

Hearing 68-201800178

Decision

Royal Cayman Islands Police Service

Sandy Hermiston
Ombudsman

16 April 2019

Summary:

An applicant made a request to the Royal Cayman Islands Police Service (RCIPS) for various records relating to an investigation of a company and parcels of land in West Bay in the 1990s. The RCIPS responded that they did not hold any records relating to the matter. This decision was confirmed in the internal review.

Upon appeal, the RCIPS produced a record of their search efforts, including an account of how the records:

- came to be stored in the basement of the Tower Building,
- suffered damage in Hurricane Ivan,
- were subsequently removed and stored in containers, and
- were eventually destroyed in 2009.

The Ombudsman considered that on the balance of probabilities the account provided was accurate and that the RCIPS made reasonable efforts to locate the records.

Statutes¹ Considered:

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

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

Contents:

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

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A. INTRODUCTION

- [1] On 5 July 2017 the Applicant made a request to the RCIPS for a wide variety of records relating to a criminal investigation concerning Cayman Islands Estates Limited (“CIEL”) and certain parcels of land in West Bay, dating from the 1990s.
- [2] On 9 August 2017 the Information Manager (IM) informed the Applicant that no records had been found, prompting the Applicant to request an internal review.
- [3] On 18 September 2017, the Commissioner of Police carried out the internal review and upheld the IM’s initial decision. The Applicant then appealed to the Office of the Ombudsman.
- [4] The Applicant provided us with background documents relating to the investigation, including correspondence from the RCIPS from the 1990s. We recommended that the Applicant make a request for the same records to the Attorney General’s Chambers and the Legal Department.
- [5] Between January and October 2018, we regularly asked the IM for a listing of his search efforts in writing, as required under regulation 6.
- [6] In July 2018 the IM informed us and the Applicant that he was trying to locate a log of the destroyed records which might contain further leads regarding the responsive records.
- [7] On 18 October the IM provided a written description of his search efforts. The Applicant then requested that the matter proceed to a formal hearing decision by the Ombudsman.

B. ISSUE

- [8] **Whether the RCIPS made reasonable efforts to locate a record that was the subject of the application for access.**

C. CONSIDERATION OF ISSUE

- [9] Regulation 6 of the Regulations requires that a reasonable search be conducted, as follows:

6. (1) *An information manager shall make reasonable efforts to locate a record that is the subject of an application for access.*

(2) *Where an information manager has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.*

[10] The question of whether a search effort was reasonable under the UK's FOIA was addressed in the appeal to the Information Tribunal in *Bromley v Information Commissioner* in which the Tribunal concluded that,

the standard of proof to be applied... is the normal civil standard, namely, the balance of probabilities.... [since] there can seldom be absolute certainty that the information relevant to a request does not remain undiscovered somewhere within the public authority's records...

[11] Furthermore, the Tribunal confirmed that a number of factors are relevant to this test, namely:

- *...the quality of the public authority's initial analysis of the request,*
- *the scope of the search that it decided to make on the basis of that analysis and*
- *the rigour and efficiency with which the search was then conducted...²*

[12] Given the extensive similarities between the UK and Cayman Islands FOI laws, I will apply the same standard and factors.

[13] In the initial decision the IM informed the Applicant that "we have searched our records, and no records were found", but did not clarify the nature of the search that had been conducted.

[14] In the course of the appeal the IM provided the following account:

- a) The request pertained to an investigation which was conducted in the early 1990s by the Commercial Crime Branch (CCB) of the RCIPS which was located in the Tower Building.
- b) At that time, closed CCB investigation files of 6 years or older were stored in a designated storage space in the basement of the Tower Building, which was shared with the Police Administration.
- c) At the time of Hurricane Ivan in 2004, the CIEL investigation file would have been stored in the RCIPS's basement storage space.

² *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072) [2011] 1 Info LR 1273 paras 12-13

- d) The Tower Building was severely damaged in Hurricane Ivan and was subsequently condemned and demolished. The flooding of the basement damaged all the records stored there. Sometime afterwards, about 500 boxes of damaged CCB and Police Administration records were removed from the Tower basement and housed in two 40 ft containers.
- e) In June 2009 the CCB expressed concerns about the security and confidentiality of the records in the containers, and reported them to be “in poor sanitary condition – wet, smelly, mold, mildew etc..” The RCIPS contacted the Cayman Islands National Archive (CINA) asking for advice on the disposal of records. Shortly afterwards the records were taken to the landfill and incinerated.
- f) The IM identified five RCIPS officers who were involved in the destruction of the files, of whom he managed to contact and interview four. They confirmed the disposal of the CCB records as described above.
- g) The IM inquired whether a log was kept of the records’ destruction, and he asked the officer in charge of the destruction for assistance in locating it. However, it turned out no documentation of the destruction of the records was kept due to their poor condition which made a detailed description impossible.

[15] In my opinion the IM demonstrated a good understanding of the request. Despite significant delays due to his attempts to contact the officers present at the incineration of the records, the quality of the IM’s analysis was satisfactory, especially keeping in mind the historical nature of the requested records.

[16] The IM knows some of the background to this case from firsthand experience, since he worked for the CCB at the time of the investigation and routinely used the storage space in the basement of the Tower Building. His experience was helpful in retracing the whereabouts of the responsive records.

[17] The scope of the IM’s search was suitable under the circumstances of this case. He took a logical and systematic approach in looking for information on the whereabouts and final disposal of potential responsive records. He was able to put together a credible account of the events that led to the eventual incineration of the records. The search appears to have been carried out rigorously and the IM exhausted all search efforts.

[18] Correspondence provided by the Applicant indicates that the RCIPS sought advice from “legal counsel in the UK” in the context of the investigation in the 1990s, which may have involved the Attorney General’s Chambers. In my opinion the IM acted correctly in not transferring the request to the AG’s Chambers, since he was aware that the request had already been forwarded to all other IMs in July 2017, by one of the original recipients (the Ministry of Finance & Economic Development).

- [19] A letter provided by the Applicant confirms that Commissioner of Police A.B. Ratcliffe indicated that the CIEL investigation was closed in 1991. The Applicant argued that the matter remained, or ought to have remained, active much longer than 1991 since the CIEL matter remains unresolved to this day.
- [20] The letter from Commissioner Ratcliffe clearly states the investigation was closed in 1991. Therefore, I consider it more likely than not that the investigation file on the CIEL matter was stored in the basement of the Tower Building with the other CCB investigation files at the time of Hurricane Ivan, and that the records were damaged in the storm, moved, kept in containers, and eventually incinerated in 2009, as the IM described.
- [21] **Therefore, on the balance of probabilities, I conclude that the IM has made reasonable efforts to locate the responsive records in this case, and that the CCB investigation file relating to the CIEL matter, no longer exists.**
- [22] Immediately following Hurricane Ivan CINA set in motion a comprehensive recovery process for flooded government records which stabilized and eventually restored some six 40 ft containers of paper government records over the subsequent two years. While many other damaged records - including records belonging to the RCIPS - were successfully restored by CINA after Ivan, the damaged CCB and Police Administration records in the basement were not brought to their attention.

D. FINDINGS AND DECISION

- [23] Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I find that the IM has made reasonable efforts to locate requested records held by the RCIPS, which were destroyed in 2009.



Sandy Hermiston
Ombudsman