced if the information was disclosed and that the disclosure would assist competitor airports in pitching offers to Ryanair to the detriment of the business of the Airport. The UK Information Tribunal found that the exemption was engaged and that it therefore had to apply the public interest test. The Information Commissioner argued that notwithstanding the commercial interests of the City Council, two issues favoured disclosure and a proper public debate. First, the airport was part of a publicly subsidised infrastructure which had never succeeded in covering its costs and there were therefore legitimate questions as to whether ratepayers' money had been well spent over the years; and secondly, there was an issue as to whether the effect of the Ryanair agreement was to give state aid to Ryanair contrary to Article 87 of the European Convention Treaty. The Tribunal found, on the facts of the case, that the Ryanair financial information should be disclosed.

Heritage sites (section 22)

Section 22(1) of the FOI Law provides that:

> *22. (1) Subject to subsections (2) a record is exempt from disclosure if its disclosure would, or could reasonably be expected to result in the destruction of, damage to, or interference with, the conservation of:*
>
> > *(a) any historical, archaeological or anthropological resources;*
> > *(b) anything which is eligible for placement on the Heritage Register under section 21 of the National Trust Law (1997 Revision) or any other law relating to the preservation of the heritage of the Islands;*

(c) any species of plant or animal life so designated or which is endangered, threatened or otherwise vulnerable;

(d) any other rare or endangered living resource.

(2)Records relating to subsection (1) (a) and (b) shall be exempt for seventy-five years.

NOTE:

- The public interest test applies to this exemption.

A heritage site is determined in the Cayman Islands using the following criteria:

(a) the site is over 50 years old;
(b) there are historical facts about the site; and
(c) the design was traditional architecture.

It is prudent to note however, that some sites which are eligible to be registered as heritage sites are privately owned sites and therefore information may already be placed in the public domain by the owners.

Personal information (section 23)

Section 23 of the FOI Law provides that:

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 persons, 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 limitation as to time.

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

"Personal information" is defined in the FOI Regulations as meaning:

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 identity 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, national or ethnic origin, colour or religious or political beliefs or associations;
(3) The individual's age, sex, sexual orientation, marital status or family status;
(4) An identifying number, symbol or other particular assigned to the individual;
(5) The individual's finger prints, 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 opinions about the individual, and
(9) The individual's personal views or opinions, except if they are about someone else.

Under section 23 of the FOI Law a public authority must not grant access to a record if it would involve the unreasonable disclosure of personal information of any person whether living or dead. Section 23(2) provides that the exemption shall not apply where the application

for access is made by the person to whose affairs it relates. Section 23(3) provides that the exemption shall be without limitation as to time and section 23(4) provides that the extent to which third party rights are to be protected shall be set out in the FOI Regulations.[64] Third party rights are the rights of persons other than the applicant to whom the personal information pertains.

NOTE:

- The public interest test applies to this exemption.

When considering the exemption in section 23 of the FOI Law, Information Managers therefore have a three stage process to go through. They should decide:

(1) whether the information sought is *personal*;

(2) whether it would be *unreasonable* to disclose it, and

(3) where the public interest lies.

In Australia, documents are similarly exempt if to disclose them would involve the unreasonable disclosure of personal information about any person, living or dead (other than the applicant for access). There is Australian authority that the word "unreasonable" imports a public interest test similar to those which are made express terms in the Canada, New Zealand and the Irish Acts.[65] In the Cayman Islands the better view is that the test of reasonableness and the public interest are not identical.

The majority of problems arise in cases involving joint or shared personal affairs; inter familial cases, especially parents applying for children's records; applications for records of a deceased person; and applications for the names and addresses of public officials. When parents apply for records concerning their children, the Information Manager should always be satisfied that the parents have the care of the children concerned and the age of children may also be of importance in this regard. Information Managers should be slow to release records where there

[64] See 4 F below.
[65] See for example *Colakovski v Australian Telecommunications Cpn* (1999) 1000 ALR 111.

is a dispute as to custody. Records about a deceased person should prima facie be released to the personal representatives. Again, it will often be necessary for the Information Manager to ask about the family circumstances. Public officials are entitled to their private life; it will only be in exceptional circumstances where it will be right to disclose the personal details of staff.

There is no equivalent to the UK Data Protection Act in the Cayman Islands, but section 23(2) of the FOI Law (which says that the personal information exemption does not apply to information held about the applicant) taken with the right of access in section 6(1) (which states that every persona shall have a right to obtain access to a record other than an exempt record) means that an applicant does have a right to see information about themselves held by public authorities in the Cayman Islands.

Health and safety (section 24)

Section 24 of the FOI Law provides that 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.*

NOTE:

- The public interest test applies to this exemption.

In the UK, it was deemed that records pertaining to the acts of a serial killer were not able to be disclosed based on the public interest test. Because the family of the victims were still alive, it was decided that the disclosure of such records may affect the surviving family members' mental health and as such it was not in the public interest to release these records.

Another example might be information as to the layout of a property which might be vulnerable to terrorist or criminal attack. Disclosing the detailed plans of a bank's safes might

endanger the safety of those working at the bank if it enabled criminals to plan a robbery of the bank.

E. The Public Interest Test

The definition of Public Interest

Public interest is not defined in the FOI Law. It is however defined in the FOI Regulations, and the task facing a public authority when applying the public interest test is clear. In effect, something *in the public interest* is simply something which serves the interests of the public. When applying the test the Information Manager is deciding whether in any particular case it serves the interests of the public better to withhold the record or to disclose it.

The definition of public interest in the FOI Regulations is:

> *"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;*
> *(g) deter or reveal wrongdoing or maladministration;*
> *(h) 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*
> *(i) reveal untrue, incomplete or misleading information or acts of a public authority;*
>
> *but does not include any information, whether listed in this definition or not, which is available in public records such as open registers.*

Matters not to be considered when applying the public interest test

The competing interests to be considered when deciding if to provide access to a record are the public interest favouring disclosure against the public (rather than private) interest favouring the withholding of the record. There will often be a *private* interest in withholding records which would reveal the incompetence on the part of or the corruption within a public authority or which would simply cause embarrassment to the authority. However, the public interest will favour accountability and good administration and it is this interest that must be weighed against the public interest in not disclosing the record.

Of course there will be many occasions when the public and private interests will coincide. For instance there is often both a private and a public interest in the protection of legal professional privilege (section 17 of the FOI Law): a private interest in that the unauthorised disclosure of record held by an attorney may damage the client, and a public interest in that it is in the interests of society as a whole that there is access to justice and a fair trial.

The UK Information Commission has advised[66] that it may sometimes be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete (for instance because the record consists of a policy recommendation that has not been followed). Neither of these are good grounds for refusal of a request. If an authority fears that information disclosed may be misleading, the solution is to give some explanation or to put the information into a proper context rather than to withhold it. These considerations apply as much to the Cayman Islands as to the UK.

[66] Awareness Guidance No. 3.

Examples of the operation of the public interest test

The application of the public interest test was considered by the UK Information Tribunal in the case of *England (1st appellant) and London Borough of Bexley (2nd appellant) v The Information Commissioner*[67] which was decided on 10 May 2007. Mr David England asked the Bexley Council for the names and addresses of empty properties in the London Borough of Bexley and in particular those that were categorised as "long term empty" and "uninhabitable empty properties". Some of the houses were owned by individuals and some by the Bexley Council and other public bodies. The Council claimed before the Tribunal that the disclosure of the information would be likely to prejudice the prevention of crime and the Tribunal so held. The Tribunal then had to consider whether the disclosure of the information was in the public interest. They referred to their previous decisions in *Hogan and Oxford City Council v The Information Commissioner*[68], *Department of Work and Pensions v Information Commissioner*[69], *and Guardian Newspapers and Heather Brooke v Information Commissioner*[70] and set out the following principles:

- The overriding principle in the UK Act is in favour of disclosure. Information held by public authorities must be disclosed on request unless the Act permits it to be withheld. *The same is true in the Cayman Islands.*
- If the public interest in favour of maintaining the exemption is equally balanced against the public interest in disclosure, then the exemption will not exclude the duty to disclose. *The same is true in the Cayman Islands.*
- There is no express provision that requires a public authority to apply a presumption in favour of disclosure when considering exemptions to the general duty to disclose, which is in contrast to the UK Environmental Information Regulations 2004. *In the Cayman Islands, there is a presumption in favour of disclosure (section 6(5) of the FOI Law).*
- There is an assumption built into the UK FOI Act that disclosure of information by public authorities on request is in the public interest in order to promote transparency

[67] Appeal No. EA/2006/0060 & 0066.
[68] Appeal No. EA/2005/0026 & 0030.
[69] Appeal No. EA/2006/0040.
[70] Appeal No. EA/2006/0011 & 0013.

and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis and not least because section 2(2)(b) of the Act requires the balance to be considered "in all the circumstances of the case". *The test must also be applied on a case-by-case basis in the Cayman Islands.*

- The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time. *The same is true in the Cayman Islands.*
- In considering public interest factors in favour of maintaining the exemption, they relate to the particular interest which the exemption is protecting. *The same is true in the Cayman Islands.*
- The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process. *The same is true in the Cayman Islands.*

The Tribunal found, on the public interest test that, insofar as the properties were owned by individuals, the public interest in maintaining the exemption did out weigh the public interest in disclosure. The impact of crime on individuals as an inherent part of the public interest in this circumstance was a significant factor and led to the exemption outweighing the public interest in disclosure in the Tribunal's view. However, for those properties that were owned by those other than individuals, including public authorities, the Tribunal's conclusion was that it did not, and therefore the public interest was in favour of disclosure. This was because the impact of crime on an individual was not present and this inherent aspect of the public interest in preventing crime was therefore absent and changed the analysis of the balance.

F. Third Party Rights

Section 23 of the FOI Law contains the exemption for records relating to personal information. Section 23(4) provides that the extent to which third party rights are to be protected shall be set out in FOI Regulations.

Third parties and public information

Third parties may well have a keen interest in the non-disclosure of records which relate to their businesses and commercial interests. The FOI Law and Regulations impose no obligation on the public authority in such circumstances to consult the third party before disclosure. The only exception to this is records which if released would amount to an actionable breach of confidence (section 17). In all other cases it is good practice and Information Managers should make every effort to consult third parties. Information Managers should be aware that if a third party hears that public records which concern them may be disclosed they may seek judicial review of the authority's decision to disclose. It is better to talk to the third party at an early stage and find out what their concerns are.

Personal information: What must the authority do to obtain third party views?

If a public authority intends to give access to a record which they believe contains personal information relating to a third party, the Information Manager must give the third party written notice of the application for access within 14 calendar days of receipt of the application. The notice must state that:

- a request has been made by an applicant (it is not reasonable to disclose the name of the applicant to the third party) for access to a record containing information the disclosure of which contains personal information about the third party;
- describe the contents of the request and record concerned;
- within 28 calendar days from the date of the notice (the notice must be dispatched on the date of the notice), the third party may, in writing, consent to the disclosure or may

make written representations to the public authority explaining why the record should or should not be disclosed;

- the third party is being given an opportunity to make representations concerning disclosure, within the time stated in the notice;
- a decision will be made by the public authority and whether or not to give the application access to the record within 14 calendar days from the expiry of the 28 calendar days or from the date a response is received from the third party if earlier.

Information Managers should always seek to have direct contact with the third party either in person, by telephone or by email. This will save time and money in the long run.

It is not necessary to give the third party notice if the authority does not intend to give access to the record.

Extension of time

An Information Manager may, in his discretion, extend the time for making a decision on a request under the FOI Law in order to receive a response from a third party. If the third party does not respond to the notice advising them of a request, the Information Manager should use all available methods to contact the third party (i.e. phone, fax, email etc.). On reaching a decision, the Information Manager must give written notice of the decision. If the decision is to grant access the Information Manager must give notice to:

- the applicant;
- the third party; and
- the Information Commissioner

Right of appeal

The third party has a right to appeal a decision to release information about them to the Information Commissioner within 30 calendar days after the decision. The notice must outline the right of appeal. The Information Manager should inform the applicant that the record will be withheld until the time for appealing to the Information Commissioner (30 calendar days) has expired.

Where the Public Authority decides to claim an exemption for the record, or part thereof, following receipt of third party representations, notice of the decision shall be given within 7 calendar days to the person who requested access to the record. An appeal may be made by the applicant as outlined in the FOI law. The applicant can appeal to the Information Commissioner within 30 calendar days of the decision.

Case studies

This hypothetical case study deals with the position of third parties otherwise in relation to personal information. The Cayman Islands Airport Authority ("CIAA") invites tenders for the construction of an extension to the airport on Grand Cayman. Three firms A Ltd, B Inc., C and Partners submit tenders. A Ltd is successful. Six months later B Inc. makes a request under the FOI Law for the record of all the tender documents. The Information Manager concludes that the request relates to a public record and does not involve personal information, but as a matter of good practice he asks A Ltd whether they object to the disclosure of the record. A Ltd says that they do, and immediately launch proceedings seeking an injunction to stop CIAA from disclosing any record.

The Information Manager then decides that it is in the public interest to release the total price but not the detailed costing, which shows how the total price is made up. The detailed costing comes within the exemption in section 21 of the FOI Law and the Information Manager refuses to release it. A Ltd is content with the Information Manager's decision, but B Inc seeks an internal review. The Chief Officer reaches the same conclusion as the Information Manager. B Inc then applies to the Information Commissioner who confirms that the exemption applies to

the detailed costing, and that the public interest does not require disclosure because the information in the tender documents is still sensitive.

This hypothetical case study deals with the position of third parties in relation to applications for someone else's personal information. Albert makes an application to Health Services Authority ("HSA") to see his neighbour's (Bob's) medical records. The Information Manager denies the application to release the record on the basis that the medical records are the personal information of Bob and there is no public interest which requires disclosure. Within 30 days of receipt of the refusal to release the record, Albert applies to HSA for an internal review. The Chief Officer of the authority conducts the internal review and agrees with the Information Manager's decision to deny the request to access the record. Within 30 days of receiving the notice from the Chief Officer informing Albert his request is denied, Albert appeals to the Information Commissioner. The Information Commissioner conducts a review of the decisions made by HSA and agrees with its decision.

G. Frequently asked questions

Questions and answers

Questions and answers that apply to exemptions:

1. Who can issue Certificates of Exemption?

The Governor can issue a certificate of exemption if he is satisfied that that disclosure would or would be likely to prejudice the maintenance of the convention of collective responsibility of Ministers (s.20(1)(a)) of the FOI Law. A certificate issued by the Governor is conclusive and cannot be challenged. Ministers can issue certificates if they are satisfied that the exemptions in s.15 (security defence and international affairs), s.16 (law enforcement), s.20(1)(b)(c)(d) (prejudice to the effective conduct of affairs) and s.22 (heritage sites) apply. Certificates issued by Ministers can be challenged by way of judicial review.

2. How long do the exemptions in the FOI Law apply?

The majority of exemptions do not apply to documents that are 20 years old, or older. Exemptions relating to heritage sites remain in effect for 75 years (section 22(2) of the FOI Law) and records relating to the unreasonable disclosure of personal information are exempt without limitation as to time (section 23(3)of the FOI Law). Certificates of Exemption remain in effect until they are set aside by the Governor or the Grand Court.

3. What is an absolute exemption?

An absolute exemption is one which protects a class of record absolutely. The exemption in s.19(1)(b)of the FOI Law (records revealing the Government's deliberative processes) are exempt if they fall into that category. It is not necessary to show prejudice or to consider the public interest.

4. If one exemption applies do you have to consider other possible exemptions?

It is good practice to do so, because a decision that one exemption applied may be overruled on internal review or by the Information Commissioner. Considering all exemptions at one time is more efficient and reduces the need to re-examine records for access if an initial decision is overruled.

5. How do you decide what is in the public interest?

Where the public interest lies is often a question of fact. You should list those factors which favour disclosure of the record and those which are against disclosure. If the factors are finely balanced the record should be disclosed.

6. If disclosure will embarrass the Government is that a relevant consideration for non-disclosure?

No. Records are held for the benefit of the public not for the Government or officials.

7. Who decides whether the disclosure of a record would prejudice the effective conduct of affairs?

If the prejudice relates to the maintenance of the convention of collective ministerial responsibility (section 20(1)(a) of the FOI Law), the initial decision about releasing the record is taken by the Minister concerned. If the prejudice relates to inhibiting discussion, or concerns advice given by the Attorney-General, or otherwise prejudices the effective conduct of public affairs (subsection 20(1)(b),(c) and (d) of the FOI Law) the initial decision is taken by the Minister or Chief Officer concerned.

8. What happens if the information in the record has been given in confidence?

The exemption in section 17(b)(i) will apply if the disclosure of the record would constitute an actionable breach of confidence. Remember that there is a public interest defence to an action for breach of confidence. Section 54 of the FOI Law provides that nothing in the FOI Law shall be construed as authorising the disclosure of any official record which is a breach of confidence.

9. What does "redaction" mean?

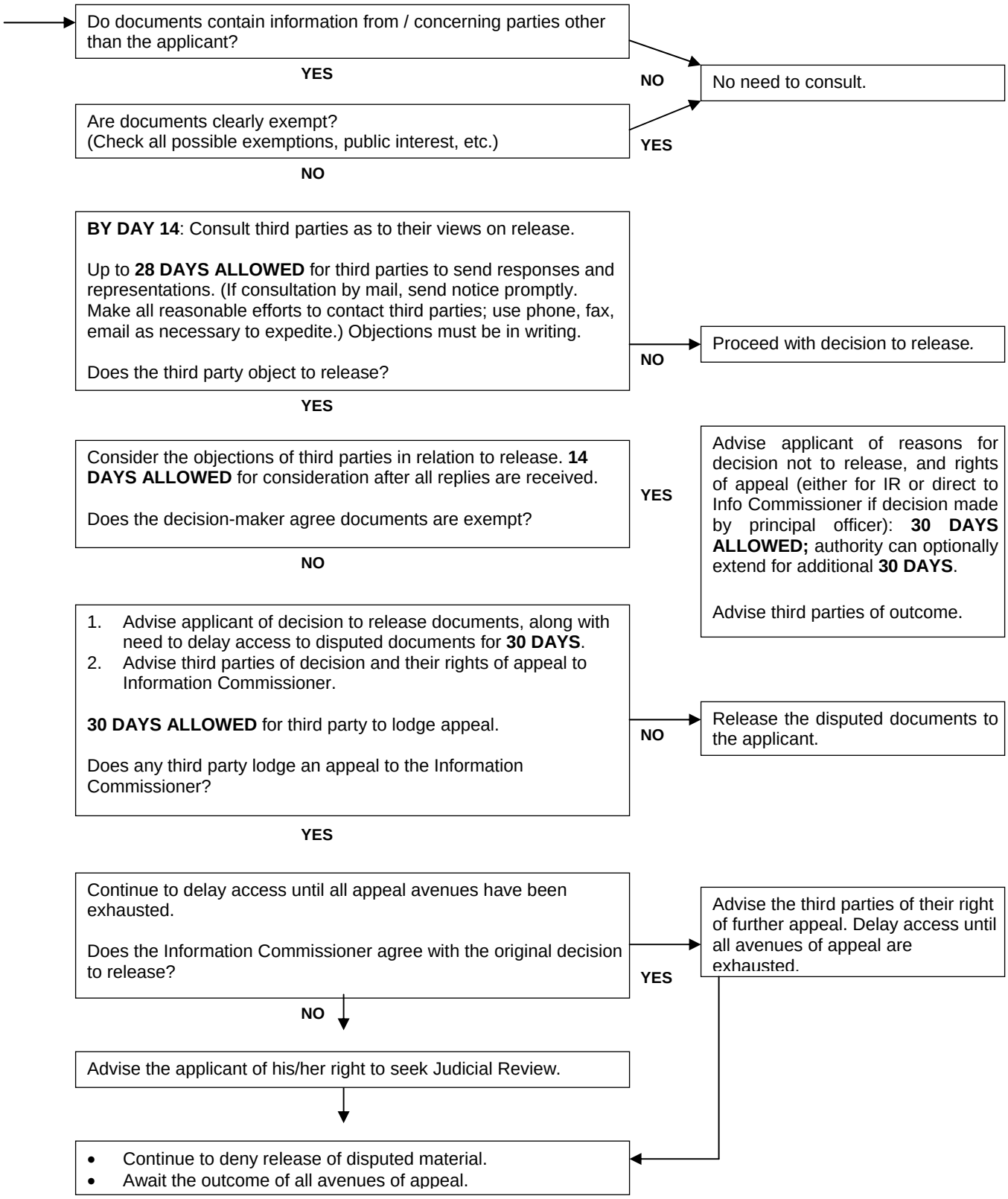
Redaction means covering up (blacking out) part of a record which is exempt so that the remainder of the record may be disclosed without the exempt material being seen.

10. Will disclosure of records amount to a contempt of court?

It might, but a record is exempt from disclosure if the disclosure of such would be in contempt of court (s.17 (b)(ii) FOI Law).

Flow Chart

FLOWCHART: THIRD PARTY CONSULTATION



7
AMENDMENTS OF RECORDS

A. Introduction

Individuals can request amendments of records

The FOI Law deals specifically with amending records that contain personal information which is incomplete, incorrect out of date or misleading, and which remains available for use by a public authority for administration purposes. An Information Manager should ensure that all records are accurate, not just those which contain personal information, and to correct any information which is known to be wrong.

It is very important that an individual should be able to correct any misleading information about himself which is held by public authorities. Section 28 of the FOI Law provides that a person who claims that personal information about himself is incomplete, incorrect, out of date, or misleading, and has been used, or is available for use, by a public authority for administrative purposes may apply to the public authority for an amendment or annotation of the record (for example compiling the register of voters).

B. Separate Applications

How does a person apply?

Under the FOI Regulations an application is required where a person seeks to alter, by amendment or annotation, a record held by a public authority. The application has to be in writing and be made by the person to whom the information relates and the FOI Law envisages that such an application will be made where a person seeks or has been granted access to a record. This makes sense, for a person should only be able to apply for the amendment or annotate of a record, if the applicant is sure what the record actually says. The FOI Regulations

contain forms of application for amendment or annotation of a record. Information Managers should ensure the forms are available at all public authority offices.,.

The applicant must specify, as far as practicable, the personal record which requires amendment or annotation. In the case of an application for amendment, the applicant should specify:

- whether information in the record is claimed to be incomplete, incorrect, out of date or misleading and the information in respect of which that claim is made;
- the applicant's basis for making that claim; and
- the nature of the amendment required by the applicant.

"Incomplete" means details are missing which are required to be in a particular document by the terms of that document, or which on a proper and considered view should be included with the personal information already present in the records.

"Incorrect" means factually wrong.

"Misleading" means giving the wrong impression about the person concerned or their circumstances, or unfounded opinions about an individual.

In the case of an application for annotation, the application should be accompanied by a statement specifying:

- the same information as is required for an amendment under the first two bullet points above; and
- the information that would make the record complete, correct, up to date, and not misleading.

C. Dealing with the application

The Information Manager's duties

If a public authority is satisfied that the matters stated in an application under section 28 of the FOI Law are true then section 29(1) requires the authority to amend the record. The Information Manager must see that the amendment is made and he should do this whether the applicant applied for an amendment or an annotation.

If the applicant applied for an annotation the Information Manager should provide an annotation. The Information Manager must ensure that all records containing the information which the authority has acknowledged to be incomplete, incorrect, misleading or out of date are amended.

When amending a record, if the information is contained in a paper document, it should be corrected by ruling through the information found to be incorrect and writing the correct information next to it. The amendment should not obliterate the text of the record as it existed before the amendment. The amendment should be sealed. The Information Manger should insert:

> *"Amended on [insert date] under s29 (1) of the FOI Law, 2007"*.

Where the incorrect information is not in a written document (i.e. a sound or video recording), the Information Manager should add a clear reference to the file, where the correct information is held, to the folio, or the record, holding the incorrect information.

The Information Manager must make an annotation by adding a file note to the record, summarizing the applicant's statement, cross indexed to the material claimed to be incomplete, incorrect, out of date, or misleading. The annotation of the record should be clearly displayed on the cover of the applicant's files. Where the application is for an annotation, if the authority

is not satisfied of the truth of the matters specified in the application, it may refuse to annotate the record.[71]

Where a public authority decides not to amend a record s.29(2) of the FOI Law provides that it shall:

- take such steps as are reasonable to enable the applicant to provide a statement saying what he claims is wrong with the record, the applicant's basis for making the claim, and the information which the applicant says would make the record complete, correct up to date and not misleading; and
- annotate the record by adding thereto the statement the applicant has supplied[72] and noting that the application has been refused.

Consideration of the request to amend or annotate documents

When making a decision whether or not to amend or annotate a record the Information Manager should consider the following questions:

1. Can the author of the record be contacted? It may be sensible to discuss the record with the author. In particular the author should be advised of the application and asked to comment. The Information Manager will need to weigh the application against the author's statement bearing in mind the age of the records;
2. Does the record contain a statement of opinion? Was it based on facts? Did it take account of all the available facts?
3. What evidence has the applicant produced in support of his claim and how authoritative is it? Is it a statutory declaration sworn by the applicant, a medical report or a reference from an employer? Has the evidence been provided by a person as qualified as the person who made the original record?

[71] FOI Law s.30 (b).
[72] FOI Law s.29(2)(b).

Proof of identity

The FOI Regulations require that a person making an application for personal information, which includes an application to amend or annotate personal information, should provide sufficient proof of identification, as determined by the public authority. This may include use of a passport, driver's licence, utility bill etc which enables the public authority to positively identify the applicant. For applicants who do not possess such documentary evidence of identity (such as children under 18, itinerant persons etc.) a flexible approach should be used. For instance, a copy of a school report, or a statement from a Government Official that they know the person by that name could be sufficient. For more sensitive records, a greater level of security in identity-checking may be appropriate.

Does the applicant have to pay?

There is no fee payable for the amendment or annotation of a record.

Notice of the decision

The Information Manager must inform the applicant of the authority's decision. The Information Manager must also inform any other public authority which the Information Manager is satisfied has made prior use of the record, of any amendment and or any annotation. If the Information Manager believes that the application should more appropriately have been made to another authority he must transfer the application to that authority and inform the applicant of his decision. The provisions about transfers in s.8 of the FOI Law, (see Chapter 5 above) also apply to applications to amend or annotate the record.[73] Persons can apply for internal review or to the Information Commissioner if they are unhappy with the decision as per section 33(2) of the FOI Law.

[73] FOI Law s.32.

Checklist

The Information Manager should confirm that:

- the application is in writing;
- the applicant has provided adequate proof of identity;
- the application specifies the record concerned;
- it specifies the amendment or annotation required;
- the application is supported by sufficient evidence;
- the author of the original record, if available, has been contacted;
- before an amendment or annotation is made the Information Manager is satisfied on the balance of probabilities that the record is incomplete, incorrect, out of date or misleading;
- all mistakes have been corrected;
- other public authorities who have used the record have been informed;
- a record of the decision has been made;
- the applicant has been informed;
- copies of all correspondence are placed on the registered file for the request; and
- the FOI monitoring and tracking system is updated with regard to the action which has been taken.

D. Frequently asked questions

Questions and answers

1. Is an amendment appropriate? How do I know if an entry is complete?

A record is incomplete if it does not adequately deal with the relevant facts and circumstances.

2. When is an entry misleading?

"*Misleading" has been interpreted to mean "leading astray, causing to go wrong, giving the wrong impression.*[74]

3. When should an entry in a record be deleted?

It may be that the more serious instances of incomplete, incorrect or misleading information will warrant deletion of the original entry. Where information is deleted from a record a note should be made clearly indicating that a portion of the record has been deleted under the FOI Law.

4. Who needs to be told if a record is amended?

The applicant; any other authority who is known to have relied on the record; and anyone who is known to have referred to the record in the previous year.

5. Is total removal or destruction of a record allowed?

No.

[74] *Leveret v Australian Telecommunications Commission* (1985) 6 ALNN171.

8
APPEALS

A. General

Introduction

There are three stages to the appeal process under the FOI Law. First, an applicant who is dissatisfied with a public authority's decision usually has to go through the internal review process. Secondly, there is an appeal to the Information Commissioner who rehears the matter. Thirdly, any party who is dissatisfied with the decision of the Information Commissioner can appeal by way of judicial review to the Grand Court.

If the original decision has been made by the Minister, Chief Officer, or Principal Officer of the public authority concerned, any appeal goes straight to the Information Commissioner,[75] without need for internal review procedures.

B. Internal Review

What decisions are subject to internal review?

The following decisions may be addressed by Internal Review:

- decisions to refuse all or part of a request (failure to decide within the set time limits counts as a refusal);
- decisions to grant access in a form other than the form requested;
- decisions to delete certain exempt material from a record;
- decisions refusing the correction by amendment or annotation of personal information which the applicant believes is incomplete, incorrect, out of date or misleading;

[75] FOI Law s.33(4).

- decisions as to fees charged;
- decisions relating to the rights of a person to obtain reasons for decisions affecting that person; and
- decisions to defer grant of access.

Time limits

Where a decision to refuse a FOI request is made, the applicant may seek *internal review* within 30 calendar days from the date of notification of the authority's decision[76] (the "initial period") or such further period, not exceeding 30 calendar days, as the authority may permit. If the applicant is not notified of the decision, time runs from the date by which the applicant should have been so notified. The application for internal review should be in writing. The review should be completed within 30 calendar days of receipt of the application.[77]

The conduct of internal reviews

Internal reviews in relation to records referred to in section 15 (security, defence and international affairs), section 16 (law enforcement) and section 18 (the national economy) of the FOI Law must be conducted by the responsible Minister. All other internal reviews must be conducted the Chief Officer in the relevant Ministry or the Principal Officer of the public authority, but no review shall be conducted by the person who made the original decision or a person junior in rank to the person who made the original decision.

The person who conducts the internal review may take any decision in relation to the application which could have been taken on the original application.

Checklist

The person conducting the review should:

[76] "Calendar days" include weekends and holidays.
[77] FOI Law s. 34(3).

- log the application for review in the FOI Tracking System on the date of receipt;
- issue an acknowledgement;
- ask the Information Manager for the registered file for the FOI request;
- review the application from the beginning;
- obtain the reasons for the original decision from the Information Manager;
- contact the FOI Unit if in doubt;
- if the application is withdrawn, log this on the FOI monitoring and tracking system;
- record the decision on the file and on the FOI monitoring and tracking system;
- issue notification of the decision to the applicant;
- notify the Information Manager and ask him to arrange for access to the records if appropriate; and
- place copies of all correspondence and supporting documents with regard to the action which has been taken, onto the registered file for the request.

C. The Information Commissioner

Grounds for appeal

A person who has made a request for a record and has exhausted the other means of redress provided may apply in writing to the Information Commissioner for a decision that a public authority has:

- failed to indicate whether it holds a record;
- failed to communicate the information contained in a record within the time allowed;
- failed to communicate the information contained in a record at all, either by refusing access or by granting only partial access;
- failed to respond to a request for a record within the time limits;
- failed to provide a notice in writing of its response to a request for a record;
- charged a fee that is in contravention of the FOI Law; or

- otherwise failed to comply with an obligation imposed under the FOI Law.[78]

The obligations of public authorities are wide. For example an appeal could relate to the transfer of an application to another authority, the maintenance of the authority's publication scheme, a decision to grant access in a form other than that requested, refusing to amend or annotate a record or decisions relating to third party information.

Time limits

An appeal must be made within 30 calendar days after the applicant is notified of the final decision of the public authority or within 30 calendar days of the date such notification was due to be provided. This will usually be notification of the decision on internal review. The Information Commissioner has power to extend this period of time if the appellants conduct is not unreasonable.[79]

Processing appeals

When the Information Commissioner receives an appeal, a copy will be sent to the public authority and any third parties involved. The Information Manager in the authority, when he receives notice of the appeal, should consult with the Attorney General's Chambers and arrange for all the relevant papers and files to be forwarded to the Information Commissioner, together with a schedule setting out the detailed reasons for the decision and particulars of any third parties involved.

Friendly settlement

The Information Commissioner will seek, where appropriate, to settle the matter informally between the parties, in which case the appeal may be suspended or discontinued.

[78] FOI Law s. 42(1).
[79] FOI Law s. 42(2) and.(3).

The Information Commissioner's powers and decision

The Information Commissioner, on considering an appeal, may make any decision which could have been made on the original application, save that he cannot nullify a certificate issued under section 25 of the FOI Law.[80]

The burden of proof is on the public authority to show that it acted in accordance with the FOI Law.[81]

The Information Commissioner is required by section 43 of the FOI Law to decide the appeal as soon as is reasonably practicable and, in any case, within 30 calendar days after giving the complainant and the relevant public authority an opportunity to provide their views in writing. The Information Commissioner may extend this period, for good cause, for one further period, not exceeding 30 calendar days, provided that before the expiry of the original period he gives the parties written notice, stating why the period has been extended.

In reaching his decision the Information Commissioner may compel witnesses to give evidence, he can require the production of documents and he can inspect the records.[82] No record shall be withheld from the Information Commissioner unless the Governor certifies that the examination of such record would not be in the public interest.[83]

The Information Commissioner may:

- reject the appeal;
- require the authority to take such steps as may be necessary to bring it into compliance with the FOI Law; and
- in the case of egregious or wilful failures to comply with an obligation under the FOI Law, refer the matter to the appropriate disciplinary authority.

[80] FOI Law s. 42(4).
[81] FOI Law s. 43(2).
[82] FOI Law s. 45(1).
[83] FOI Law s. 45(2).

The Information Commissioner is required to serve notice of his decision both on the applicant and the public authority.

Implementation of the decision

The Information Commissioner may decide that a public authority has failed to comply with its obligations.

In implementing his decision, the Information Commissioner may:

- order the publishing of certain information or categories of information;
- recommend changes in the practices of the public authority in relation to the keeping, management and destruction of records, and the transfer of records to CINA;
- recommend the provision of training to the public authority's officials on the right of access to records; and
- refer a matter to the appropriate disciplinary authority.

The Information Commissioner is required to give notice of his decisions in regard to these matters to the applicant and to the public authority.[84] The notice must include a statement of the right of appeal.

The Information Commissioner may conduct investigations on his own initiative. Such investigations are treated as appeals.[85]

[84] FOI Law s. 44.
[85] FOI Law s. 46.

D. Judicial Review

Appeal to the Grand Court

In the Cayman Islands, there is a right of appeal to the Grand Court on an application for judicial review. The judicial review by the Grand Court cannot lead the Court to make a decision in substitution for that of the Information Commissioner. The Court does not formally decide the merits of the case, this is whether or not the complainant should have access to the information. In a judicial review, the Court considers various grounds of review which affect the legality of the decision, and whether or not it should be set aside. The grounds the Court considers include:

- ensuring all the proper processes of the FOI Law were followed in reaching the decision;
- ascertaining that all material, relevant considerations were taken into account;
- ensuring that no material, irrelevant considerations were taken into account;
- ensuring that all parties received a proper hearing or had the opportunity to put their argument;
- considering whether a relevant error of law was involved. Relevant errors of law are those which relate to the Information Commissioner's power to arrive at the decision; and
- the Court may find that the decision was so unreasonable or irrational that no reasonable Information Commissioner could have made it. See generally *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

The applicant or the public authority has 45 days in which to appeal the Information Commissioner's decision, by way of judicial review to the Grand Court.[86] NOTE: section 47(1) of the FOI Law specifies 45 days, not 45 calendar days, so that weekends and public holidays are not included.

[86] FOI Law s. 47.

In any appeal, the burden of proof is on the public authority to show that it has acted in accordance with the FOI Law.

Section 48 of the FOI Law provides that on the expiration of the 45 day period for appeals, the Information Commissioner may certify in writing to the Court any failure to comply with a decision made under s.43 and s.44 of the FOI Law or an order made under s.45; the Court may consider such failure under the rules relating to contempt of court. The Court can impose a fine or sentence of imprisonment for contempt of court, so this is a real and effective sanction.

Preparations for an appeal to the Information Commissioner or for judicial review

An Information Manager should prepare for an appeal by:

- preparing bundles of documents for use by the Information Commissioner or the Court. The bundles should include copies of (i) the FOI application file; (ii) all the documents which were before the Information Manager and the Information Commissioner (in the case of judicial review); and (iii) all correspondence with the Information Commissioner (in the case of judicial review);
- writing a memorandum setting out all the facts which were considered (i) by the authority; and (ii) by the Information Commissioner (in the case of judicial review) including any affidavits establishing the facts;
- writing a memorandum setting out the detailed reasons for the authority's original decision and the grounds on which they oppose/support the decision which the Information Commissioner made, including reference to any previous decisions of the Information Commissioner or the Grand Court or of Courts in other jurisdictions, which appear helpful (in the case of judicial review);
- seeking the advice of the FOI Unit on the application;
- consulting the head of the authority;
- seeking legal advice;
- instructing counsel, where appropriate; and

- placing copies of all memoranda, advice and other correspondence on the registered file for the request and updating the FOI monitoring and tracking system with regard to the appeal.

E. Flow chart of timelines for appeals.

Timelines for appeals:

Step 1	decision refusing access to record received by applicant.
Step 2	applies for internal review: within 30 calendar days of step 1 with an extension of 30 calendar days possible.
Step 3	internal review: within 30 calendar days of step 2.
Step 4	notify applicant the result of the internal review.
Step 5	appeal to Information Commissioner: within 30 calendar days of step 4.
Step 6	Information Commissioner's decision: as soon as possible but within 30 calendar days. Information Commissioner can stop time to promote friendly settlement.
Step 7	notify applicant of the decision made by Information Commissioner.
Step 8	appeal to Grand Court: within 45[87] days of step 7.
Step 9	Information Commissioner makes order implementing decision.
Step 10	notify applicant of the decision made be Information Commissioner.
Step 11	appeal to Grand Court: within 45 days of step 9.
Step 12	hearing in the Grand Court.

[87] Days not calendar days. Weekends and holidays are excluded.

F. Frequently asked questions

Questions and answers

1. Who should conduct the internal review?

An internal review cannot be conducted by the person who made the original decision. If the application is about records relating to security, defence, international relations, law enforcement or the economy, the internal review must be done by the responsible Minister. Otherwise the internal review must be conducted by the Chief Officer or the principal officer of the authority.

2. Does an appeal to the Information Commissioner involve a formal hearing?

This will be determined by the Information Commissioner appointed, however usually the procedure is quite informal. The Information Commissioner will determine the procedures, which may include talking to the parties to try to narrow the issue requiring written submissions etc. The Information Commissioner will give his decision in writing.

3. Is an internal review a way of delaying the process?

No. There are no circumstances in which public authorities should seek to hold up requests for information under the FOI Law. The internal review procedure is a quick and inexpensive way of getting to the right answer. If speed is of the essence the authority can suggest that the matter should go straight to the Information Commissioner.

4. Where is the burden of proof?

The burden of proof is on the public authority to show that it has acted in accordance with the FOI Law.

5. Is there an appeal to the Grand Court on a point of law?

No. Some countries, like the UK have provided for an appeal to the High Court on a point of law, but the Cayman Islands have opted for giving everyone a right of appeal to the Grand Court but by way of an application for judicial review. The Grand Court will decide appeals on familiar judicial review principles as set out in the case of Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.

In the Cayman Islands, there is a right of appeal to the Grand Court on an application for judicial review. The judicial review by the Grand Court cannot lead the Court to make a decision in substitution for that of the Information Commissioner. The Court does not decide the merits of the case, that is, whether or not the complainant should have access to the information. In a judicial review, the Court considers various grounds of review which affect the legality of the decision, such as:

- *ensuring all the proper processes of the FOI Law were followed in reaching the decision;*
- *ascertaining that all material relevant considerations were taken into account;*
- *ensuring that no material irrelevant considerations were taken into account;*
- *ensuring that all parties received a proper hearing or had the opportunity to present their argument;*
- *considering whether a relevant error of law was involved. Not every error of law will be a ground of judicial review but only those which are relevant to the powers of the Information Commissioner to arrive at the decision; and*
- *the Court may find that the decision was so unreasonable or irrational that no reasonable administrator could have made it (as per the case of Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223).*

9
INFORMATION MANAGERS

A. Appointment, duties and training

Appointment

The FOI Law requires that every public authority shall appoint an Information Manager. The Information Manager may be either full or part time. The Information Manager shall, under the general and specific supervision of the head of the authority concerned:

- promote in the authority best practices in relation to record creation, maintenance and disposal, in accordance with the Chief Secretary's Code of Practice on Records Management, and the NAPR Law; and
- receive requests for records, assist individuals seeking to access records, paying proper attention to people with relevant disabilities, and receive complaints regarding the performance of the authority relating to information disclosure.

Depending on the size and complexity of the public authority, the Information Manager may be supported by one or more records officers, who carry out the more day-to-day filing duties. This may include opening or closing files, conducting searches or retrieving information from among the records of a particular unit within the public authority.

Public authorities are required to ensure that members of the public know the name, functions and contact details of the Information Manager. The way to do this is through the authority's publication scheme.

Duties and responsibilities

The FOI Regulations provide that the functions and duties of Information Managers shall include:

- interviewing applicants to identify which records they wish to see;
- where a record is available to the public in accordance with s.6(4) of the FOI Law (see chapter 2 above), inform the applicant;
- where a record is already made public by an authority, if requested, providing access to such publication,
- ensuring that there is proper documentation to prove the identity of people requesting personal information, or seeking to make an amendment to information held about them. Information Managers should ask for a passport, a driver's licence, a rent bill, or a public authority bill, the applicant must establish his identity;
- ensuring applicants are fully informed on the progress of their request;
- monitoring the inspection of records;
- making a record of all applications for access and maintaining a disclosure log for the public authority of all requests granted;
- supervising the transfer of applications to other public authorities where they hold or are likely to hold the information sought;
- assisting persons who have limited ability to read or write English or suffer from any relevant disability;
- authenticating records in the manner determined by the Attorney-General (see s.10(4));
- examining the records which have been requested to determine whether:
    - i.) the record is exempt;
    - ii.) a record contains exempt matter;
    - iii.) access must be granted or refused;
    - iv.) the grant of access should be deferred.
- publishing in a newspaper when the public authority's publication scheme is available and each year when it has been updated.

The tasks of an Information Manager will vary to some extent from authority to authority, for organisational reasons or because some authorities will be more in the front line than others. As an example, in the Cabinet Office, the Information Manager has been assigned the following tasks when requests are received:

- identify if the information is subject to exemptions, or if there are any other Laws which restrict access;
- redact exempt information if necessary;
- grant or refuse access, giving reasons;
- contact third parties where the request is for information belonging to third parties;
- provide information / testify to the Information Commissioner / Court if the matter is appealed;
- promote in the authority the best practices in relation to record maintenance, archiving and disposal; and
- receive complaints regarding the performance of the authority in relation to information disclosure.

Many of these tasks will be appropriate for Information Managers in other authorities.

Training

Section 53 of the FOI Law requires every public authority to ensure that training is provided for its officials regarding the right to access records and the effective implementation of the FOI Law.

It is the Information Manager's task to deliver the familiarization training, written by the Freedom of Information Unit, to front line employees in the authority so that all employees are able to answer basic questions from applicants regarding access to records and the FOI Law.

B. Problems, protection and sanctions

Copyright

The dictionary definition of *copyright* is "the sole right to reproduce a literary, dramatic musical or artistic work". As a general rule, copyright is owned by the person who creates a document and asserts a right to it.

The law governing copyright in the Cayman Islands is the UK Copyright Act 1956. This Act was repealed in the UK by the Copyrights, Patents and Designs Act 1998, but continues to apply to the Cayman Islands. By section 39 of the Copyright Act 1956, the copyright in "every original literary….work made by or under the direction or control of Her Majesty or a government department" vests in Her Majesty.

In the UK, the Controller of Her Majesty's Stationery Office is responsible for administering crown copyright. There is no equivalent arrangement in the Cayman Islands. Crown copyright is vested in the Governor. Those in the private sector may retain copyright in documents which they create, but this is unlikely to have any impact on the disclosure of documents under the FOI Law, though it may prevent public authorities providing copies of documents, the copyright in which, is owned by a third party. For example, if an applicant seeks to see architectural plans which have been drawn up (by a private sector architect) for the development of a new library, there will be no breach of copyright if the ministry produces the plans to be inspected by the applicant. The authority will not be able to give a copy or allow a copy to be made by the applicant without the architect's consent subject to the fair dealing provision in the Copyright Act 1956.

Section 54 of the FOI Law states:

1. *Nothing in this Law shall be construed as authorising 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.

2. *Where access to a record referred to in subsection (1) is granted in the bona fide belief that the grant of such access is required by this Law, no action for defamation, breach of confidence or breach of intellectual property rights shall lie against-*

   (a) The Government, a public authority, Minister or public officer involved in the grant of such access, by reason of the grant of access or of any re-publication of that record; or

   (b) The author of the record or any other person who supplied the record to the government or the public authority, in respect of the publication involved in or resulting from the grant of access, by reason of having so supplied the record.

3. *The grant of access to a record in accordance with this Law shall not be construed as authorization or approval-*

   (a) for the purpose of the law relating to defamation or breach of confidence, of the publication of the record or its contents by the person to whom access is granted.

   (b) for the purposes of any law relating to intellectual property rights, of the doing by that person of any act comprised within the intellectual property rights in any work contained in the record.

Copyright is an intellectual property right

Copyright does not have any direct effect on FOI legislation, because the owner of the copyright continues to be protected after a record has been disclosed to an applicant. In the UK, the Office of Public Sector Information recommends that government departments include the following statement in their publication statements:

> *The copyright in the material listed in this publication scheme is owned by [name of authority] unless otherwise stated. The supply of documents under the Freedom of Information Legislation does not give the person or organisation who receives them an automatic right to re-use the documents in any way that would infringe copyright, for example, by making multiple copies, publishing and issuing copies to the public.*
>
> *Brief extracts of the material may be reproduced under the fair dealing provisions of the Copyright, Design and Patents Act for non-commercial purposes, private study, criticism, review and news reporting.*

The fair dealing provisions in the Copyright Act 1956 are contained in sections 5 to 9 which also provide that brief extracts may be reproduced for non-commercial purposes, private study, criticism, review and news reporting. Information Managers can use the statement recommended by the UK Office of Public Sector Information as a basis for including a statement in their own publication scheme. It also provides guidance for how Information Managers should deal with any copyright issues which may come up when records are disclosed. Many cases will be able to be dealt with under the fair dealing rule. Standard clauses that address copyright issues have also been included in this Manual.

The FOI Law provides that the obligation to provide access is not to be construed as authorising any act that would be an infringement of copyright. It is therefore clearly striking a balance between the public's rights of access with the individual rights of privacy, intellectual property and other interests.

The same is true where Copyright Laws are concerned, the keyword for which has always been balance; that is, balancing the rights of the copyright owner to control the dissemination of his/her works with the interests of the public to have access to those works.

Protections and sanctions

No action for defamation, breach of confidence or breach of intellectual property rights shall lie against an Information Manager who grants access to a record in the bona fide belief that that access was required by the FOI Law.[88] The grant of such access will not be regarded as authorising or approving the publication thereof, for the purpose of the law of defamation or breach of confidence; nor will it be construed as authorizing or approving the doing of any act comprised within the intellectual property rights in any work contained in the record.[89]

Section 55 of the FOI Law states:

1. *A person commits an offence, if in relation to a record to which a right of access is conferred under this Law, he:*
    (a) alters or defaces;
    (b) blocks or erases;
    (c) destroys; or
    (d) conceals,

    the record with the intention of preventing its disclosure.

2. *A person who commits an offence under subsection (10) is liable on summary conviction to a fine of one hundred thousand dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.*

[88] FOI Law s. 54(2)
[89] FOI Law s. 54(3)

9
RESOURCES AND IMPLEMENTATION TOOLS

A. Getting started

The value of Freedom of Information

First an Information Manager must understand and be able to explain why freedom of information is important. Its value lies in the provision of an open, transparent and accountable government. The FOI Law changes the basis on which information is available to the public by providing a legally enforceable right to information which is based on the presumption that public records are considered open unless otherwise determined under the provisions of the FOI Law. The burden of proof will lie on the public authority to demonstrate why the record(s) cannot legitimately be released.

Each public authority is required to prepare an action plan which details how they will prepare internally for implementation of the FOI Law. Action plans should address the following issues:

- a survey of existing records: freedom of information legislation is only as good as the quality of the records to which it provides access. Rights of access are of little use if reliable records are not created in the first place, they cannot be found when they are needed and the arrangements for their ultimate archiving or destruction are inadequate;
- creation of file plans;
- procedures for granting access to information;
- procedures for the payment of fees;
- procedures for producing and retrieving records; and
- internal procedures for handling of requests.

The systems which are developed must be people-friendly, practical and simple.

B. Information and records management

Records Management Code of Practice and basics from CINA

The Chief Secretary, after consultation with the Director of CINA, has issued a Code of Practice relating to the keeping and disposal of records and their transfer to CINA.[90]

Under the NAPR Law, every public authority is required to make and maintain full and accurate public records of its business and affairs. It is the duty of the most senior officer in the authority to ensure that the records are maintained in good order and condition and are created, managed and disposed of in accordance with records management standards and disposal schedules drawn up under the law. CINA issues standards and provides advice regarding:

- minimum standards for public record storage facilities;
- the treatment, in a manner that will prevent further deterioration or damage, of records that have been damaged or have deteriorated; and
- disaster preparedness in relation to public records.

The NAPR Law provides that every public authority shall, in consultation with CINA, draw up a disposal schedule which identifies the projected administrative life of the public records for which it is responsible. All schedules have to be approved by Cabinet through the Records Advisory Committee.

Information Managers should make sure that the record system in their authority complies with the Code of Practice and with the provisions of the National Archive and Public Records Law. If the Information Manager has any difficulty in doing this, he should consult CINA for further guidance and training.

[90] FOI Law s. 51.

The process of decision-making

The Information Manager should develop internal procedures which describe the steps to be taken by the Authority's employees if they receive a request for information. The procedures should include:

- Receipt of an FOI request
    a.) Recording the request:
        i. date stamp the request on the date of arrival (if received on paper) or forward the email;
        ii. request delivered to Information Manager within 2 days; open a registered file for each request;
        iii. input the request on the IT tracking system;
        iv. note the deadline for reply on the front of the file.

- Follow the steps laid out in the "Flowchart of Timelines" above.

Preparation of documents for release

When access to a record is granted it is the responsibility of the Information Manager to arrange for suitable access by the applicant. If the request is for a specific document or documents it is necessary to note their release for inspection and copying on the folder. If the request is for the whole contents of a file, each document in the file should be numbered in indelible ink, using a mechanical paginator or software, and any documents exempt from release should be noted and the decision letter should be attached to the file. Where documents are of more than one page, each page should be numbered, if two sides of a sheet are used both should be numbered. CINA should be contacted for further guidance on this matter.

The numbering of documents in this way will serve several purposes. The main purposes will be to:

- assist the information manager to ensure that no documents are removed from a file in the course of inspection by the applicant;
- assist the Information Manager to maintain the sequence of the file in the course of photocopying; and
- enable the creation of a schedule of the documents which have been released.

C. Monitoring requests and statistics

FOI monitoring and tracking system[91]

The FOI monitoring and tracking system is a centralised system, developed and maintained by the Computer Services Department. This system will be used to track and monitor requests for all public authorities across Government. All reporting information will come from the single system. The system enables the submission of statistics and other monitoring data which must be reported to the Freedom of Information Unit and which will thereafter be submitted to the Information Commissioner for inclusion in his yearly report to the Legislative Assembly. The system allows public authorities to track the progress of requests from receipt through to response, including any subsequent appeals. Information Managers should comply with any instructions from the Freedom of Information Unit or the Computer Services Department in relation to the FOI monitoring and tracking system.

[91] This section is based on the Cayman Islands Government's Implementation Plan for the FOI Law.

D. Freedom of Information Unit

The Unit

The purpose of the Freedom of Information Unit is to promote open government. It is the primary resource to which Information Managers should turn. The Unit will:

1. provide policy advice on areas of common concern for public authorities on freedom of information;
2. provide general advice on interpretation of sections of the FOI Law, FOI Regulations and procedural and administrative requirements;
3. make presentations and arrange briefings for public authorities;
4. conduct comprehensive training for Information Managers at basic and advanced levels from each public authority;
5. keep this Guidance Manual updated and under review; and
6. act as Secretariat for the Freedom of Information Steering Committee.

The FOI Unit has created an Information Managers Network to share experiences and best practice in the provision of information to the public. The network will be supported and serviced by the Freedom of Information Unit.

E. Disclosure logs

The purpose of a disclosure log is to make individual releases of information disclosed under the FOI Law available to the widest possible public audience. The benefits of a disclosure log include:

- providing the public with a user-friendly source of information disclosed under the FOI Law by a public authority;
- allowing information disclosed to one applicant to be made available to a wider public audience and therefore reduce the need to deal with multiple requests for the same information;

- allowing information released to be accompanied with supporting information, explaining issues of public interest in greater depth; and
- giving the public greater understanding of what information the public authority holds, thus enabling the public to make better informed information requests in the future.

Generally a grant of access to information is disclosure to the world except for the release of personal information. Some information however is not suitable for inclusion in a disclosure log and public authorities may not be legally entitled to publish more widely all information released to individual applicants under the FOI Law. These problems are more likely to arise in relation to information that was received from a third party or information which contains personal data. It is generally easier for public authorities to publish information that the authority itself has produced for its own use.

Information Managers must make sure that their authority has the necessary power to publish information on a discretionary basis. Whilst the FOI Law provides public authorities with both a duty and a power to release information that is not exempt, the FOI Law does not itself give public authorities a separate power to disclose information to the public other than in response to a request.

It is important to note:

- there is no express protection from actions for defamation for disclosure made to the public generally. However, there is expressed protection from actions for defamation for disclosure made to an individual applicant;
- in some cases confidential information may be disclosed to an individual applicant although it is actually exempt under the FOI Law, but which is nonetheless provided on a discretionary basis. Information released on a discretionary basis will not be suitable for publication and is likely to be confidential to the applicant; and
- it is possible that a statutory prohibition will prevent disclosure to the public but not to a particular applicant. Such information may not be published in a disclosure log.

Notwithstanding these restrictions, a disclosure log is a useful supplement to the authority's publication scheme.

As a guiding principle, information within a disclosure log should be easily accessible by members of the public and navigable without requiring knowledge of technical terms or jargon. A disclosure log should provide users with the means to view and/or download documents that have been referred to on the disclosure log. A disclosure log should not merely provide a list or summary of information disclosed but should provide direct access to the information itself.

The best disclosure logs are made available online and provide access via links to true copies of the records which may be viewed and downloaded by a user without recourse to additional assistance from the public authority. If some information is withheld or redacted, this should be stated, so users can see this when they download a document.

Documents may be published as PDF files, as RFT (Rich Text Format) files, or in plain HTML. If PDF is used, the website should provide links to the Adobe website. Whatever format is chosen, Information Managers should ensure that:

- files are created in an accessible format for members of the public using assistive technologies;
- PDF files are compatible with earlier versions of PDF readers; and
- file size is kept as small as possible without compromising quality so that users with dial-up connections do not experience difficulty downloading large files.

Wherever possible, files should be provided in the format which enables the widest possible audience to access the content, regardless of the age or operating system of their computer. Where documents are not held electronically, consideration should be given to publishing scanned images. Information Managers should contact the Computer Services Department and CINA for more information about document imaging and electronic records management.

F. General guidance on handling specific types of requests

Tenders

Many of the tendering processes undertaken and contracts entered into by public authorities before the advent of the FOI Law were done on the basis that most, if not all, of the information concerning commercial relationships would remain confidential. Often contracts would contain confidentiality clauses which purport to prohibit the disclosure of such information. There is likely to be a concern amongst both public authorities and the private sector regarding the validity of such clauses in existing contracts, as well as how information can be protected in the future.

The FOI Law recognises that there are valid reasons for withholding some information. However, in response to a request, a public authority cannot contract out of its responsibilities under the FOI Law and, unless information is covered by an exemption, it must be released if requested.

The two most relevant exemptions to tenders are section 21 of the FOI Law (records relating to commercial interests) and section 17 (records the disclosure of which would constitute an actionable breach of confidence). Section 21 is subject to the public interest test and there is a public interest defence to an action for breach of confidence. Only information which is in fact confidential or which could prejudice a commercial interest if released, can be withheld under these provisions.

It should be remembered that the nature of information will change over time. For example, if information that was once considered confidential becomes public knowledge, it will lose its quality of confidence. Similarly, information that was commercially sensitive during the tendering process, may no longer be sensitive once contracts have been entered into.

A public authority may face some difficult decisions when considering the public interest in disclosing information which it believes could prejudice a third party’s commercial interests.

When weighing up the public interest, it may be appropriate for the public authority to take account of the possibility of a third party successfully taking legal action following the disclosure of the information. Information Managers should seek legal advice as required.

It is important that contractors have an understanding that requests may be made for information and once an FOI request is received, information will be disclosed unless it is covered by an exemption. Public authorities should take steps to raise public awareness of its new responsibilities, including through its publication scheme.

In other countries, documents relating to tenders for government contracts have been frequently requested under FOI legislation. Over many years of review decisions, a set of general principles has emerged about the sensitivity of the documents at different stages of a tender competition. These principles are:

- public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded;
- tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances would historic prices remain trade secrets. As a general proposition, tender documents which would reveal detailed information about a company's current pricing strategy or about otherwise unavailable product information could fall within the scope of section 21(1)(a) (i) of the FOI Law even following the conclusion of a tender competition;
- tender prices generally qualify as commercially sensitive information for the purposes of sections 21(1)(a)(ii) and (b) of the FOI Law. Depending upon the circumstances, product information can also be considered commercially sensitive under section 21(1)(a)(ii) of the FOI Law;
- when a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. The public interest also favours the release of such information, but exceptions may arise; and

- other successful tender information which is commercially sensitive (for example, details of the internal organisation of a tenderer's business, analyses of the requirements of the public body, or detailed explanations as to how the tenderer proposed to meet these requirements) may remain confidential. Disclosure in the public interest ordinarily would not be required, unless it were necessary to explain the nature of the goods or services purchased by the public body.

Unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract, and the public interest lies in protecting that information from disclosure. No tender-related records are subject to either release or exemption as a class; therefore, each record must be examined on its own merits in light of the relevant circumstances.[92]

Parliamentary questions

Ministers should not refer to the application of the FOI Law when responding to parliamentary questions by Ministerial statement. Doing so could interfere with free speech in the Legislative Assembly and may impinge on the separation of powers between the Legislative and Judicial branches of Government. The following paragraphs outline a legal precedent from the UK.

In the UK, parliamentary questions should not be answered by a ministerial statement as to the result of the application of the UK Freedom of Information Act. The application of the FOI Act to a particular case is to be determined by the judiciary. Mr Justice Burnton so decided in *Office of Government Commerce v Information Commissioner & Her Majesty's Attorney General (on behalf of the Speaker of the House of Commons)* [2008] EWHC 737 Admin.

The Office of Government Commerce appealed against two decisions of the Information Tribunal upholding decision notices of the Information Commissioner requiring the disclosure of gateway reviews into the Government's identity card system. The second application by

[92] (Adapted from the Irish Information Commissioner's Decision of 25/06/2001 (*Mr. Mark Henry and the Office of Public Works)* http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1481,en.htm

Mark Oaten MP was by way of a parliamentary question asking for the traffic light status awarded to the identity card scheme by the Office of Government Commerce. Mr. Oaten's question was answered by a Ministerial statement which said that such information was subject to the exemptions in sections 33 (audit functions) and 35 (formulation of government policy) of the FOI Act 2000 and that disclosure was not in the public interest. The Information Tribunal required disclosure in both applications. The Office of Government Commerce appealed. The Speaker of the House of Commons, as intervener, submitted that (1) the assumption by the commissioner or tribunal of jurisdiction to consider the adequacy of a Ministerial reply to a parliamentary question would infringe the Bill of Rights 1689, Article 9 and the wider principle of parliamentary privilege, and the FOI Act conferred no such jurisdiction; and (2) the tribunal infringed Article 9 and parliamentary privilege by relying on the conclusions of the Parliamentary Select Committee on Work and Pensions as authority supporting its decision for disclosure and by examining the extent to which the Government had complied with public commitments given to a select committee.

Mr. Justice Burnton held that parliamentary privilege precluded the Court from considering a challenge to the accuracy of something said in Parliament. The law of parliamentary privilege was based on the need to avoid any risk of interference with free speech in Parliament and the doctrine of separation of powers. Accordingly Courts could not consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament, which included parliamentary questions and answers. The irrelevance of an opinion expressed by a parliamentary select committee to an issue that fell to be determined by the courts arose from the nature of the judicial process, the independence of the judiciary and of its decisions and the respect that the legislative and judicial branches of government owed to each other. Accordingly, it was best if parliamentary questions were not answered by a Ministerial statement as to the result of the application of the FOI Act to a particular case.

The application of the FOI Act to a particular case was a matter to be determined by the judiciary. A tribunal should not refer to evidence given by a parliamentary committee that was contentious or to the opinion or finding of the committee on an issue that the tribunal had to determine. In relying on the opinion of the select committee, the tribunal took into account an

illegitimate and irrelevant matter. Accordingly the decisions of the tribunal had to be quashed and the case remitted.

In the light of this decision, Ministers in the Cayman Islands should not answer parliamentary questions raising questions under the FOI Law by Ministerial statement.

Assistance to person with disabilities

Information Managers are under a duty to assist those with any relevant disability at every stage to make and carry forward an application under the FOI Law. If the Information Manager believes that someone may have a relevant disability, it is important to meet them face to face. It may be only then it may become apparent that, for example, someone is in fact blind or deaf or has difficulty in reading or writing. The aim of Information Managers should be to provide a level of access to applicants with a disability at least equivalent to that available to other applicants.

The level of service can be maximised by:

- converting oral requests from applicants who are unable to read, print and/or write due their disability to written requests. Using a standard form to help such applicants make their request in writing may be necessary;
- enabling the applicant to inspect records, have records provided in a different format or to have records explained to him; and
- accepting requests from a third party on behalf of an applicant with a disability.

In exceptional cases, it may be necessary to make contact with voluntary and other services which can provide assistance to applicants with particular disabilities. Information Managers should maintain a list of such services. Those who suffer from disabilities should not be expected to pay for any extra costs which may be incurred in making the information available because of their disability.

Checklist for preparing a Statement of Reasons

STEP 1 **Background/Scope**	• Ensure decision letter reflects the request as made by the applicant • If necessary include details of correspondence/ conversations with applicant to clarify scope or amend scope (dates and what was agreed) of request • If the request was transferred to another public authority, state when and to whom and which part of the request, if not transferred, is being dealt with
STEP 2 **Authorization**	• Ensure letter contains decision maker's authority to make the decision
STEP 3 **Legislative basis for decision**	• Ensure that either in the body of the letter outlining the decision, or as an attachment, each section of the FOI Law relied upon is set out so the applicant knows the actual text of each section relied on
STEP 4 **Evidence/Material upon which findings are based**	• Identify the records at issue, what the records are and where they are located • Other material used in making the decision i.e. submissions by the applicant, third parties etc. • Policy or procedural material, guidelines, handbooks or memos relied on by the decision-maker • Other factors, evidence, documents etc. taken into account when making the decision
STEP 5 **Decision**	• Set out the decision reached • Set out why deletions have not been made (if this is the case) so as to allow the record to be released • Set out why the records are not able to be released outside the FOI Law
STEP 6 **Reasons for decision**	• Set out the reasons why each document meets the criteria for an exemption i.e. documents are submissions prepared for Cabinet • Set out your understanding of the legislative basis for the decision i.e. a record is exempt under s.19 of the FOI Law, if it is a document that has been submitted to the Cabinet etc. • Set out any evidence/findings to substantiate the claim for an exemption i.e. "I have considered submissions made by third parties in relation to their personal information. These parties objected to disclosure on the grounds of (……) and I find that in those circumstances disclosure of the documents will be unreasonable" • Set out any public interest considerations including the weightings given to each consideration and the findings, i.e. "On balance I considered that the public interest argument in not disclosing outweighs the public interest supporting disclosure" • Sum up findings in the language of the FOI Law, i.e. "On the basis of the above I find that the records are ones to which s.18(1) of the FOI Law applies and that they are exempt from disclosure for the reasons outlined above"
STEP 7 **Review and complaint rights**	• Set out or attach appropriate rights of the applicant for internal review • Set out or attach rights to of the applicant to apply to the Information Commissioner for an appeal.
STEP 8	• Sign and date the letter. • Make sure all attachments are attached and that documents to be released are attached

A
Letter: Acknowledging receipt of request

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

We will undertake the necessary research in order to respond to your request within the prescribed period of thirty (30) calendar days. 30 calendar days means 30 days including weekends and public holidays.

If you have any queries about this letter, please contact me. Please remember to quote your reference number above in any future correspondence.

Yours sincerely

Information Manager
[Name, address, email address, and telephone number]

B

Letter: Further information needed to process request

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

The request which you made was in the following terms:
[set out the request]

Unfortunately, your request does not provide sufficient details to identify the record(s) you require. [include explanation of why this is the case, if appropriate]. I will not be able to take this matter further without extra information from you. In particular, it would be useful to know [give the applicant an indication of the sort of information that you will require in order to proceed with the request]
Kindly contact me to:

(a) provide further particulars about the record(s) you require; or
(b) set an appointment with me so that you can provide these further particulars.

Public Authorities are not able to answer open-ended requests but we would like to assist you as best we can.

If you have any queries about this letter, please contact me. Please remember to quote your reference number above in any future correspondence.
If you are unhappy with the service you have received in relation to your request and wish to make a complaint or request an review of our decision, you should write to.

Yours sincerely

Information Manager
[Name, address, email address, and telephone number]

C

Letter: Grant of access to a record to view / copy

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt). The [name of Public Authority] is pleased to grant you access to the record(s) requested being:

(a) (describe record(s) requested in application)

You requested to (examine / view / listen to) the original record. We invite you to do so at [address] on [date] at [time]. Kindly contact this office to confirm if this date and time is convenient for you. There is no fee for inspecting record(s) at this office.

OR

You requested a copy (ies) of the record(s). A cost of $_____ is payable prior to the reproduction of the record(s); kindly make arrangements for payment to be made. Within 14 days of payment, the copy (ies) of the record(s) will be available for collection at (address of public authority) between the hours of (opening days and times of the authority). The fee does not exceed the actual cost of reproducing, preparing and communicating the information.

Should you require the copy (ies) be sent to you via (post, courier, bearer etc), there will be an additional cost of $_____. Kindly advise if you require this additional service.

Yours sincerely

Information Manager
[Name, address, email address and telephone number]

D
Letter: Informing applicant of extension and reasons

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

The request which you made was in the following terms:
[set out the request]

Unfortunately, it is taking longer than expected to answer your request for information. I have to extend the period for response for a further 30 calendar days; that is 30 days from the date you should have originally received a response being (insert date response originally due). 30 calendar days means 30 days including weekends and public holidays.

The reason for this extension is that:
(a) the record(s) is/are difficult to locate because [give reason]; or
(b) we are short of staff due to illness/holidays.

I apologize for the delay. You will be provided with notice of our decision by (give date 60 calendar days from receipt of request) at the latest.

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

E

Letter: Informs applicant of transfer

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

The record(s) requested is not within the subject matter portfolio of this Public Authority. Your Application has therefore been transferred to the Public Authority indicated below, which handles this area of interest:

(Name of Public Authority)
(Date of Transfer)
(Contact Information)
(Address)
(Tel No)
(Email)
(Name of Responsible Officer of Receiving Public Authority)

Yours sincerely

Information Manager
[Name, address, email address, and telephone number]

F

Letter: Informs applicant that information is already available

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

The record(s) for which you have applied is/are already published and available. It/They may be obtained from:

(Name of Public Authority, address, phone number, email address)
OR
(website from which the record(s) can be viewed and/or downloaded).

Yours sincerely

Information Manager
[Name, address, email address, and telephone number]

G

Letter: Informs applicant that information not held

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

I have carefully considered your application for information. Unfortunately, this Authority does not hold the record(s) you have requested and, to my knowledge, no other Authority holds the record(s) either.

Under section 33 of the Freedom of Information Law, you may ask for an Internal Review of a response to your request:

(a) refusing to grant access;
(b) granting partial access to the record(s) specified in your application;
(c) deferring the grant of access to the document;
(d) refusal to amend or annotate an official document containing personal information; or
(e) charging a fee for action taken or as to the amount of the fee charged;

and where the decision was taken by a person other than the responsible Minister, Chief Officer or Principal Officer of the public authority.

You have 30 days from the date of receipt of this Notice to request an Internal Review by writing to the Public Authority in question and including:

(a) your name, address and telephone number;
(b) a copy of your Application and/or the Reference Number assigned to your Application;
(c) a copy of this letter; and
(d) if so inclined, the basis on which you are requesting a Review of the decision indicated.

If upon Internal Review, the decision is still not favourable to you, you have the right under section 42 of the FOI Law to appeal to the Information Commissioner within 30 days of:

(a) the date of notification of the decision taken at Internal Review;

(b) a decision taken by a responsible Minister, Chief Officer or Principal Officer of the public authority; or
(c) the date on which you should have been notified of the decision(s) referred to above but of which you received no notification .

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

H

Letter: Informing applicant that information is enclosed

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

[name of Public Authority] is pleased to grant you access to the record(s) requested being:
(describe document requested in application)

Please find enclosed a copy(ies) of the record(s) which you requested. Please let me know if I can be of any further help.

Yours sincerely

Yours sincerely

Information Manager
[Name, address, email address, and telephone number]

Enclosure: Copy of record(s) [give a brief description of this]

I

Letter: Informs applicant that request for information is deferred, reason and right of appeal

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

Access to the record(s) requested has been deferred pursuant to section 11 of the Freedom of Information Law for the following reason(s) and until the happening of the actions stated herein:

(a) Publication of the document within a particular period is required under the provisions of (state name of Law / Regulation);
(b) The record(s) has been prepared for presentation to the Legislative Assembly;
(c) The record(s) was prepared for the purposes of being made available to a particular person or body;
(d) The release of the record(s) at this time would be contrary to the public interest (state reasons); or
(e) Access to the record(s) will be granted on the [day] of [month], [year].

Under section 33 of the FOI Law, you may ask for an Internal Review of a response to your request:

(a) refusing to grant access;
(b) granting partial access to the record(s) specified in your application;
(c) deferring the grant of access to the document;
(d) refusal to amend or annotate an official document containing personal information; or
(e) charging a fee for action taken or as to the amount of the fee charged;

and where the decision was taken by a person other than the responsible Minister, Chief Officer or Principal Officer of the public authority.

You have 30 days from the date of receipt of this Notice to request an Internal Review by writing to the Public Authority in question and including:

(e) your name, address and telephone number;
(f) a copy of your Application and/or the Reference Number assigned to your Application;
(g) a copy of this letter; and
(h) if so inclined, the basis on which you are requesting a Review of the decision indicated.

If upon Internal Review, the decision is still not favourable to you, you have the right under section 42 of the FOI Law to appeal to the Information Commissioner within 30 days of:

(a) the date of notification of the decision taken at Internal Review;
(b) a decision taken by a responsible Minister, Chief Officer or Principal Officer of the public authority; or
(c) the date on which you should have been notified of the decision(s) referred to above but of which you received no notification .

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

J

Letter: Informs applicant that request denied in full, reason and right of appeal

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

Option I – Record(s) are Exempt

Your application has been regrettably denied as the record(s) requested is an exempt record(s) pursuant to section (_____) of the Freedom of Information Law, 2007. (If a Certificate of Exemption has been issued under sections 15, 16, 20(b)(c)(d) and 22 in respect of this type of record, it must accompany this letter).

The record(s) requested is exempt as its disclosure would prejudice the interest of other parties because it contains the following type(s) of information:

(a) affecting security, defence or international relations, etc. (section 15);
(b) relating to law enforcement (section 16);
(c) subject to legal privilege, etc. (section 17);
(d) affecting national economy (section 18);
(e) revealing government's deliberative processes (section 19);
(f) prejudice to the effective conduct of public affairs (section 20);
(g) commercial interests (section 21);
(h) relating to heritage sites (section 22);
(i) personal information (section 23); or
(j) likely to endanger health and safely (section 24).

Option II – Record(s) contains Exempt Matter

The record(s) requested contains exempt matter which has been deleted / redacted pursuant to section 12 of the Freedom of Information Law.

The [name of Public Authority] is pleased to grant you partial access to the record(s) requested being:

(a) (describe record(s) requested in application)

We invite you to do so at [address] on [date] at [time]. Kindly contact this office to confirm if this date and time is convenient for you. There is no fee for inspecting record(s) at this office.

Under section 33 of the FOI Law, you may ask for an Internal Review of a response to your request:

(a) refusing to grant access;
(b) granting partial access to the record(s) specified in your application;
(c) deferring the grant of access to the document;
(d) refusal to amend or annotate an official document containing personal information; or
(e) charging a fee for action taken or as to the amount of the fee charged;

and where the decision was taken by a person other than the responsible Minister, Chief Officer or Principal Officer of the public authority.

You have 30 days from the date of receipt of this Notice to request an Internal Review by writing to the Public Authority in question and including:

(a) your name, address and telephone number;
(b) a copy of your Application and/or the Reference Number assigned to your Application;
(c) a copy of this letter; and
(d) if so inclined, the basis on which you are requesting a Review of the decision indicated.

If upon Internal Review, the decision is still not favourable to you, you have the right under section 42 of the FOI Law to appeal to the Information Commissioner within 30 days of:

(a) the date of notification of the decision taken at Internal Review;
(b) a decision taken by a responsible Minister, Chief Officer or Principal Officer of the public authority; or
(c) the date on which you should have been notified of the decision(s) referred to above but of which you received no notification .

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

K
Letter: Consultation with third party

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

I have considered your application which relates to personal information held by this Authority about another person. Before I can determine your application I must obtain the views of the other person and I am required, under the Freedom of Information Law and FOI Regulations to give him/her a period of 28 calendar days to comment on the application for disclosure of their personal information.

Therefore there will be some delay before I am able to make a decision regarding the record(s) you requested in your application.

If you have any queries about this letter please contact me.

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

L

Letter: Advising a third party their information has been requested

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

I am writing to you in connection with a request for information received by the [*insert Public Authority*] which is being considered under the Freedom of Information Law 2007. Part of the information requested [was supplied by/relates to] you. [*When possible, the third party should be given the terms of the request and if appropriate a description of the information held. It is essential that this is fact-sensitive*].

The FOI Law requires public authorities to disclose information in response to a request unless an exemption applies. There are two types of exemptions in the FOI Law. The first type is an 'absolute' exemption, whereby disclosure may be withheld if the information falls within the terms of the exemption in question. However, where the exemption in question is only covered by a 'qualified' exemption, we can only withhold the information if the balance of the public interest, in all the circumstances of the case, favours maintaining the exemption of the information.

[In light of the fact that you provided this information to us / in light of your interest in this information], we are informing you of this request. If you wish to notify us of any particular issues or considerations that you consider relevant to the question of disclosure of this information, please do not hesitate to contact me. All relevant factors will be taken into account when making our decision on whether the information is required to be disclosed, in particular the relevant public interest considerations both in favour of and against disclosure.

I would be grateful if you could respond to me by [*date*] to enable the [*public authority*] to consider all relevant factors in taking a decision on whether the FOI Law requires this information to be disclosed.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

M

Letter: Non-payment of fees

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Further to the letter dated (insert date of notice letter) sent to you advising of the fees which this Authority will charge if we are to send you a copy(ies) of the record(s) as you requested, I advise that payment has not yet been made.

Until such payment is made, you will not be able to obtain the copy (ies) of the record(s) requested.

If payment is not made within 21 calendar days from the date of this letter your request will be considered withdrawn on the grounds that you have not paid the fees due. You may request an extension of time for payment. Calendar days means all days including weekends and public holidays.

Kindly contact this office to confirm a date and time that is convenient for you should you wish to inspect the record(s) instead. There is no fee for inspecting record(s) at this office.

If you have any queries about this letter please contact me.

Yours sincerely

Information Manager
[Name, address, email address, telephone number].

N

Letter: Refusal of access due to diversion of resources (s. 9(c))

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

The request which you made was in the following terms:
[set out the request]

Unfortunately, your request was too broad/extensive to properly identify the record(s) you require. After further consultation, you were unable to narrow the scope of your request.

As explained previously, it would take many days and many hours of staff time to search all files for the record(s) which you have requested. This would involve an unreasonable diversion of the resources available to this Authority.

Due to the reasons listed above, under section 9(c) of the Freedom of Information Law, access to the record(s) you requested has been denied because compliance with your request as it stands will involve an unreasonable diversion of this Authority's resources.

Under section 33 of the FOI Law, you may ask for an Internal Review of a response to your request:

(a) refusing to grant access;
(b) granting partial access to the record(s) specified in your application;
(c) deferring the grant of access to the document;
(d) refusal to amend or annotate an official document containing personal information; or
(e) charging a fee for action taken or as to the amount of the fee charged;

and where the decision was taken by a person other than the responsible Minister, Chief Officer or Principal Officer of the public authority.

You have 30 days from the date of receipt of this Notice to request an Internal Review by writing to the Public Authority in question and including:

(a) your name, address and telephone number;
(b) a copy of your Application and/or the Reference Number assigned to your Application;
(c) a copy of this letter; and
(d) if so inclined, the basis on which you are requesting a Review of the decision indicated.

If upon Internal Review, the decision is still not favourable to you, you have the right under section 42 of the FOI Law to appeal to the Information Commissioner within 30 days of:

(a) the date of notification of the decision taken at Internal Review;
(b) a decision taken by a responsible Minister, Chief Officer or Principal Officer of the public authority; or
(c) the date on which you should have been notified of the decision(s) referred to above but of which you received no notification .

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

O

Letter: Refusal of access due to substantially similar previous requests from same person (s. 9(b))

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

The request which you made was in the following terms:
[set out the request]

Your request is in substantially similar terms to the request which you made to this Authority on [state date], a copy of which I enclose. Your request was answered by this Authority on [state date] and I enclose a copy of the reply. Nothing has changed since then.

In these circumstances, under section 9(b) of the Freedom of Information Law, access to the record(s) you requested has been denied because this Authority has answered a substantially similar previous request from you.

Under section 33 of the FOI Law, you may ask for an Internal Review of a response to your request:

(a) refusing to grant access;
(b) granting partial access to the record(s) specified in your application;
(c) deferring the grant of access to the document;
(d) refusal to amend or annotate an official document containing personal information; or
(e) charging a fee for action taken or as to the amount of the fee charged;

and where the decision was taken by a person other than the responsible Minister, Chief Officer or Principal Officer of the public authority.

You have 30 days from the date of receipt of this Notice to request an Internal Review by writing to the Public Authority in question and including:

(a) your name, address and telephone number;

(b) a copy of your Application and/or the Reference Number assigned to your Application;
(c) a copy of this letter; and
(d) if so inclined, the basis on which you are requesting a Review of the decision indicated.

If upon Internal Review, the decision is still not favourable to you, you have the right under section 42 of the FOI Law to appeal to the Information Commissioner within 30 days of:

(a) the date of notification of the decision taken at Internal Review;
(b) a decision taken by a responsible Minister, Chief Officer or Principal Officer of the public authority; or
(c) the date on which you should have been notified of the decision(s) referred to above but of which you received no notification.

Yours sincerely

Information Manager
[Name, address, email address, telephone number]

P
Exemption Certificate

THE FREEDOM OF INFORMATION LAW, 2007

Certificate of Exemption

In accordance with section 25 of the Freedom of Information Law, 2007, this is to certify that the

record

part(s) of the record

requested under the FOI Law, Reference Number ( ), dated ( ) and being the document described hereunder:

(describe exempt record or exempt part(s) of record)

is/are exempt pursuant to section (***state relevant section)*** of the FOI Law for the following reason(s):

1.
2.
3.

Dated this _____ day of _____, 20___.

Signed: _____ Signed: _____
Governor Minister of ( )

Q
Copyright

NOTE:

- **You may wish to consider whether it is appropriate and/or necessary to include the paragraphs on copyright in response to all requests for information.**

Reference Number:
[Name of applicant]
[Address of applicant]

[Date]

Dear [Name]

Thank you for your application dated (insert date of application), received by us on (insert date of receipt).

The request which you made was in the following terms:
[set out the request]

I am writing to confirm that the [*public authority*] has now completed its search for the information which you requested.

[A copy of the information is enclosed – if you have been unable to provide it in the format requested by the applicant because it was 'unreasonable to do so' then you should state why.]
OR
[A copy of the information is enclosed in the format you requested.]
OR
[As you have asked to view the records in which the information is contained, and we are content to let you do so. Please telephone me to make the necessary arrangements.]

The information supplied to you continues to be protected by the Copyright Act 1956. You are free to use it for your own purposes, including any noncommercial research you are doing and for the purposes of news reporting. Any other reuse, for example commercial publication, would require the permission of the copyright holder.
If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.
Under section 33 of the FOI Law, you may ask for an Internal Review of a response to your request:

(a) refusing to grant access;

(b) granting partial access to the record(s) specified in your application;
(c) deferring the grant of access to the document;
(d) refusal to amend or annotate an official document containing personal information; or
(e) charging a fee for action taken or as to the amount of the fee charged;

and where the decision was taken by a person other than the responsible Minister, Chief Officer or Principal Officer of the public authority.

You have 30 days from the date of receipt of this Notice to request an Internal Review by writing to the Public Authority in question and including:

(a) your name, address and telephone number;
(b) a copy of your Application and/or the Reference Number assigned to your Application;
(c) a copy of this letter; and
(d) if so inclined, the basis on which you are requesting a Review of the decision indicated.

If upon Internal Review, the decision is still not favourable to you, you have the right under section 42 of the FOI Law to appeal to the Information Commissioner within 30 days of:

(a) the date of notification of the decision taken at Internal Review;
(b) a decision taken by a responsible Minister, Chief Officer or Principal Officer of the public authority; or
(c) the date on which you should have been notified of the decision(s) referred to above but of which you received no notification.

Yours sincerely

Information Manager
[Name, address, email address, telephone number]