

ICO Hearing 32-01812
Decision
Ministry of Education, Employment & Gender Affairs
and The Department of Labour and Pensions

Jennifer Dilbert MBE, JP
Information Commissioner for the Cayman Islands

17 December 2013

Summary:

The Applicant made a number of Freedom of Information requests to the then Labour and Pensions Office (LPO). This Hearing deals with four requests made between May 2012 and August 2012, which due to reasons set out below came before me on 17 October 2013.

The Information Commissioner upheld the decision of the DLP to withhold or redact information from most of the responsive records.

Statutes¹ Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
National Pensions Law (2012 Revision)

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¹ In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

A. PROCEDURAL ISSUES

- [1] These requests have taken an inordinate amount of time to come before me for Hearing, having been made between May and August 2012. There are several reasons for the delays encountered.
- [2] The appeals being heard here were accepted for investigation by the Information Commissioner's Office ("ICO") between August 2012 and February 2013. With the Applicant's agreement, because there were several requests, it was decided to keep the investigation of some of the appeals in abeyance until other requests had been dealt with.
- [3] The then Ministry of Education, Financial Services and Employment ("The Ministry"), [now the Ministry of Education, Employment and Gender Affairs], maintains that some of the Applicant's requests for an Internal Review of the Information Manager's decision to withhold or redact records fell outside the time allowed by the Law to request an Internal Review. This led to considerable time being spent by the ICO in the pre-Hearing investigation stage. The ICO met with the Chief Officer of the Ministry in March 2013 to discuss procedural issues with the Applicant's various requests, and to try to establish which requests had been subject to an Internal Review by the Ministry. The Ministry has refused to conduct internal reviews for some of the Applicant's requests as they claim that the 30 days within which the Applicant can apply for an internal review had passed. The Applicant in turn points to the confusion and delays surrounding the response to the various requests and maintains that they should all be considered. The appeal of several other requests by this Applicant continues to be under investigation by the ICO.
- [4] The Applicant's requests have been inextricably linked to a complaint by the Applicant concerning the way that the National Pensions Office ("NPO") and the Ministry dealt with a particular case. The Applicant alleged that pension contributions had not been made by the employer of an individual. The then Ministry of Education, Financial Services and Employment conducted an "Internal Review and Investigation Report" into the handling of the Applicant's complaint. It is noted that this report was not *"in itself a re-hearing of [the] actual complaint"*. I understand that a copy of the report was provided to the Applicant.
- [5] The Office of the Complaints Commissioner has also been involved in the substantial complaint made by the Applicant against the actions of the NPO in the matter.
- [6] The scope of the Applicant's requests is very broad, and there is a large number of responsive records. Many records were provided to the Applicant in response to the request, with further records released in the course of the ICO's investigation. A total of 83 records remained in dispute when these four appeals eventually moved to a Hearing before me. Well into the Hearing process, these records were still being clarified, and requests for some were withdrawn by the Applicant. Also, when arguing the exemptions being claimed in their submission for Hearing, some exemptions were reconsidered and further records released by the public authority, some in full and some with information redacted.

- [7] In order to prepare for the Hearing, the ICO compiled a list of records in dispute from the records received by the ICO in the course of the appeal. About 400 pages of records were presented to the ICO and it was unclear what had already been provided to the Applicant, or what had been redacted or withheld. To complicate matter further, along with their submissions at Hearing the Attorney General's Office, on behalf of the NPO, provided an Index of responsive records which did not match the list of records in dispute as provided by the ICO's Registrar of Hearings.
- [8] Despite the efforts of the public authority and the ICO, because of the number of records, the complexity of the various requests and the piecemeal release of records over time (some of which was unavoidable), it has been very difficult for me to reconcile the actual records in dispute, and what has already been provided to the Applicant. It is equally difficult and time consuming to extract Freedom of Information matters from all the documents before me, as both the Applicant and the public authorities involved convolute the substantial complaint of the Applicant, that the employer did not pay a pension benefit and this was not properly handled by the regulator; the complaint as to how the Applicant's complaint was handled; and the numerous FOI requests for records and the responses to these by the public authorities.
- [9] In addition, the question remains as to whether there may be further records that are responsive to the request and which should have been provided or considered by the Ministry. The Applicant maintains that important records have been referred to during the course of the requests, even read to the Applicant over the telephone, that have not yet been identified and considered. However, I appreciate that this has been a very involved and ongoing request, and that the public authority has done a large amount of work in providing the Applicant with many records.
- [10] Once again in this case, as I have seen in several other appeals that have come before me, and as I stated in Hearing Decision 23-00512² involving the National Pensions Office, the Information Manager ("IM") in responding to the initial request, and the Chief Officer in responding to the Applicant at Internal Review, have simply stated the exemption being claimed, and given no reason for applying that exemption. It is only in their submissions for Hearing that any attempt has been made to explain why the exemptions should apply to the records, and this at times is in very general terms as outlined further below as I attempt to look at each request.
- [11] The Hearing of these appeals was further delayed by the late involvement of the Legal Department, who required further time to accommodate Crown Counsel to assist the Ministry in the preparation of their submissions for Hearing.

B. BACKGROUND

- [12] As per the Cayman Islands Government's Organizational Chart of 1 July 2013, The Department for Labour and Pensions (DLP) currently falls under the Ministry of Education, Employment & Gender Affairs. Prior to this, responsibility for the DLP and

² ICO Hearing Decision 23-00512 can be found at www.infocomm.ky/appeals.

the former Department of Employment Relations fell to the former Ministry of Education, Training and Employment.

- [13] According to the Director of the Department of Labour and Pensions, the DLP is a new Department that was established to oversee the employer compliance aspects of the work previously undertaken by both the Department of Employment Relations and the National Pensions Office. The new Department is intended to provide a more effective one-stop shop for all labour services and enable a system of proactive workplace inspections to be instituted. This will promote compliance with both Labour and Pensions legislation. The restructure of Labour and Pensions also seeks to provide pension regulatory responsibilities. It seeks to align the complex forensic and investigative accounting of pension plans with employer compliance and enforcement.
- [14] The Labour Investigations Unit deals mainly with Individual Dispute of Rights regarding matters such as non-payment of vacation pay, labour complaints regarding severance pay or unfair dismissals and refers unresolved complaints to be heard by the Labour Tribunal.
- [15] Although the National Pensions Office was technically not in existence on 15 July, the date of the submissions for this Hearing, the Attorney General's Office has presented a submission on behalf of the NPO. I will hereafter refer to this submission as NPO's submission in this Hearing.

C. FOI REQUEST # 48655

- [16] 28 May 2012: The Applicant made an FOI request to the Labour and Pensions Office (LPO) for -
This request is for the names and email addresses of the current members of the National Pension Board.
- [17] 28 June 2012: The records were withheld and the Information Manager relied on section 23 of the Law.
- [18] 29 June 2012: The Applicant requested an Internal Review.
- [19] 20 July 2012: An Internal Review was completed and a redacted record was provided to the Applicant. The Applicant was provided with a record containing the names of the then current members of the National Pensions Board as well as the email address through which they could be contacted. The Chief Officer continued to rely on section 23(1) to withhold the personal email addresses of the members.
- [20] The ICO agreed to keep the case in abeyance until all other outstanding FOI requests had been dealt with.
- [21] 13 February 2013: The Applicant confirmed they wished to proceed with the appeal to the Information Commissioner's Office.
- [22] 21 July 2013: In the written submission for this Hearing, the Applicant abandoned the request for the personal email addresses of the Board members.

- [23] This request, which pertains to Record 1 on the ICO List of Records in Dispute, will not be considered further in this Hearing as the Applicant has indicated that the record is no longer required, and the Department of Labour and Pensions (DLP) is required to take no further action on this request.

D. FOI REQUEST # 49436

- [24] 2 August 2012: The Applicant requested -

A copy of the detailed calculations which illustrate both principal and interest used to determine the pensions arrears amount attached to the letter dated 7th March 2012 ..., from [] Pension Superintendent.

- [25] 11 September 2012: The record was withheld under section 17(b)(i).
- [26] 13 September 2012: Internal Review was requested.
- [27] 11 October 2012: Internal Review was completed by the Chief Officer of the Ministry of Education, Employment and Gender Affairs (the Ministry), upholding the Information Manager's decision to withhold the records under section 17(b)(i) and 23(1).
- [28] The ICO agreed to keep the case in abeyance until all other outstanding FOI requests had been dealt with.
- [29] 13 February 2013: The Applicant confirmed they wished to proceed with the appeal to the Information Commissioner's Office.
- [30] At the request of the Applicant this matter did not enter informal resolution but instead proceeded directly to Hearing before the Commissioner.
- [31] The records under review are as follows:

Records 2, 3 and 4: National Pensions Law Interest Calculator – January, February and March 2012. The exemptions being claimed are those under sections 17(b)(i) and 23(1).

- [32] In their submission with respect to records responsive to 49436, the Attorney General's Chambers on behalf of the NPO refers to "arguments previously made herein regarding the above exemptions" and contends that disclosure of records 2, 3 and 4 would result in an actionable breach of confidence, and that they also contain personal information of a third party which would be unreasonable to disclose. The NPO has given me no reference as to where in the 84 paragraphs of their submission, which covers four separate requests, these arguments are located.
- [33] **Section 17(b)(i)**

An official record is exempt from disclosure if- ...

- (b) *the disclosure thereof would-*
(i) *constitute an actionable breach of confidence;*

[34] However, their consideration of 17(b)(i) is found in paras [57] – [75] of their submission and the NPO discusses a number of records responsive to a different request, but does not refer to the three records, or similar records, under consideration here. As an example of the complexity of these requests, and the sometimes haphazard way with which they were processed, I quote from their submission at paragraph [55] which is an introduction to their consideration of request 48734:

The NPO in its processing of the above request erroneously released nine (9) records which had already been dealt with in the applicant's request reference no. 48661 and 48665. The index shows that there were sixteen (16) responsive records with regards to this request. However only seven (7) of those records as indicated in the index are relevant to reference no. 48734. Of the seven (7) records the NPO upon review will release to the applicant an additional four (4) records, which are letters dated 7/12/11; 16/3/12; 22/3/12 and email dated 20/3/12. The submissions hereunder are therefore being made in relation to the remaining three (3) records of relevance.

[35] I note that the three remaining records being considered in this section are not Records 2, 3 and 4 that are responsive to request 49436.

[36] **I am therefore not in a position to consider how section 17(b)(i) relates to the these records as no arguments have been put forward by the NPO. As the burden of proof is on the public authority to show that it acted in accordance with the Law, I find that it has not be demonstrated to me that section 17(b)(i) applies to Records 2, 3 and 4.**

[37] Section 23 states:

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 person information of any 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.

The position of the NPO

[38] The NPO's arguments supporting the use of the personal information exemption in 23(1), are first put forward in paragraphs [20] to [25] of their submission when discussing request 48655. In this instance, the arguments focus on the release of a record responsive to request 48655, which as stated above is no longer being sought by the Applicant.

- [39] The personal information exemption is again discussed in paragraphs [30] to [32] of their submission, in relation to request 48661 and paragraphs [76] and [77] in relation to request 48734.
- [40] However, part of these arguments relate to the pension contribution calculation, albeit for a different month (Record 45). As Record 45 is quite similar to Records 2, 3 and 4 being requested here, I will consider the arguments that they contain personal information of a third party which would be unreasonable and not in the public interest to disclose.
- [41] The NPO argues that pension calculation sheets reflect the third party's employment history which is their personal information. They state that it would be unreasonable to disclose this information as it would have been given to the NPO as a statutory regulator, and otherwise would not have been accessible under the FOI Law.
- [42] A public interest defence is put forward by the NPO in their consideration of request 48734, and again some relevance to the records under consideration here can be extracted. Later in their submission the NPO points out that the third party's salary is not paid from the public purse, it does not involve government expenditure, and the public interest is therefore not served in disclosing this information.
- [43] In their submission the NPO states that the Applicant is not recognised under the NPL as a prescribed person to whom disclosure could be made as the Applicant is not the spouse of a member or former member of a pension plan.

The position of the Applicant

- [44] Generally, the Applicant expresses dissatisfaction with the FOI request process, stating:

Throughout the entire FOI request process, I have been met with unnecessary delays, unacceptable denials of requested records, or information released with redactions due to exemptions that are either inappropriate or irrelevant in this matter. Further, there is information which exists, and was included in the requests, but not included in the release of information, even in a redacted version ...

- [45] The Applicant refers to section 23(2) and submits that as the information is being requested by a "person to whose affairs the record relates" then 23(1) does not apply. The Applicant submits that as a "spouse/former spouse, beneficiary and claimant" they are entitled to all information requested.
- [46] In addition, the Applicant submits that under the National Pensions Law a prescribed person would have full access to records pertaining to their plan.
- [47] With respect to the release of personal information in the public interest, the applicant submits that some of the information being withheld would show that the Ministry and the NPO may be relying on false or misleading information and full disclosure would reveal this. It would therefore be in the public interest for this information to be

released. Disclosure of other records would also show a lack of enforcement by the NPO.

Discussion

- [48] With respect to whether the Applicant is considered a “prescribed person” under the NPL, or indeed whether the records requested are “prescribed records” or any other record referred to in the NPL, section 23 of the NPL states:

23. (1) On written request, an administrator shall make available the *prescribed documents and information in respect of a pension plan and the pension fund for inspection without charge to* -

- (a) *a member;*
- (b) *a former member;*
- (c) *the spouse or former spouse of a member or former member;*
- (d) *a claimant;*
- (e) *any other person entitled to pension benefits under the pension plan;*
- (f) *an agent authorised in writing by a person mentioned in paragraph (a), (b), (c), (d), or (e);*
- (g) *an employer who is or was required to make contributions to the pension plan;*
- (h) *a receiver or trustee in bankruptcy of an employer referred to in paragraph (g); and*
- (i) *such other person as may be prescribed.*

- [49] I find that in this case, this requirement cannot be seen as requiring the NPO to release records of a third party to a person, even if that person is a prescribed person under sections (a) to (i) above. In any event, there exists no pension plan or fund with respect to the individual whose information is being withheld.
- [50] The public authority has not addressed the Applicant’s claim that pursuant to section 23(2), section 23(1) of the FOI Law does not apply when the application for personal information is made by the person “to whose affairs the record relates”. However, my interpretation of this section is that it is intended to make a provision for a person to be given their own personal information, and is not meant to be interpreted widely, so that one’s personal information should not be disclosed to anyone else who claims to be a person “to whose affairs the record relates”.
- [51] I also see no credible arguments as to why it would be reasonable to disclose the personal information of the third party or parties in this case. It is noted that the individual and company involved are not a government employee or a public authority, and no public funding is involved. I also cannot see how disclosure of the responsive records in this request would demonstrate mal-administration or wrong-doing on the part of any public authority, or serve any other public interest.

- [52] In the interest of protecting the personal information of a third party and proper application of the Law, I cannot agree that that Records 2, 3, and 4 relate to the affairs of the Applicant.
- [53] **I therefore conclude that the withheld information is the personal information of a third party which would be unreasonable and not in the public interest to disclose.**

E. FOI REQUEST # 48661

- [54] 28 May 2012: The Applicant made an FOI request to the LPO for -
- This request is for a copy of all correspondences sent from the Superintendent of the National Pension Office related to my complaint filed on July 10, 2009*
- [55] 29 June 2012: The Applicant received no response within the required time frame and requested an Internal Review.
- [56] 30 July 2012: An Internal Review was completed and redacted records released. The NPO relied on sections 16(b)(i), 17(b)(i), 20(1)(d) and 23(1).
- [57] 20 August 2012: The Applicant requested an Appeal to the ICO on request #48661.
- [58] In their written submission for this Hearing the DLP clarifies that they are relying on sections 17(a), 17(b), 20(1)(b) and (d), and 23(1) to withhold all or parts of the responsive records.
- [59] During the course of the investigation of the appeal by the ICO, the DLP released further records. Well into the Hearing process, as late as 12 November 2013, the Applicant accepted that some further records had either been received or were no longer being sought. To further complicate matters, the NPO's cross reference to the ICO list (Item Nos.) are often incorrect, and I have had to take significant time and effort simply identifying the records in question.
- [60] **Some of the records responsive to the above request which have been provided to me are emails between the Applicant and the Public Authority which I will not consider as these emails are not exempt under the Law and they should either be already held by the Applicant, or should be provided to the Applicant if so desired. Those records claimed already fully disclosed by the NPO should be provided to the applicant if required.**
- [61] The records responsive to Request # 48661 and their status are therefore as follows:
- Record 5 – released or no longer required by Applicant.
Record 6 – released or no longer required.

Record 7 – NPO could not identify, I identify as NPO’s Item 36. This is a letter dated 14 December 2011 from the NPO and the Applicant has been provided with a copy with the names of individuals redacted.

- [62] **I find that the information redacted is personal information of a third party and pursuant to the arguments already presented above is exempt under section 23(1) of the FOI Law as indicated by the public authority, and the public interest does not require disclosure.**

Record 8 – agreed released.

Record 9 – agreed released.

- [63] Record 10 – NPO identifies as Item 41 and claims fully disclosed. I identify as Item 39 **These are emails between the Applicant and the Public Authority which should either be already held by the Applicant, or should be provided to the Applicant in full.**

Record 11 – 13 – agreed released.

- [64] Record 14 – NPO claims fully disclosed, identifies as Item 37, I identify as Item 35. **These are emails between the Applicant and the Public Authority which should either already be held by the Applicant, or should be provided to the Applicant in full.**

Record 15 – released or no longer required.

Record 16 – agreed released.

Record 17 – NPO identifies as Item 34, I identify as Item 32.

- [65] The public authority is relying on the exemption found in 20(1)(d) to redact information from this record, the remainder of which has been provided to the applicant. Section 20(1)(d) states:

20. (1) *A record is exempt from disclosure if-*
(d) *its disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs.*

- [66] The NPO argues that *“there is a real and significant risk of the occurrence of prejudice to the effective conduct of public affairs if the records are disclosed, as the said disclosure would likely result in a negative impact on the NPO’s deliberative process and thereby undermine the quality of its decision”*.

- [67] The Applicant requests that I deny the public authority’s request to apply section 20(1)(d), presumably because this exemption was applied at the submission for Hearing stage. However, given the complexity of the appeals, and the large volume of records that have been considered, released and exempted by the public authority, and the fact that a third party’s information is involved, I am willing to consider this and the other exemptions claimed by the NPO. The Applicant also was given an opportunity to make a reply submission in which these exemptions could be addressed as necessary.

[68] I agree that the information that has been redacted from Record 17 reflects the deliberative processes within the NPO and accept their arguments that release of this information would prejudice the effective conduct of public affairs. I also see no reason why the release of this information would be in the public interest. In addition, I refer to paragraph of my Decision 23-00512³ when I comment that regulators must be able to obtain all information necessary from those being regulated, in the knowledge that the FOI Law protects this information from disclosure where necessary.

[69] **I therefore find that the information redacted from record 17 is exempt under section 20(1)(d) and the public interest does not require its disclosure.**

Record 18 – released or no longer required.

Record 19 – agreed released.

Record 20 – agreed released.

[70] Record 21 – NPO claims fully disclosed.

In any event should be fully disclosed as redacted information pertains to names of Board Members which are not exempt under section 23, and it would not be in the public interest to disclose the records.

Record 22 – released or no longer required

Record 23 – agreed released

[71] Record 24 – NPO claims fully disclosed.

These are emails between the Applicant and the Public Authority which should either already be held by the Applicant, or should be provided to the Applicant in full.

[72] Records 25-26 – released or no longer required.

Record 27 – NPO claims fully disclosed.

Record 28 – released or no longer required.

Record 29 - NPO claims fully disclosed.

Records 30-31 – released or no longer required.

Record 32 – agreed released.

Record 33 – NPO claims fully disclosed.

Record 34 – agreed released.

Record 35 – NPO claims fully disclosed.

Record 36 – released or no longer required.

Records 37-39 – agreed released.

[73] Record 40 – NPO identifies as Item No. 63 which is not provided. I identify as Item 61 in their bundle. Record withheld.

[74] The NPO relies on the exemption found in section 20(1)(b), or in the alternative, section 20(1)(d). Section 20(1)(b) states:

20. (1) *A record is exempt from disclosure if- ...*

³ ICO Hearing Decision 23-00512 can be found at www.infocomm.ky/appeals

(b) *its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.*

- [75] The NPO submits that it is important that employees feel free to consult and candidly discuss issues relevant to the effective exercise of their functions. They argue, and I agree, that the above exemption seeks to ensure a “safe space” in which employees are able to discuss and seek guidance from each other. They contend that a release of this record would constitute an erosion of this safe space.
- [76] The withheld record contains an exchange of views for the purposes of the NPO making a decision on how to proceed on a matter, and section 20(1)(b) applies. I do not see how the public interest would be served in the release of this record.
- [77] **I find that Record 40 is exempt under section 20(1)(b).**
- [78] Record 41 – NPO identifies as Item No. 62. I identify as Item 60. Record withheld. The NPO relies on the exemption found in section 20(1)(b), or in the alternative, section 20(1)(d).
- [79] **For reasons already set out above, I find that Record 41 is exempt under section 20(1)(d).**
- [80] Record 42 - NPO identifies as Item No. 51. I identify as Item 49. Record withheld. In its submission the NPO states that this record, an email dated 25 May, 2011, is being withheld under sections 20(1)(b) and 20(1)(d) instead of section 17(a), which relates to legal professional privilege.
- [81] **For reasons set out above, I find that Record 42 is exempt under section 20(1)(b). In the alternative, I also find that it is exempt under section 20(1)(d).**
- [82] Record 43-44 – NPO cannot identify these, but ICO has copies. **These records are emails and an undated letter between the Applicant and the NPO which should either be held by the Applicant, or should be provided to the Applicant in full.**
- [83] Record 45 – NPO identifies as Item No. 59. I identify as Item 57. **As discussed in paragraph 40 above, this record is similar to the responsive record in request 49436 and I find that it is exempt under section 23(1) and that the public interest does not override the exemption.**
- [84] Record 46 - NPO identifies as Item No. 61. I identify as Item 59. Record withheld. **For reasons already set out above, I find that Record 46 is exempt under section 20(1)(b) and that the public interest does not override the exemption.**
- [85] Record 47 - NPO identifies as Item No. 60. I identify as Item 58. Record withheld. **For reasons already set out above, I find that Record 47 is exempt under section 20(1)(b) and that the public interest does not override the exemption.**
- [86] Record 48 - NPO identifies as Item No. 59. I identify as Item 57

- [87] **As discussed in paragraph 40 above, this record is similar to the responsive records in request 49436 and I find that it is exempt under section 23(1) and that the public interest does not override the exemption.**
- [88] Records 49 to 55 - NPO identifies as Items No. 58, 57, 54, 53, 52, 50 and 49. I identify as Item 56, 55, 52, 51, 50, 48 and 47.
- [89] The public authority relies on section 17(a) to withhold these records. This section states:
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;*
- [90] The legal department, on behalf of the NPO, has set out case law pertaining to the purpose of legal professional privilege as they have done in several previous submissions. The general application of legal professional privilege has been addressed in the past in various of my Decisions, including Decisions 2-01109, 10-02310, 11-02410 and 25-00812⁴, and I will not repeat these here.
- [91] The NPO maintains that Records 49 through 55 represent communications between the NPO and Crown Counsel in which the NPO sought and obtained legal advice.
- [92] In their submission, the Applicant gives various reasons why legal professional privilege does not attach to the records being sought, but also states that no requests have been made for any correspondence or documentation between the NPO and the Legal Department.
- [93] **In the case of Records 49 - 55, these clearly represent correspondence between the NPO and the Legal Department, in which legal advice is sought, given or discussed, so these records are either not responsive to the Applicant's request, or exempt under section 17(a).**

F. FOI REQUEST # 48734

- [94] 1 June 2012: The Applicant made an FOI request to the Labour and Pensions Office and the Ministry of Education for -
- I would like to request a copy of all communication and documents held by the National Pension Office, the Department of Labour and Pensions, the Minister of Education, and/or the Ministry of Education, Labour and Pensions between [] or other company related in any way to the [] and any other party including the above entities.*
- [95] 26 June 2012: The LPO acknowledged receipt of the request.

⁴ ICO Hearing Decisions 2-01109, 10-02310, 11-02410 and 25-00812 can be found at www.infocomm.ky/appeals

- [96] 3 July 2012: The Applicant received no response within the required time frame and requested an Internal Review.
- [97] 2 August 2012: The Internal Review was completed and the Applicant received redacted records, pursuant to 17(a), 17(b)(1), 20(1)(d) and 23(1).
- [98] 20 August 2012: The Applicant requested an Appeal to the ICO.
- [99] In their submission, the NPO contends that there are only three remaining records of relevance to this request and relies on sections 17(b), 23(1) and 20(1)(d) of the FOI Law to exempt from disclosure information redacted from these three records. I have to assume that the NPO means 17(b)(i) of the Law, as subsections (ii) and (iii) are not relevant to this case.
- [100] In the case of this request, both the Record Numbers set out by the ICO, and some of the Item Numbers created by the NPO do not match the description of the records. It is therefore unclear to me, once again, what records have been released, further released, redacted or withheld from the Applicant.
- [101] In addition, the Applicant has submitted descriptions of some records that have been referred to in other documents, and claims that they should therefore exist.
- [102] For clarity therefore, and from the records before me, I will abandon the use of any numbers at all, and refer to the responsive records for this request by a short description:

Email 20 March 2012– agreed released.

Email 8 March 2012 and accompanying letter 7 March 2012 – agreed released.

Letter 14 Dec 2011 from NPO – same as record 12 above, agreed released.

Letter 7 Dec. 2011 to NPO – agreed released.

Letter 22 Nov 2011 from NPO – same as record 16 above, agreed released.

Email 5 November 2009 – similar or identical record to Record 34 above – agreed released.

Emails 29 Dec 2009 – same as record 32 above, agreed released.

Email 1 August 2009 – Similar to record 34 above – agreed released.

Report 1 February 2013 – agreed released.

Attachment to Record 48 – similar or identical to records considered in Request 49436 above.

Letter read to Applicant on 20 October 2010 – not identified by NPO or provided to ICO.

Deed of Settlement – not identified by NPO or provided to ICO.

Enclosed Documents referred to in Record 63 – these form part of the records attached to the letter of 11 January 2009 as considered below.

- [103] Letter 11 Jan 2009 to NPO.
This letter had 14 documents enclosed, which constitute the remainder of the documents before me, which are considered below.

- [104] The NPO has redacted some information from the record provided to the Applicant, under sections 23(1), 20(1)(d) and 17(b)(i), relating to actionable breach of confidence.
- [105] The personal information withheld, as well as the reasons for doing so, are the same as discussed above, and I uphold the use of section 23(1) to redact information from these documents. Similarly, the redaction made under section 20(1)(d) in the letter of 8 December 2009 is upheld.
- [106] The exemption applied by the NPO to withhold the remainder of the information is 17(b)(i).

Section 17(b)(i) states:

17. *An official record is exempt from disclosure if-*
(b) *the disclosure thereof would-*
(i) *constitute an actionable breach of confidence.*

- [107] The NPO has made a clear and compelling case as to why the redacted information should be withheld, providing relevant case law, which I support. The author of the letter of 11 January 2009 stated that the documents were to remain confidential, and that they were being provided for the NPO on the basis that they would not be disclosed. While the NPO accepts that this alone would not make inapplicable the provisions of the FOI Law, it does provide evidence of the intention of the party providing the information.
- [108] They accept that a contractual duty of confidence does not exist in this case, but submit that the NPO has an equitable duty of confidence to hold in confidence the personal information of a third party which has been submitted to the NPO pursuant to its regulatory powers under the NPL.
- [109] The NPO also demonstrates that the records have the necessary quality of confidence, and are neither trivial nor generally accessible. They also show that the information was imparted in circumstances importing an obligation of confidence. Finally they submit that the unauthorized use of the information would cause detriment to the third party.
- [110] The NPO concludes that based on the circumstances the NPO owes an equitable duty of confidence to the provider of the information, and that the grant of access under the FOI Law would be a breach of that duty.
- [111] **I find that the records attached to the letter to the NPO of 11 January 2009 which have been withheld or redacted are exempt under 17(b)(i) as indicated by the NPO on each record.**

G. CONCLUSION

- [112] This has been a particularly difficult Hearing due to the many factors set out above. Most difficult has been the separation of the FOI matters from the general complaints and issues surrounding the request. I believe that it has been frustrating for the Applicant, who has felt that the NPO and the Ministry were often not in compliance with the FOI Law, and that there have been unacceptable delays. At the same time, the public authorities have made a huge effort, albeit sometimes after delays, to provide the Applicant with a multitude of records.
- [113] At this stage, many more records have been released to the Applicant than at the start of the appeal with the ICO, due in part to the intervention of the ICO. I hope that the arguments set out above will demonstrate that under the FOI Law, I must focus only on the exemptions claimed, and cannot take into consideration any other factors which may surround the request for records.
- [114] While there have been delays and other difficulties with respect to the public authorities' compliance, which I have noted in this Decision, I find no egregious or wilful failures to comply with the FOI Law.
- [115] The Applicant currently has several other requests on appeal with the ICO. Given the huge amount of time and resources that have been expended on this matter to date, I am not prepared to continue with these appeals in the current form. Section 39 of the FOI Law states that the Commissioner may hear, investigate and rule on appeals filed under this Law, and I am hereby exercising my authority to decline to hear or rule on these current appeals.
- [116] The records being requested are overlapping with some already received, exemptions are similar to those applied to the requests in this Decision, and there remains confusion as to what has been already provided, what has been internally reviewed, and what records remain outstanding.
- [117] While I appreciate that this entire case has already spanned over a year, the most effective way to continue the process of getting access to further records, would be for the Applicant to carefully examine all the records that have been provided, consider the exemptions that have been applied by the NPO and upheld by me, and make a new FOI request for any outstanding records. This would include clearly identifying any records that are referred to elsewhere in records already received. These requests could then work their way through the processes in a timely and organised manner.

H. FINDINGS AND DECISION

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

Findings:

I find that the records withheld, and the information redacted from the records as set out above are exempt under section 23(1), 20(1)(b) and (d), and 17(1)(a) and (b)(i) except for correspondence to and from the Applicant and the NPO which should be provided to the Applicant in full.

Decision:

I uphold the decision of the Department of Labour and Pensions to withhold and redact information from records as set out above.

Further appeals by the Applicant currently with the ICO will be discontinued, and the Applicant is advised to resubmit new requests for any further records.

As per section 47 of the *Freedom of Information Law, 2007*, the complainant, or the relevant public 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.

Pursuant to section 48, upon expiry of the forty-five day period for appeals referred to in section 47, the Commissioner may certify in writing to the court any failure to comply with this Decision and the court may consider such failure under the rules relating to contempt of court.



Jennifer Dilbert
Information Commissioner

17 December 2013