



Hearing 104-202300830

Decision

Royal Cayman Islands Police Services

Sharon Roulstone
Ombudsman

May 9, 2024

Summary

An applicant made a request under the Freedom of Information Act (2021 Revision) (FOIA) for a Human Resources Report (the Report) following the investigation of a complaint she had made to the Royal Cayman Islands Police Service (RCIPS).

The RCIPS discussed the findings of the Report with the applicant/complainant, and disclosed a redacted version, claiming the exemption relating to personal information of third parties who were involved in the investigation, including witnesses who made statements in confidence, as well as information relating to the individual who was the subject of the complaint. Information that was already known to the applicant, or that constituted her own personal data was disclosed, except where it overlapped with the personal data of others and where such disclosure would not be reasonable. The exemption required consideration whether any information is prohibited or required to be disclosed under the Data Protection Act (2021 Revision) (DPA).

Information relating to the HR company hired by the RCIPS to conduct the investigation and write the Report, which was initially redacted, was also disclosed, except for the signature of one employee of that company.

The Ombudsman agreed with the redactions made by the RCIPS and no further action is required. The Report has been disclosed to the applicant only, not to the world at large.

Statutes considered¹

¹ In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

Freedom of Information Act (2021 Revision) (FOIA)
Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)
Data Protection Act (2021 Revision)

Contents

A. INTRODUCTION	2
B. CONSIDERATION OF ISSUES.....	3
C. FINDINGS AND DECISION.....	10

A. INTRODUCTION

- [1] On 25 September 2023, the applicant made a request under the FOIA to the RCIPS for:

... a copy of the/a report of which I... am the complainant. The report was commissioned by and submitted to the RCIPS' Chief Officer and Human Resources Department from CaymanHR, approximately two weeks ago. [sic]

- [2] The applicant explained that the Report was about a complaint that she, herself, had made, about events a few months prior while she was employed by the RCIPS. After conclusion of the Report, the, then, Police Commissioner and Deputy Police Commissioner, as well as the HR Manager, met with the applicant to discuss the Report and its findings. The applicant was told that the Deputy Governor's Office was to be informed of the receipt of the Report that same day.
- [3] However, the, then, Police Commissioner had denied the applicant a copy of the Report, saying that it had been commissioned by the RCIPS, and that permission of the individual who was the subject of the complaint would have to be sought.
- [4] The RCIPS acknowledged the request the next day, and on 25 October 2023 the RCIPS's Information Manager (IM) granted partial access to the Report, including "any part of [the Report] which constitutes your personal data as defined in [the DPA]". The exemption in section 23(1) of the FOIA was applied to redact information relating to third parties who were involved in the investigation, including witnesses who made statements in confidence, as well as information relating to the individual who was the subject of the complaint.
- [5] The applicant requested an internal review on 6 November 2023. The Police Commissioner responded on 20 November, reducing the amount of information redacted and maintaining the remaining redactions.
- [6] The applicant then made an appeal to the Ombudsman, which was formally accepted on 5 December 2023.

- [7] In the informal stage of the appeal, we received the responsive record, analyzed the redactions, wrote to, and met with, the RCIPS to discuss the potential release of the names, job titles and work email addresses of individuals occupying a position in a public authority, or individuals/entities providing a service for a public authority, pursuant to paragraphs 2(a) and (b) of schedule 1 of the Regulations.
- [8] On 17 January 2024, the RCIPS disclosed an updated record with fewer redactions, now relying on sections 20(1)(d) (claiming prejudice to the conduct of public affairs) as well as 23(1). Previous redactions on the basis of section 21(1)(b) (commercial interests), relating to the company that wrote the Report, were abandoned.
- [9] The applicant indicated that she wanted a formal hearing before the Ombudsman, and also stated (my emphasis):

*... I am not so much keen on knowing the names of who said what in their responses of their interviews as witnesses as I am in receiving all other information of the report. I also believe some pages of the report are missing [as well as named] recommendations...
I also have concerns that only 4 "witnesses" were interviewed when I provided names of no less than 5 witnesses.*

- [10] The applicant also stated their suspicion that some of the redacted information,
- ... could be as 'incriminating' as other previous redacted information but only to further substantiate the findings and witness revelations.*

- [11] We responded by moving the appeal to the formal hearing stage. We also clarified that it did not appear to us that the Report was incomplete (e.g. there were no pages or paragraphs missing) and stated that we could not speculate whether or why certain information may have been, or may not have been included in the Report, and the matter progressed to a formal hearing.

B. CONSIDERATION OF ISSUES

- [12] The Report is the single responsive record consisting of 6 pages, including the cover page.
- [13] Section 6(1) states:
- General right of access***
- 6. (1) Subject to the provisions of this Act, every person shall have a right to obtain access to a record other than an exempt record.***
- [14] Section 12(1) states:

Partial access

12. (1) Where an application is made to a public authority for access to a record which contains exempt matter, the authority shall grant access to a copy of the record with the exempt matter deleted therefrom.

[15] Section 23 states:

Records relating to personal information

23. (1) Subject to the remaining provisions of this section, a record is exempt if its disclosure would involve the unreasonable disclosure of personal information of any natural person, whether living or dead.

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

(3) Records relating to personal information shall be exempt without 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 Act.

(5) Where the Data Protection Act, 2017 [Law 33 of 2017] does not permit disclosure or publication of a record or part of a record, that record or part of the record shall be exempt from disclosure under subsection (1), and section 26(1) shall not apply.

[16] Personal information” is defined in regulation 2 as:

... information (including information forming part of a database) or an opinion, whether true or not, about an individual, whether living or dead, whose identity is apparent, or can reasonably be ascertained, from the information or opinion, and includes the particulars set out in Schedule 1.

[17] Schedule 1 of the Regulations states:

SCOPE OF “PERSONAL INFORMATION”

1. The scope of “personal information”, as defined in regulation 2, includes —

- (a) the individual’s name, home address and home telephone number;
- (b) the individual’s race, national or ethnic origin, colour, and religious or political beliefs or associations;
- (c) the individual’s age, sex, marital status, family status and sexual orientation;
- (d) an identifying number, symbol or other particular assigned to the individual;

- (e) the individual's fingerprints, other biometric information, blood-type, genetic information and inheritable characteristics;
- (f) information about the individual's health and health care history, including information about a physical or mental disability;
- (g) information about the individual's educational background;
- (h) information about the individual's financial records;
- (i) information about the individual's employment history;
- (j) information about an individual gathered in the course of assessments related to the individual's skills, aptitudes and capabilities, including psychometric testing conducted for employment purposes;
- (k) information about the individual's criminal history, including criminal records where a pardon has been given;
- (l) another person's expression of opinion about the individual; and
- (m) the individual's personal views or opinions, except if those views or opinions are about someone else.

2. The scope of "personal information", as defined in regulation 2, does not include —

- (a) where the individual occupies or has occupied a position in a public authority
 - (i) the name and official contact details of the individual;
 - (ii) information relating to the position, or its functions;
 - (iii) the general terms upon, and subject to which, the individual would occupy that position; or
 - (iv) anything written or recorded in any form by the individual, in the course of and for the purpose of, the performance of the functions of the position; and
- (b) where the individual is or was providing a service for a public authority under a contract for services
 - (i) the name of the individual;
 - (ii) information relating to the service, or the terms of the contract;
 - (iii) anything written or recorded in any form by the individual, in the course of and for the purposes of, the provision of the service; or
 - (iv) the views or opinions of the individual in relation to a public authority, the staff of a public authority, the business or the performance of the functions of a public authority.

[18] Section 26 states:

Granting access to exempt information

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

(2) Public interest shall be defined in regulations made under this Act.

(3) Notwithstanding that a record or part thereof is exempt from disclosure, access shall be granted to personal information if disclosure would be required under the Data Protection Act, 2017 [Law 33 of 2017].

- [19] Section 27 states:

Making of decisions and reasons public

27. Public authorities shall make their best efforts to ensure that decisions and the reasons for those decisions are made public unless the information that would be disclosed thereby is exempt under this Act.

- [20] Section 43(2) states:

(2) In any appeal under section 42, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Act.

- [21] I am required to apply the civil standard of proof (the balance of probabilities), which means that a matter is “more likely than not” to have occurred.

The position of the RCIPS

- [22] The RCIPS has provided a detailed, page-by-page outline of its reasons for partially redacting the text of pages 2-6 of the Report. The title page (page 1) is no longer redacted.
- [23] In its hearing submission the RCIPS confirms that the exemption in section 20(1)(d) “has not been considered and is not the argument put forward by the [RCIPS]”. Therefore, this exemption was abandoned, and I will not consider it further.
- [24] The exemption in section 21(1)(b) was initially claimed to justify the redaction of the name and other information relating to the company that conducted the investigation and wrote the Report. However, the RCIPS abandoned this argument as well. Therefore, page 1 and the footer on each subsequent page were disclosed.
- [25] On page 2 the signature of the representative of the company that produced the Report has been redacted. This redaction is on the basis of section 23(1), as it is personal information that would be unreasonable to disclose.
- [26] On the subsequent pages information pertaining to the applicant, or information already known to the applicant, including specific situations or incidents at work in which the applicant took part, is disclosed. However, information on the respondent to the complaint and outcomes in their regard have been redacted.

- [27] Information (names, official contact details, etc.) on public officers acting in their official capacity, or on individuals providing a service for a public authority, has been disclosed in accordance with paragraphs 2(a) and (b) of schedule 1 of the Regulations. However, personnel matters and detailed narratives of events relating to the subject of the complaint have been withheld on the basis of the exemption in section 23.
- [28] The RCIPS's reasoning for relying on the exemption in section 23 is as follows:

The information currently redacted is the personal data of various third parties and any disclosure to the applicant would be an unreasonable disclosure. Information has been provided by witnesses with an expectation of confidentiality and investigations would be expected to be conducted in this manner. Also, the subject of the complaint has a right to expect their information is kept confidential and not released as part of a Freedom of Information request.

Information has been provided which pertains to the applicant or is already known to the applicant, including first hand accounts of various incidents. In addition, where the applicant is part of a documented incident, information has been provided.

- [29] The RCIPS points to section 23(5), which requires consideration whether the DPA prohibits disclosure of a record or part thereof, stating:

Section 23(5) of the FOIA is applicable as the Data Protection Act (2021 Revision) does not permit disclosure and the record is exempt under 23(1) and section 26(1) shall not apply.

The relevant section under the Data Protection Act (2021 Revision) is section 8(7) whereby "if a data controller cannot comply with the request without disclosing data relating to another data subject who can be identified from that personal data, the data controller is not obliged to comply with the request unless a) the other data subject has consented to the disclosure of the personal data making the request; or b) it is reasonable in all the circumstances to comply with the request without the consent of the other data subject".

- [30] The RCIPS has also considered section 26(3), as follows:

It is not considered reasonable in all the circumstances under section 8(7) of the Data Protection Act (2021 Revision) to provide the information as the other data subjects have not given consent and the remaining redacted information has either been provided in confidence or is predominantly the personal data of a third party.

Also, the [Office of the Commissioner of Police] does not consider Schedule 1 of the Freedom of Information (General) Regulations (2021 Revision) to be applicable in the context of where an individual occupies a position in a public authority. The names and e mail addresses etc.

have now been unredacted in compliance with the regulation but the information withheld is concerned with personnel matters and the detailed narrative of events.

- [31] The RCIPS states that it relied in part on guidance from the UK Information Commissioner's Office² relating to access to information in complaint files, in reaching its decisions.

The position of the applicant

- [32] The burden of proof is on the RCIPS, not on the applicant. The applicant did not make an initial submission, but provided a reply submission, in which she responded to the RCIPS's position.
- [33] The applicant takes the position that she is entitled to the entire report, but that the "personal identifying details and information pertaining to persons named in the report are not a priority and do not need to be divulged to me." The applicant states that this also relates to the identifying information on the accused and the witnesses.
- [34] The applicant confirms that the findings of the Report were discussed in a meeting with the, then, Commissioner of Police. Because of this, she believes it is "unproductive to not want to supply the report in an unredacted format save the names and identifying information".
- [35] The applicant states that she, herself, provided the names of the witnesses, and is therefore aware of their identities, which in any event, she says, she is able to deduce from their "communication styles".
- [36] The applicant does not believe the name and logo of the HR company that conducted the investigation should be redacted. This is a moot point, since the redactions relating to the HR company and its staff have already been removed by the RCIPS, save for the signature which is discussed further below.
- [37] The applicant points out that a settlement was reached in regard to the complaint, and that it included a non-disclosure agreement relating to the Report. Therefore, in any event, she would not be in any position to discuss or disclose the Report to others, and disclosure "will only serve my personal piece of mind and record".

Discussion

Section 23(1)

- [38] After a close review of the redactions made by the RCIPS, it is clear that the RCIPS, with the help from my office, has carefully dissected the Report to identify those parts that would, or would not be reasonable to disclose. While the exemption in section 20(1)(d) could have been applied to most

² <https://ico.org.uk/media/for-organisations/documents/2021/2619040/s40-access-to-information-held-in-complaint-files-final-v-31.pdf>

of these same redactions (relating to prejudice to the conduct of public affairs), the RCIPS is claiming the exemption in section 23(1) (relating to personal information).

- [39] It would be unreasonable to withhold information that is already known to the applicant, e.g. where the applicant was personally involved in the events recounted by the witnesses. However, to the extent that it is not yet known to the applicant, information that can identify the accused and the witnesses should be withheld under the exemption in section 23(1).
- [40] Although the applicant states that she provided the names of witnesses and therefore already knows their identities, she does not know exactly what each witness said. As well, other parties may have proposed witnesses, who may have been interviewed. Therefore, the identity of the witnesses cannot be taken as known by the applicant.

Section 23(5)

- [41] Section 23(5) demands a consideration whether disclosure is permitted under the DPA. In the circumstances of this appeal, the only processing condition (aka “legal basis”) in schedule 2 of the DPA that could conceivably apply, would be the sixth paragraph, which states:

6. The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except if the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

- [42] The disclosure of information under the FOIA is a legitimate interest. However, in the circumstances of this case, I do not find that the sixth data processing condition in schedule 2, or any other legal basis, applies. This is because the witnesses have a legitimate, inherent expectation of confidentiality and privacy. As well, the Report and its findings can clearly be understood without the disclosure of the personal data of the witnesses (including information that renders them identifiable), thereby negating the “necessity” of the disclosure.
- [43] **Therefore, the DPA does not “permit” the disclosure of the third-party personal data, and the exemption in section 23(1) is engaged. The application of section 23(5) also has the effect that there is no public interest test under section 26(1).**

Section 26(3)

- [44] Furthermore, where an exemption applies, section 26(3) of the FOIA grants access if disclosure is required under the DPA.
- [45] Section 8 of the DPA grants a right of access to one’s own personal data. The RCIPS has applied this provision in regard to the applicant’s own personal data. However, where the personal data of one individual is intrinsically intertwined with the personal data of a third-party individual (including their name and/or other data that would render them identifiable), as is the case here, the right to access must be balanced against the rights of third-party individuals.

- [46] The third-party individuals have not given their consent for disclosure, and as witnesses they have a legitimate expectation of confidentiality and privacy. This undermines a finding under section 8(7) of the DPA that “disclosure would be reasonable in all the circumstances”.
- [47] **Therefore, the exemption is not overridden by the requirements of the DPA, as provided for under section 26(3) of the FOIA, and it remains engaged.**
- [48] As stated above, the information relating to the HR company has been disclosed, except for the signature of a staff member of that company, which has been redacted under section 23(1).
- [49] The disclosure of the signature of a private sector individual, even though the company in question was engaged by the RCIPS, would be unreasonable by virtue of section 23(1), since disclosure of the signature would pose an increased risk of identity theft and harassment. This information is in any event not necessary to interpret the responsive record. As required, I have considered sections 23(5) and 26(3), and I confirm that the information is prohibited to be disclosed under the DPA, for the same reason as the third-party personal data discussed above, and it is not required to be disclosed to the applicant under the DPA. Consequently, under section 23(5), no public interest test is required in regard to the signature.

C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above, I make the following findings and decisions:

- a) The redacted parts of the Report are exempted under section 23(1), by reason of section 23(5) which provides that that exemption is engaged where disclosure of personal data is not permitted under the provisions of the Data Protection Act (2021 Revision).
- b) The exemption of the redacted parts of the Report is not overridden by the provisions of the Data Protection Act (2021 Revision), as provided under section 26(3).
- c) In accordance with the above findings, no further steps are required to be taken by the RCIPS.

I want to clarify that the determination of the exemptions and redactions in this case was in consideration of this specific applicant's identity and involvement in the HR investigation documented in the Report. Therefore, disclosure is to this specific applicant only, and not to the world at large, as is usually the case in FOI appeals.

As per section 47 of the Freedom of Information Law, 2007, the applicant or the RCIPS may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.



Sharon Roulstone
Ombudsman