

Hearing 106-202400728

Decision

Office of the Director of Public Prosecutions (ODPP)

Sharon Roulstone
Ombudsman

31 July 2025

Summary:

This hearing decision addresses an appeal under the Freedom of Information Act (2021 Revision) concerning a request made by an applicant to the Office of the Director of Public Prosecutions (ODPP). The applicant sought access to records detailing the number, nature, and reasons for decisions not to prosecute matters from 2017 to the present.

The ODPP initially refused the request under section 9(c) of the FOI Act, citing that compliance would unreasonably divert its resources. The applicant then narrowed the scope of the request to cover the years 2022 to 2024. Despite this, the ODPP maintained its refusal, arguing that even the reduced scope would require extensive manual review of thousands of files, many of which are not centrally indexed or stored in a searchable format.

The Ombudsman's investigation involved a detailed assessment of the ODPP's justification under Regulation 10(3)(b), which requires consideration of:

- The nature and size of the public authority;
- The number, type, and volume of records requested;
- The work time involved in processing the request.

The ODPP provided estimates indicating that compiling the requested information would take weeks of staff time and significantly impact its operational capacity. The Ombudsman also reviewed procedural compliance, including whether the ODPP had made reasonable efforts to locate the records and whether it had properly communicated with the applicant during the internal review process.

A notable procedural concern arose when the ODPP requested an extension to submit additional material for the hearing, citing exceptional circumstances. The extension was granted; however, the ODPP failed to

submit any further documentation, which the Ombudsman found to be inconsistent with principles of procedural fairness and cooperation.

Ultimately, the Ombudsman concluded that the ODPP had met its burden of proof under section 43(2) of the FOI Act and that compliance with the request would indeed unreasonably divert its resources. The appeal was dismissed, and the ODPP was not required to comply with the request. The Ombudsman also encouraged the ODPP to consider proactive publication of aggregate data on prosecutorial decisions to enhance transparency and public accountability.

Statutes¹ considered:

Freedom of Information Act (2021 Revision) (FOIA)

Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)

Contents:

A. INTRODUCTION.....	2
B. ISSUES UNDER REVIEW	3
C. BURDEN OF PROOF	3
D. CONSIDERATION OF ISSUES.....	4
D.1. PROCEDURAL CONCERNS.....	6
E. FINDINGS AND DECISION.....	6

A. INTRODUCTION

1. This decision concerns an appeal under section 43 of the Freedom of Information Act (2021 Revision) (“FOI Act”) by an applicant who sought access to records from the Office of the Director of Public Prosecutions (“ODPP”) relating to decisions not to prosecute criminal matters.
2. On 7 October 2024, the applicant submitted a request for:
 - The number of matters the DPP decided not to prosecute from 2017 to date;
 - The nature of the allegations in those matters; and
 - The reasons for each decision not to prosecute.

¹ In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision) as amended, and all references to regulations are to the Freedom of Information (General) Regulations 2021, unless otherwise specified.

3. The ODPP responded on 4 November 2024, refusing the request under section 9(c) of the FOI Act, stating that compliance would unreasonably divert its resources. The applicant immediately requested an internal review.
4. On 26 November 2024, the Information Manager (IM) reiterated the refusal, explaining that the ODPP receives approximately 2,500 matters annually, and that identifying and compiling the requested information would require extensive manual review of a large volume of case files, many of which are not centrally indexed by outcome.
5. The applicant then offered to narrow the scope of the request to the period 2022–2024. However, the ODPP maintained that even the reduced timeframe would still impose an unreasonable burden on its limited resources.
6. On 2 December 2024, the applicant appealed to the Ombudsman. The appeal was accepted on 3 December 2024, and both parties were notified. The Ombudsman’s office conducted a pre-hearing investigation, including correspondence with the ODPP to assess the application of section 9(c) and Regulation 10(3)(b), which outlines the factors to be considered when determining whether a request would unreasonably divert resources.
7. The Ombudsman provided the applicant with an analysis of the appeal on 20 February 2025. On 21 February 2025, the applicant requested a formal hearing.
8. A written hearing was convened in accordance with the with section 43(1) and further explained in the Ombudsman Appeals Policy. This decision is issued following the close of that hearing and is based on the submissions of both parties, the applicable law, and the findings of the Ombudsman’s investigation.

B. ISSUES UNDER REVIEW

The Ombudsman considered the following issues:

1. Whether the Information Manager made reasonable efforts to locate the records (Regulation 6(1)).
2. Whether compliance with the request would unreasonably divert the ODPP’s resources (FOI Act section 9(c) and Regulation 10(3)(b)).

C. BURDEN OF PROOF

Under section 43(2) of the FOI Act, the burden of proof lies with the public authority—in this case, the ODPP—to demonstrate that it acted in accordance with its obligations under the FOI Act.

D. CONSIDERATION OF ISSUES

1. Reasonable Efforts to Locate Records

The applicant submitted that the ODPP, as a public authority, is required under Regulation 6 of the FOI (General) Regulations to make reasonable efforts to locate records. He argued that no such efforts were documented or disclosed, and that the ODPP failed to maintain records in accordance with the National Archives and Public Records Act (NAPR Act), particularly section 6(2), which places responsibility on the most senior officer to ensure records are maintained in good order.

There is no indication that the ODPP failed to make reasonable efforts to locate the requested records. The refusal was based on the anticipated burden of processing the request, not on the absence of records.

2. Whether Compliance Would Unreasonably Divert Resources

The ODPP invoked section 9(c) of the FOI Act, asserting that compliance would unreasonably divert its resources. It cited the volume of matters it handles annually (approximately 2,500), the complexity of identifying decisions not to prosecute, and the lack of a centralized system for tracking such decisions.

The applicant challenged this position on several grounds:

- He initially requested records from 2017 to 2024 but later narrowed the request to 2022–2024 to reduce the burden.
- He argued that the ODPP, as a constitutional office, should maintain records of decisions not to prosecute, and that producing a list of such decisions should not be a “mammoth job.”
- He submitted that the ODPP had six months since the request to begin compiling the data and could have completed the task within that time.
- He proposed that, at minimum, the ODPP could have allowed him to inspect the records under section 10(a) of the FOI Act.

The applicant further argued that the ODPP failed to conduct a proper public interest balancing test as required under section 26 of the FOI Act and Regulation 2 of the FOI Regulations. He cited the Privy Council decision in *Maharaj v Petroleum Company of Trinidad and Tobago Ltd* [2019] UKPC 21 to support the need for a transparent and accountable decision-making process.

He also raised concerns about systemic governance and transparency failures, including the potential for unequal treatment of Caymanians and non-Caymanians in prosecutorial decisions, and called for the Ombudsman to recommend reforms and disciplinary action under section 106 of the Constitution.

Section 9(c) of the FOI Act provides that a public authority is not required to comply with a request where compliance would unreasonably divert its resources.

The requested information is not maintained in a statistical format as part of the ODPP’s regular business operations. It is worth noting that the ODPP holds records containing the information required to create the requested statistics; however, the FOI Act does not require a public authority to create any record that is not already created in the normal course of business.

Furthermore, the Ombudsman has no power to order the creation of a new record. Since the ODPP does not, in the normal course of business, keep the requested information in statistical form, and I have no power to order them to do so, I must determine whether to order them to release the records which the Applicant could use to create those statistics.

In this case, the ODPP identified a number of records which led to the application of section 9. I am therefore required to consider Regulation 10(3)(b).

Regulation 10(3)(b) outlines the factors to be considered:

- Nature and size of the public authority: The ODPP is a relatively small office that receives approximately 2,500 matters annually. A significant portion of these involve decisions not to prosecute, which are not centrally recorded in a searchable format.

- Number, type, and volume of records: The request potentially encompasses thousands of files, many of which would require manual review to determine relevance and extract the requested information, as highlighted by the ODPP:

"As previously stated herein the ODPP receives 2,500 files annually to rule on.

The number of charges per annum could exceed 4,000 as one defendant could be charged from anywhere between one to six charges or even more where fraud and/or sexual offences are charged.

A defendant faced with a 15 count indictment may offer pleas of guilty to 8 of those charges. The ODPP may accept those pleas as sufficient to reflect the defendant's overall criminality and may take the view that to prosecute the defendant further would not affect the ultimate sentence which may be imposed. Further, there may be situations where a defendant is already serving a sentence of imprisonment and, similarly, there may be no cause to proceed on some or all of the charges.

Due to the volume of cases which are dealt with by the ODPP, records of each and every charge which has been discontinued would be very difficult to identify.

The ODPP has confirmed the position set out above with a senior software developer, with the CIG Computer Services Department. They have been responsible for assisting the office with implementation of a more refined case management system. From their perspective as someone versed in the capacity of the case management system, they have confirmed that "it would take a few weeks to pull that information even if the data is available".

- Work time involved: The ODPP estimated that compiling the requested data—even for the narrowed period of 2022–2024—would require weeks of staff time, diverting resources from core prosecutorial functions.

The Ombudsman notes that the ODPP engaged with the applicant and considered narrowing the scope of the request. However, even the reduced scope was deemed too burdensome.

D.1. PROCEDURAL CONCERNS

The Ombudsman notes with concern that the ODPP requested an extension of time to submit additional material for the hearing on the basis of exceptional circumstances. This extension was granted in good faith to ensure the ODPP had a fair opportunity to present its case. However, when the ODPP submitted its response following the extension, it stated:

“We maintain the position outlined in our submissions dated the 28th of January 2025, so on that basis we have nothing further to add.”

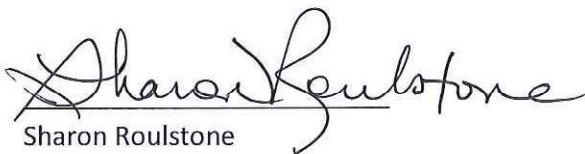
While the ODPP was within its rights to rely on its earlier submissions, the decision not to provide any further clarification or engagement—despite the additional time granted—limited the Ombudsman’s ability to fully assess the authority’s position in light of the applicant’s detailed submissions. This approach falls short of the level of cooperation and responsiveness expected of public authorities in the FOI appeals process.

The Ombudsman reminds all public authorities of their responsibility to engage meaningfully and in good faith throughout the FOI appeals process, particularly when procedural accommodations are made to support fairness.

E. FINDINGS AND DECISION

1. The Ombudsman finds that the ODPP has met its burden of proof under section 43(2) of the FOI Act.
2. The Ombudsman accepts that compliance with the request, even as narrowed, would unreasonably divert the ODPP’s resources, and therefore the ODPP is not required to comply with the request under section 9(c) of the FOI Act.
3. The Ombudsman encourages the ODPP to consider whether it can proactively publish aggregate data on prosecutorial decisions in the future, in the interest of transparency and public accountability.

Decision: The appeal is dismissed. The ODPP is not required to comply with the request under section 9(c) of the FOI Act.



Sharon Roulstone
Ombudsman