

Hearing 75 - 201900058

**Decision**

Department of Labour & Pensions

Sandy Hermiston  
Ombudsman

9 March 2020

**Summary:**

An applicant asked the Department of Labour and Pensions (“the Department”) for a wide variety of records under the Freedom of Information Law (2018 Revision), related to Government compliance with the National Pension Law (“NPL”), including annual reports from 2006 to 2017, and minutes of the National Pensions Board (“NPB”).

The Department began processing the request but required additional time due to the volume of the requested records and the limited resources they claimed were available to them. Access to the annual reports was deferred until June 2020, and some minutes were released in partially redacted form. The Department committed to completing the review and publication of all the requested minutes. These efforts continued while this hearing progressed.

The Department claimed an unreasonable diversion of resources in regard to the remainder of the request, and invited the applicant to narrow the request. The applicant refused to narrow the request. The Department refused to comply with the request claiming that the requestor was vexatious and compliance with the request would be an unreasonable diversion of resources.

The Ombudsman found that a reasonable period of time had expired for the Department to comply with the statutory requirement to present, approve and table the annual reports in the Legislative Assembly (LA), and the annual reports therefore must be disclosed. The Department has 90 days to complete its review and publication of the requested minutes.

In regard to the other parts of the request, the Ombudsman agrees with the Department’s claim that compliance with the request would unreasonably divert its resources, and the Department is not required to comply with the remainder of the request, pursuant to section 9(c).

**Statutes<sup>1</sup> Considered:**

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

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

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**A. INTRODUCTION**

[1] On 7 December 2018, the Applicant made a request under the FOI Law for a wide variety of records:

*This request is for the entire records from July 1, 2006, to date, in any way related to the compliance of the Minister(s), Ministry and Director of Labour and Pensions with the requirement of the National Pension Law (NPL), Section 84 Annual Report.*

[2] The Applicant listed 26 different types of records of interest, including correspondence, reports, legal opinions, payments, memoranda, agendas and minutes of meetings, phone logs, and conversation records, entities consulted, and records relied on by the Director of Pensions in ensuring legal compliance with section 85 of the NPL.

[3] On 27 December 2018, the Department informed the Applicant that they do not release draft versions of any record “as per section 2 of the Department’s FOI Publication Scheme”, and that they would need to extend the timeline for the initial response, as permitted under section 7(4). Through ongoing communications with the Applicant, the Department believed the Applicant was willing to wait as long as it took for the NPB minutes to be reviewed and published on their website.

[4] The timeline for the initial decision was extended a second time - although section 7(4) only allows a single extension. Since a high volume of records were involved, the Applicant was invited to narrow the scope of the request. However, he declined and asked for an internal review.

[5] During the appeal process, the Department released some of the requested records to the Applicant. Redacted NPB minutes dated between 2006 – 2008, were disclosed and

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<sup>1</sup> 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.

published on the Department's website. Following the disclosure of these records, the Department continued to review the remaining minutes for release, and again invited the Applicant to narrow the request.

- [6] The annual reports for 2006 and 2007 were tabled in the LA some years ago and are available on the Department's website. Access to the remaining annual reports was deferred until 27 December 2019, recently extended to the end of June 2020. The Department said it reserved the right to defer them further. Although approved by the Board between 2015 and 2019, the annual reports were only recently (in the course of this hearing) forwarded to the Minister who, according to the Department, wished to table them all at once.
- [7] During our investigation we ascertained the volume and type of records involved in this appeal, and also invited the Applicant to narrow the request, but he declined.

## **B. CONSIDERATION OF ISSUES**

### **a. Whether access to the annual reports was correctly deferred under section 11(2)(a), (b) and (c)**

- [8] The Department clarified that the Deputy Director is responsible for preparing the annual reports. Upon approval by the Director and the NPB, the annual report is submitted to the responsible Minister who submits it for tabling in the LA. In this case the Minister responsible is the Minister of Employment & Border Control ("the Ministry").
- [9] Section 85 of the amended National Pensions Law (2012 Revision) ("NPL") states:
- (1) The [Director] and the Board shall report annually to the Minister on the business of the [Director] and the Board.*
- (2) The Minister shall submit the annual report to the Governor and shall then lay the report before the Legislative Assembly at the meeting of the Legislative Assembly immediately following the submission of the report.*
- [10] The Department explained that the annual reports from 2008-2016 were completed and approved by the Director and the NPB, and have been sent to the Minister for tabling in the LA.
- [11] The annual report for 2016-17 is currently being produced and the 2018 report does not yet exist and in any event falls outside the scope of this appeal.

[12] In order to speed up the completion of the outstanding annual reports the Department is engaging outside help. In this respect it has disclosed an approved Request for Proposal to the Applicant.

[13] Section 11(2) of the FOI Law reads as follows:

*(2) A public authority may defer the grant of access to a record –*

*(a) if publication of the record within a particular period is required under the provisions of any enactment, until the expiration of that period;*

*(b) if the record was prepared for presentation to the Legislative Assembly or for the purpose of being made available to a particular person or body, until the expiration of a reasonable period after its preparation for it to be so presented or made available to that person or body; or*

*(c) if the premature release of the record would be contrary to the public interest, until the occurrence of any event after which or the expiration of any period beyond which, the release of the record would not be contrary to the public interest.*

[14] The Department has claimed all three of these provisions in relation to the annual reports. However, this cannot be correct since they are mutually exclusive. Section 85 of the NPL requires that the Director and the NPB submit a report to the Minister on an annual basis. The Minister is then obliged to table the reports in the LA “immediately following the submission of the report”. The annual reports could therefore be subject to deferral under section 11(2)(b), but not under (a) or (c), because the records were prepared for presentation to the LA (2008-2016) or the NPB (2016-17).

[15] Section 11(2)(b) allows for the deferral of access under the FOI Law “until the expiration of a reasonable period after its preparation for it to be... presented [to the LA] ...”.

[16] The period of time since the 2008-2016 reports were approved by the NPB and became available for tabling in the LA varies between 9 months and five years. The approval of the more recent 2016-17 report has been delayed more than two years so far, and the ultimate timeline for its completion and approval remains unclear.

[17] Clearly, the statutory requirements under section 85 of the NPL to report annually to the Minister, submit the report to the Governor and table the report in the LA “immediately following the submission of the report” have not been met.

[18] In a parallel case, the previous Information Commissioner ruled in 2012 on the deferral of actuarial reports, stating:

The fact that it is planned for the 2008 Report to be incorporated into the 2011 Report with the objective of having these Reports jointly tabled in the Legislative

Assembly [in the coming months] is irrelevant to the release of the 2008 Report, and cannot be used to justify a further deferral... [and] a reasonable period after its preparation for it to be ... presented ... has expired.<sup>2</sup>

[19] In comparison, section 44 of the Public Management and Finance Law grants two months after the end of the year for preparation of entities' annual reports, and a further three months to present them to the Cabinet.

[20] On 25 November 2019 the Minister confirmed to the Finance Committee of the LA that the 2008 – 2016 annual reports have been prepared, and although they remain three years behind, they will be laid before the LA very soon.<sup>3</sup>

[21] **Therefore, in accordance with section 43(5)(a), I find that a reasonable period of time to comply with the statutory requirement to present, approve and table the Department's annual reports that were requested has passed. The Department's deferral under section 11(2)(b) is therefore not applicable and the annual reports, including the draft 2016-17 annual report, must be disclosed.**

[22] **Although the 2016-17 annual report remains in draft form, it nonetheless is a record to which the FOI Law applies, and must be disclosed in its current form. The Department must clearly identify it as a draft report when disclosing it.**

**b. Whether compliance with the remaining documents in the request would constitute an unreasonable diversion of the Department's resources under section 9(c) of the FOI Law.**

[23] Section 9 provides that a public authority is not required to comply with a request if one of the four listed conditions is met. In this instance, the Department invoked section 9(c) which states:

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

...

*(c) compliance with the request would unreasonably divert its resources;*

[24] Section 9 is not an exemption. Because of its potential to stop the request outright, a claim under section 9 must be considered before any exemptions are taken into consideration, since it may annul the request altogether.<sup>4</sup> Accordingly, the Department should have

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<sup>2</sup> [https://ombudsman.ky/images/pdf/decisions/FOI\\_Ddecision\\_20.pdf](https://ombudsman.ky/images/pdf/decisions/FOI_Ddecision_20.pdf)

<sup>3</sup> See: [https://www.youtube.com/watch?v=qA7VcO6hh\\_c&t=606s](https://www.youtube.com/watch?v=qA7VcO6hh_c&t=606s) at approx.. 10'37" to 11'02"

<sup>4</sup> [https://ombudsman.ky/images/pdf/decisions/Hearing\\_decision\\_67-201800197\\_FINAL.pdf](https://ombudsman.ky/images/pdf/decisions/Hearing_decision_67-201800197_FINAL.pdf)

identified its reliance on section 9 and informed the applicant early in the process of the claimed diversion of resources.

[25] The Department justified its application of section 9(c) stating operational challenges such as the secondment of key personnel, and medical and maternity leave, which have left the Department's human resources stretched and overburdened, about which more below.

[26] The Applicant expressed his concerns regarding the Department's position and asked that the following be considered during the hearing (his emphasis):

*To date, the pension regime is distrusted for good reason because Ministers, Ministries, Chief Officers and Superintendent of Pensions has [sic] miserably failed to ensure the pension regime is operated exclusively "**...for the benefit of employees in the Islands.**", indeed they are the only stakeholders in pension matters. All others involved in pensions, including the pension regulator, are well paid for services by employees/members.*

...

[27] The Applicant believes the Department is not doing enough to inform and educate the general public about the pensions regime. The Department agreed and wrote that they would ensure that redacted records such as minutes are shared on its website, following legal advice and consultation of the NPB and the Multi-Employer Pension Plans.

[28] Regulation 10 (1) prescribes that a public authority must take certain steps when it refuses access under section 9(c), namely:

*...the information manager shall send written communication to the applicant-*

*(a) explaining how the request is likely to unreasonably divert resources; and  
(b) inviting consultation with a view to narrowing the request.*

[29] The Department's Information Manager and Director communicated with the Applicant, and asked the Applicant to narrow the request. However, he did not agree to do so.

[30] Regulation 10(3) provides that a determination on unreasonable diversion of resources is made on a case by case basis, and lists the factors to be taken into consideration. These include the nature and size of the Department, the number, type and volume of requested records, and the work time involved in processing the request.

**(i) Nature and size of the public authority**

The Department enforces the labour and pensions legislation applicable to the Cayman Islands' private sector. It deals with individual disputes regarding matters such as non-payment of vacation pay, labour complaints regarding severance pay

and unfair dismissal. The Department refers unresolved complaints to the Labour Tribunal.

The Department states that it has a total of 23 staff positions. However, it currently has a vacancy rate of approximately 50%. About eight staff members are out of the office for various long-term reasons, and two positions are vacant. At the same time the Department's workload has doubled and, in some cases, tripled. It appears that the Department's existing human resources are significantly overextended, particularly in the light of additional challenges such as secondment opportunities, and staff on medical and maternity leave.

The Information Manager deals with FOI requests in addition to her other duties and is currently operating without a Deputy Information Manager.

**(ii) Number, type, and volume of records falling within the request**

The request is for a very wide range of records. Apart from the meeting minutes, the Department has hundreds of containers in warehouse storage holding correspondence and memoranda dating back to 2006, many of which will be responsive to the Applicant's request.

The total extent of the records held in storage has not been provided. However, photos of the containers were submitted with the explanation that the Department is working with the National Archive to develop a plan to address records management concerns.

The Department also submits that there are possibly thousands of responsive administrative records, such as emails, on their computer drives. However, they were only able to locate 250 emails after conducting a narrowed keyword search under the specific subject of the Applicant's request. These emails only form the top of the iceberg, as they only cover the last year. It is estimated that there may be as many as 3,000 emails to be reviewed covering the period from 2006 to 2016.

**(iii) Work time involved in fully processing the request**

In the UK, the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, 2004*, set an upper limit on the amount of time a public authority is expected to expend, above which it is allowed to charge a standard fee, before invoking an unreasonable diversion of resources. The upper limit for responding to a request in the UK is £600 in central government and £450 in local government. These amounts are calculated on the basis of an hourly rate of £25. Therefore, central government public authorities in the UK are expected to spend up to 24 hours, and local government entities up to 18 hours responding to an FOI request

before an unreasonable diversion of resources can be claimed. The UK legislation also allows for the aggregation of the costs of all related requests received within 60 working days from the same person, or from persons who appear to be working together.<sup>5</sup>

The Department asserts that four staff members assisted with a review of records in response to the Applicant's request, between January and August 2019. According to the Department, this alone represents an estimated 388 hours costing approximately \$ 9,985 in staff time which has already been expended reviewing the responsive records, particularly the board minutes.

The Department outlined the following actions would still need to be completed before release:

- Legal advice from the Attorney General's Chambers;
- Consultation with the NPB; and,
- Consultation with third-party Multiple-Employer Pension Plan Administrators.

This process also involved a series of reviews by staff to ensure the accuracy and completeness of the responsive records. Members of staff worked weekdays as well as weekends to review and redact the records, but this process remains ongoing.

[31] Although the Cayman Islands FOI Law does not specify an upper limit or require aggregation like the UK legislation, the latter can serve as a useful comparison. Given the wide scope of the request, and the high volume of likely responsive records, compounded by the lack of specificity of the request, and the Applicant's unwillingness to narrow down the request, I agree that the cost and resources required to respond to the request in full would be an unreasonable diversion of resources.

[32] However, it is best practice for minutes and agendas of meetings of public sector boards, and any related background documents, to be published proactively, where necessary in a redacted form, so that it should not be necessary to make a request under the FOI Law for such records.

[33] Contrary to what the Department suggests, reviewing documents for accuracy and completeness cannot be considered part of responding to an FOI request, as the quality of any records (particularly minutes of Board meetings) ought to be foremost on the mind of any public authority, whether or not such records are requested under the FOI Law.

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<sup>5</sup> [http://www.legislation.gov.uk/uksi/2004/3244/pdfs/uksi\\_20043244\\_en.pdf](http://www.legislation.gov.uk/uksi/2004/3244/pdfs/uksi_20043244_en.pdf)



- [34] I am mindful of the fact that the Department has already made a portion of the requested records available, particularly some of the minutes of the NPB, and has expressed its willingness to complete their review and publication of the minutes on their website.
- [35] **Taking into account all of the above factors, I agree with the Department's claim that compliance with the request would unreasonably divert its resources, and the Department is not required to comply with the request pursuant to section 9(c). However, since the board minutes are already in the process of being prepared for publication, the Department has 90 days to complete its review and publication of the minutes that remain outstanding.**
- [36] Since I have found that the Department is not required to comply with the request because doing so would unreasonably divert its resources under section 9(c), I am not required to examine the exemptions claimed by the Department.
- [37] The Applicant did not challenge any of the redactions made to the NPB minutes that were published so far. In its review and publication of the minutes the Department is entitled to make such redactions as they believe are appropriate. However, the redactions may be subject to a new application under the FOI Law.

### C. FINDINGS AND DECISION

- [38] Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following findings and decisions:
- a) A reasonable period of time has expired for the Department to comply with the statutory requirement to present, approve and table the annual reports in the Legislative Assembly. The Department's deferral under section 11(2)(b) is therefore not applicable and I require that the annual reports be disclosed.
  - b) The Department has 90 days to complete its review and publication of the requested minutes.
  - c) In regard to the remainder of the request, I agree with the Department's claim that compliance with the request would unreasonably divert its resources, and the Department is not required to comply with the remainder of the request, pursuant to section 9(c).



Sandy Hermiston  
Ombudsman