



## **Information Commissioner's Office**

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### **Policies & Procedures: Mediation**

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## 1. DEFINITIONS

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Any 'section' references made below refer to the Freedom of Information Law, 2007 (FOI).

**“appeal”** means an appeal to the Commissioner by an applicant under section 42 that a public authority has not complied with any of its obligations under the Law;

**“applicant”** means the individual who made the original application for access to records;

**“commissioner”** means the Information Commissioner appointed under section 35;

**“hearing”** means a written or oral proceeding before the Commissioner in which each party is entitled to present their case after which the Commissioner decides all matters of law and fact and makes a decision;

**“public authority”** means-

- (a) a ministry, portfolio or department;
- (b) a statutory body or authority, whether incorporated or not;
- (c) a government company which-
  - I. is wholly owned by the Government or in which the Government holds more than 50% of the shares; or
  - II. is specified in an Order under section 3(2)
- (d) any other body or organization specified in an Order under section 3(2)

**“record”** means “information held in any form including -

- (a) a record in writing;
- (b) a map, plan, graph or drawing;
- (c) a photograph;
- (d) a disc, tape, sound track or other device in which sounds or other data are embodied, whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced there from;
- (e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced there from, held by a public authority in connection with its functions as such, whether or not it was created by that authority or before the commencement of this Law

**“third party”** in relation to a request for access to a record means any person or group of persons other than the person who made the request.

**“without prejudice”** means that statements made or an offer made to settle a dispute cannot be used against the person that made the statement or offer in a future hearing before the Commissioner.

## **2. PURPOSE OF THESE POLICIES & PROCEDURES**

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The Commissioner has established these Policies and Procedures to advise members of the public and public authorities covered by the FOI Law what to expect during the mediation of an Appeal filed to the Information Commissioner. Mediation is conducted on a voluntary basis and all information provided by the parties during mediation is treated on a “without prejudice” basis, which means each party can engage in free and frank discussions without fearing damage to their case should the matter proceed to a Hearing before the Commissioner. Information passed on to the mediator is also kept on a confidential basis and is not shared between the parties unless the originator's consent is provided.

## **3. POLICIES & PROCEDURES**

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- 1) Before considering an Appeal from an applicant or a third party applicant under section 43 of the FOI Law, the Commissioner will normally assign staff from the ICO to investigate the appeal and attempt, through mediation, to assist the parties to settle the dispute. Not all appeals are appropriate for referral to mediation and you will be advised accordingly, should this be the case.
- 2) The mediator is not an advocate for either side. The role of the mediator is to impartially discuss the matter to ensure that the applicant has received all of the information he or she is entitled to, and/or seek a remedial solution to the issue that satisfies both parties and is consistent with the FOI Law.
- 3) Once the Notice of Appeal has been sent to all the parties involved, the mediator's next step will be to contact the parties, usually by email or by phone. The mediator's objectives will be to hear the “stories” from both sides and collect any additional evidence that is not already on the file, including a copy of the withheld records and the rationale for withholding the information, if applicable. The mediator will then carefully analyze the information.
- 4) The mediator may obtain from the public authority, through an Order by the Commissioner under section 45 of the FOI Law if necessary, copies of the records in dispute or any other records relating to the matter. It is stressed that the records and other information provided during the mediation process are confidential and will not be disclosed to the appellant nor their contents revealed, unless a party volunteers to disclose such information.
- 5) While analyzing the information the mediator also researches relevant case law and previous decisions by the Commissioner, or Commissioners in other jurisdictions, to assist him/her in interpreting the FOI Law.
- 6) The Mediator considers possible resolution strategies and forms an opinion on whether the public authority has withheld records appropriately and/or met its obligations under the FOI Law. This opinion is usually shared with both parties and can aid in the mediation process. It may also assist both sides in determining whether or not they wish to proceed to a formal Hearing before the Commissioner.

For more information on Hearings, see the '*Instructions for a Written Hearing*' document which can be found on our website at [www.infocomm.ky](http://www.infocomm.ky)

- 7) After sharing his/her opinion with the parties the mediator will seek feedback from the public authority and/or the applicant, as applicable, and will attempt to ascertain their willingness to change their position on the matter or seek alternative resolutions.
- 8) Throughout the mediation process, a public authority is entitled to stand by its original decision and the applicant is entitled to request at any time that the mediation end and the matter proceed to a Hearing.
- 9) Mediation may not result in the parties changing their positions. Successful mediation may result in any or all of the following:
  - more records are disclosed;
  - the decision is further clarified;
  - a response is received;
  - a fee is reduced or clarified;
  - more records are located;
  - a request is narrowed;
  - issues under review are narrowed;
  - an exemption is better understood;
  - a process or practice is amended;
  - a new request is made; or
  - an agreement between the parties is reached.
- 10) If, during mediation, a public authority decides to provide further information to the applicant, the public authority will provide it directly and provide written confirmation to the Mediator.
- 11) Where a matter settles through mediation, the Mediator will provide a closing letter to both parties, and the appeal is closed. The ICO will return to the public authority any records in dispute obtained by the Commissioner.
- 12) Through mediation, other issues may be identified that require follow-up discussions between the ICO and the public authority after the matter is mediated or after the matter has proceeded to Hearing to ensure ongoing compliance with the FOI Law.
- 13) Mediated settlements are case specific and do not set legal precedents.
- 14) Where an appeal is not settled, the applicant may request the matter proceed to a formal Hearing before the Commissioner under section 43 of the FOI Law.
- 15) The mediation process may continue up until the closing date of the Hearing.
- 16) The mediation process is separate from a subsequent formal Hearing by the Commissioner. All information provided by the parties during mediation is treated on a "without prejudice" basis, which means each party can engage in free and

frank discussions without fearing damage to their case should the matter proceed to a Hearing before the Commissioner. Therefore, the Commissioner is not privy to the details of the mediation discussions to ensure that, if the matter proceeds to a formal Hearing, the Commissioner remains impartial. Furthermore, information provided during mediation is not disclosed to any other party unless the party providing the information consents beforehand to its release.

- 17) The Commissioner may refuse to conduct a Hearing where no reasonable claim is present or where she determines that no meaningful remedy is available at a Hearing.
- 18) If at any time during the Mediation process an Applicant or a Public Authority wishes to speak to a member of staff in person, they should make an appointment in advance. It is also important to note that in some cases questions put to the ICO by an Applicant or a Public Authority may take some time to respond to because detailed consideration and/or research may be necessary.
- 19) The length of time an Appeal takes to mediate depends on the complexity of the issues, workload and the willingness of the parties involved to compromise. It is not uncommon for the mediation process to take anywhere from one week to six months to resolve.
- 20) Further information about the ICO can be found on our website [www.infocomm.ky](http://www.infocomm.ky)