

ICO Hearing 39-02513
Decision

Planning Department

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

3 March 2015

Summary:

On 30 May 2013 an applicant made a comprehensive request for access to records relating to the Kai Village Planned Area Development to the Planning Department under the *Freedom of Information Law, 2007*.

In its response the Department offered access to the responsive records by means of onsite inspection in its offices. It also withheld a record (to which later three more records were added) relying on the exemption in section 17(a) which protects legal professional privilege. The Department claimed that it responded under the provisions of the Development and Planning Law (2011 Revision) and the Development and Planning Regulations (2011 Revision), pursuant to section 6(4) of the FOI Law, but also informed the Applicant of his right to an internal review under the FOI Law.

The request was internally reviewed by the Chief Officer, and was then appealed to the Information Commissioner's Office. During the appeal numerous records were disclosed on the Department's website, including all the drawings and plans relating to the proposed development. The dispute could not be resolved amicably and proceeded to a formal hearing before the Acting Information Commissioner.

In the Hearing Decision the Acting Commissioner found that three records were exempted under section 17(a) because they were privileged from production in legal proceedings on the ground of legal professional privilege. One record was not exempted under section 17(a) since it was older than 20 years, and was ordered disclosed.

In regard to the other outstanding issues (answering under another enactment, the application of the *Copyright Act 1956*, and making reasonable efforts to locate the responsive records) both the Department and the Applicant relied entirely on the arguments raised in Hearings 37-02613 and 38-02413. The Acting Information Commissioner therefore did not reconsider these questions but repeated his previous findings.

Statutes¹ Considered:

Cayman Islands Constitution Order 2009 (2009 No. 1379)
Freedom of Information Law 2007
Freedom of Information (General) Regulations 2008
Interpretation Law (1995 Revision)
Freedom of Information Act (UK) 2000 (2000 c.36)

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A. INTRODUCTION

[1] The planning application for the Kai Village Planned Area Development (KVPAD) in Cayman Kai, and the subsequent consultation in accordance with the *Development and Planning Law (2011 Revision)* (DPL) and *Development and Planning Regulations (2013 Revision)* (DPR) elicited a great deal of interest from the public. Some 40 requests for access to related records were made to the Planning Department (the Department) under the *Freedom of Information Law, 2007* (FOI Law), three of which, including the present request, proceeded to an appeal and formal hearing. Two previous Hearing Decisions were issued in this regard, namely Decisions 37-02613 on 28 May 2014, and 38-02413 on 16 October 2014.

[2] The Applicant made a request to the Department on 30 May 2013, as follows:

We are aware of the Freedom of Information Law and would ask that I be provided with copies of all regulations and correspondence with respect to consideration of such

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. Where several laws are being discussed in the same passages, all relevant legislation has been indicated.

Planned Area Development applications, including the rules and procedures governing the operation of the Central Planning Authority. Please also provide all records relating to this PAD application so that I can carefully consider and prepare my arguments for submission before any formal consideration of this application.

- [3] The Department responded on 25 June 2013. It offered access to the responsive records by means of onsite inspection in its offices only, pursuant to the provisions of the DPL. It also withheld a record under section 17(a) of the FOI Law for reasons of legal professional privilege (“LPP”). The Department on the one hand claimed that its answer fell outside the FOI Law, by virtue of section 6(4), and on the other hand pointed out the Applicant’s right to an internal review under the FOI Law.
- [4] The Applicant requested an internal review of the initial decision on 26 June, and received the Chief Officer’s internal review decision in response on 26 July 2013. The internal review upheld the Department’s initial decision.
- [5] The Applicant made an appeal to the Information Commissioner’s Office (ICO) on 8 August 2013. The appeal was accepted on 14 August 2013.
- [6] Throughout the appeal and while the preparations for the present Hearing were ongoing, numerous additional records were disclosed on the Department’s website. These included CPA minutes and all the drawings and plans relating to the KVPAD application.
- [7] The appeal could not be resolved amicably and the pre-hearing investigation was stopped, and the formal hearing process was started. The disclosure of additional records continued when the preparations for the hearing had started.

B. BACKGROUND

- [8] The Department’s functions are summarized in its mission statement:

To ensure that all development applications are processed efficiently, courteously, unbiased and in accordance with the development plans and associated legislation so that the physical development of the Islands is aesthetically pleasing, environmentally friendly, sustainable, technically sound, promotes a strong economy, and provides an unparalleled quality of life for existing and for future generations.

- [9] The Department is comprised of four divisions: Current Planning, Building Control, Policy Development, and Administration.
- [10] The Current Planning section (CP) is responsible primarily for processing development applications for presentation to the Central Planning Authority (CPA) on Grand Cayman and the Development Control Board (DCB) on the Sister Islands.

C. PROCEDURAL ISSUES

- [11] The Applicant notes some of the same procedural issues that have already been discussed in my Decisions 37-02613 and 38-02413, without adding further evidence or argumentation.
- [12] The Applicant also draws my attention to alleged unfairness and breaches of constitutional rights in regard to the Department's application and interpretation of the access and notification provisions of the DPL and DPR, in particular the limitations it has placed on access to planning application records by potential appellants under the planning laws.
- [13] I have explored these questions in depth in Decision 38-02413, as well as in the earlier Decision 37-02613, in so far as possible without making *ultra vires* pronouncements about legislation over which I have no authority. I refer to paragraphs 27-30 of Decision 37-02613 for my views on these matters. The Applicant may wish to explore whether it would be appropriate for him to seek redress through the courts, but these matters cannot be resolved in an appeal under the FOI Law.
- [14] For further guidance on some of the additional procedural questions raised by the Applicant, I refer to my discussion of procedural issues in Hearing Decisions 37-02613 and 38-02413.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [15] The following four issues are under review in this Hearing, as listed in the Fact Report:
- 1. Whether records may be exempted under sections 17 (a) of the FOI Law;**
 - 2. Whether access to records is already provided pursuant to another enactment, namely the Development and Planning Law (2011 Revision) and the Development and Planning Regulations (2011 Revision) in accordance with section 6(4) of the FOI Law;**
 - 3. Whether the provision of paper, or electronic copies of drawings or plans would be an infringement of intellectual property rights under the Copyright Act 1956 as per section 10(3)(b) of FOI Law, taking into consideration section 54(3)(b) of the FOI Law.**
 - 4. Whether a reasonable search was conducted by the Public Authority to identify the responsive records as per regulation 6(1) of the FOI Regulations 2008.**
- [16] The two parties draw different conclusions from the fact that these same questions, relating to the same exact records in dispute, were also before me in Hearings 37-02613 and 38-02413.
- [17] The Department points out that the current Hearing is identical to Hearing 37-02613, and invites me to reach a decision that is consistent with my conclusions in that Hearing. Its submission is identical to the submission it made in the previous two Hearings.
- [18] The Applicant, on the other hand, while acknowledging that he has read Decision 38-02413, states that he wishes to adopt "the reasoning of the Applicant in Appeal 38 and [to reject] the

arguments of the Planning Department". He dismisses the notion that my findings on the issues under review in the present case should be determined by the outcome of the previous two Decisions.

[19] Bearing in mind that the Department's position has remained entirely unchanged from its submission in the previous related cases, and that the Applicant has provided arguments for the first issue under review only, I believe it is proper for me to consider the first issue only.

[20] Given the lack of new evidence and argumentation on the second, third and fourth issue under review, I do not intend to reconsider those matters in this Decision. I have nothing further to add to these questions, and consider them *res judicatae*. For convenience, I have repeated my previous findings on those issues below.

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Whether records may be exempted under section 17(a)?

[21] Section 17(a) provides:

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; or

...

[22] Section 6(2) provides:

(2) The exemption of a record or part thereof from disclosure shall not apply after the record has been in existence for twenty years unless otherwise stated in this Law.

[23] Unlike the parallel exemption in the UK Freedom of Information Act, 2000, the exemption relating to legal professional privilege in the FOI Law is not subject to a public interest test.

[24] Section 3(7) provides:

(7) Nothing in this Law shall be read as abrogating the provisions of any other Law that restricts access to records.

The position of the Department:

[25] In words that are exactly identical to its submission in the parallel hearings 37-02613 and 38-02413, the Department clarifies that the exemption in section 17(a) is being claimed in respect of four documents which in their view are "pieces of legal advice". They are communications respectively dated 26 June 1989, 19 August 1994, 30 March 2001 and 31 July 2007.

[26] The application of the exemption and the Department's claim of legal advice privilege is based upon the delineation of the privilege by the courts in *Balabel and another v Air India* [1988] 1

CH. 317, *Three Rivers DC v Bank of England* (No.5) [2004] 2 WLR 1274, and *Three Rivers DC v Bank of England* (No.6) [2004] UKHL 48. Specifically, the privilege will attach to confidential communications between a legal professional and his client undertaken for the dominant purpose of giving or obtaining legal advice. The Department claims that these four documents are such communications.

[27] The Department points out that legal advice is not restricted to advice on the client's legal rights and liabilities but also includes "advice as to what should prudently and sensibly be done in the 'relevant legal context'".

[28] The Department contends that the four documents are communications provided by the Attorney General's Chambers in March 2001 and July 2007, which are subject to legal professional privilege. The advice was rendered after,

extensive research in the area of law upon which advice was sought and provided a reasoned opinion on the particular area. The advice provided direction on the law to the client and clarified certain obligations. It is clear that the purpose of the communication between the Department of Planning and the legal advisers for the Government was to seek legal advice.

[29] The Department has not addressed the question of the age of the responsive records in the light of the application of section 6(2), quoted above.

The position of the Applicant:

[30] The Applicant states that he has read my Hearing Decision 38-02413, and "to the extent that the issues are the same I adopt the reasoning of the Appellant in Appeal 38 and reject the arguments of the Planning Department."

[31] However, the Applicant rejects the notion that the present appeal,

should be determined by the outcomes of Appeal 37 and 38, particularly when I don't know all of what was submitted in those appeals and I don't know whether the Information Commissioner had all of the relevant facts and law relevant to my appeal in front of him when he made his previous decisions.

[32] In particular, the Applicant rejects my interpretation of section 3(7) in paragraphs 51-53 of Decision 38-02413, and my decision not to order the record, which was found to be legally privileged but more than 20 years old, disclosed pursuant to section 6(2).

[33] The Applicant brings the *Cayman Islands Interpretation Law, 1995* to my attention in respect of the application of section 3(7) of the FOI Law. The Department solely relied on section 17(a), and not on section 3(7), and the Applicant asks that I address specifically whether the Interpretation Law "permits section 3(7) of the FOI Law to be applied" to determine whether a record older than 20 years old should be disclosed.

[34] The Applicant says that the FOI Law must be interpreted in accordance with the Interpretation Law, section 2 of which,

says that the word 'Law,' when it is capitalized, as it is in the phrase 'any other Law' found in section 3(7) of the FOI Law, only refers to legislation of different types and does not include the common law.

[35] The Applicant states his belief that there is no basis for interpreting “the Law” in section 3(7) “as anything other than what the Interpretation Law says”, and that, if the Legislators had intended section 3(7) to cover both statute and common law, they would have made this clear in the text of the FOI Law. He concludes that, since section 3(7) refers only to statute law (i.e. capitalized “Law”), the section does not apply to the common law, and the record in question, which is more than 20 years old, is therefore not covered by any exemption and must be disclosed.

[36] Finally, the Applicant notes that,

Government papers are almost all released to the public after the passage of years. That is the case even with Cabinet papers which become open to access with the passage of time. There is therefore no basis for thinking that the Legislative Assembly intended section 3(7) to include the common law which would put the records requested in this appeal beyond release potentially for all time.

Discussion:

[37] As the Applicant states, Decision 38-02413 dealt *inter alia* with the question of the application of the exemption in section 17(a), relating to legal professional privilege. In that Decision I concluded that of the four responsive records in question, three are legally privileged and covered by the exemption, namely the communications dated 19 August 1994, 30 March 2001 and 31 July 2007. I also concluded that the fourth document, a communication dated 26 June 1989, is legally privileged, but it is not exempted because it was more than 20 years old at the time the request was first dealt with by the Department. However, in respect of this last document, I found that it remains privileged nonetheless, by virtue of section 3(7) and the common law of legal professional privilege.²

[38] The 1989 record is a confidential communication received by the Director of Planning from his professional legal advisor in the Attorney General’s Chambers. It consists of confidential legal advice within the relevant legal context, and I have not seen any evidence that the privilege has been waived or has otherwise been lost. Therefore, the document is subject to legal professional privilege.

[39] However, by virtue of section 6(2) the exemption in section 17(a) expires after the responsive record is 20 years old, which is the case here.

[40] The Applicant’s arguments in relation to sections 3(7) and 6(2) relate to the 1989 document only, since it is the only of the four documents which at the time of the request was over 20 years old.

[41] Since the 1989 record constitutes legal advice provided by the hand of the Attorney General personally, an argument could also be made that the exemption in section 20(1)(c) would apply, but would also cease to apply after 20 years by reason of section 6(2). Section 20(1)(c) provides:

² *ICO Hearing Decision 38-02413 Planning Department* 16 October 2014 paras 49-53, 56

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

...

(c) it is legal advice given by or on behalf of the Attorney-General; or

...

[42] In the earlier Decision 38-02413 I applied section 3(7) to the 1989 letter out of an abundance of caution, in view of the fact that, unlike the Supreme Court of Canada³, the English and Caymanian courts continue to hold that legal professional privilege does not expire and can “only be overridden by legislation”.⁴

[43] In reaching that Decision I was also mindful that the common law of legal professional privilege represents a very strong public interest both for reasons of protecting the general right to privacy and the right to access to justice, both of which have been enshrined in the *Cayman Islands Constitution Order, 2009*. It is therefore imperative that the common law of legal professional privilege not be abrogated lightly.

[44] In *Special Commissioner and Another, Ex P Morgan Grenfell & CO Ltd* [2002] UKHL 21, referring to *R v Derby Magistrates Court, Ex Parte B* [1996] AC 497, Lord Hoffmann, speaking for the majority of the Court, expressed the following principles in respect of legal professional privilege:

7. ... First, LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.... It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the [European] Convention [on Human Rights] (Campbell v United Kingdom (1992) 15 EHRR 137; Foxley v United Kingdom (2000) 31 EHRR 637)...

8. Secondly, the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication...⁵ [emphasis added]

[45] This approach was adopted by the UK Information Tribunal in *Ministry of Justice v Information Commissioner EA/2007/0016*:

... the great force of the public interest in preserving confidentiality across [legal professional privilege] has been acknowledged and repeated by courts at the highest level, so that the courts will maintain non-disclosure of legal advice even where the exercise of the privilege may impede the proper administration of justice in the individual case... Further, the strength of the public interest in maintaining legal professional privilege is such that it will not be treated as abrogated by general words used in a

³ *Blanks v Canada (Minister of Justice)* [2006] 2 S.C.R 319 2006 SCC 39 paras 34-41

⁴ *Three Rivers DC v Governor and Company of the Bank of England (No 5)* [2004] UKHL 48 para 25

⁵ *Special Commissioner and Another, Ex P Morgan Grenfell & CO Ltd* [2002] UKHL 21 paras 7-8, 16 and 30

statute – rather, clear, specific and express language would be required: see R v IRC, ex p Morgan Grenfell [2003] 1 AC 563.⁶ [emphasis added]

[46] The term “Law” is not defined in the FOI Law, but the *Interpretation Law (1995 Revision)* provides two explanations for the term. The first one, in section 2 under the marginal title “Definition”, is as follows:

2. *In this Law-*

“Law” means any Law and any regulations made thereunder, and any prerogative Order of the Sovereign in Council applicable exclusively to the Islands, whether enacted before or after the commencement of this Law.

[47] As well, in section 3(1) of that Law, under the marginal title “Interpretation of terms applicable generally”, the following appears:

“Law” includes any Order in Council;

[48] The term “Order in Council” is further listed in section 3(1) of that Law as meaning:

“Order in Council” means any prerogative Order of the Sovereign in Council applicable exclusively to the Islands;

[49] Furthermore, the same section of that Law provides that the term “common law” “... means the common law of England”

[50] I find this dual approach to the definition of “Law” in the *Interpretation Law* somewhat unclear. The definition of “Law” in section 2 of that Law appears to relate to the subject matter and application of the *Interpretation Law* itself. It provides that the *Interpretation Law* applies to enactments.

[51] The *Interpretation Law* assists in the interpretation of enactments, in part by means of the “interpretation of terms applicable generally”, many of which are further explained in section 3(1) of that Law, which is plainly intended to give guidance on the interpretation of terms with general application, and is therefore relevant to the question how the term “Law” is to be interpreted in this case. Section 3(1) does not explicitly restrict the term “Law” to enactments, nor expressly excludes the common law.

[52] However, it cannot be denied that the *Interpretation Law* provides distinct definitions for “Law” and “common law”, and neither one is said to include (or exclude) the other.

[53] As well, section 48 of the *Interpretation Law* deals with the interplay between two or more Laws, as well as between statutory and common law, by providing:

48. Where any act or omission constitutes an offence under two or more Laws, or both under a Law and under the common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Laws or under the common law, but shall not be liable to be punished twice for the same offence.

⁶ *Ministry of Justice v Information Commissioner* 6 August 2007 EA/2007/0016 para 22(3)

While this provision relates to offences, which is not directly relevant to the present discussion, it does demonstrate to some degree that the “Law” and the “common law” are distinct in the framework of the *Interpretation Law*.

- [54] The 20-year limit to the application of the exemption relating to legal professional privilege in the FOI Law clearly contradicts the common law rules, however, a presumption against implied repeal does not assist since the common law of legal professional privilege is explicitly addressed in the FOI Law, where it is listed as an exemption (s.17(a)). Therefore, the concept of legal professional privilege itself remains intact, even though the privilege will no longer apply in the circumstances where a legally privileged record is more than 20 years old, as provided in section 6(2).
- [55] Therefore, the way in which the FOI Law deals with legal professional privilege meets the criteria expressed by Lord Hoffman, quoted above, in that the provisions are expressly stated, and also appear by necessary implication to override the common law rules relating to legal professional privilege. Section 3(7) therefore does not apply, and the application of section 6(2) in terms of the exemption in section 17(a) remains in effect.
- [56] I consider that this conclusion is consistent with the objectives of the FOI Law, as expressed in sections 4 and 6(1), of reinforcing governmental accountability, transparency and public participation in national decision making by granting a general right of access to government records, in this case legal advice provided to the Planning Department more than 20 years ago.
- [57] Finally, I note that the parallel exemption in section 42 of the UK *Freedom of Information Act 2000* also provides for an expiry of the exemption after 30 years by virtue of section 63(1) of that Act.
- [58] **For these reasons, I find that the communication dated 26 June 1989 is no longer protected against disclosure under section 17(a) by reason of section 6(2), since it is more than 20 years old, and I require that the Planning Department disclose it.**

2. **Whether access to records is already provided pursuant to another enactment, namely the Development and Planning Law (2011 Revision) and the Development and Planning Regulations (2011 Revision) in accordance with section 6(4) of the FOI Law;**
3. **Whether the provision of paper, or electronic copies of drawings or plans would be an infringement of intellectual property rights under the Copyright Act 1956 as per section 10(3)(b) of FOI Law, taking into consideration section 54(3)(b) of the FOI Law.**
4. **Whether a reasonable search was conducted by the Public Authority to identify the responsive records as per regulation 6(1) of the FOI Regulations 2008.**

- [59] In relation to these three remaining issues under review, the Department’s submission is identical to its submission in Hearing 38-02413, and it has not sent me a reply submission. For his part, the Applicant refers to these issues in general terms only, in his submission and reply submission, and expresses the wish to adopt “the reasoning of the Applicant in Appeal 38 and

[to reject] the arguments of the Planning Department". Neither the Applicant, nor the Department has therefore added any new argumentation to these three issues.

[60] In the interest of expediency, and in view of the lack of new evidence or argumentation, I am not prepared to reconsider these questions as I consider that they have already been decided. I refer to paragraphs 57-112 of Decision 38-02413 for my reasoning in support of the following findings.

[61] **In relation to issue 2, I find that the Department's reliance on section 6(4)(a) is not justified as that section is not engaged, and the Department should have responded under the FOI Law, as it subsequently did.**

[62] **In relation to issue 3, I find that the Applicant has no avenue for appealing this issue, as it is hypothetical, and I will consequently not decide this question.**

[63] **In relation to issue 4, I find that the Department did not initially make reasonable efforts to locate all records that were subject to the application for access at the time of the initial decision, as required under regulation 6(1). However, through the identification and disclosure of further records in the course of the appeal, this initial failure has been satisfactorily addressed, and no further corrective steps are required.**

F. FINDINGS AND DECISION

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

Findings and decision:

- (1) In respect of the four documents that were claimed by the Planning Department to be exempt under section 17(a) of the *Freedom of Information Law, 2007*, I find:
 - (a) the document dated 26 June 1989 is not exempted under section 17(a) by virtue of section 6(2) since the document is over twenty years old. As no other exemption applies to it, I require that the Department disclose this record; and,
 - (b) the three documents dated 19 August 1994, 30 March 2001 and 31 July 2007 are exempt by reason of section 17(a) as they are privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) The Department's reliance on section 6(4)(a) was not justified, and the Department should have responded under the FOI Law, as it subsequently did.
- (3) The questions on alleged copyright infringements and differing interpretations of provisions of the FOI Law in relation to the application of intellectual property rights are hypothetical since they relate to records that have already been fully disclosed on the Department's website in the course of the appeal and hearing. I do not consider that the

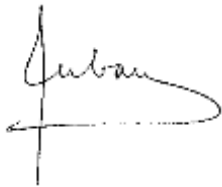
Applicant has an avenue for appealing this issue, and I therefore do not rule on this question.

- (4) I find that the Department did not make reasonable efforts to locate all records that were subject to the application for access at the time of the initial decision, as it was obligated to do by reason of regulation 6(1). However, after identifying and disclosing all further records, this failure has been satisfactorily addressed and no more corrective steps are required.

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 for leave be sent to my Office immediately upon submission to the Court.

Pursuant to section 48, upon expiry of the forty-five day period for judicial review referred to in section 47, I 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.

A handwritten signature in black ink, appearing to read 'Jan Liebaers', with a large, sweeping flourish extending to the right.

Jan Liebaers
Acting Information Commissioner

3 March 2015