
Hearing 79- 201900167

Decision

Office of the Director of Public Prosecutions

Sandy Hermiston
Ombudsman

28 May 2020

Summary:

An applicant made a request under the Freedom of Information Law (2018 Revision) (FOI Law) for the name of a medical expert (Expert) who wrote an independent consultancy report concerning the applicant (Report) for the Office of the Director of Public Prosecutions (ODPP).

The Report was disclosed but the name and other identifying information relating to the author was redacted under the exemption in section 23(1) of the FOI Law, as the ODPP argued that the disclosure of that information would be unreasonable. The ODPP also claimed that the request was vexatious.

On appeal, the Ombudsman found that the request was not vexatious, and that the redacted information was not exempted as it was excluded from the definition of “personal information” in the Freedom of Information (General) Regulations, as it relates to an individual who provided a service for a public authority under a contract for services.

The ODPP is required to disclose the report to the applicant without redactions.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision) (FOI Law)

Freedom of Information (General) Regulations 2008 (FOI Regulations)

¹ In this decision all references to sections are to sections of the *Freedom of Information Law (2018 Revision)* as amended, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

Contents:

A. INTRODUCTION	2
B. CONSIDERATION OF ISSUES	2
C. FINDINGS AND DECISION.....	7

A. INTRODUCTION

- [1] On the 12th of September 2019 the applicant requested that the ODPP disclose the name of the Expert who wrote a Report in 2018 as an independent consultant engaged by the ODPP to review the appropriateness of the medical care provided to the applicant. The ODPP had previously disclosed the Report but had redacted the name and other data that could identify the Expert, which was claimed to be exempt pursuant to section 23(1) relating to the unreasonable disclosure of personal information.
- [2] On the 16th of September 2019 the Acting Director of the ODPP replied, referring to ODPP's response to a previous request from the same person, stating that the ODPP's position had not changed and they continued to rely on section 23(1).
- [3] The applicant was not satisfied and appealed to the Ombudsman to overturn the redactions.

B. CONSIDERATION OF ISSUES

- [4] The ODPP relied on the exemption in section 23(1), but in its submission also claimed that the applicant "has become sufficiently vexatious to justify an outright refusal to grant access" on the basis of section 9(a). The ODPP did not separate the arguments relating to unreasonableness under section 23(1) and vexatiousness under section 9(a), but did provide various examples of what it alleged was vexatious and reckless behaviour on the part of the applicant.
- [5] As discussed in previous decisions, the provisions in section 9 do not form part of the exemptions in Part III of the FOI Law. Since it has the potential to stop a request outright, a claim under section 9 must be considered before any exemptions are taken into consideration. Therefore, I will first consider the claim of vexatiousness and then move on to the claimed exemption.

a. Whether compliance with the request is not required because it is vexatious under sections 9(a) of the FOI Law.

- [6] Over a period of several years the applicant complained to the George Town Hospital, the Health Services Authority, the Royal Cayman Islands Police Service (RCIPS), HE the Governor, the Cayman Islands Courts, and other entities about a medical examination conducted in 2011, while she was a minor, and various reviews that took place in its aftermath. She also said she planned to file a complaint with the Florida Medical Board and indicated she had copied the complaint to other US authorities.
- [7] The applicant had received a copy of the Report with the name and identifying information relating to the Expert redacted. The applicant believed the Expert was wrong to conclude that the medical practitioners had performed their duties competently and within the expected standard of care, and was keen on holding the Expert accountable. The applicant questioned whether the Report was written by a medical expert at all.
- [8] The applicant's allegations were examined and considered by the Board of Medical Practitioners, a civil court, the (former) Director of Public Prosecutions, an independent Queen's Counsel, and an independent medical consultant (the Expert), over a period of several years. However, the applicant rejected the conclusions of these authorities, and continued to believe that the initial examination had been mishandled.
- [9] In a letter dated the 6th of November 2018 the applicant claimed that the Expert "lied... [and] needs to be held accountable", and suggested that the former DPP "conceal[el] the wrongs of [the physician who had conducted the 2011 examination]".
- [10] The ODPP stated that a letter from the applicant dated the 3rd of March 2019 constituted a "false medical report". It was addressed to the Serious Crime Case Manager investigating her complaint, and purported to have been commissioned by the ODPP as a "second opinion", which the ODPP said was untrue.
- [11] In a subsequent letter dated the 12th of September 2019 the applicant again made sweeping accusations. She called the Expert's Report "inconsistent with the findings, the medical records, medical summary, medical record's office report, police report, civil report, Attorney's report, email of [the physician who conducted the initial examination], social worker's report, affidavit of [the physician], etc. ...". The applicant called the Report "bias[ed], misleading, dishonest and [unreliable]".
- [12] The applicant also said that she and her family feared for their lives, stating that they,

... have prepared a file to be send [sic] to the U.K. and involved the U.S. Government in the event [the applicant] goes missing or [is] killed, they know why, the FBI is also informed. ... After all people goes [sic] missing here... I have to install sevailance [sic] in our home and to my phone because of us reporting child abuse as we were told, looking over our shoulders, living in fear of our lives... When you look at the time this case started, the lies, deceptions, people concealing the truth, accepting lies

under oath, we will take no chances that people are capable of any wrong doings including killing.

[13] The ODPP argued that the applicant “behaved in an increasingly unreasonable and vexatious manner”, asserting that their actions “are not just reckless and vexatious; they could amount to an offence under s.120 of the Penal Code”.

[14] Section 9(a) states that:

9. A public authority is not required to comply with a request where –

(a) the request is vexatious;

[15] The term “vexatious” is not defined in the FOI Law or in the Interpretation Law, 1995. In **Information Commissioner v Devon County Council and Dransfield** the UK’s Upper Tribunal concluded that in the context of FOI “vexatious” can be defined as the “... manifestly unjustified, inappropriate or improper use of a formal procedure”². The same Tribunal also made clear that the concepts of proportionality and justification are central to the consideration of vexatiousness in this context.

[16] Guidance from the UK’s Information Commissioner identifies a number of indicators, and clarifies that these “should not be regarded as either definitive or limiting”. The indicators are:

- Abusive or aggressive language
- Burden on the authority
- Personal grudges
- Unreasonable persistence
- Unfounded accusations
- Intransigence
- Frequent or overlapping requests
- Deliberate intention to cause annoyance
- Scattergun approach
- Disproportionate effort
- No obvious intent to obtain information
- Futile requests
- Frivolous requests

[17] While the applicant’s communications displayed a number of these indicators for vexatiousness, other indicators are lacking. The applicant’s language and behaviour can be described as unreasonably persistent, intransigent and expressing unfounded accusations.

² *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 (AAC) 28 January 2013 para 27

- [18] However, there is no suggestion that complying with the request would place an undue burden or disproportionate effort on the ODPP, or that the request has the intention to cause deliberate annoyance, lacks focus, has no obvious intent to obtain information, is futile or frivolous.
- [19] In view of the applicant's persistent suspicions and accusations of wrongdoing in spite of the numerous investigations and reviews, a certain level of annoyance on the part of the ODPP is understandable. However, there is no justification to call the request, in the words of the UK Upper Tribunal, a "... manifestly unjustified, inappropriate or improper use of a formal procedure". In fact, disclosure may allay some of the applicant's suspicions about the nature of the Report. While the applicant was undoubtedly intransigent and persistent, the request itself was limited in scope to the identity of the author of an independent Report on the subject of the applicant's own medical history, which the applicant was reasonably entitled to.
- [20] **For these reasons the request is not vexatious, and section 9(a) does not apply.**

b. Whether granting access to the redacted information would involve the unreasonable disclosure of personal information of any person, living or dead.

- [21] The ODPP claimed that the disclosure of the name and other personal information of the Expert would constitute an unreasonable disclosure of his personal information, in view of the applicant's stated goal of filing a complaint against the Expert, and the information is therefore exempted under section 23(1). The ODPP relied on the same arguments as above to claim that the disclosure of the Expert's name would be unreasonable.

- [22] Section 23(1) 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 personal information of any person, whether living or dead.

- [23] "Personal information" is defined in regulation 2:

"personal information" means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, including but not limited to-

(a) the individual's name, home address or home telephone number;

- (b) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations;*
- (c) the individual's age, sex, marital status, family status or sexual orientation;*
- (d) an identifying number, symbol or other particular assigned to the individual;*
- (e) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics;*
- (f) information about the individual's health and health care history, including information about a physical or mental disability;*
- (g) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given;*
- (h) anyone else's opinions about the individual; or*
- (i) the individual's personal views or opinions, except if they are about someone else;*

but does not include-

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

[24] The exemption in section 23(1) involves a two-step test, namely (1) whether the redacted information is “personal information”, and (2) if so, whether the disclosure of the redacted information would be unreasonable.

[25] Paragraph (ii) of the definition of “personal information” in regulation 2 explicitly excludes,

- (ii) where the individual is or was providing a service for a public authority under a contract for services, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service;*

- [26] The redacted information consists of the name and other identifying data relating to the author of the Report, who was an independent medical consultant engaged by the ODPP to review the appropriateness of the medical care provided to the applicant.
- [27] In writing the Report the Expert was acting in an official capacity as an independent consultant for the ODPP. He had a reasonable expectation that the Report – including his own identity as the author – would receive a certain amount of exposure, in so far as possible due to the sensitive nature of its contents. Indeed, the name and credentials of the author as a medical expert form an integral part of the Report that lend it trust and credibility. As the subject of the Report, the applicant had a reasonable expectation that its content and author would be made known to her.
- [28] In relation to the ODPP's argument that the applicant's desire to file a complaint against the Expert is unreasonable, and that the name should be withheld on that basis, I want to repeat the words of the previous Information Commissioner:

Questions of access to a record held by Government cannot be concerned with how that record might be used in the future. This would be a shortcut to censorship, and would contradict the fundamental objectives of the FOI Law. Either a record is exempt under the Law or it is not, but, in either case, any presumed future use of a record can have no bearing on its disclosure. This principle is stated in section 6(3), which states that an applicant is not required to give any reason for requesting access. In the UK it is known as "motive blindness".³

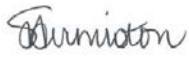
- [29] **In conclusion, the redacted information is not personal information as defined in the Regulations, and the exemption in section 23(1) consequently does not apply to it. Therefore, the full Report including the name and identifying information of the author must be disclosed to the applicant.**
- [30] **Given the sensitive nature of the Report, which includes details of the applicant's health conditions and medical care, the disclosure is strictly to the applicant and not to the world at large.**
- [31] Since I have found that the exemption in section 23(1) does not apply to the redacted information I am not required to conduct a public interest test under section 26(1).

C. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following findings and decisions:

³ Information Commissioner *ICO Hearing 37-02613 Decision Planning Department* 28 May 2014 para 143

- a) The request for the identity of the Expert is not vexatious under section 9(a).
- b) The requested information in the 2018 Expert Report relating to the applicant is not personal information as defined in the Freedom of Information (General) Regulations, 2008, and is therefore not exempt under section 23(1).
- c) The Office of the Director of Public Prosecutions is required to disclose the Report to the applicant without redactions.



Sandy Hermiston
Ombudsman