

Hearing 60-01617

Decision

Ministry of Finance and Economic Development

Sandy Hermiston
Ombudsman

17 April 2018

Summary:

The Applicant requested information on stamp duty abatements from the Ministry of Finance and Economic Development by date range and by block and parcel numbers. The Ministry located responsive records within the given date range, which were redacted and disclosed, but said they were unable to locate any records in relation to the block and parcel numbers. The Applicant believed more records existed. She filed a second request for the records by block and parcel numbers. This led to the identification and disclosure of further responsive records by block and parcel numbers.

The Applicant appealed to the Ombudsman because she was not satisfied with the Ministry's response to her original request.

The Ombudsman found that the Deputy Information Manager misinterpreted the original request, searched for only part of the request and failed to interview the Applicant. The Ministry missed several chances to resolve the matter in a positive and customer-friendly manner. No order or direction was made since the Applicant, on her own initiative, was able to secure the records she was seeking. The Ombudsman also recommended the Ministry apologize to the Applicant for their poor customer service.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision)

Freedom of Information (General) Regulations 2008

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

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A. INTRODUCTION

[1] On 29 June 2017 the Applicant made a request to the Ministry of Finance and Economic Development (the Ministry), as follows (emphasis added by the Applicant):

*Requesting a copy of any abatements of stamp duty between **March 1st 2017 and June 30th 2017** by the Ministers [sic] of Finance.*

I am also requesting a copy of the letter of abatement of stamp duty for the following Block and Parcel numbers.

32B 12, 31, 46.

32C 30, 31, 55, 68.

[2] On 24 July 2017 the Ministry’s Deputy Information Manager (DIM) provided the Applicant with a decision, disclosing redacted copies of the abatements within the date range specified in the first part of the request.

[3] In response to the second part of the request the Applicant was informed that “*despite an extensive search no letters of abatement of stamp duty were found for Block and Parcel numbers: 32B 12, 31, 46; 32C 30, 31, 55, 68*”.

[4] The Applicant informed the DIM on 3 August 2017 that she was aware of certain discrepancies in regard to the response provided. The DIM invited the Applicant to submit the alleged discrepancies in writing. The Applicant said they were sensitive and asked for a meeting with the Minister responsible to discuss the matter, adding that she would voice her concerns with the Governor or the Deputy Governor, in the alternative.

[5] After being reminded by the Chief Officer (CO) of her right to seek an internal review, the Applicant did so on 10 August 2017 in regard to the claim that no records were found in response to the second part of the request.

[6] The CO provided the Applicant with his decision on 8 September 2017. The CO explained that a stamp duty abatement decision had been made in regard to the land parcels on 9 December 2016. However, he did not find these records relevant to the request since they

... did not include any abatement letters with respect to these particular properties – because the 9th December 2016 decision preceded the specified timeframe of March 1st 2017 to June 30th 2017.

I have therefore concluded that the answer addressed, precisely, the request.

[7] In the meantime, on 7 September 2017 the Applicant made an appeal to the Information Commissioner's Office (now the Ombudsman) questioning whether a reasonable search had been undertaken as required under regulation 6(1). Since this was not an issue subject to an internal review under section 33(1), the Ombudsman accepted the appeal on 14 September 2017.

[8] The next day the Ombudsman's Appeal and Compliance Analyst (the Analyst) requested an outline of the search efforts made by the DIM in accordance with regulation 6(2), including the locations searched, persons questioned and time spent in dealing with the search for records. The DIM provided the details requested.

[9] On 21 September 2017 the Analyst asked the DIM to widen the search for responsive records, to include the records referenced in the second part of the Applicant's original request.

[10] On 26 September 2017 the Analyst learned that the Applicant had made a second request on 25 August, in which she repeated the second part of her original request. The Applicant received the requested records in redacted form on 13 September 2017. Neither party had informed the Analyst. The Applicant confirmed that she was satisfied with the disclosures and redactions, but not with the way the request had been handled, and requested a formal decision by the Ombudsman.

B. ISSUES

[11] **Whether the Ministry of Finance and Economic Development's Deputy Information Manager:**

- a) **made reasonable efforts to locate a record that is the subject of an application for access (reg. 6(1))**
- b) **conducted an interview with the Applicant to ensure that the appropriate records were located (reg. 21(b))**

C. CONSIDERATION OF ISSUES UNDER REVIEW

The position of the Ministry:

[12] The Ministry claims that all reasonable efforts were made to locate the requested records and provides a detailed listing of their search efforts covering electronic and paper files, listing the two staff members involved in the search as well as two additional persons who were contacted and provided information on the time taken for the search. Once the records had been identified, they were redacted and partially disclosed to the Applicant.

[13] On 25 August 2017 the Ministry received a second request from the same Applicant and the Ministry responded on 13 September 2017 by making additional disclosures which satisfied the Applicant's request for records.

[14] The Ministry states that "there were no warranted reasons to meet with or interview the Applicant", for the following reasons:

- The FOI request was clear and unambiguous, and there was no cause to seek clarification, "nor did the Applicant invite clarification enquiries by the Ministry, - presumably because the Applicant was of the view that her request was clear."
- The Applicant's request for a meeting was after the records were located and disclosed, and therefore the Ministry considered the request closed. Regulation 21(b) speaks to conducting interviews "to ensure that the appropriate records are located", but not after a request has been concluded.
- The Applicant refused to state the reasons for requesting a meeting with the Minister. The Ministry tried to ascertain whether the matter was about the FOI-related matter or something else, particularly since there had been a prior incident which was not related to FOI.

[15] The Ministry clarifies that the Minister and the Ministry staff "would have gladly met with the Applicant" if she had provided a reason for the meeting. However, because the Applicant refused to provide a reason for the meeting, the Minister, the CO and FOI staff all agreed that they would not meet with the Applicant.

[16] In its Reply Submission the Ministry rejects all allegations the Applicant made in her Submission, namely: there were not seven abatements, but only one that was approved and subsequently extended twice; the approval was given by the previous, not the present Minister of Finance; the approvals/extensions were not granted around the time of the General Election; the Ministry's staff are "respectful, professional, patient, civil and cooperative"; the Minister of Finance does not have a close relationship with the recipient of the abatements; any accusation

of corruption is false, and the Ombudsman should “not be used as a conduit for passing on, to the Ministry, unsubstantiated, spurious and malicious allegations.”

[17] The Ministry indicates that it has responded to 83 FOI requests in the last five years, all of which it says were in full compliance. Nonetheless, the Ministry reports that it is making improvements to its FOI processes by: “(a) ensuring proper communication and understanding of FOI requests between the FOI staff and record holders; and (b) consider the widening of the scope of FOI requests, if deemed necessary”.

The position of the Applicant:

[18] The Applicant is concerned that even after an apparently extensive search was undertaken by the Ministry, the documents responsive to the second part of the request were not located at the time of the initial decision. The Applicant also points out that by the time of the CO’s internal review, the additional records were located, but the CO decided not to disclose them.

[19] The Applicant herself was in possession of a record (a letter dated 9 December 2016) which showed that additional records existed beyond what had already been disclosed. The Applicant claims that it was only when the Ministry realized this to be the case, and after she had made the second application repeating the second part of the first application, that the additional records were located and disclosed.

[20] Her request for a meeting with the Minister to discuss the “discrepancies” which she perceived as “a sensitive matter”, was refused without “valid explanation”, and in a manner she considers “very disrespectful”, and worthy of a “King of the Mountain and above the law”.

Discussion:

[21] As a preliminary matter, I note that both parties in this hearing raised issues about the other’s motives in this matter. I remind the Ministry that an Applicant’s motive for making an access request is irrelevant. Section 6(3) of the Law states that an applicant is not required to give any reason for requesting access to a record. The Ministry ultimately disclosed the requested records rendering any analysis of their motives irrelevant.

a) Whether the Ministry made reasonable efforts to locate a record that is the subject of an application for access (reg. 6(1)):

[22] In Bromley v Information Commissioner the UK Information Tribunal concluded,

There can seldom be absolute certainty that the information relevant to a request does not remain undiscovered somewhere within the public authority’s records... the test to be applied [is] not certainty but the balance of probabilities. We think that its

*application requires us to consider a number of factors including **the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted.***²

[23] While the parallel provision in the UK's *Freedom of Information Act, 2000* is not identical to regulation 6(1) of the Cayman Islands *FOI Regulations*, these same criteria are relevant to an examination of the reasonableness of the Ministry's search efforts in the present case.³

The quality of the public authority's initial analysis of the request

[24] The original request for records bears repeating (emphasis added):

Requesting a copy of any abatements of stamp duty between March 1st 2017 and June 30th 2017 by the Ministers [sic] of Finance.

*I am **also** requesting a copy of the letter of abatement of stamp duty for the following Block and Parcel numbers.*

32B 12, 31, 46.

32C 30, 31, 55, 68.

[25] The Applicant's original request is comprised of two parts. The first part of the request is for all stamp duty abatements that fall within a specified data range, while the second part is for letters of abatement relating to specific block and parcel numbers. The two parts are clearly delineated, and it is plain that the two parts do not cover the same ground, if for no other reason than that the second part starts with the words "I am also requesting...".

The scope of the search

[26] Given the limited interpretation that was given to the initial request, the search that was undertaken was inadequate. It yielded a number of responsive records which were partially disclosed to the Applicant, but it did not cover the entirety of the request.

[27] The Applicant had to file a second request in order to receive an answer to the second part of the original request.

The rigour and efficiency of the search

[28] The search for the records referenced in the first part of the request was conducted with sufficient rigour and efficiency. However, the second part of the request was not

² Information Tribunal (UK) *EA/2006/0072 Linda Bromley et al v Information Commissioner and The Environment Agency* 31 August 2007 para 13. See also: Information Commissioner's Office *Hearing 35-01213 and 35-01313 Ministry of Education, Employment & Gender Affairs* 5 December 2013

answered because the search was restricted to the specified date range. The Ministry was aware of a record, outside the specified date range, relating to one of the specified block and parcel numbers because the CO referred to it in his decision. In my opinion, when the CO decided not to disclose that record because it preceded the timeframe, he misinterpreted the original request and missed an opportunity to correct the mistake made by the DIM.

I conclude that the DIM failed to make reasonable efforts to locate the requested records because of a misinterpretation of the Applicant’s original access request.

b) Whether the DIM failed to conduct an interview in accordance with regulation 21(b):

[29] The Ministry acknowledges that it did not meet with the Applicant regarding her request. Section 21(b) of the Law requires an information manager to conduct interviews with the applicants to ensure that the appropriate records are located. The Law contemplates the interviews occurring at the initial phase of an access request. The onus is on the information manager to initiate such an interview.

The DIM failed to conduct an interview in accordance with the FOI Regulations.

Recommendation to apologize:

[30] The civil service, led by the Deputy Governor, has recently announced a strategic plan which seeks to establish a “world-class” civil service. One of the five main goals of the plan is to deliver outstanding customer service. To that end, the government has placed 30 customer satisfaction kiosks in public locations to gather feedback. I think it is safe to say that if the Applicant had access to such a kiosk, she would not have selected the “happy face” as a reflection of her customer experience.

[31] Sometimes great customer service means saying you are sorry. Ombudsmen around the world regularly recommend apologies as a way of making things right. An honest and sincere apology has the potential to initiate the restoration of trust and to repair a mistake. While apologies cannot undo the past, they can mitigate the negative effects of a mistake.

[32] In my role as Ombudsman I would be remiss if I did not take this opportunity to recommend the Ministry apologize to the Applicant. Apologies seem to be the hardest words to say for some governments and civil servants. I hope this is not the case in the Cayman Islands because this seemingly small action can make a meaningful difference in the government’s relationship with the people of the Cayman Islands. A well-placed apology is an important tool in any customer-service-focussed organisation’s tool kit.

[33] In my opinion the Ministry made a mistake when it responded to the Applicant’s first request. Rather than spending time defending its actions, I believe the Ministry would have

been better served by offering an apology. I am confident that such an action would have ended this matter and this decision would not have been necessary.

The Ministry missed several chances to resolve the matter in a positive and customer-friendly manner.

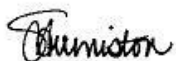
D. FINDINGS AND DECISION

[34] Under section 43(1) of the *Freedom of Information Law, 2007* for the reasons stated above I make the following findings and decision:

- The Deputy Information Manager performed an inadequate initial analysis of the request, which caused an insufficient search to be undertaken. The Ministry failed to make reasonable efforts to locate the records that were the subject of the application, as required by regulation 6(1).
- The Deputy Information Manager failed to interview the Applicant in order to ensure that appropriate records were found, as required by regulation 21(b).

Since the Applicant has, on her own initiative, secured the records she was seeking, there is no order or direction required with respect to disclosure.

Even if I had the power to order the Ministry to apologize, I would not. Apologies must be made freely in order to be effective and to achieve the ultimate goal of repairing mistakes. I urge the Ministry to make such an apology in these circumstances.



Sandy Hermiston
Ombudsman

17 April 2018