

ICO Hearing 12 – 01011/01211

Decision

Portfolio of Legal Affairs

Jennifer Dilbert, MBE, JP

Information Commissioner for the Cayman Islands

14 June 2011

Summary:

An Applicant was refused access by the Portfolio of Legal Affairs to a number of requests for statistical information, and to “the number of pending extradition requests from the Attorney General specifying country of request”.

The Information Commissioner upheld the decision of the Portfolio of Legal Affairs to refuse access to the responsive records, and found that the Portfolio was not required to comply with the request for records under the *Freedom of Information Law, 2007*.

Statutes Considered:

Freedom of Information Law, 2007

Freedom of Information (General) Regulations, 2008

Exemptions Considered:

Sections 9(a) and 16(b) of the *Freedom of Information Law, 2007*

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A. INTRODUCTION

- [1] This Hearing deals with two separate sets of requests as set out below:
- [2] Request Set 1 - On 30 January 2011, the Applicant submitted an FOI request to the Portfolio of Legal Affairs ("PLA") for:
1. *Number of cases prosecuted by the Solicitor-General personally in 2008, 2009 and 2010.*
 2. *Number of case files ruled on by the Solicitor-General personally in 2008, 2009 and 2010.*
 3. *Number of days Solicitor-General off island on official business 2008, 2009 and 2010.*
 4. *Number of case files ruled on by the Attorney-General personally in 2008, 2009 and 2010.*
 5. *Number of days Attorney-General off island on official business 2008, 2009 and 2010.*
 6. *Number of members of the public received by the Attorney-General on official business 2008, 2009 and 2010.*
- [3] On 28 February 2011, the PLA responded to the Applicant granting access to parts 3 and 5 of the request. The PLA declined from responding to parts 1, 2, 4 and 6 as they deemed the request to be vexatious as per section 9(a) of the FOI Law.
- [4] The Applicant requested an Internal Review of the response from the PLA on 28 February, and on 18 March the PLA responded to the Applicant's request for an Internal Review in which they upheld the earlier decision to decline from responding to parts 1, 2, 4 and 6. The Applicant appealed the matter to my Office on 21 March, 2011.
- [5] Request Set 2 - Concurrently, on 6 February 2011 the Applicant submitted an FOI request to the PLA for:
1. *Number of civil case files handled by the Legal Dept for 2007, 2008, 2009.*
 2. *Number of civil case files handled by the Nine (9) Civil Crown Counsel for 2010.*
 3. *Number of pending extradition requests from the Attorney-General specifying country of request.*
 4. *Number of convicted persons absconded and wanted in the Cayman Islands*
 5. *Names of convicted persons absconded and wanted in the Cayman Islands*
- [6] On 4 March 2011, the PLA responded to the Applicant and declined from responding to parts 1 and 2 as they deemed the request to be vexatious as per section 9(a) of the FOI Law. In relation to part 3, the PLA stated that the record relates to law enforcement and is therefore exempt from disclosure under section 16(b) of the FOI Law. Part 4 and 5 were closed administratively as the request was already being dealt with by the RCIPS. On the same day, the Applicant requested an Internal Review of the response from the PLA.

- [7] On 1 April 2011, the PLA responded to the Applicant's request for an Internal Review in which they upheld the earlier decision to decline from responding to parts 1 and 2 as they deemed the request to be vexatious as per section 9(a) of the FOI Law. The Internal Review also upheld the PLA's decision to exempt from disclosure under section 16(b) of the FOI Law records relating to part 3 of the request. The Applicant appealed the matter to my Office on 4 April, 2011.

B. THE PORTFOLIO OF LEGAL AFFAIRS

- [8] The Portfolio of Legal Affairs advises the Government, its affiliated bodies, statutory boards and corporations, on legal matters. It is responsible for criminal proceedings¹, legal drafting, law revision, law reform and local legal education through the Cayman Islands Law School. The Portfolio of Legal Affairs is headed by the Attorney General and includes the Office of the Solicitor General and the Legal Department.

C. PROCEDURAL MATTERS

- [9] These requests were properly dealt with by the Portfolio of Legal Affairs as required under the FOI Law, and all responses were made within the statutory time limits.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [10] The issues to be decided in this Hearing are:
1. **Section 9(a)** – Is the PLA not required to comply with the requests because the requests are vexatious?
 2. **Section 16(b)** - Are parts of the request exempt from disclosure because the responsive records relate to law enforcement, and their disclosure would, or could reasonably be expected to 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?

E. CONSIDERATION OF ISSUES UNDER REVIEW

- [11] 1. The PLA has denied access to some of the requested records on the ground that they are subject to section 9(a) of the FOI Law. This section states:

"A public authority is not required to comply with a request where ... the request is vexatious".

¹ Criminal prosecutions are now handled by the Office of the Director of Public Prosecutions

- [12] 2. Access to the number of pending extradition requests from the Attorney-General specifying country of request was withheld under section 16(b) of the FOI Law. This section states:

“Records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to...(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”.

Discussion

- [13] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

1. Is the Portfolio of Legal Affairs not required to comply with the requests because the requests are vexatious?

- [14] Under section 9(a), a public authority is not required to comply with a request where the request is vexatious. This exclusion is not subject to a public interest test. Section 9 is essentially a remedial tool the public authorities possess to curb abuse of the right of access. The term “vexatious” is not defined in the FOI Law or Regulations, and is therefore intended to have its ordinary meaning, such as “causing or tending to cause annoyance, frustration or worry...²”. It is premised on the assumption that a person who wields their statutory rights in a vexatious manner, unnecessarily burdens a public authority and threatens or diminishes the ability of others to exercise their statutory access rights. Vexatious requests also threaten to bring the FOI Law into disrepute.
- [15] Guidance from the UK Information Commissioner’s Office³ offers that in identifying a vexatious request the following questions should be considered, taking into account the context and history of the request:

(i) Can the request fairly be seen as obsessive?

- [16] The PLA has listed previous requests made by the Applicant which total 23 requests containing more than 100 questions over the 8 months period to 6 February 2011. The Applicant also sets out a number of further requests made prior to these, and also requests to other public authorities.
- [17] The PLA submits that the volume, length and frequency of the requests can fairly be characterized as obsessive or manifestly unreasonable.
- [18] The Applicant does not refute the number of requests made, and points to many other of their requests that have been responded to by the PLA which involved

² <<http://www.oxforddictionaries.com>>

³ Information Commissioner’s Office (UK), *Freedom of Information Act: vexatious or repeated requests*, version 4, 3 December 2008, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/vexatious_and_repeated_requests.pdf (accessed 4 August 2010)

much greater difficulty and detail than those currently being considered. The Applicant considers that “the Legal Department does not have a fixed and/or balanced method and/or judgment and/or standard to assess FOI requests.”

- [19] I find that there is a continuing pattern of behaviour on the part of the Applicant that points to these requests being obsessive.

(ii) Is the request harassing the authority or causing distress to staff?

- [20] The PLA submits that in many cases (and they quote 7 such cases) the Applicant has attempted to degrade the staff of the Attorney General’s Chambers, both in the press and in the tone and substance of requests made. It states that “it is clear that the intention of the applicant is to harass the criminal prosecutorial arm of the Attorney General ...”

- [21] The Applicant purports that their objective is to promote transparency and oversight of a government department and to encourage public debate on transparency and thereby bring meaningful change to the administration of the Department and others.

- [22] In this case, based on the evidence provided to me, I can see where the staff of the PLA could have found the pattern of requests from this Applicant to be distressing.

(iii) Would complying with the request impose a significant burden?

- [23] While in this instance the PLA has not formally applied the exemption pertaining to unreasonable diversion of resources as per section 9(c) of the FOI Law, it does address the significant burden that the frequency and volume of these requests has placed on it. In addition, the PLA cites other requests from the Applicant which have in the past been denied under this section.

- [24] The Applicant feels that the requests being considered would not involve an unreasonable diversion of resources, and that in the past the PLA has provided “FOI reply information of much greater difficulty and detail”.

- [25] The PLA does not have a dedicated Information Manager. The Information Manager is a Crown Counsel with many other pressing duties, in an extremely busy Department. It would not be reasonable, especially in this time of financial constraints, to require that a valuable member of staff be consigned solely to respond to a barrage of requests, and this was not the intention of the FOI Law. I agree with the Portfolio of Legal Affairs that continually dealing with this volume of requests over a relatively short period imposes a significant burden.

- [26] Applicants should use the FOI responsibly, and to abuse the rights given under the Law brings the Law into disrepute, and undermines the operation of the Law for the benefit of others.

(iv) Is the request designed to cause disruption or annoyance?

- [27] The Applicant, as stated above, is of the opinion that the information provided and subsequently publicized will lead to greater accountability in the Portfolio.

[28] While I can see how these requests might cause disruption or annoyance, I am not convinced that they are designed to do so. It is important to note that it is the request, and not the requestor, that must be found to be vexatious.

(iiv) Does the request lack any serious purpose or value?

[29] The Portfolio of Legal Affairs submits that some of the requests are a further attempt by the Applicant to seek statistical data to substantiate a claim that the staff of the PLA is incompetent and unproductive.

[30] The Applicant points out that the information requested, and that attained in the past, is “a matter of public interest”. In addition, the Applicant submits that “the Legal Dept. has no oversight body similar to the UK Crown Prosecution Inspectorate or normal civil service supervision and therefore requires greater scrutiny”.

[31] Each individual request made by the applicant could be seen to have a serious purpose or value. However, it is the pattern and quantity of the requests and the negative effect that dealing with them all would have on a public authority that must be considered.

[32] Looked at in isolation, none of the requests on their own would likely be found to be vexatious. However, taken together, in a relatively short period of time, the requests qualify as being vexatious. Had the individual requests now being considered, and those made prior to these, been made one at a time, over a longer period of time, I would not expect the PLA to find them vexatious.

[33] The UK Information Commissioner’s Office advises that to judge a request vexatious, a relatively strong argument should be made under more than one of the questions.

[34] I have found that strong arguments have been made in three of the above criteria which, along with the context and history of requests from this Applicant, point to the requests being vexatious.

2. Are parts of the request exempt from disclosure under section 16(b) of the FOI Law?

[35] The PLA has set out arguments to support the exemption in section 16(b) as applicable to the request for “the number of pending extradition requests from the Attorney General specifying country of request”.

[36] As I have concluded that all of the requests made by the Applicant to the Portfolio of Legal Affairs on 30 January and 6 February, 2011 are vexatious, I have not considered whether parts of the request are exempt from disclosure under section 16(b) of the Law.

[37] It is worth stating here my interpretation of section 9(a) of the FOI Law, which states that “*A public authority is not required to comply with a request where the request is vexatious*”. I take the view that “not complying” with the request in this instance means that the public authority is not required to process the request under the Law. The public authority need not identify and examine the responsive record, and apply an exemption,

as it would be required to do when deciding not to release a record for any other reason. However, as has been done in this case, the applicant should be advised by the public authority that the request is being deemed vexatious, and informed of the right to appeal to the Information Commissioner.

- [38] An applicant may appeal the public authority's decision to deem a request vexatious, as is the case that is the subject of this Hearing. However, at such a Hearing, I would not be deciding whether or not the responsive record or records should be released, but only whether the request or requests are vexatious. Should I decide at Hearing that a request is not vexatious, I would be ordering the public authority to deal with the request under the Law, and would not at that point be making a decision as to whether or not the record should be released. The request would then have to be properly dealt with under the Law, and the responsive record either released or exempted under a lawful exemption. The applicant would be able to further appeal whatever response is given at that time.

E. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law*, I make the following findings and decision:

Findings:

The Applicant's requests to the Portfolio of Legal Affairs made on 30 January and 6 February, 2011 are subject to section 9(a) of the *Freedom of Information Law* as they are vexatious requests.

As I have concluded that all of the requests made by the Applicant to the Portfolio of Legal Affairs on 30 January and 6 February, 2011 are vexatious, I have not considered whether parts of the request are exempt from disclosure under section 16(b) of the Law.

Decision:

I uphold the decision of the Portfolio of Legal Affairs to refuse to comply with the requests of the Applicant dated 30 January and 6 February, 2011 under section 9(a) of the *Freedom of Information Law*, and do not require the Portfolio of Legal Affairs to respond to these requests.

As per section 47 of the *Freedom of Information Law*, 2007 the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.



Jennifer P Dilbert
Information Commissioner
14 June 2011