

ICO Hearing 23 - 00512
Decision

National Pensions Office

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
5 October 2012

Summary:

An Applicant was refused full access by the National Pensions Office to audited accounts and records of correspondence relating to Multiple and Single Employer pension plans from July 2006 to June 2010.

Following the Information Commissioner's Decision 16 – 00811¹, a significant number of records were disclosed, but some information was redacted, and the Applicant appealed to the Information Commissioner.

The Information Commissioner upheld the decision of the National Pensions Office to redact personal and commercially sensitive information from the records provided to the Applicant.

Statutes² Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
National Pensions Law (2010 Revision)

Exclusions and Exemptions Considered:

Sections 20(1)(d), 21(1)(a)(ii), 21(1)(b) and 23(1) of the *Freedom of Information Law, 2007*

¹ ICO Hearing Decision 16 – 00811, dated 25 October 2011 involving the National Pensions Office, www.infocomm.ky/appeals.

² In this decision all references to sections are to sections under the *Freedom of Information Law, 2007* unless otherwise specified.

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A. INTRODUCTION

[1] On 12 October 2010, the Applicant made an FOI request to the National Pensions Office (“NPO”) for records as follows:

1. *The period for which the following information is requested is from July 2006 to June 2010.*
2. *In this request for information correspondence includes but is not limited to all (i.e. within Government, individuals and private sector) letters, faxes, reports, emails, memos, minutes of meetings, meeting notes, phone logs, phone conversation records, etc.*
3. *In this request for information correspondence does not include the information requested in FOI Request 37373 - MEPP & SEPP Audited Accounts. However, if the NPO wishes to consolidate FOI Request 37373 - MEPP & SEPP Audited Accounts with this current FOI Request then that is acceptable.*
4. *Copies of all correspondence from:*
 - 4.1 *The auditors of all Multi Employer Pension Plans (MEPP) and all Single Employer Pension Plans (SEPP) sent to the respective plans and a copy of this correspondence is held by the National Pension Office (NPO).*
 - 4.2 *The NPO to all MEPPs' and SEPPs' auditors.*
 - 4.3 *The NPO to MEPPs' and SEPPs' as a result of or in connection with correspondence received from auditors and referencing an MEPP or SEPP.*

[2] On 25 January, 2011 The National Pensions Office withheld the requested document, relying on the exemption in section 3 (7) of the FOI Law, relating to abrogating the provisions of any other Law that restricts access to records. An internal review by the Chief Officer dated 23 February 2011 upheld the NPO's decision. The applicant then appealed to the ICO on the 28 February 2011, and was granted a Hearing on 13 July 2011. The Commissioner heard the matter and issued a written decision, dated 25 October 2011, which ruled that the request must be dealt with under the law, and ordered the Chief Officer of the National Pensions Office to review her decision of 23 February 2011. The Commissioner's decision also preserved the right of the Applicant to appeal the new decision that might result.

[3] On 1 February 2012 the Chief Officer issued a revised decision which released redacted records to the Applicant. In this instance the Chief Officer relied on sections 21(a)(ii), 21(b), and 23(1) relating to diminishing commercial value, prejudice of commercial interest and

unreasonable disclosure of personal information respectively. The Applicant appealed to the Information Commissioner on 11 February 2012.

[4] The Fact Report lists the records in dispute as:

1. Audited Financial Statements

- a. Colonial Private Trustee Limited, 2009
- b. Colonial Private Trustee Limited 2010
- c. Cable & Wireless International Retirement Benefits Plan, 2010
- d. Wyvern Retirement Trust, 2010
- e. Schroder Cayman Retirement Benefits Scheme, 2010
- f. Any other current plans not already provided.

2. Correspondence related to Pension Plan Auditors

- a. Fidelity Pension Plan
 - i. Letter from PWC to NPO dd 12 November 2009
 - ii. Letter from NPO to Fidelity Pension Plan dd 13 Jan 2012
- b. Silver Thatch Pension Plan
 - i. Letter from PWC to NPO dd 28 September 2009 with attachments
 - ii. Letter from NPO to Silver Thatch dd 31 Jan 2012
- c. Chamber of Commerce Pension Plan (COC)
 - i. Letter from PWC to NPO dd 15 Dec 2006 with attachments
 - ii. Letter from NPO to COC dd 31 Jan 2012
- d. For any other current plans not already provided.

B. BACKGROUND

[5] The National Pensions Office (NPO) is the regulatory body for private pension plans in the Cayman Islands. Its mission is to ensure the effective and efficient administration, implementation and evolution of the National Pensions Law and Regulations (NPL). The NPO's functions are governed by the NPL, and the National Pensions Board, which is a statutory Board appointed by the Governor in Cabinet under section 78 of the NPL.

C. PROCEDURAL MATTERS

[6] During the course of this Hearing further records were disclosed including items 1 a. and 1 b. above.

[7] After the Fact Report and the Notice of Hearing had been issued in this case, in their initial submission, the NPO added reliance on the exemption set out in section 20(1)(d) relating to the effective conduct of public affairs. The Applicant responded to the use of this exemption in their reply submission.

- [8] As both parties have had an opportunity to give their views in writing on the use of this exemption, I will consider the arguments presented.
- [9] In its submission, the NPO objects to the amendment made in the Fact Report to the list of "Records in Dispute" to include "Any other current plans not already provided". This is academic at this point, as I am not able to rule on any record that I have not had a chance to inspect. However, based on examination of the records at the offices of the NPO, the ICO has no reason to believe that further records exist, other than those listed by name above, which are responsive to this request.

The records to be considered in the Hearing are therefore set out in D below.

- [10] It must be noted that the original request for these records was made in October 2010, with my original decision on this matter dated October 2011. It has taken a further year to bring this matter to this point. Delays to this Hearing were caused by a mixture of missed deadlines by the NPO and the Legal Department acting for them, the late involvement of the Legal Department, and subsequent objections to various procedural matters which required the ICO to take legal advice.
- [11] Although the process has taken an inordinately long time, the NPO has provided the Applicant with a significant volume of records responsive to the request. Some of these were disclosed during the course of this Hearing, as late as August 2012. With a timely and correct application of the FOI Law, these documents could have been reviewed, redacted as necessary, and disclosed much earlier, sparing the Applicant, the ICO, the NPO and the Legal Department much time and resources.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [12] The NPO has provided me with unredacted copies of the following documents, as well as copies of the redacted records as provided to the Applicant. Where redactions are made, the sections of the Law under which the information is considered exempt are indicated.

The records being considered at this Hearing are:

1. Audited Financial Statements

- a. Cable & Wireless International Retirement Benefits Plan, 2010
- b. Wyvern Retirement Trust, 2010
- c. Schroder Cayman Retirement Benefits Scheme, 2010

2. Correspondence related to Pension Plan Auditors

- a. Fidelity Pension Plan
 - i. Letter from PWC to NPO dd 12 November 2009
 - ii. Letter from NPO to Fidelity Pension Plan dd 13 Jan 2012
- b. Silver Thatch Pension Plan
 - i. Letter from PWC to NPO dd 28 September 2009 with attachments

ii. Letter from NPO to Silver Thatch dd 31 Jan 2012

c. Chamber of Commerce Pension Plan (COC)

i. Letter from PWC to NPO dd 15 Dec 2006 with attachments

ii. Letter from NPO to COC dd 31 Jan 2012

[13] The issues to be decided in this Hearing are:

1. **Section 23(1)** - Are the responsive records exempt from disclosure because their disclosure would involve the unreasonable disclosure of personal information of any person, whether living or dead?
2. **Section 21(1)(a)(ii)** – Are the responsive records exempt from disclosure because their disclosure would reveal any information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed?
3. **Section 21(1)(b)** - Are the responsive records exempt from disclosure because they contain information concerning the commercial interests of any person or organization and the disclosure of that information would prejudice those interests?
4. **Section 20(1)(d)** – Are the responsive records exempt from disclosure because their disclosure would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs?

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Section 23(1)

[14] Except in one instance, the information to which this exemption has been applied consists solely of the names or signatures of officials in the various private sector companies associated with the Pension Plans to which the request applies. The exception to the above is probably as a result of an oversight, which is in my view insignificant. However, two words in the penultimate paragraph of a letter from PriceWaterhouseCoopers dated 28 September have been redacted under section 23 which are not names or a signature. The redactions pursuant to section 23 have been made to the letters accompanying the Financial Statements and the Correspondence Related to Pension Plan Auditors.

The position of the National Pensions Office

[15] The NPO submits that the information it has redacted is personal information as defined in the Regulations, and that disclosure of this information “would lead to adverse publicity for the persons named who had not acted in their personal capacity.” They argue that “it is in keeping with the concept of collective responsibility that the name of the relevant company for which they work be disclosed and the individuals named be exempt from disclosure. It is submitted that disclosure of such personal information in the circumstances would be unreasonable”.

- [16] The NPO further argues that it would not be in the public interest to disclose this information. They consider various public interest factors in support of disclosure and conclude that the public interest factors have very limited application to the instant case.

The position of the Applicant

- [17] The Applicant states in their submission that “the information requested is not for personal pension plan records or other personal information”. The Applicant does not therefore argue further with respect to the release of personal information.

Discussion

- [18] I agree that the names or signatures of individuals in the responsive records constitute personal information. In this case, the personal information which has been redacted by the NPO relates to individuals who do not occupy a position in a public authority, or fall into any other category set out in the regulations which would exclude it from being personal information.
- [19] As the applicant has indicated that they do not require personal information to be disclosed, all that is required in this case is for me to confirm that the redactions made pursuant to section 23 relate to personal information.
- [20] However, the two words referred to in paragraph 14 above do not constitute personal information and should be disclosed.

2. Section 21(1)(a)(ii) and 3. Section 21(1)(b)

- [21] The NPO has applied these exemptions jointly to parts of the responsive records which have been redacted, so the above exemptions will be considered together. The redactions to the Audited Financial Statements cover items such as an explanation and listing of securities held by each plan, liquidity strategy, and in one case, percentages charged for administration and management.

The position of the National Pensions Office

- [22] The NPO submits that the redacted information would have commercial value to the administrators of a pension plan, and the pension fund, as it includes:

...details on the plans' investment portfolio composition. This would have been uniquely determined by the investment managers of the pension plans to bring about the highest returns on investments for the benefits of members.

- [23] They further argue that the information redacted is information which helps to determine the competitive edge of the pension plan and thus has commercial value which could be destroyed or diminished if disclosed. The NPO states:

The disclosure of the redacted information would ... make available sensitive information which is of commercial interest to the administrators of the pension plan. It is more probable than not that this would negatively impact the competitive advantage of the respective pension plan and the pension fund ... [and] ... the

administrator would be prejudiced by the disclosure as this could result in the transfer of a pension plan to other participants in the market.

- [24] When asked by the NPO, some administrators did not object to disclosure. The NPO has presented evidence from two companies who felt that as their respective pension plans are solely for their employees, the Audited Financial Statements should not be disclosed.

The position of the Applicant

- [25] The Applicant accepts that the NPL provides for members of pension plans to have the right to obtain information on their own pension plans, including the audited accounts. However, the Applicant goes on to say that:

...current members of a pension plan may not be satisfied with the operation of a pension plan and want to change to another pension plan. In selecting a new pension plan the workers must be able to access all operational information about the alternative pension plan prior to the NPL Regulations Section 3 choice of pension plan vote.

- [26] The Applicant believes that it is in the public interest to have the disclosure of full pension plan operational information, so that workers can “hold Government accountable to the implementation of the NPL and the operational quality of the regulatory regime”.
- [27] The Applicant makes reference to various cases particularly in the United States where Annual Investment & Financial Reports, Comprehensive Annual Financial Reports and Summary of Investments of pension plans are publicly available. They also cite various pension scandals in the US, and the Disclosure Policies and Procedures for pension funds in New York State and California.
- [28] In addition, the Applicant refers to the Cayman Islands Complaints Commissioner’s Own Motion Investigation into the ability of the National Pensions Office to effectively investigate, charge and convict companies who are non-compliant with pension contributions as mandated under the Law.

Discussion

- [29] I support the view of the NPO that the information redacted pursuant to sections 21(1)(a)(ii) and 21(1)(b) is information of a commercial value, and it is information concerning the commercial interests of any person or organization. The NPO has also demonstrated that the value of this commercial information would be, or could reasonably be expected to be destroyed or diminished if the information were disclosed. They have further demonstrated that the disclosure of that information would prejudice those interests.
- [30] The arguments are weakened by two factors. First, it is the case that some companies concerned had no objection to their full financial statements being disclosed. It could therefore be argued that the same should apply for the responsive records being considered here. Second, as mentioned in my Decision 16 – 00811 [paragraph 36], a prescribed person under the National Pensions Law would have full access to records pertaining to their plan, and could potentially share this information with others.

- [31] However, I do not think that these factors override the fact that the documents before me do contain information that is exempt under the Law, and the companies involved have stated that it would be detrimental to the plans and to the administrators to have it disclosed. Furthermore, I am not privy to agreements that may be made between a prescribed person and their plan administrators with respect to confidentiality.
- [32] Despite the Applicant's plea for better regulation/accountability, I do not find that the release of this limited redacted information would promote accountability within or improve the services of the NPO, nor would disclosure reveal any wrongdoing or maladministration. The Complaints Commissioner has already performed an extensive investigation into the NPO, and the report on this investigation is available to the public. Recommendations made in this report have been presented to the Government.
- [33] I do not see where disclosure of the redacted records that are subject of this Hearing would further assist the public with a general understanding of the overall state of pension plans and pension regulation in Cayman. It must be noted that although the entire process has taken quite some time, and this application was plagued with the procedural issues cited above, the Applicant has now been provided with a significant number of records. The matter being considered here relates to the redaction of a small amount of information from the Audited Financial Statements of three plans. All of the other information including the auditors' opinions has been released. The Applicant has also been provided with correspondence from the auditors where breaches of the National Pensions Regulations have been identified.

3. Section 20(1)(d)

- [34] As I have found that the redacted information is exempt under other sections of the Law, I am not required to consider the application of this exemption. I do note however the arguments of the NPO in this respect. In particular, I concur that regulators must be able to obtain all information necessary from those being regulated, in the knowledge that the FOI Law protects this information where necessary.

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

Findings:

The information redacted from the responsive records as listed in D. above is exempt from disclosure under sections 21(a)(ii), 21(b), or 23(1) of the Freedom of Information Law, 2007, with the exception of two words in the penultimate paragraph of a letter from PriceWaterhouseCoopers dated 28 September which have been redacted under section 23. These words do not constitute personal information and should be disclosed.

Decision:

Under section 43(3)(b) of the FOI Law I uphold the decision of the National Pensions Office to redact information in the responsive records and do not require the NPO to disclose the redacted information except as set out in my **Findings** above .

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.

If judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.

If judicial review has not been sought on or before 19 November 2012, and should the National Pensions Office fail to disclose the responsive records in this matter, I may certify in writing to the Grand Court the failure to comply with this Decision and the Court may consider such failure under the rules relating to contempt of court.



Jennifer P Dilbert
Information Commissioner
5 October 2012