

Decision 3 - 02209
The Department of Agriculture ("DOA")

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
20 April 2010

Summary:

An Applicant was refused access by the Department of Agriculture to a copy of the 'Alliance of Marine Mammal Parks and Aquarium Standards and Guidelines'. These guidelines were referenced in the Department of Agriculture's policy papers which set out the conditions and application process to import a marine mammal to the Cayman Islands.

The Information Commissioner found that the requested record was not exempt from disclosure under the *Freedom of Information Law, 2007* and ordered the Department of Agriculture to release a copy of the record to the Applicant.

Statutes Considered:

Freedom of Information Law, 2007, sections 15(b), 17(b)(i), 21(1)(a)(ii), 21(1)(b).
The Animals Law (2003 Revision).

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A. INTRODUCTION

- [1] On 6 May 2009, the Applicant requested a copy of the 'Alliance of Marine Mammal Parks and Aquarium Standards and Guidelines ("Standards and Guidelines")' from the Department of Agriculture ("DOA").
- [2] The DOA refused access to the Standards and Guidelines citing section 17 (b)(i) of the *Freedom of Information Law, 2007* ("FOI Law"). An internal review of the request was conducted by the Chief Officer of the Public Authority ("PA") who upheld the decision of the DOA to withhold the responsive record. In August 2009, the matter was appealed to my office and as per the procedures of the Information Commissioner's Office ("ICO"), an attempt to resolve the matter through mediation was made. The issues were not resolved and the matter proceeded to a formal Hearing before me.

B. PROCEDURAL MATTERS

- [3] I invited the Alliance of Marine Mammal Parks and Aquariums ("AMMPA" or "The Alliance") to be a Third Party to the Hearing. AMMPA is based in the United States and describes itself as "an international association representing marine life parks, aquariums, zoos, research facilities, and professional organizations dedicated to the highest standard of care for marine mammals and to their conservation in the wild through public education, scientific study an wildlife presentations"¹.
- [4] Within the set deadlines for the Hearing, AMMPA requested that they be allowed to add exemptions to the Hearing. **I decided that as the Third Party was not directly involved in the mediation process, and may not have had the opportunity to provide their input on which exemptions should be used by the Public Authority, I would allow two of the Third Party's requested exemptions to be added to the Hearing.**
- [5] In this specific and unique situation, I allowed the additional exemptions from the Third Party as a gesture of fairness. It is not the policy of the ICO to consider exemptions from other parties and instead we require all grounds for exemption to be applied by the PA who bears the responsibility to prove that it has acted in accordance with the Law. It should be noted that prior to the Hearing and throughout the processing of this request, and indeed in response to a previous request for this record², the only exemption ever stated by the Public Authority and the Third Party related to Section 17(b)(i) – that is, that release of the record would constitute an actionable breach of confidence.
- [6] The day after the deadline for objections to the Notice of Hearing and Fact Report, the Public Authority asked to add new exemptions to this Hearing. **I decided that the DOA had ample time to add exemptions at several points leading up to the formal Hearing and I would not allow additional exemptions to be added.** The PA objected to my ruling on this matter and requested an adjournment so that judicial review could be

¹ Initial Submission of the AMMPA, submitted 1 March 2010, page 2

² Affidavit of Brian Crichlow, submitted 1 March 2010, paragraph 12

sought. I informed the PA that the hearing would proceed and that they were able to apply to the Grand Court for judicial review once my decision in this Hearing was given.

- [7] It must be highlighted that that under section 43(2) of the FOI Law, in any appeal, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law. The DOA stated in its submission, and this view has been mirrored by the Third Party, that the Information Commissioner is not restricted to a determination of the appeal solely on the grounds relied on by the respondent, and that she is statutorily obligated to consider all other relevant exemptions even when not raised by the respondent. I do not support this view. Such action would mean that the Information Commissioner would need to argue all exemptions possible under the Law in any appeal. In addition, in the interest of judicial fairness, the applicant would also need to be given an opportunity to make submissions on each and every exemption under the Law. I do not consider that this was the intention of the FOI Law, as it states clearly that the burden of proof lies with the public authority.

C. ISSUES UNDER REVIEW IN THIS HEARING

- [8] The issues to be decided in this Hearing are:
1. **Section 17(b)(i)** - Would release of the record constitute an actionable breach of confidence?
 2. **Section 21(1)(a)(ii)** – Would disclosure of the record reveal 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)** – Would disclosure of the record reveal that it contains information concerning the commercial interest of any person or organization and the disclosure of that information would prejudice those interests?

D. MARINE MAMMALS IN THE CAYMAN ISLANDS

- [9] There are currently two captive dolphin facilities in operation in the Cayman Islands. Neither is a listed member of the Alliance of Marine Mammal Parks and Aquariums. The DOA published, at a date not confirmed to me, a document entitled “*Conditions Governing the Importation, Housing, Husbandry and use of Bottlenose Dolphins in the Cayman Islands*”, which sets out importation conditions in accordance with *The Animals Law (2003 Revision)*. The DOA advises in this document that “persons interested in importing bottlenose dolphins for public display in the Cayman Islands [are] required to satisfy certain conditions prior to [being] granted an import permit”. These conditions state that “the guidelines referred to in this document are the Standards and Guidelines (2003) document of the Alliance of Marine Mammal Parks and Aquariums (AMMPA)”.

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 17(b)(i) OF THE FOI LAW?

- [10] The DOA denied access to the requested record on the grounds that it is exempt pursuant to section 17(b)(i) of the FOI Law. This section states that an official record is exempt from disclosure if the disclosure thereof would constitute an actionable breach of confidence.

1(a) The position of the DOA and AMMPA

- [11] In its submission, the DOA argues that the AMMPA provided them with the document on the basis that it would be held in confidence and that it would be used for internal purposes only. It was intended to assist the DOA in formulating its policy on the importation, housing, husbandry and use of bottlenose dolphins in the Cayman Islands. There was no contractual relationship between the DOA and AMMPA, and, as testified in an affidavit by the Acting Assistant Director, the DOA has been unable to locate earlier correspondence between itself and the AMMPA expressly stating that the document was being made available to the DOA on a confidential basis only. However, he attests that there was always an understanding of confidentiality, and attaches a copy of a memorandum (unsigned) between the then Permanent Secretary and the Chief Agricultural & Veterinary Officer, dated 17 October 2006 which states that the document is provided “with the caveat that the document is not to be shared with external organizations or entities ...”
- [12] In addition, the DOA states that in referencing the AMMPA Standards and Guidelines in its own policy document, the DOA erroneously cited the document in its entirety instead of quoting the sections it intended to adopt. They advise that the policy document is no longer in use, and that a new document will be issued which will not make specific reference to the Alliance document.
- [13] The DOA also provides a copy of a letter from AMMPA dated 5 February, 2009, which states that the document had been provided to the DOA in the strictest confidence. This letter was provided in the light of another Freedom of Information request for the Standards and Guidelines document that was made on 15 January, 2009 by an applicant. The Applicant had also requested this document on 7 July 2006, directly from AMMPA and was advised that “the Alliance does not distribute its Standards and Guidelines”.
- [14] Given all of the above, the DOA argues that the document possesses the necessary quality of confidence. They submit that the record, “though not classifying as a trade secret, is of a highly confidential nature as it reflects a body of Standards and Guidelines created by professionals who have devoted an enormous amount of time to combine the document for the guidance of governments and other practitioners within this particular industry”.
- [15] The DOA attests that the document has not entered the public domain as the Alliance allows only limited access to the record. They submit that the erroneous reference to the record in the DOA’s policy document does not constitute a breach of confidentiality.

- [16] With respect to unauthorized use of the information, the DOA submits that disclosure of the record would be in conflict with the undertaking given to hold the record in confidence and for internal use only, and that disclosure to the Applicant and to the public at large would not have been authorized by the AMMPA.
- [17] The DOA submits that “upon an amendment to the policy document, the content of the record will no longer form a part of the condition to be satisfied by a potential importer”. Further, as the granting of import permits has been suspended since October 2006, the interest of the public would therefore not be served by granting access to a document as the conditions specified therein will not be imposed on the public.
- [18] In its submission, AMMPA states that its Standards and Guidelines are proprietary property of the Alliance and its members. The document represents an enormous investment of time and resources and is regularly reviewed and updated. It says that where the Alliance makes its Standards and Guidelines available to a government agency, it only does so in the strictest confidence and upon assurance by the Government that such information is to be maintained as confidential and used merely as background or a reference guide. The Alliance would “unequivocally view release of its Standards and Guidelines as an actionable breach of confidence”.

1(b) The Applicant’s position

- [19] The Applicant essentially argues that the Cayman Islands Government is not at liberty to enter into any arrangement with a third party to keep secret from the public, information which is a part of a regulatory document. The Applicant states that the AMMPA Standards and Guidelines are the Government’s published requirement under the authority of the Animals Law to which all facilities holding and displaying dolphins in the Cayman Islands must comply in their operations. This document must be a readily available public document as are all other laws, regulations and standards/codes adopted by the Cayman Islands Government from foreign organizations or jurisdictions for use by the Cayman Islands Government to establish standards of operation in the Cayman Islands”.

1(c) Discussion and finding – Is the record requested exempt from disclosure under section 17(b)(i) of the FOI Law?

- [20] In order for a case of breach of confidence to succeed (in the event of no contract), three elements are normally required³;
- (i) *the document must have the necessary quality of confidence about it;*
 - (ii) *the information must have been imparted in circumstances importing an obligation of confidence; and*
 - (iii) *there must be an unauthorized use of that information to the detriment of the party communicating it.*
- [21] However, even if these three criteria are met, there is still a common law public interest defence to the disclosure of the document. I discuss these three elements below:

³ Coco v. A. N. Clark (Engineers) Ltd [1969] RPC 41

- [22] (i) First, on examination of the document, I am not satisfied that the document has the necessary quality of confidence about it. The document is not marked “confidential”, and instead states on its cover that - “THESE STANDARDS AND GUIDELINES ARE MEANT TO ENHANCE AND COMPLIMENT, NOT DUPLICATE, GOVERNMENT STANDARDS FOR THE CARE AND MAINTENANCE OF MARINE MAMMALS”. The guidelines would have to be seen and considered by any party seeking to become a member of the Alliance, as membership is contingent upon complying with the guidelines.
- [23] In addition, while the DOA admits to an erroneous reference to the document in its entirety, it did at least intend to quote the sections that would form a part of their policy document - “Conditions Governing the Importation, Housing, Husbandry, and use of Bottlenose Dolphins in the Cayman Islands”. This lends itself to being a public document as it pertains to conditions set out under *The Animals Law (2003 Revision)*.
- [24] Finally, with respect to the confidentiality of the document, the AMMPA themselves provided the Applicant with an abbreviated version of their then current Marine Park Standards and Guidelines in February of 2006.
- [25] I am therefore not satisfied that condition (i) above applies and that the document has the necessary quality of confidence about it.
- [26] (ii) While it is now being submitted that AMMPA imparted the document to the Public Authority on the understanding that it would be kept confidential, this claim for confidentiality follows the request for the document being made. The DOA has been unable to locate earlier correspondence between itself and AAMPA expressly stating that the document was confidential. I find it noteworthy that the reference to confidentiality in the Chief Agricultural and Veterinary Officer’s memorandum, dated 17 October 2006 and referenced earlier, goes on to state “with the caveat that the document is not to be shared with external organizations or entities, in particular the local group objecting to the establishment of captive dolphin programs in the Cayman Islands” [my emphasis].
- [27] I see no evidence that the DOA gave any undertaking of confidentiality, and indeed it used and referenced the document publicly as part of conditions attached to a Law of the Cayman Islands. The document thereby must be seen to have entered the public domain. I would agree with the Applicant that the document must be a readily available public document.
- [28] I see no conclusive evidence that at the time of the document was provided to the DOA, there was an obligation of confidence and that condition (ii) is met.
- [29] (iii) Finally, I do not find that detriment to any party due to disclosure has been persuasively demonstrated nor has any evidence been presented to me to that effect.
- [30] In any event, even if the three elements normally required for a breach of confidence to succeed had been met, a common law public interest test must be

applied. In this case, the public interest in disclosure of the responsive record outweighs the public interest in maintaining confidentiality. The document forms part of government published guidelines and in the public interest, it should be available to the public.

- [31] **I therefore find that the document requested is not exempt from disclosure under section 17(b)(i) of the FOI Law.**

2 . IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 21((a)(ii) OF THE FOI LAW?

- [32] AMMPA states that the information contained in the document has commercial value, that would, or could reasonably be expected to be, destroyed or diminished if the information were disclosed beyond the Alliance's members or others provided it only in consideration that it be held in the strictest of confidence. They state that use or misuse of the Alliance Standards and Guidelines by others not directly authorized by the Alliance could impair the Alliance's interests.
- [33] The Applicant points out that similar Standards used in the UK and other jurisdictions are readily available to the public.

Discussion and finding:

- [34] Neither the Public Authority nor the Third Party has provided evidence as to any independent value attached to the information contained in the document. There are references to the enormous amount of time professionals have devoted to combine the document for the guidance of governments and other practitioners within this particular industry. They do not state however in what way the value of the information would be or could reasonably be destroyed or diminished if the information were disclosed.
- [37] **I find that section 21(a)(ii) of the FOI Law does not apply to the requested record.**

3 . IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 21(b) OF THE FOI LAW?

- [38] The issue under review is if the disclosure of the records would reveal that it contains information concerning the commercial interest of any person or organization and the disclosure of that information would prejudice those interests.
- [39] No further arguments are put forward to support the use of this exemption other than a statement from the Alliance that "use or misuse of the Alliance's Standards and Guidelines by others not directly authorized by the Alliance could impair the Alliance's interests".

Discussion and finding:

- [40] Section 21(b) is intended to protect information (other than trade secrets and commercial information), the disclosure of which would prejudice commercial interests. As with any

exemption, it is not enough to simply assert that harm will materialize. The threshold is high (“would prejudice”) and there must be objective and reasonable evidence of the likelihood of harm. This section should not be used to withhold information simply because a third party objects to its disclosure. The DOA and the Alliance have failed to convince me that the disclosure of the record would reveal that it contains information concerning the commercial interest of any person or organization and the disclosure of that information would prejudice those interests.

[41] **I find that section 21(1)(b) of the FOI Law does not apply to the requested record.**

F. FURTHER ISSUE UNDER CONSIDERATION

[42] **Upon thorough review of the submissions presented, I have decided to consider the section 15(b) exemption, which had been sought by the Third Party, and to consider the arguments put forward by the Third Party and the Public Authority on the application of this exemption.**

1. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 15(b) OF THE FOI LAW?

[43] The issue being considered is of the record exempt from disclosure in that it contains information communicated in confidence to the Government by or on behalf of a foreign government or by an international organization.

1(a) The position of the DOA and the AMMPA

[44] The Public Authority and the Third Party argue that the responsive record contains information communicated in confidence to the Government of the Cayman Islands by an international organization and is therefore exempt from disclosure under section 15(b) of the FOI Law. They contend that the Alliance is an international organization, recognized as a Non-Government Organization by the Convention on International Trade in Endangered Species, and the Convention on Migratory Species. The AMMPA further contends that:

It is the Alliance’s policy never to share our Standards and Guidelines without first being assured that the document will be kept confidential. We must receive assurance that the document will be kept in the strictest confidence before sending it to the requesting government. Without that pledge, the document is not sent.

[45] The DOA also states in its submission that “the terms on which the record was obtained required that it be held in confidence and the circumstances in which it was obtained made it reasonable for the government or organization to expect that it will be so held”. In the absence of any documented evidence, either on the part of the Alliance or the DOA stating that the document was provided or received in confidence, the DOA has supplied me with affidavits that attest to this assertion. In the affidavit of Brian Crichlow dated 1 March 2010, he states that:

The DOA has been unable to locate the earlier correspondence between itself and the Alliance expressly stating the document was being made available to the DOA on a confidential basis for its internal use only. However, in early 2009 when reviewing the matter I was verbally advised by Dr. Alfred Benjamin former Chief Agricultural and Veterinary Officer who is no longer employed to the DOA that from the outset, the Alliance agreed to provide the standards and guidelines to the DOA on the condition that they were kept confidential.

Mr Crichlow also attaches a copy of a later email from the Executive Director of the Alliance, dated September 2008 in which the Alliance provides their latest standards and guidelines, and asks that “as in the past, I appreciate you keeping these confidential and for your use only”.

- [46] The DOA also submits an affidavit by Alfred Benjamin dated 1 March 2010, in which he states “[the Alliance] willingly shared information with me...with the understanding that the guidelines could be adapted for use in our regulatory framework but with a caveat that the document which is owned by its membership must remain private and confidential.”

1(b) The position of the Applicant

- [47] The Applicant questions whether the DOA could have reasonably made a pledge to keep a document confidential and then used it as part of a regulatory document which would have to be made available to the public. The Applicant contests that:

Given the vigorous efforts by the DOA and the AMMPA to now block the release of the “*guidelines*”, currently a Cayman Islands regulatory document that the AMMPA would have kept the confidentiality agreement in a fireproof safe and the AMMPA’s lawyers would have ensured that the agreement stated that the “*guidelines*” must not be referenced in any jurisdiction’s regulatory documents. The AMMPA is too good an organization to have allowed this oversight to have occurred.

1(c) Discussion and finding – Is the record requested exempt from disclosure under section 15(b) of the FOI Law?

- [48] I accept that the Alliance can be classed as an international organization, and concede that one of the requirements for the application of this exemption is met. An assessment is needed therefore as to whether the information was “communicated in confidence”. Section 15(b) is a “class-based” exemption. This means, that if the content of the record is indeed “information communicated in confidence by...an international organization” the record is exempt. It is not necessary for the Public Authority to establish that any harm or prejudice will result from the disclosure.
- [49] The *Freedom of Information Law, 2007* refers to information “communicated” in confidence. Other FOI Laws refer to information being supplied, provided or received in confidence. It is my opinion that in using the word “communicated” the Law intended for there to be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. There should be clear evidence of the confidentiality of the communications, not just after the fact assertions.

- [50] In this case, it can be argued that the Alliance made at least after the fact assertions that it expected the document to be kept confidential. However, the DOA has failed to provide me with persuasive evidence that it gave any assurances to the Alliance that it would keep the document confidential, and indeed it did not do so, as the document was referred to in a public policy document. Referring to the affidavit of Alfred Benjamin noted above, how could the DOA put the Alliance Guidelines and Standards into its regulatory framework, and at the same time expect that they be kept private and confidential? In my view the two actions are not congruent.
- [51] In 1999⁴, David Loukidelis, Information and Privacy Commissioner of British Columbia, stated that public bodies should look at the intentions of both parties in order to determine if the information was “received in confidence”, and considers the indicators of confidentiality in such cases. Some of the factors listed can be helpfully applied to this case. These include:
- i. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or the recipient?*
- [52] The information is a set of standards and guidelines, the purpose for which is to help ensure best practice in the care and maintenance of marine mammals. I would not expect that a reasonable person would regard the document as confidential. The supplier has indicated that its usual practice is to keep the document confidential, but similar bodies do make their equivalent documents publicly available. The recipient has not treated the document as confidential.
- ii. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?*
- [53] It is difficult to see how a document can be meant to “enhance and compliment...government standards for the care and maintenance of marine mammals” as stated in the document, and at the same time be considered confidential.
- iii. Was the record in question explicitly stated to be provided in confidence? It is important to note that this may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.*
- [54] The record in question has not been explicitly stated to have been provided in confidence. I have not been able to glean from the material submitted to me the respective dates that the document was referred to in a published document by the DOA, as compared to the unsigned Memo to the Permanent Secretary from the Chief Agricultural and Veterinary Officer that refers to the document not being shared with external organizations. The DOA does not demonstrate an

⁴ Office of the Information & Privacy Commissioner, British Columbia, Order No. 331 – 1999

understanding that there was a true expectation of confidentiality as it referred to the record in a regulatory document under *The Animals Law*.

iv. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?

[55] The pledge of confidentiality referred to in the Alliance's submission has not been demonstrated. The Public Authority has shown no persuasive evidence that it confirmed to the Alliance that the document would be kept confidential, and in fact it was used in formulating and establishing public policy, which inherently is not confidential.

v. Do the actions of the public body and the supplier of the record – including after the supply – provide objective evidence of an expectation of, or concern for confidentiality?

[56] The actions of the DOA in using the document, (or even parts of the document as it intended to do) as a part of public policy, do not demonstrate an expectation or concern for confidentiality. In addition, the supplier of the record itself provided the Applicant with an abbreviated version of the Standards and Guidelines.

[57] In summary, in this case the subject matter of the document has been used publicly. Even if this was erroneously used, as the DOA asserts, it was still their intention to use sections of the document in Cayman Islands policy. The pledge of confidentiality referred to in the Alliance's submission has not been demonstrated. I have not been provided with evidence that the Public Authority advised the Alliance that the document would be kept confidential, and the evidence against this is that it was used in formulating and establishing public policy. Neither the Alliance nor the DOA have been able to locate records attesting to the fact that the document was originally communicated in confidence. The document itself is not marked "confidential", and in fact refers to its use in enhancing and complementing government standards.

[58] In my view, the DOA and the AMMPA have failed to establish that this record was communicated in confidence, and **I find that the record requested is not exempt from disclosure under Section 15(b) of the FOI Law.**

G. FINDINGS AND DECISION

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

Findings:

The Alliance of Marine Mammal Parks and Aquariums Standards and Guidelines is not exempt from disclosure under sections 15(b), 17(b)(i), 21(1)(a)(ii), or 21(1)(b) of the *Freedom of Information Law, 2007*.

Decision:

I require the Department of Agriculture to provide the Applicant with a copy of the responsive record requested within 45 calendar days (3 June 2010) of the date of this Order, unless an appeal is filed on or before that time to the Grand Court by way of judicial review of this Decision. Upon expiry of 45 calendar days, and should the Public Authority fail to provide the Applicant with the document, I will 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.

Concurrently, the Department of Agriculture should forward me a copy of the cover letter together with a copy of the document it supplies to the Applicant.



Jennifer Dilbert
Information Commissioner
20 April 2010