

ICO Hearing 21 – 01212
Decision

Portfolio of the Civil Service
and
Office of the Deputy Governor

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
24 July 2012

Summary:

The Portfolio of the Civil Service and the Office of the Deputy Governor withheld and partially withheld records from the Applicant, relating to the recruitment exercise resulting in the appointments of three Chief Officers.

The decision of the portfolio of the Civil Service to redact information from the candidate evaluation forms, the interview notes of each panelist and the overall score calculation chart was upheld by the Information Commissioner.

The Information Commissioner overturned the decision of the Portfolio of the Civil Service to withhold the resumes and proof of education and qualifications for the three successful candidates.

She also overturned the decision of the Office of the Deputy Governor to redact some information contained in the unfinished unsigned panel report provided to the Applicant and ordered the disclosure of an unredacted copy.

The Information Commissioner found that some of the records requested by the Applicant, including a signed panel report, did not exist and therefore could not be provided. She identified further responsive records and ordered their disclosure.

She also found that the Portfolio of the Civil Service and the Office of the Deputy Governor are in contravention of the Freedom of Information Law with respect to the record keeping for the recruitment exercise for Chief Officers conducted in January 2012.

Statutes¹ Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
Public Service Management Law (2011 Revision)
National Archive and Public Records Law, 2007

Exclusions and Exemptions Considered:

Section 23(1), 20(1)(b) and 20(1)(d) of the *Freedom of Information Law, 2007*

Contents:

A. INTRODUCTION	2
B. BACKGROUND	3
C. PROCEDURAL MATTERS	4
D. ISSUES UNDER REVIEW IN THIS HEARING	5
E. CONSIDERATION OF ISSUES UNDER REVIEW	5
F. ADDITIONAL ISSUES OF CONCERN	16
G. FINDINGS AND DECISION	18

A. INTRODUCTION

[1] On 29 January 2012 the Applicant made a Freedom of Information (FOI) request to the Portfolio of Internal and External Affairs (PIEA) for the following records relating to the recruitment exercise resulting in the appointments of Stran Bodden, Eric Bush and Alan Jones as Chief Officers:

1. *The criteria used to select the 12 applicants who were shortlisted;*
2. *The score sheets indicating the scores that each of the interviewees received for the various exercises that they completed prior to the face to face interviews, along with the criteria/ score key used for each exercise (if applicable);*
3. *The score sheets completed by each interviewer on each interviewee, indicating the scores that were awarded during the face to face interviews;*
4. *All interview notes made by members of the interview panel on each interviewee during the face to face interviews and during any subsequent meetings/ discussions held in relation to the recruitment process;*
5. *The score sheets indicating the overall scores achieved by each interviewee and the methodology used to arrive at the same;*
6. *The panel report;*
7. *The resumes and proof of education and qualifications for the three successful candidates (University diplomas, post graduate certificates, etc.);*
8. *Any other information from the interview process not listed above.*

¹ In this decision all references to sections are to sections under the *Freedom of Information Law, 2007* unless otherwise specified.

- [2] On 30 January 2012 PIEA informed the Applicant that it held no records and was therefore transferring the request to the Portfolio of the Civil Service (PoCS). On 1 March 2012 PoCS responded to the Applicant stating that they had “granted access to the record(s) requested”. They provided the Applicant with a list of the selection criteria used to shortlist applicants, a redacted copy of an excel spreadsheet entitled the “Chief Officer Selection Matrix of Results” and a link to a government press release containing “pertinent details” from the resumes of the successful candidates. The Information Manager (IM) also asked the Applicant whether they would accept an unsigned copy of the panel report.
- [3] The Applicant appealed the matter to the Information Commissioner’s Office (ICO) on 30 March. The IM, Mr. Ian Fenton, was at the time also the Acting Chief Officer, which removed the possibility of Internal Review, and thus the ICO accepted the Applicant’s appeal.
- [4] During the informal resolution process conducted by the ICO on 20 April 2012, PoCS identified further records relying on section 23(1) to redact information within certain records and withhold other records in their entirety. The IM also informed the Applicant that the requested panel report was either in the Office of the Deputy Governor (ODG) or PIEA, and on 24 April 2012 the IM of PoCS transferred the request for the signed panel report back to PIEA.
- [5] As a result, on 27 April 2012 the Applicant clarified and restated the responsive records that were still being sought, and asked for the appeal to proceed to a formal Hearing before the Information Commissioner. The Fact Report prepared by the ICO and confirmed by all Parties state the following as records in dispute in this Hearing:
1. *The shortlisting criteria for the recruitment exercise;*
 2. *An unredacted copy of the “Candidate Evaluation Forms”;*
 3. *Interview notes of each panelist for each interviewee;*
 4. *Overall score calculation/weighting methodology;*
 5. *Psychometric test scores;*
 6. *Successful candidates resumes;*
 7. *Successful candidates proof of education/qualification;*
 8. *A signed copy of the Panel Report.*
- [6] Following the commencement of the Hearing, the Deputy Governor advised the ICO that his Office would be dealing with the matter of the panel report. The Applicant was subsequently provided with a redacted copy of an unfinished, unsigned panel report, with which the Applicant was not satisfied. The Commissioner therefore added the Office of the Deputy Governor as a party to the Hearing, with respect to the panel report

B. BACKGROUND

- [7] In January 2012 a recruitment process was carried out to recruit three Chief Officers to vacant positions in the Civil Service. The Acting Deputy Governor asked the Portfolio of the Civil Service to assist in the recruitment process as the organisation with primary responsibility for supporting the Deputy Governor as Head of the Civil Service.

- [8] Fifty-two persons applied and twelve were selected for assessment and an interview. Assessments were conducted by PoCS on the 5th and 9th January 2012. Each assessment included online testing of the shortlisted candidates, and completion of several written tasks of the type typically carried out by Chief Officers.
- [9] Interviews were conducted over three days. The interview panel comprised the then Acting Deputy Governor, the Strategic Advisor, and two persons from the private sector. The Portfolio of the Civil Service provided a note taker. During the interview process, each panel member individually assessed each of the candidates. The resulting scores were then combined with the assessment results and three candidates were selected as Chief Officers namely, Stran Bodden, Eric Bush and Alan Jones. Details of the recruitment process, and a summary of the qualifications and experience of each of the selected candidates were published in a press release.

C. PROCEDURAL MATTERS

- [10] There were numerous problems with the handling of this request. While PoCS initially insisted that the seven pages of records supplied to the Applicant in the first instance constituted a full response, this is negated by the fact that numerous other responsive records were subsequently identified and provided to the Applicant and subsequently to me in the course of this appeal, and PoCS states in their submission that “some 280 pages of records have now been disclosed to the Applicant”.
- [11] As stated above, the ICO accepted the appeal of the Applicant in the absence of an Internal Review (IR) having been conducted, given that the initial decision on the application was made by the Information Manager who was also the Acting Chief Officer at the time. In its submission, PoCS criticizes this approach, citing that the substantive Chief Officer was due back in office shortly and could have carried out an IR. However, in his response the IM did not advise the Applicant of their right to IR, nor of the possibility of an IR being carried out by the substantive Chief Officer. He also neglected to advise the Applicant of their right to appeal to the Information Commissioner, as required under the Law.
- [12] PoCS also suggested that had an IR been conducted, the matter could have been resolved before moving to a Hearing before the Information Commissioner. In this respect, I must point out that at any time during the investigation period which followed, as further documents were being discovered and disclosed, and much discussion took place between the ICO and the Parties, there was ample time for an amicable resolution before moving to a formal Hearing, but this did not occur. An amicable solution is encouraged as a matter of routine procedure by the ICO in the early stages of any appeal, the present one being no exception.
- [13] The passing of parts of the request to and from the public authorities involved, eventually resulting in the Office of the Deputy Governor becoming a party to the Hearing with respect to one document, added to the uncertainty surrounding the existence and whereabouts of some of the records in dispute.
- [14] As a result of the ICO investigation, PoCS has now provided the Applicant with a significant number of responsive records, some in full and some redacted. In their submission for this Hearing, they include many responsive records, citing reasons under the FOI Law for partial or non-disclosure. This is the type of response that should have been provided to the Applicant in

the first instance, as mandated by the Law, rather than erroneously insisting that the few responsive records initially provided constituted a full response to the request for records.

- [15] In their submission, the Applicant expressed surprise and frustration at the handling of the FOI request by PoCS, and stated:

When I submitted my FOI request for substantive records produced during the Chief Officer recruitment exercise back in January 2012 I certainly did not envision that some four months later I would find myself as uninformed in many respects as I was at the outset. Given that the exercise had only just been completed, I naturally assumed that the responsive records would have been on hand and easy to access... .

- [16] The Applicant listed numerous instances of what in their opinion constitute contraventions of the FOI Law. I will comment further on the way this request was handled later in this Decision, and make recommendations necessary to ensure compliance with the FOI Law with respect to the processing of requests by the public authorities involved.

- [17] In contrast to the preceding process, there were no procedural issues with respect to the Hearing itself, with all submissions and reply submissions being provided on time.

- [18] In their submission and reply submission the Applicant aired various comments and allegations with respect to the recruitment process, to which PoCS responded in their submissions. I have considered these issues as they relate to the handling of the request and the subsequent identification, withholding or redaction of records found to be responsive to the request in accordance with the requirements of the FOI Law. I have also considered my duties under section 39(d) as to whether I am required to refer to the appropriate authorities cases where it appears that an offence has been committed.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [19] The issue to be decided in this Hearing is:

Section 23(1) – Would disclosure of the responsive records involve the unreasonable disclosure of personal information?

E. CONSIDERATION OF ISSUES UNDER REVIEW

- [20] For each of the eight sets of responsive records in this Hearing, the following questions must be answered:

- a) Does the record contain personal information of a third party?
- b) Would disclosure of this information constitute an unreasonable disclosure of personal information as contemplated by section 23 of the FOI Law?
- c) Does the public interest nonetheless require the disclosure of the information?

Responsive Record 1: The shortlisting criteria for the recruitment exercise

- [21] The Applicant was given the following response, considered by the IM to be a full response to this part of the request:

Selection criteria used to shortlist applicants:

1. Undergraduate degree
2. Five years relevant experience
3. Residency on Island/Caymanian.

- [22] However, following the commencement of this Hearing, the Office of the Deputy Governor (ODG) provided me with a document entitled “Recruitment of Chief Officer Second Update” dated 7 December 2011 which in fact sets out the shortlisting criteria.
- [23] It is of great concern that this record was not identified and considered as a responsive record in the first instance. Although unsigned, one of the authors of the record is shown as the IM for PoCS, who also attended the meeting on 7 December, so he must have been aware of this record. This omission is very serious and may, at worse, amount to concealment of a record. At best it illustrates a lack of coordination in the handling of the request as well as poor record keeping practices in relation to the recruitment records.
- [24] No arguments were put forward by either PoCS or the ODG with respect to the release of this record. It would be unfair to the Applicant to require a new FOI request for a document that should have been considered some 4 months ago, and I have therefore examined the record and find that it contains no personal information or any other exempt information under the FOI Law except for the names and positions of the unsuccessful candidates, and the name of a potential interviewer.
- [25] As further explained below, the release of personal information of unsuccessful candidates is not reasonable, nor in the public interest, nor is the release of the name of a private individual who was to be approached to serve on the interview panel but subsequently did not do so. In addition, the Applicant states in their submission that they accept that the names of the unsuccessful candidates would have to be redacted.
- [26] **I find that, except for the names and positions of the unsuccessful candidates and the name of a private individual who did not serve on the interview panel, the document entitled “Recruitment of Chief Officer Second Update”, dated 7th December, 2011 is not an exempt record under the FOI Law.**

Responsive Record 2: An unredacted copy of the completed “Candidate Evaluation Forms”

- [27] The Applicant has now received copies of the candidate evaluation forms for the successful candidates. The names of the panel members were redacted on each form. The Applicant points out that only three forms were provided for Eric Bush, and questions whether one form was withheld or whether it is an oversight. However, in their submission PoCS explains that there were in fact only three interviewers for this candidate. I am satisfied that the 4th record referred to by the Applicant therefore does not exist.

- [28] The Applicant notes that not all of the candidate evaluation forms contain notes by the panelists, and that such written comments as exist are all in the same handwriting. The Applicant questions whether there may have been falsification of these records, or whether further records exist that provide the notes of the other panelists. The unredacted copies of these forms provided to me contain no further notes, and I have no reason to believe that these records have been further redacted or falsified in any way, or that further records exist that are responsive to this part of the request.
- [29] PoCS relies on section 23(1) of the Law to redact the names and signatures of the panelists on each form as they consider this to be personal information as defined in regulation 2(a). Section 23 permits a public authority to withhold information if the disclosure of that information would be an unreasonable disclosure of personal information. In assessing whether this exemption has been appropriately applied, I must first determine whether the information is in fact "personal information" as defined in regulation 2 of the *Freedom of Information (General) Regulations 2008* (the Regulations):

"Personal information" means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonable 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 rec-*

orded 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.

[30] The arguments presented by PoCS with respect to personal information contained in the responsive record are fundamentally flawed, as they fail to consider the entire definition of “personal information” and rely solely on points (a) to (i). Personal information means the information set out in (a) to (i) above, but does not pertain where the individual falls into the categories set out in the subsequent points (i), (ii) or (iii).

[31] **I find that the names of the panelists (interviewers) are excluded from being personal information under (i), (ii) and (iii) as they are either public servants, providing a service for a public authority, or giving their views on the business or the performance of the public authority.**

[32] There is therefore no need to consider whether disclosure would be unreasonable, nor the public interest in disclosure, as the names of the panelists are not personal information that it would be unreasonable to disclose.

[33] Later in their submission PoCS gives “further reasons for non-disclosure”. Although they state that they are relying solely on section 23 (the personal information exemption) they continue to argue further exemptions that may limit the full disclosure of some of the responsive records. This is another illustration of the procedural deficiencies in the handling of this request. At the point of providing or not providing records to the Applicant, relevant exemptions should have been properly considered, and the Applicant advised of the exemptions that were being applied. Even in the submissions for the Hearing these exemptions were not effectively argued. However, the Applicant has seen these comments, and has had a chance to respond. I believe it is fair then that I briefly consider these additional exemptions.

[34] The further exemptions that I will consider are:

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

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

and

(d) *its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.*

[35] If the above records were disclosed in full, it would reveal the comments and scores that each individual panelist gave for each successful candidate. Both Public Authorities have argued that it would be detrimental to the interview process in general should this information be disclosed.

[36] The ODG submits that:

...we have started the practice of involving members of the private sector in our senior recruitment exercise and we believe this desirable practice would be compromised if comments and scorings for the members of the panel were disclosed, as it is likely that

the private sector would not want any future involvement with government recruitment exercises if this was permitted to occur.

- [37] PoCS essentially argues the same thing, as well as that the forms can be considered a part of the deliberation process, which would therefore engage the exemption found in 20(1)(b) above.
- [38] The Applicant refutes this line of reasoning, and feels that interviewers for such a high-level recruitment process would be willing to disclose their comments which would demonstrate their commitment to transparency, accountability and best practice.
- [39] In my Hearing Decision 9–02210, I set out in some detail the factors that I take into account when considering the application of section 20(1)(b). As stated there, this exemption intends to protect against disclosures which would result, with a certain degree of probability, in restraining the unimpeded, open and honest exchange of views expressed for the purpose of evaluating competing arguments or considerations with a view to making a decision.
- [40] In my view, the scoring of each candidate, and the discussions that go into each panelist's score, forms an integral part of the deliberation during the recruitment process. The scores therefore relate to views frankly and freely expressed by the panelist for the purpose of deliberation. There is also a good probability that the disclosure of this information would restrain the unimpeded, open and honest exchange of views by the panelists in the future, and therefore the exemption in 20(1)(b) applies.
- [41] It follows that if the interview process is so restricted, it would prejudice the effective conduct of the process and therefore section 20(1)(d) is also engaged.
- [42] **As it relates to the unredacted copy of the score sheets completed by each interviewer on each successful candidate, I find that both sections 20(1)(b) and 20(1)(d) apply to the names of each interviewer. I agree with the Public Authorities that the disclosure of what amounts to deliberations of the panel would likely inhibit the free and frank exchange of views of future interview panels, and would prejudice the effective conduct of the recruitment exercise as a whole.**
- [43] Pursuant to section 26, notwithstanding that the responsive record falls within section 20(b) and/or (d), access shall still be granted if such access would nevertheless be in the public interest.

Public Interest Test

- [44] The public interest is defined in regulation 2 as follows:

“public interest” means but is not limited to things that may or tend to-

- (a) promote greater public understanding of the processes or decisions of public authorities;
- (b) provide reasons for decisions taken by Government;
- (c) promote the accountability of and within Government;
- (d) promote accountability for public expenditure or the more effective use of public funds;
- (e) facilitate public participation in decision making by the Government;

- (f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;
- (h) [sic] deter or reveal wrongdoing or maladministration;
- (i) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (j) reveal untrue, incomplete or misleading information or acts of a public authority.

[45] Section 4 also clarifies that the general right of access is balanced against the public interest in exempting from disclosure certain types of information.

[46] Furthermore, section 6(5) provides that:

(5) Where the factors in favour of disclosure and those favouring nondisclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26.

[47] In their submissions the Public Authorities make their representations with respect to the public interest test as it relates to the disclosure of personal information in the various records wholly or partially withheld but not in relation to the additional exemptions considered here. As I have found that the records being considered in this section, that is, unredacted copies of the candidate evaluation forms for the successful candidates, do not contain personal information, these arguments are not applicable. However, in the course of their discourse, the Public Authorities do mention public interest factors that also relate to sections 20(1)(b) and (d) and I have undertaken to extricate these arguments from their general submission. In the same vein, the Applicant refers to the public interest throughout their submissions, and I have taken all these views into consideration.

[48] Full disclosure of the responsive records cited above would no doubt serve to promote greater public understanding of the processes or decisions of public authorities, provide reasons for decisions taken by Government, and promote the accountability of, and within Government. It would also deter or reveal wrongdoing or maladministration in the recruitment process. However, full disclosure would also be likely to have an adverse effect on the effective conduct of the affairs of the Public Authorities, in that it would be difficult for panelists to have and record free and frank discussions in future. I believe that on balance, what has already been disclosed to the Applicant, along with the additional records being ordered disclosed in this Hearing, will be sufficient for a determination as to the proper carrying out of this interview process to be made, without the further disclosure of the record being considered here.

[49] **I find that the arguments in favour of redacting the names of the panelists from each candidate evaluation form outweigh the arguments in favour of full disclosure, and it would therefore not be in the public interest to disclose the parts of this record that have been redacted. I therefore uphold the decision of PoCS to redact this information.**

Responsive Record 3: Interview notes of each panelist for each interviewee

[50] The Applicant has been given 5 pages of interview notes taken by one panelist, with interviewee names redacted, but the bulk of the response to this part of the request takes the form of

interview notes taken by the note taker during the exercise. The Applicant has received the note taker's notes with the names of the unsuccessful candidates redacted. The redacted names have been given numbers to enable the Applicant to reference back to the overall matrix provided originally. Copies of notes taken by other panelists have not been provided, and I have no reason to believe that they exist, or are held by PoCS. Given the score sheets completed by the panelists, and the presence of a note taker, it is plausible that the other panelists did not take further notes.

- [51] **For reasons already stated in the consideration of the previous record above, I support the decision of PoCS to redact the names of the individual panelists and unsuccessful candidates. The Applicant has already accepted that the names of the unsuccessful candidates will not be disclosed.**

Responsive Record 4: Overall score calculation/weighting methodology

- [52] These records pertain to the score sheets indicating the overall scores achieved by each candidate and the calculation/weighting used to arrive at the same. The Applicant has received the score sheets, with the candidates and panelists listed by number only. With respect to disclosing the names of each successful candidate, the Applicant has already been provided, in the draft panel report, with information which would enable the identification of what score relates to what successful candidate.
- [53] With respect to each individual panelist's score for each candidate, the Applicant submits that "in the light of the public interest and in the spirit of transparency it was my expectation that the names of the Panel Members would have been provided ...". The Applicant expresses concern that there may have been room for bias, an allegation which PoCS robustly refutes. Again, I must stress that the purpose of this Hearing is to allow me to rule on the disclosure of responsive records and ancillary issues, and not to form an opinion of the conduct of the recruitment exercise.
- [54] For reasons stated in my consideration of Responsive Record 2 above, I do not accept that each individual panel member's score for each candidate constitutes personal information. I do find however, that disclosure of these scores would inhibit the free and frank exchange of views for the purpose of deliberation, and would also potentially compromise the interview process to the extent that the effective conduct of public affairs (conducting interviews) would be prejudiced.
- [55] I would like to comment specifically on a point raised by both the ODG and PoCS. Both refer to the potential for private sector interviewers being deterred from involvement in interviews should the individual scores be released. I point out that the individual scores recorded by the public sector interviewers involved in a hiring exercise deserve equal protection under the FOI Law and should also not be disclosed.
- [56] The chart provided to the Applicant shows numbers between one and four being awarded to each candidate for the various tests and subject areas. In addition, weights are applied to each subject area. No separate record has been provided which speaks to the ratings or a weighting methodology. However, paragraphs 3 and 4 of a record supplied to me during the course of the Hearing, entitled "Recruitment of Chief Officer Fourth Update", prepared by the Strategic Advisor, and dated 3 January 2012, is responsive to this part of the request. This record should have been identified as a responsive record from the start. I have considered this record and

determined that paragraphs 3 and 4 should be disclosed. In this instance, I am not considering the remainder of the document as it is not responsive to the request.

- [57] **I find that paragraphs 3 and 4 of the record entitled “Recruitment of Chief Officer Fourth Update”, dated 3 January 2012, is responsive to the request and not subject to an exemption under the Law.**
- [58] **I find that the information redacted from the overall score calculation chart provided to the Applicant is exempt under section 23(1), section 20(1) (b) and 20 (1)(d).**

Responsive Record 5: Psychometric test scores

- [59] The first set of records that I am considering responsive to this part of the request is not each candidate’s psychometric individual report, but the actual test scores, since this is what the Applicant asked for. These scores are found in the “Assessment Summary” section of each individual report.
- [60] The second set of records is contained in the Learning Agility Assessment Results, pages 3 and 4 which set out “Overall Results – Reference Group” and “Overall Results – Candidates”.
- [61] The “Overall Results – Reference Group” chart contains no personal information. The “Overall Results – Candidates” contain personal information which, as argued below, it would be unreasonable to disclose if the identity of the individual is disclosed.
- [62] With respect to the unsuccessful candidates it is evident, and has already been accepted by the Applicant, that their identity and rankings are personal information which should not be disclosed. I maintain that it is in a private capacity that these candidates applied, and as they were not hired, all the information on each one held by the Public Authorities has no bearing on Government activity. With respect to the public interest in disclosure, I find that none of the factors set out in the Regulations apply to the records of the unsuccessful candidates, and I find no other factors to support disclosure in the public interest. It is therefore not in the public interest to disclose the personal information of the unsuccessful candidates found in these responsive records.
- [63] With respect to the successful candidates, the individual scores in each test as contained in the “Assessment Summary” and in the “Overall Results – Candidates” chart, are in the same way personal information. The scores relate to a technical scoring and rating of each candidate that forms a part of the overall recruitment exercise. I find that it would be unreasonable to disclose these individual scores as they contain detailed opinions and information on each candidate, above and beyond what is directly relevant to the performance of their duties as public officers. The panelists were charged with the responsibility of considering these scores and other factors and making a choice as to the most suitable candidate. While it is essential for the public to be assured that the exercise was carried out in a proper manner, I do not find that the disclosure of these specific scores would assist with this assessment.
- [64] However, if the names of the candidates are redacted from these records, the information is no longer “about an individual whose identity is apparent, or can reasonably be ascertained” as per the definition of personal information in the Regulations.

- [65] I find that the “Overall Results – Reference Group” chart does not contain personal information and is not an exempt record. The “Assessment Summary” section of each candidate’s psychometric individual report, and the “Overall Results – Candidates” chart contains personal information which would be unreasonable, and not in the public interest to disclose. However, once the names of the candidates are redacted, the remaining information is no longer personal information.

Responsive Record 6: Successful candidates resumes and 7: Successful candidates proof of education/qualification

- [66] In response to the initial request for the above records, the Applicant was directed to the Government website which contains a press release on the appointment of the Chief Officers. The Applicant was advised that they could find “pertinent details from [the Chief Officers’] resumes, qualifications, experience etc.” on this web page, which was already in the public domain. The Applicant has submitted that “this is not an acceptable substitute for the records requested”.
- [67] The resumes of two of the successful candidates are contained in the standard Government application forms, while the third candidate refers to a separate resume attached to his form. All have provided copies of their various degrees and qualifications.
- [68] PoCS argues that the resumes and proof of qualification for the three successful candidates is personal information of a third party by virtue of regulation 2 (g). Again, the IM has failed to apply sub section (i) which stipulates that (g) does not apply to personal information relating to the position or its functions when the individual occupies or has occupied a position in a public authority.
- [69] All three successful applicants held senior positions in the Civil Service at the time they applied for the position of Chief Officer. Pursuant to sub section (i), it is my opinion that most of the information found in the resumes and proof of education/qualification of the successful applicants is not personal information as defined in the Regulations, and should be disclosed, with the home addresses and other information not relevant to the positions they then held redacted.
- [70] Application forms contain a “Personal Statement” from each candidate, which asks the candidate to “explain why you are applying and how you met the requirements set out in the job description”. As this information does not relate to the position held by the candidate (at the time of the application for the post), I consider this to be captured by the definition of personal information.
- [71] However, given that these candidates now hold the positions that their statements refer to, I do not believe that it would be unreasonable to disclose these statements.
- [72] I find that the resumes (as found in the application forms) and proof of education/qualifications of the successful candidates are not exempt under section 23(1), except for the home addresses and other information not relevant to their positions in Government. I find that information provided in the “Personal Statement” section of the application forms is personal information that it would not be unreasonable to disclose.

Responsive Record 8: A signed copy of the Panel Report

[73] This record was not provided to the Applicant in response to the initial request on 1 March. The IM advised that he was in possession of “an electronic copy of the panel report, but not the original signed one”, and inquired if this was sufficient. The Applicant did not respond to this offer, and PoCS maintains that they considered the request to have been dealt with in full. They submit that “Reasonable access was provided to the relevant record pursuant to section 10(1) of the Freedom of Information Law 2007, the public authority thereby discharging its duty under the Law.” However, subsequently, during the investigation of the appeal by the ICO, PoCS determined that they did not hold the record, and transferred this part of the request back to the Portfolio of Internal and External Affairs.

[74] On 7 May the Office of the Deputy Governor responded, having accepted the transfer of the request instead of PIEA, and provided the Applicant with an unfinished, unsigned panel report. In their submission they confirm that they provided the Applicant with “a draft document developed as part of the deliberations of the panel, however it was never completed.” They also state that “on 22nd May, 2012, I sent a letter to ... the applicant, clarifying the point that there was no signed copy of the interview report... .”

[75] The Applicant questions the non-existence of a signed panel report, and states:

The Panel Report ... was not provided and Mr. Fenton made reference to the fact that he was unable to locate a copy of the signed one. I find this disturbing as the [recruitment] exercise had only just been completed and as per best practices in HR, the appointments should not have been made prior to the signing of the Panel Report by all panelist involved.

[76] With respect to the question of whether reasonable access to this record has been provided, the Applicant furthermore states:

Having ascertained that a number of critical records were missing from PoCS's response to my FOI request, I determined that it would have been a waste of time to pursue the matter with them any further, as it was evident that my request was not being taken seriously. For Mr. Fenton to say that “reasonable access” was provided to the Panel Report is ridiculous as anyone with sense would know that an unsigned report of this nature carries no validity whatsoever. This only heightened my suspicion at the time, as my first thought was: “There is no way they could have gotten to the appointment stage without a signed Panel Report so what are they trying to pull? This lack of transparency led me to determine that the involvement of the ICO at this juncture was critical in order for my request to be handled in accordance with the Law.

[77] The Applicant is not satisfied with a redacted copy of the unsigned panel report, and is requesting a full copy of the signed document.

[78] Surprisingly, PoCS submits that:

*There is no statutory requirement that the panel is mandated to prepare a **panel report**. However, a draft panel report having been prepared, there is no statutory requirement that same must be signed. Consequently no adverse inference ought to be drawn from the fact that the draft report was not signed. The ultimate decision is within the discretion of the [Head of the Civil Service].*

- [79] **Given the above, although best practices would dictate that a panel report be completed and signed, I am satisfied that there is no completed signed copy, and am therefore ruling on the redactions made to the unsigned report.**
- [80] Dates of Birth have been redacted for the three successful applicants. The Applicant has accepted this redaction so it is not further considered.
- [81] Regarding the sentence prior to “Overall Learning Agility” and the entire “Overall Learning Agility” section, the ODG states that the redacted information *“is clearly personal information and that it would be unreasonable to disclose same and further the public interest test does not outweigh the exemption in Section 23 of the Freedom of Information Law”*. They do not argue further.
- [82] The ODG does not actually plead the exemption in section 20(1)(d) which exempts a record if its disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs. However, they in effect argue this when they state: *“We are greatly concerned that if this type of personal information is released, it will prejudice further recruitment exercises in terms of using psychometric tests”*. They express concern that private sector panel members may be deterred from participating in government interviews by the disclosure of unredacted panel reports.
- [83] The Applicant submits that:
- A typical panel report does not document every comment made by every panelist about each applicant. Rather, it provides a summary of each candidate’s performance during the recruitment/interview process and in the conclusion, the deliberative process that was used to select the best candidate(s) is described clearly so that it is evident how the final decision(s) regarding which candidate(s) to appoint was arrived at.*
- If a panelist participates in this deliberative process in a professional and objective manner that is in-keeping with best practices in HR, I cannot envision why they would hesitate to have this made public, as surely this is a testament to their professionalism and integrity.*
- [84] The information on each successful candidate contained in the sentences prior to each “Overall Learning Agility” section, as well as the entire Overall Learning Agility section itself, which has been redacted on the copies provided to the Applicant, clearly is information or an opinion about an individual whose identity is apparent, as per sections (a) and (h) in the definition of personal information. This information contains the name of each successful candidate, the panel’s opinion about them, and a summary of their overall learning agility. I do not find that the exclusions in (i), (ii) or (iii) of the definition apply. The tests were administered and the opinions of the panel stated in the process of the recruitment exercise. These results and opinions do not relate to the positions then held by the successful candidates. In this context, the individuals were not providing a service to a public authority, nor does the information contain the views or opinions of the individual in relation to a public authority.
- [85] I therefore agree with PoCS that this information is personal information. However, given the seniority of these positions and the need for transparency as appreciated by all parties, it would not be unreasonable, and it would be in the public interest to disclose the general comments on each successful candidate and the summaries of their overall learning agility.

- [86] Section 20(1)(d) of the Law exempts a record from disclosure if its disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs. This draft panel report contains information on the successful candidates only. As it is normal for panel reports to also contain comparisons with unsuccessful candidates, and this one does not, this supports the comment of the ODG that the report was unfinished and in draft. The redacted information sets out general findings and opinions about the successful candidates, and I do not see how the disclosure of these could prejudice the way interviews are handled. Moreover, the fact that a panel report could be disclosed should serve to assure panelists that their collective views are properly recorded.
- [87] I have already upheld the withholding of the individual testing reports of each candidate. However, I have not been convinced that the release of the general information with respect to the overall learning agility of each successful candidate would adversely affect the use of this testing tool in the future. On the contrary, I would expect that disclosure of a summary of the results of the objective tests administered would demonstrate the impartiality, transparency and professionalism with which such an exercise should be carried out.
- [88] **I find that except for the dates of birth, the redacted parts of the draft panel report are not exempt under section 23(1) or 20(1)(d) of the Law.**

F. ADDITIONAL ISSUES OF CONCERN

- [89] The Applicant alleges many discrepancies in the recruitment process, cites an apparent disregard for both the Public Sector Management Law (PSML) and best practice in Human Resource management as it relates to recruitment, and gives examples where in their opinion PSML and the accompanying Regulations were not complied with. PoCS strongly refutes these allegations, and insists that the requirements of the relevant laws have been met. I have considered these arguments as it is within my power by virtue of section 39(d) to refer to the appropriate authorities cases where it appears that an offence has been committed. In this case, it does not appear to me that any offence has been committed in the course of the recruitment exercise. It would be outside the remit of my Office to investigate this further, or to make any further comments or recommendations on this issue.
- [90] Within my remit, however, are the record keeping issues relating to this recruitment exercise. Pursuant to section 52(1) every public body is required to maintain its records in a manner which facilitates access to information under the FOI Law and in accordance with the Code of Practice provided for in subsection (3). Public authorities also have a duty to apply the record keeping standard identified in the *National Archive and Public Records Law, 2007*.
- [91] It is evident that the record keeping relating to the responsive records in this case was deficient, and that the identification of records responsive to this FOI request suffered as a result. There was a lack of coordination between PoCS, ODG and the PIEA in the identification, location and provision of the responsive records. This is evidenced by the fact that the Applicant was initially only provided with a few pages of responsive records. Once an appeal was lodged with my Office, in the course of the investigation of the appeal many other records were identified, and, as stated in the submission of PoCS, a "second physical folder containing records relating to the recruitment was identified in the office of PoCS." Other records responsive to the request were only identified and found late in the Hearing process in the Office of the Deputy Governor.

[92] The fact that a panel report was not finalized and signed has been discussed by all Parties. Although PoCS contends that there is no legal requirement for same to be produced, I find it extraordinary that best practices in recruitment have not been followed in this case, by the very public authority that is responsible for enforcing these practices in other public authorities, and in relation to the recruitment of three very senior public officers. This is even more disturbing as in this instance PoCS was charged with the responsibility of providing logistical support for the Deputy Governor's Office for this very important interview process, and for retaining records arising from the process.

[93] PoCS points out that the Deputy Governor is subject to the "rigours of audit through the role of the Human Resource Audit of the Portfolio of the Civil Service". It would be expected then that record keeping and indeed responses to FOI requests with respect to HR matters would be exemplary in this Portfolio, and would set the standard for other public authorities. This has definitely not been the case in this instance. The Applicant expresses understandable surprise, frustration and disappointment in the difficulties encountered with the request and states at one point:

As for the Interview Notes that Mr. Gough advised "came to light last week" they serve only to heighten my already elevated concerns as to the obvious anomalies that have obviously occurred during the course of this recruitment exercise in relation to best practices in both record keeping and HR practice, as well as the lack of respect for and adherence to the FOI Law. Responsive records which have been promised seemed to have vanished, and others which were purported not to exist pop up unexpectedly, all of which makes a mockery of transparency and accountability and reflects very badly on the civil service, which already has serious credibility issues.

[94] Unfortunately, I have to agree with many of these sentiments, especially as they relate to the handling of the FOI request and the failures in record keeping for this exercise.

[95] In addition, the request was in effect "passed from pillar to post", with the initial request going to PIAE, which transferred it to PoCS, and part of the request then transferred back to PIAE. In the end, the ODG actually dealt with this part of the request. The result of this has meant further delays in the provision of non-exempt records to the Applicant who began to question whether records were deliberately being withheld, and stated that after all that had transpired, they had very little confidence in the validity and integrity of the records received. The concerns of the Applicant were further elevated in the light of the fact that from records received it was determined that one of the successful candidates scored only 1.05 points more than the unsuccessful candidate rated fourth in the exercise (133.965 vs 132.915). Accurate record keeping is therefore all the more essential to support the final choice of candidate, and to endorse the validity of the recorded information.

[96] The end result is that the poor handling of the records relating to this crucial recruitment exercise, and the similarly poor handling of the FOI request, has the potential to reflect badly on the exercise itself. The lesson to be learned here is that not only must public authorities act properly, they must also record their actions properly, and promote the disclosure of these records as much as possible. In addition, in this case, the time and effort spent dealing with this FOI request could have been avoided with better record keeping and a culture of openness, bearing in mind the need to apply legitimate exemptions provided for under the Law.

[97] In its submission PoCS states that:

The PoCS and the Office of the Deputy Governor acted in good faith at all material times and made every attempt to comply with the request of the Applicant and provide the fullest disclosure possible within the constraints of the law and the right of third parties.

- [98] I cannot agree with this assessment. As set out in numerous instances above, the experience of the Applicant and of this Office in dealing with the appeal does not reflect an acceptable approach to disclosure. The Applicant states that:

I find it interesting that Mr. Fenton can speak so strongly about the open and fair manner in which the Portfolio has operated, when in fact, at the outset, the minimum response was offered and it was only after the intervention of the ICO via mediation that additional records were forthcoming.

- [99] Finally the Applicant has requested that I look into Mr. Peter Gough's appointment as the Information Manager for the Office of the Deputy Governor for the purposes of dealing with this request, and queries whether he has a potential conflict of interest having been one of the four panelists involved in the recruitment exercise. I can confirm that The Deputy Governor has provided me with an explanation as to why this appointment was made, and I am satisfied that the decision to have Mr. Gough act as Information Manager was correct.

G. FINDINGS AND DECISION

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

Findings:

- a) The shortlisting criteria for the recruitment exercise is found in a record entitled "Recruitment of Chief Officer Second Update", dated 7 December, 2011. I find that except for the names and positions of the unsuccessful candidates, and the name of a private individual who did not serve on the interview panel, the record is not exempt under the FOI Law.
- b) I find that the information redacted from the "Candidate Evaluation Forms" is not personal information. However, the redacted information is exempt from disclosure under sections 20(1)(b) and 20(1)(d) and the public interest in favour of redacting the information outweighs the public interest in full disclosure of the information.
- c) For the same reasons as above, I find that the names of the individual panelist on interview notes of each panelist for each interviewee are exempt from disclosure. The names of the unsuccessful candidates do not need to be considered as the Applicant has accepted that they will not be disclosed.
- d) I find that the information redacted from the overall score calculation chart provided to the Applicant is exempt under sections 23(1), 20(1)(b) or 20(1)(d). The calculation/weighting methodology is found in paragraphs 3 and 4 of a record entitled "Recruitment of Chief Officer Fourth Update" dated 3 January, 2012. I find that information in these paragraphs is not exempt under the Law.

- e) I find that the “Assessment Summaries” of the Individual Reports, and the “Overall Results – Candidates” chart contain personal information which would be unreasonable, and not in the public interest to disclose. However, once the names of the candidates have been redacted, the remaining information is no longer personal information as it is not “about an individual whose identity is apparent, or can reasonably be ascertained” as per the definition of personal information in the Regulations. The “Overall Results – Reference Group” chart contains no personal information and is not an exempt record.
- f) I find that the resumes (as found in the application forms) and proof of education/qualifications of the successful candidates are not exempt under section 23(1), except for the home addresses and other information not relevant to their positions in Government. I find that information provided in the “Personal Statement” section of the Application Forms is personal information that it would not be unreasonable to disclose and is therefore not exempt under section 23(1).
- g) I am satisfied that there is no signed copy of the Panel Report. I find that except for the dates of birth, the redacted parts of the draft panel report are not exempt under section 23(1) or 20(1)(d) of the Law.
- h) I find that the Portfolio of the Civil Service and the Office of the Deputy Governor is in contravention of section 52(1) of *the Freedom of Information Law, 2007* with respect to the record keeping for the recruitment exercise for Chief Officers conducted in January 2012.
- i) I find that PoCS is in contravention of regulation 6(1) in that the information manager did not make reasonable efforts to locate a record that was the subject of an FOI request.
- j) I find that the response to this request was poorly coordinated between the three public authorities concerned – PoCS, ODG and PIEA, including the incorrect and late transfer of the request between them, pursuant to section 8(2).

Decision:

I require the Office of the Deputy Governor to disclose a copy of a record entitled “Recruitment of Chief Officer Second Update” dated 7 December, 2011 except for the names and positions of the unsuccessful candidates, and the name of a private individual who did not serve on the interview panel. Concurrently, the Office of the Deputy Governor is required to provide me with a copy of the cover letter and the record it supplies to the Applicant.

I uphold the decision of the Portfolio of the Civil service to redact information from the “Candidate Evaluation Forms” pursuant to sections 20(1)(b) and 20(1)(d).

I uphold the decision of the Portfolio of the Civil service to redact information from the interview notes of each panelist for each interviewee, pursuant to sections 20(1)(b) and 20(1)(d).

I uphold the decision of the Portfolio of the Civil service to redact information from the overall score calculation chart, pursuant to sections 23(1), 20(1)(b) or 20(1)(d).

I require the Office of the Deputy Governor to disclose a copy of paragraphs 3 and 4 of the record entitled “Recruitment of Chief Officer Fourth Update”, dated 3 January, 2012. Concurrently,

the Office of the Deputy Governor is required to provide me with a copy of the cover letter and the record it supplies to the Applicant.

I require that the Portfolio of the Civil Service disclose the Assessment Summaries of the Individual Reports, the Overall Results – Reference Group and the Overall Results – Candidates chart with the names of the candidates redacted.

I require that the Portfolio of the Civil Service disclose the resumes and proof of education/qualifications of the successful candidates. Under separate cover I advise PoCS which of the provided documents are responsive to this request and must be disclosed, as well as what information can be redacted from the application forms which contain the resumes. Concurrently, the Portfolio of the Civil Service is required to provide me with a copy of the cover letter and the records it supplies to the Applicant.

I require the Office of the Deputy Governor to disclose a full copy of the draft panel report except for the dates of birth of the candidates. Concurrently, the Office of the Deputy Governor is required to provide me with a copy of the cover letter and the record it supplies to the Applicant.

Pursuant to section 39(c), I recommend that the Portfolio of the Civil Service and the Office of the Deputy Governor ensure that the record keeping for the recruitment exercise for Chief Officers conducted in January 2012, and all similar functions, be maintained in a manner which facilitates access to information under the Freedom of Information Law, 2007.

As per section 47 of the *Freedom of Information Law*, 2007, the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of 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.

If judicial review has not been sought on or before 7 September 2012, and should the Portfolio of the Civil Service and/or the Office of the Deputy Governor fail to disclose the responsive records in this matter, I may certify in writing to the Grand Court the failure to comply with this Decision and the Court may consider such failure under the rules relating to contempt of court.



Jennifer P Dilbert
Information Commissioner
24 July 2012