

ICO Hearing 27 - 00912
Decision
Public Service Pensions Board

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
21 January 2013

Summary:

The Public Service Pensions Board withheld some records and redacted information from others pertaining to the Applicant's pension benefits. The Information Commissioner upheld the decision of the Public Service Pensions Board to withhold some responsive records, and ordered the disclosure of others. She agreed to some but not all of the redactions made by the Public Service Pensions Board.

Statutes¹ Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008

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¹ In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to regulations under the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

A. INTRODUCTION

- [1] On 7 November 2011 the Applicant made an FOI request to the Public Service Pensions Board (PSPB) for:
- 1. Copy of all correspondence between the Public Service Pensions Board and the CI Government Legal Department in relation to advice sought pertaining to my... pensionable and qualifying service This is to include, but [is] not limited to copy of correspondence to the Legal Department from the PSPB seeking advice and copy of advice obtained by the PSPB from the Legal Department.*
 - 2. Copy of all correspondence between the Public Service Pension Board and the Governor's office in relation to advice sought pertaining to my ... pensionable and qualifying service, and stemming from advice received from the Government Legal department as above in #1... . This is to include, but [is] not limited to copy of correspondence to the Governor's Office from the PSPB seeking advice and copy of advice obtained by the PSPB from the Governor's office.*
 - 3. Copy of review report of my file based on advice received by the PSPB from both the Government legal Department and the Governor's office... .*
- [2] On 7 December 2011 the Information Manager (IM) of the PSPB responded to the Applicant withholding a number of responsive records, relying on the exemption in section 17(a) and deferral in section 11(2)(c), respectively relating to legal professional privilege, and premature release of the record being contrary to the public interest. After conducting an Internal Review of the initial decision, on 3 February 2012 the Managing Director of the PSPB upheld the IM's decision with respect to exemption 17(a) and advised the Applicant that she understood that the record previously deferred had now been provided by the IM.
- [3] The Applicant appealed the matter to the Information Commissioner's Office (ICO) on 1 March 2012, and a pre-hearing investigation commenced. While the ICO requested and received a copy of the records in dispute from PSPB, it subsequently took considerable effort to clarify exactly which records had been provided to the Applicant. Following the ICO's investigation and recommendations, on 9 November 2012 further records were provided to the Applicant, which consisted of some new disclosures, some records released with redactions, and some revised redactions of records previously released. It was also confirmed that the record originally deferred had been released in redacted form.
- [4] The exemption of 23(1) relating to personal information of a third party was added by the PSPB at the investigation stage of this appeal during the subsequent release and redaction of further information.
- [5] On 15 November 2012 the Applicant stated that they were still dissatisfied with the response, and the matter proceeded to a formal Hearing before the Information Commissioner.

[6] The records in dispute in this Hearing and the exemptions claimed are as follows:

Document 1 – Memorandum dated 26 April 2010
(withheld) – 17(a)

Document 2 – Memorandum dated 7 December 2010
(withheld) – 17(a)

Document 3 – Interoffice Memorandum dated 11 November 2011
(redacted) – 17(a) and 23(1)

Document 4 – Correspondence to and from the Director, Plan Administration
(withheld) – 17(a)

Document 5 – Letter dated 16 September 2012
(redacted) – 17(a)

B. BACKGROUND

[7] The PSPB is responsible for the management and administration of public sector pension funds and plans. They ensure delivery of retirement pension benefits to public sector pensioners, in accordance with relevant Cayman Islands legislation and international professional standards.

C. PROCEDURAL MATTERS

[8] There are several factors which contributed to this matter taking an inordinately long time to come to Hearing. Throughout the investigation stage, more records were fully or partially released to the Applicant, often taking longer than promised by the PSPB. Redactions were also revised to release further information. There was confusion as to what records had already been disclosed to the Applicant, and misunderstanding between the PSPB and the Applicant as to the actual records in dispute, which had to be resolved by the ICO. A heavy workload at the ICO also contributed to the matter not being progressed, although it should not be contingent upon the ICO to compel public authorities to meet their obligations under the Law.

[9] The PSPB did not provide reasons for the use of the exemptions applied at any stage during the request and appeal.

D. ISSUES UNDER REVIEW IN THIS HEARING

[10] The issues to be decided in this Hearing are;

1. **Section 17(a)** - Are Documents 1, 2 and 4, or the information redacted from Documents 3 and 5 exempt from disclosure because they would be privileged from production in legal proceedings on the ground of legal professional privilege?
2. **Section 23(1)** – Is further information redacted from Document 3 exempt from disclosure

because its disclosure would involve the unreasonable disclosure of personal information of any person, whether living or dead?

E. CONSIDERATION OF ISSUES UNDER REVIEW

- [11] While it is helpful for an applicant to put forward arguments in support of their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

Section 17(a) and Section 23(1)

These sections provide:

17. *An official record is exempt from disclosure if-*
- (a) *it would be privileged from production in legal proceedings on the ground of legal professional privilege;*
23. *(1) Subject to the provisions of this section, a public authority shall not grant access to a record if it would involve the unreasonable disclosure of personal information of any person, whether living or dead.*

The position of the Public Service Pensions Board

- [12] In the case of all the records withheld or redacted, the PSPB has not put forward any arguments as to why they have applied the exemptions above. Their submission, which, in accordance with section 43(1), serves to provide them with an opportunity to provide their views in writing as to why I should rule in their favour, consists only of a repeat of the chronology and synopsis of this case. The exemptions being claimed are stated, but no arguments or substantive reasons are given as to why these restrictions to the general right of access granted in section 6(1) should apply.

The position of the Applicant

- [13] The Applicant points out that:

Section 42(3) puts the burden of proof on the Public Authority (Public Service Pensions Board) to show that it acted in accordance with their obligations under the Law, which in this case they have not. They have not provided any evidence in their initial submissions supporting their reasons or the basis of their non-disclosure under the quoted sections 17(a) or 23(1).

Discussion

- [14] I can find no reference in any of the material before me, neither in the various responses given to the Applicant on request or at internal review, nor in the submissions prepared by the PSPB in preparation for this Hearing, to reasons for the application of the exemptions claimed. As this is the third Hearing in which the PSPB has been involved, the public authority should be aware of the requirements of dealing with an appeal including the Hearing stage, and that the burden of proof is on the public authority to demonstrate that they have correctly applied the exemptions.
- [15] However, as I have done in previous decisions, if at all possible I must protect the disclosure of information that is clearly exempt under the FOI Law. This includes documents that may be subject to legal professional privilege, and the personal information of a third party that it would be unreasonable to disclose, subject to a public interest test.
- [16] Therefore, I have used my discretion and determined the following.

Documents 1 and 2

- [17] The PSPB applied the exemption found in section 17(a) to these records. The records are both memorandums from legal professionals to their clients consisting of legal advice, and as such are clearly exempt under this section. I refer to my previous decisions² for further details of my consideration of legal professional privilege under the FOI Law.

Document 3 (redactions)

- [18] This record, which has been disclosed in part to the Applicant, is a memorandum to the Managing Director from the Director, Plan Administration of the PSPB. Some information has been redacted pursuant to section 17(a). However, I find that the memorandum is not between a client and a legal advisor and no arguments have been put forward as to why legal professional privilege should attach to the redacted information. I find that the information redacted under section 17(a) is not exempt. This exemption is not subject to a public interest test.
- [19] The PSPB has applied the exemption in 23(1) to parts of this record. I do not find that all of the information redacted by the PSPB is exempt under this section. However, this record does contain names and other identifying information of third party individuals, which constitute personal information in accordance with the definition in regulation 2. Upon consideration, I believe it would be unreasonable, and not in the public interest to disclose this personal information relating to third parties. In reaching this conclusion I have considered the questions relating to unreasonableness in my Decision 8-01610³. I have also considered the public interest, but I do not believe there are public interest factors in favour of disclosure that would outweigh the individuals' right to privacy in this instance.

Document 4

- [20] These records consist of emails to and from the Director, Plan Administration. They are not between a client and a legal advisor and no arguments have been put forward as to why legal professional privilege should attach to these records. I find that these records are not exempt under section 17(a). In addition, the information redacted from the final email making up this

² ICO Decisions 2-01109, 10-02310, 11-02410 and 25-00812 at <http://www.infocomm.ky/appeals>

³ ICO Decision 8-01610 at <http://www.infocomm.ky/appeals>

document has already been provided to the Applicant in the form of a direct quote.

Document 5 (redactions)

- [21] This record, which has been disclosed in part to the Applicant, is a letter to His Excellency the Governor from the Director, Plan Administration of the PSPB. No arguments have been put forward as to why section 17(a) should apply to the redacted information, and I find that the redacted information is not exempt under this section.

F. FINDINGS AND DECISION

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

Findings:

Documents 1 and 2 are exempt from disclosure pursuant to section 17(a).

Information redacted by PSPB from Document 3 pursuant to section 17(a) is not exempt from disclosure.

Some information redacted from Document 3, details of which will be provided separately to the PSPB, is exempt from disclosure pursuant to section 23(1). Other information redacted by PSPB is not exempt under this section.

Records contained in Document 4 are not exempt under section 17(a).

Information redacted from Document 5 is not exempt under section 17(a).

Decision:

I uphold the decision of the Public Service Pensions Board to withhold Documents 1 and 2 pursuant to section 17(a) of the *Freedom of Information Law, 2007* and do not require the PSPB to disclose these records.

I uphold the decision of the PSPB to redact some information from Document 3 pursuant to section 23(1). I require that further information redacted from this record be disclosed as directed under separate cover.

I overturn the decision of the PSPB to withhold records contained in Document 4 pursuant to section 17(a) and require the PSPB to disclose these records.

I overturn the decision of the PSPB to redact information from Document 5 pursuant to section 17(a) and require the PSPB to disclose this information.

Concurrently, the PSPB is required to forward me a copy of the cover letter together with a copy of the records it supplies to the Applicant.

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 leave to apply for judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.

Pursuant to section 48, upon expiry of the forty-five day period for appeals referred to in section 47, the Commissioner may certify in writing to the court any failure to comply with this Decision and the court may consider such failure under the rules relating to contempt of court.



Jennifer P Dilbert
Information Commissioner
21 January 2013