

OFFICE OF THE OMBUDSMAN

**Report on Election Registration and
Processing of Voter Data**

April 2022

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The Ombudsman is an impartial and independent office of Parliament that acts as the Cayman Islands' guardian of fairness, transparency and accountability.

Executive Summary

During the latter part of 2020, information on the Cayman Islands Government’s Elections Office website relating to the voter registration process were drawn to the attention of the Office of the Ombudsman. Concerns were raised about the processing of voter data by the Elections Office. As a matter of public interest, the Ombudsman decided to investigate these issues given the pending date of the April 2021 general election.

The voter data processing issues were reviewed by our data protection team, and the voter registration concerns were reviewed by our maladministration team. Compiling the findings of these separate investigations in one report was considered the best approach since both broadly related to elections.

Before concluding our investigations, the Domestic Observers Report¹ was published following the 2021 general election. This report recommended that the Elections Office conduct “a thorough review of the Elections Act and all related procedures with the Ombudsman to achieve consistency and compliance with the Data Protection Act”. We hope this report will help the Elections Office meet that recommendation.

The scope of the Ombudsman’s investigation is set out below where the separate issues are described in more detail. The data protection team focused on three areas: (a) the collection of personal data to populate the Register of Electors; (b) the publication and sale of the revised list and the Register of Electors; and (c) the retention and disposal of data held by the Elections Office.

The maladministration team had to determine what advice was provided to the public about voter registration, particularly regarding eligibility to register to vote. It had to then determine what measures were taken by the Elections Office to ensure the integrity of the voter registration process.

Overall, we found that the Elections Office has a robust, transparent system in place to both register electors and weed out ineligible voters. In addition, the data processing practices of the Elections Office are in line with requirements of the Elections Act and therefore do not

¹ <https://www.caymancompass.com/wp-content/uploads/2021/05/Domestic-Observers-Report-Cayman-GE2021.pdf>

lead to breaches of the Data Protection Act (DPA). Nonetheless, this report makes recommendations to ensure that voter data processing is carried out in a way that is necessary and proportionate to meeting its goals of holding free and fair elections, given that the right to privacy is contained within the Bill of Rights, Freedoms and Responsibilities (the Bill of Rights) in the Cayman Islands Constitution² (contained in the Cayman Islands Constitution schedule 2 to the Cayman Islands Constitution Order, 2009) (the Constitution).

We also discovered a broader issue, which, while not the responsibility of the Elections Office, nevertheless impacts on the important work that it undertakes in connection with the registration of voters. There appears to be no current list of individuals with the right to be Caymanian. This makes the job of registering Caymanian electors more difficult and could potentially increase the chance of errors.

Finally, certain areas were identified where greater clarity about the rules for registering electors could improve the effectiveness of the work of the Elections Office.

The recommendations from our combined investigation are as follows:

- The Elections Office should consider removing all requirements to produce non-essential personal documents for those registering as electors from its website and removing any references to those documents from form 4.
- The Elections Office should produce a privacy notice that explains to individuals how their personal data will be used. This may help to allay the fears of some individuals about the collection and publication of their data.
- In line with the recommendations of the Domestic Observers' Report, the Elections Act should be reviewed to ensure that all personal data that it requires is necessary for the relevant purpose. Any forms used to collect personal data as part of this process should also be reviewed to ensure that only necessary data is collected.

- We encourage the Elections Office to consider including a right for individuals to opt out of appearing on the online version of the register, as part of any amendment to the Elections Act.
- The requirement to publish the date of birth of individuals about to turn 18 should be reviewed to ensure that this is necessary and proportionate for the relevant purposes.
- The Elections Office should work with the National Archive to draw up and implement an appropriate file plan and disposal schedule for the records for which it is responsible.
- The Cayman Islands Government should consider creating a comprehensive list of all individuals holding the right to be Caymanian. The form this list takes, whether an internally managed database, a national ID card or some other form, is a matter for the Government.

Data Protection Investigation Summary:

The data protection investigation was undertaken under section 43(3) of the DPA, which provides that the Ombudsman may, on her own motion, conduct an investigation. To identify relevant areas to investigate, we undertook a review of the Elections Office website and of the Elections Law (2017 Revision). As the Elections Act (2021 Revision) was gazetted during our investigation, we ensured that we also took account of any relevant changes to the law as a result of this. Unless otherwise stated, any references to the Elections Act relate to the 2021 Revision.

During our investigation, we received complaints from two individuals who were concerned with the processing of their personal data in the context of the Register of Electors. Both were concerned that their personal data, as well as that of their families, was publicly available, particularly on the online version of the Register of Electors.

One of the complainants felt that this publicly available information put their safety at risk and they wished for it to be taken offline. Rather than opening separate cases for these

complaints, it was agreed that the concerns of these individuals would be considered as part of this investigation.

Section 12 of the Elections Act requires the registering officer for each electoral district to compile, in each quarter, a list of electors consisting of every person entitled to vote in that electoral district. This list is referred to as “the revised list”. Section 13(4) of the Elections Act states that the revised list should include “The names, street addresses and occupations of all electors”.

Once this revised list for each district has been completed, the registering officers are required by section 14(4) of the Elections Act to compile and publish a list of the changes registered during that quarter. This allows people to raise omissions and objections, after which the revised lists are settled and certified, and deemed to be the Register of Electors. The revised list and Register of Electors are published and made available for sale in printed or electronic form.

This is a simplified explanation of the process, but it sets out the key stages that need to be considered from a data protection perspective: the compilation of the revised list; the publication of the list of changes; and the settling of the revised list, which then become the Register of Electors. Each stage involves the collection and/or publication of personal data about the individuals who are registered. The question of how long this personal data is retained by the Elections Office was also addressed.

The data considered relates to living, identifiable individuals, and the compilation, publication, revision and retention of the list of electors is a form of “processing”, as defined in section 2 of the DPA. Section 43(3) of the DPA grants the Ombudsman the power to conduct an own motion investigation. Therefore, these matters fall within the scope for an investigation by the Ombudsman under the DPA.

Our investigation focused on three main issues:

- 1) the collection of personal data to populate the Register of Electors;**

- 2) the publication and sale of the revised list and the Register of Electors;
- 3) the retention and disposal of data held by the Elections Office.

Issue No. 1: The collection of personal data to populate the Register of Electors

Before we consider compliance with data protection principles,³ we should note that section 24 of the DPA provides an exemption to certain rights and obligations as follows:

Personal data are exempt from –

- (a) the subject information provisions;*
- (b) the fourth data protection principle and section 14(1) to (3); and*
- (c) the non-disclosure provisions,*

if the data consist of information that the data controller is obliged by or under any enactment to make available to the public, including by inspection, gratuitously or on payment of a fee.

The subject information provisions are defined as:

- (a) the first data protection principle to the extent to which it requires compliance with paragraph 2 of Part 2 of Schedule 1; and*
- (b) section 8.*

The non-disclosure provisions are defined as:

... the following provisions to the extent that they are inconsistent with the disclosure in question –

- (a) the first data protection principle, except to the extent to which it requires compliance with the conditions in Schedules 2 and 3;*
- (b) the second and third data protection principles; and*
- (c) sections 10 and 14.*

In summary, section 24 exempts the processing of personal data, where applicable, from:

³ <https://ombudsman.ky/data-protection-organisation/data-protection-principles>

- the requirement for a privacy notice;
- the right to access;
- the requirement that the data is accurate and, where necessary, up to date;
- the right to complain to the Ombudsman on the basis that the data is inaccurate;
- the requirement that the data is obtained for only one or more specified purposes, and that it is not further processed in a manner incompatible with that purpose, or those purposes;
- the requirement that the data is adequate, relevant and not excessive in relation to the purpose(s) for which it is obtained;
- the right to stop processing.

The information contained on the Register of Electors is “information that the data controller is obliged by or under any enactment to make available to the public”. Therefore, the exemption in section 24 applies to the collection and publication of personal data under the Elections Act to the extent specified in section 24.

One practical effect of the exemption as far as compliance with the first data protection principle is concerned is that there is no requirement for a privacy notice to be issued. Despite this, the Domestic Observers’ Report identified the lack of a privacy notice as a concern. **While not legally required, we would encourage the Elections Office to produce a privacy notice that explains to individuals how their personal data will be used.** This may help to allay the fears of some individuals about the collection and publication of their data.

A data controller is required to have a “legal basis” under Schedule 2 of the DPA, to collect and process the personal data involved. In this instance, the legal basis in paragraph 3 of Schedule 2 of the DPA would appear to be the most relevant:

The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

What is considered necessary is key to the application of this legal basis. Any legal obligation that requires the processing of personal data should be written with the principles of necessity and proportionality in mind.

The obligations in the Elections Act that require the collection and publication of the personal data of registered voters were written before the DPA was in force, and the data protection implications of this collection may not have been considered. **In line with the recommendations of the Domestic Observers' Report, we recommend that the Elections Act is reviewed to ensure that all personal data that is required to be collected is necessary for the relevant purpose. Any forms used to collect personal data as part of this process should also be reviewed to ensure that they collect only necessary data.**

We also considered whether any of the other data protection principles were potentially breached through the processing involved in the production of the Register of Electors. The Domestic Observers' Report suggests that contraventions may have occurred in relation to the third principle (on data minimisation) and the fourth principle (on "accuracy"). It raises seemingly valid concerns around the necessity of collecting data on an elector's occupation because of the likelihood that this will change over time. However, as explained above, these principles do not apply, as a result of the exemption in section 24, and therefore do not provide a basis for challenging the collection of this data.

We cover the fifth data protection principle later in this report when considering the retention of personal data by the Elections Office.

The sixth data protection principle requires that data is processed in accordance with the rights of the data subject. However, since the exemption in section 24 renders several data subject rights non-applicable (see above), the sixth principle is of limited relevance to our investigation.

The Elections Office is subject to the requirements of the seventh data protection principle, that is, to ensure that data is processed securely, but no specific issues in relation to this principle were raised during our investigation.

The eighth data protection principle states that:

Personal data shall not be transferred to a country or territory unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Whether or not publishing personal data online is a transfer to another country or territory has not yet been considered in the Cayman courts. However, according to European case law,⁴ the publication of personal data on a website is not considered a transfer of data to another country, and therefore it does not engage the eighth principle. We feel that it is appropriate to follow the reasoning of this decision and therefore find that the sharing of the register online does not breach eighth principle.

Issue No. 2: The publication and sale of the revised list and the Register of Electors

The Elections Act contains the following requirements in relation to the publication and sale of the revised list and the Register of Electors:

Section 14 – Revised list

(2) A revised list –

(a) shall be transmitted by electronic means on a website authorised by the Supervisor; and

(b) shall, during the hours of business in each day for a period of twenty-one days after the publication thereof, be open to inspection by the public free of charge at the Elections Office in George Town, the District

Administration Office in Cayman Brac and the Post Office in Little Cayman, and copies of the revised list shall be offered for sale in printed or electronic form at prices set by the Supervisor from time to time.

(4) Notwithstanding subsections (1) and (2), the registering officer in each electoral district shall, within the space of twenty-one days from the registration date, compile a list containing the changes registered during each quarter and shall cause a copy of that list, dated and signed by that registering officer, to be published in the electoral district and be open to inspection by the public free of charge.

Section 18 – Register of Electors

(4) Copies of the Register of Electors shall be offered for sale in printed or electronic form at prices set by the Supervisor from time to time.

⁴ Case C-101/01, *Bodil Lindqvist v Åklagarkammaren i Jönköping* [2003]
(<https://curia.europa.eu/juris/document/document.jsf?docid=48382&doclang=en>).

Section 2 – Definitions and interpretation

(2) Where –

(a) any notice, list or any other instrument is required to be published then, unless the contrary intention appears, the publication thereof shall be made by –

(i) posting the same in a conspicuous place on any court house, church, chapel, post office, school-house or such other building in the Islands as in the opinion of the Supervisor is suitable for the purpose, except that in places where there is no such building as aforesaid, such instrument may be posted in a conspicuous place;

(ii) transmitting the same by electronic means on a website authorised by the Supervisor; and

(iii) publishing the same in a newspaper published and circulating in the Islands; and

(b) any paper, list or report is required to be printed, such paper, list or report may be reproduced and printed by a computer.

The Register of Electors is currently published on the Elections Office website,⁵ and paper versions of the revised list, the quarterly list of changes and the Register of Electors are made available in accordance with the provisions above.

The Elections Office explained to us the historical reasoning behind the publication of the Register of Electors, stating that: “Public scrutiny and full transparency are historically integral to the completeness and integrity of the Register of Electors”. They cited the Organization for Security and Co-operation in Europe’s *Handbook for the Observation of Voter Registration*⁶ (the Handbook), which emphasizes the importance of a public scrutiny process for voter lists. The Handbook does acknowledge that “only such information as necessary to identify a voter as eligible for a particular election should be made publicly available”, and this should be taken into account when considering what data should be published.

As for the sale of the Register of Electors, we were informed that there are no restrictions on who can purchase a list of electors from the Elections Office, including political parties,

⁵ <https://portal.elections.ky/index.php/home/official-register>

⁶ <https://www.osce.org/files/f/documents/8/e/92058.pdf>

individual candidates and members of the public. No reason needs to be given at the time of purchase, but the register is typically believed to be used for canvassing purposes before a general election or referendum. It is estimated that between 40 and 60 copies of the register are sold during an election year. The Handbook also comments on this issue, stating that:

The legal framework should clearly state the permitted uses of information obtained from inspection of the voter registers and whether the information can be used for purposes other than requesting corrections or making challenges to the registration of a voter. In particular, the law should state whether the information may be used for the campaign activities of political parties and candidates. The law should also state the sanctions for misuse of information obtained from voter registers.⁷

Both complainants who contacted us during our investigation expressed concerns about public access to the register with one suggesting that: “registered voters should be given the opportunity to opt out of a public list, as is the case in other parts of the world”. The other complainant stated that he wished for his personal data to be removed from the public register on the Elections Office website.

We were informed by the Elections Office that there are no exceptions allowed in the Elections Act and that details of all electors are required to be published. As this processing is necessary to meet a legal obligation, the DPA does not prevent such publication. In addition to this, as we have already established, the right to stop processing is not applicable as a result of the aforementioned exemption under section 24. Any right of voters to opt out of having their data included in the online version of the register would have to be written into the Elections Act. **We would encourage the Elections Office to consider this option as part of any amendment to the Elections Act.**

As mentioned by one of the complainants, other countries offer this right to opt out of public lists of electors. For example, in New Zealand, the electoral roll is a public document, but people can apply to be included in the unpublished roll if they have concerns for their safety.⁸ In Australia, the electoral roll is not available for sale in any format. It can be viewed by individuals, but they may not copy, record or photograph any information from the

⁷ <https://www.osce.org/files/f/documents/8/e/92058.pdf>

⁸ <https://www.vote.nz/enrolling/get-ready-to-enrol/can-you-go-on-the-unpublished-roll/>

electoral roll with any electronic device.⁹ The UK has two versions of the electoral register, an open version and the full register.¹⁰ The open version is available for purchase by individuals, organizations and companies, but people can opt out of being included in this version of the register. Everyone appears on the full register, but it can be used only for electoral administration and campaigning.

The Elections Office should consider whether

- making the entire list available online for global access
- allowing any person to purchase a copy of the full list with no restrictions on use
- having no mechanism to allow individuals to opt out of the public register

are compatible with the right to privacy detailed in the Constitution and are proportionate and necessary to meet the objectives detailed above.

One of the complainants raised another issue involving the publication of personal data about her 17-year-old son. He was registered as he would turn 18 on or before election polling day.

Section 11(2) of the Elections Act requires that:

Where a person who has not attained the age of eighteen years is registered as an elector...

(a) that person's entry in the register shall give the date on which that person will attain that age...

The complainant rightly pointed out that this involved the publication of her son's date of birth, which she felt was excessive for the purpose. **Again, as it is required by law, it is currently permitted under the DPA, but we would recommend that this requirement is reviewed to ensure its necessity and proportionality for the relevant purposes.**

Issue No. 3: Retention and disposal of data held by the Elections Office

⁹ https://www.aec.gov.au/Enrolling_to_vote/About_Electoral_Roll/

¹⁰ <https://ico.org.uk/your-data-matters/electoral-register/>

The fifth data protection principle states that:

Personal data processed for any purpose shall not be kept for longer than is necessary for that purpose.

Section 62(3) of the Elections Act requires that:

After the expiration of twelve months from the day of any election, the Supervisor shall cause the documents used at such election to be incinerated in the presence of two Justices of the Peace, two police officers and the Deputy Supervisors.

The documents to be incinerated are detailed in sections 39(2) and 61(1) of the Elections Act. As there is a legally mandated retention period for this material, there is no breach of the fifth principle in relation to any personal data that is held within that material.

We also asked the Elections Office whether a file plan and disposal schedule had been developed (in conjunction with the Cayman Islands National Archive) under the National Archive and Public Records Act (2015 Revision) that identifies all records of the Elections Office (including records that may fall outside sections 39(1) and 61(1)) and ensures that they are managed in accordance with such a schedule. The Elections Office confirmed that they have not developed a file plan or disposal schedule for their records.

Section 8 of the National Archive and Public Records Law sets out a requirement for all public agencies to produce a retention schedule:

8. (1) Each public agency shall, in consultation with the National Archivist, draw up a schedule which identifies the projected administrative life of the public records for which it is responsible.

(2) A schedule drawn up under this section –

- (a) shall be consistent with any prescribed records management standard;*
 - (b) shall remain in force until amended or replaced by the public agency in consultation with the National Archivist; and*
 - (c) shall be kept under review by the public agency concerned so as to ensure that every public record of the public agency is included in its coverage.*
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(3) A schedule in force under this section shall, to the extent and in the manner prescribed, be made available for public inspection.

If records are not being managed in accordance with an approved retention and disposal schedule, there is a risk that personal data may be held for longer than is necessary. This would be a breach of the fifth data protection principle. **We recommend that the Elections Office works with the National Archive to draw up and implement an appropriate file plan and disposal schedule for the records for which it is responsible.**

Maladministration Investigation Summary:

Information contained on the www.elections.ky website stated the following in late 2020:

HOW TO REGISTER¹¹

*Complete a **form 4** and submit the required original documents to the Registering Officer for your district or to the Elections Office. The following original documents are required:*

*If you are a **CAYMANIAN STATUS HOLDER**: (Items # 1 and 4 on the **Form 4** application.)*

- 1) Birth Certificate*
- 2) Caymanian Status Certificate/Letter*
- 3) Photo ID: Passport or Drivers License*

*If you are **CAYMANIAN BORN AND HAVE CAYMANIAN PARENT/S OR GRANDPARENT**:*

- 1) Birth Certificate of applicant, if born in the Islands, and*
- 2) Birth Certificate of one of his parents or grandparents that was born in the Islands*
- 3) Photo ID: Passport or Drivers License*

*If you are **CAYMANIAN** with an **ACKNOWLEDGEMENT LETTER** from Immigration or WORC:*

- 1) Birth Certificate of applicant*
- 2) Acknowledgement letter from WORC/Immigration*
- 3) Photo ID: Passport or Drivers License*

¹¹ <https://portal.elections.ky/index.php/home/registration-process>

If you have moved locations, changed your name or Occupation since being registered then please complete a form 13.

Section 11(1) of the Complaints (Maladministration) Act, 2018,¹² gives the Ombudsman the power to investigate issues of “special importance which makes investigation by the Ombudsman desirable and in the public interest”. Section 10(3) of the Act allows the Ombudsman to investigate “any course of conduct or anything done or omitted by any person in the exercise of administrative functions respecting any business of the government” unless the matter is identified in the schedule of the Act as one that does not fall under the Ombudsman’s remit. The matters set out below, therefore, do fall under the purview of the Ombudsman’s power to initiate an investigation under her own initiative.

We identified the following three issues for investigation:

- 1) What are the legal requirements for voter registration and what is the definition of Caymanian Status (i.e. “the right to be Caymanian”)?**
- 2) What are the requirements for obtaining a Cayman Islands birth certificate and passport? Do either of these documents constitute proof of the right to be Caymanian?**
- 3) Could non-Caymanians potentially be registered to vote? What steps are taken to ensure the integrity of the registration process?**

This investigation involved reviewing the relevant legislation, listed below. We also issued three separate lists of questions to which Elections Supervisor Wesley Howell responded on behalf of the Government. Moreover, we attended two voting objection hearings at the Elections Office on West Bay Road, on 3 December and 7 December 2020.

The following laws and policies were reviewed:

- the Regulation of Immigration Law 3 of 1934
- the Immigration Restriction (British Subjects) Law 15 of 1961

¹² For more information about maladministration complaints, please see our website: www.ombudsman.ky

- the Caymanian Protection Law of 1971
- the Caymanian Protection (Revised) Law 7 of 1977
- the Caymanian Protection Law, 1984
- the Caymanian Protection (Amendment) Law, 1987
- the Immigration Law, 1992
- the Immigration Law (2000 Revision)
- the Immigration Law (2001 Revision)
- the Immigration (Amendment) Law, 2002
- the Immigration Law, 2003
- the Immigration Law (2003 Revision)
- the Immigration (Transition) Law, 2018
- the Cayman Islands Constitution Order, 2009
- the Elections Law (2017 Revision)
- the Customs and Border Control Law, 2018.

Issue No. 1: What are the legal requirements for voter registration and what is the definition of Caymanian Status (i.e. “the right to be Caymanian”)?

We first reviewed the current requirements to qualify (or not qualify) as an elector, which are set out in sections 90 and 91 of Schedule 2 of the Constitution:

Qualifications of electors

90. (1) Subject to section 91, a person shall be entitled to be registered as an elector in one electoral district only, but he or she shall not be entitled to be registered as an elector for elections to the Legislative Assembly unless –

(a) he or she was, on the day immediately preceding the date of commencement of this Constitution, entitled to be registered as an elector; or

(b) he or she –

(i) is a Caymanian; and

(ii) has attained the age of eighteen years; and

(iii) is resident in the Cayman Islands at the date of registration; and

(iv) has been resident in the Cayman Islands for a period or periods amounting to not less than two years out of the four years immediately preceding the date of registration; or

(c) on the day of the issue of a writ ordering an election, he or she is otherwise qualified under paragraph (b) but has not attained the age of eighteen years, but he or she will attain that age on or before the polling day at the election.

(2) Any period of absence for any of the purposes specified in section 61(3) shall be disregarded in determining whether a person is or has been resident in the Cayman Islands for the purposes of this section.

Disqualifications of electors

91. (1) A person shall not be entitled to be registered as an elector in any electoral district who –

- (a) subject to subsection (2), is serving a sentence of imprisonment (by whatever name called) exceeding twelve months imposed on him or her by a court in any country or substituted by competent authority for some other sentence imposed on him or her by such a court, or is under such a sentence of imprisonment the execution of which has been suspended;*
- (b) is a person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Cayman Islands; or*
- (c) is disqualified for registration as an elector by any law in force in the Cayman Islands relating to offences connected with elections.*

(2) For the purposes of subsection (1)(a) –

- (a) where a person is serving two or more sentences of imprisonment that are required to be served consecutively he or she shall, throughout the whole time during which he or she so serves, be regarded as serving a sentence exceeding twelve months if (but not unless) any one of those sentences exceeds that term;*
 - (b) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine; and*
 - (c) no account shall be taken of a sentence of imprisonment imposed by a court outside the Cayman Islands other than a sentence on conviction of an offence constituted by conduct which, if it occurred within the Cayman Islands, would constitute an offence punishable under the law of the Cayman Islands by imprisonment of twelve months or any greater punishment.*
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Essentially, section 90(1)(a) “grandfathers in” anyone who was registered to vote prior to the date of commencement of the Constitution Order (6 November 2009). If the person registered to vote on or after that date, however, they must be a Caymanian, be at least 18 years old, and have been resident in Cayman at the date of their voter registration and also for two years of the four immediately preceding that registration date. Additional provision is made for the registration of Caymanians who are under the age of 18 at the time of registration, but who will attain that age prior to the next election date.

In registering an elector, the onus is placed on the registrant to provide the relevant and correct documentation of proof of age and immigration status. The Elections Office staff are then charged with verifying those qualifications in accordance with the requirements of the Elections Act and the Constitution. On the face of it, this would seem to be a relatively simple process. However, we found during the course of this investigation that the definition of “Caymanian” was far more complex than we initially imagined.

Between 1934 and 2006, prior to the establishment of the Constitution, there were more than a dozen changes to legislation that defined and regulated Caymanian Status or “the right to be Caymanian” as it later came to be known. We reviewed that legislation for this investigation, but have not set out all of those changes here.

Before the Caymanian Protection Law came into force on 27 March 1972, anyone born in the Cayman Islands who was a British subject was considered a Caymanian. Following the commencement of the Caymanian Protection Law, adoption of the Immigration Law in 1992 and subsequent amendments thereafter, requirements for obtaining Caymanian Status generally shifted from birth in the Cayman Islands being required to Caymanian parentage or lineage being required. The effect of this was that simply possessing a record of birth in the Cayman Islands was no longer accepted as proof on its own of Caymanian Status.

Today, the Immigration (Transition) Act (2021 Revision) defines a Caymanian in section 26 as follows:¹³

PART 5 – PROVISIONS RELATING TO CAYMANIANS

¹³ https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2018/2018-0033/ImmigrationTransitionAct_2021%20Revision.pdf

26. (1) *A person shall, for purposes of this Law, be deemed to possess the right to be Caymanian if –*

- (a) the person is Caymanian at the 1st January, 2004;*
- (b) the person is Caymanian as of right as defined in section 27;*
- (c) the person is Caymanian by grant of the Caymanian Status and Permanent Residency Board under section 28;*
- (d) the person has obtained the right by entitlement; or*
- (e) the Cabinet, acting on the recommendation of the Caymanian Status and Permanent Residency Board, grants such right to the person and that grant is subsequently ratified by the Legislative Assembly; save that the Cabinet shall not make more than four such grants in any calendar year, and the person shall continue to possess and enjoy the right to be Caymanian unless and until the person loses it under section 33.*

There are currently a number of ways to obtain the right to be Caymanian. They include familial descent, marriage to a Caymanian, being granted the right by the Cabinet or the relevant board, and entitlement (obtaining that status in one's own right at age 18). The official documentation used to certify an individual's right to be Caymanian is different for each of the ways in which a person may have obtained the right to be Caymanian; in the case of familial descent, there is often no formal documentation at all. This has led to the Elections Office requiring different types of records from the different categories of Caymanians who apply for the right to vote. Ultimately, once that documentation has been accepted, all Caymanians have the same right.

The issue is further complicated by the fact that there is no current list of all those with the right to be Caymanian. Mr. Howell, the Elections Supervisor, confirmed this: "A single central list of all persons who are Caymanian would be ideal. However, to my knowledge such a list does not exist."

We reviewed relevant Cayman Islands legislation to see if we could find any requirement to maintain such a list. We found that there is a requirement to maintain an up-to-date list of non-Caymanian residents in section 106 of the Customs and Border Control Law (now Act), 2021:¹⁴

¹⁴ https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2018/2018-0034/CustomsandBorderControlAct_2021%20Revision.pdf

106. There shall be provided and maintained by the Director, under the direction of the Cabinet, a central register of persons who are not Caymanian, in which there shall be registered such particulars and in such form as may be prescribed.

However, there appears to be no corresponding requirement for a register of all persons who are Caymanian. Mr. Howell noted that the Government proposes moving to a national identification system for all residents of the islands. He stated:

The national ID system which is being championed by the E-Government office will be a welcomed addition to the means of identification of a person's immigration status and will serve as a central registry for persons who are Caymanian. This will ease the identification requirements for many Caymanians.

We also noted that under the current Immigration (Transition) Act (2021 Revision) any Caymanian can verify or obtain an acknowledgment of their immigration status by attending the offices of Workforce Opportunities and Residency Cayman (WORC) and have their passport stamped free of charge. The process is described in section 26(2) of the Act:

(2) A person who believes that he or she possesses the right to be Caymanian under subsection (1) may apply in the prescribed form to the Director of WORC for the formal acknowledgement of that right in his or her passport, and the Director of WORC shall, within fourteen days, either provide the acknowledgement or give written reasons for the refusal to do so.

The difficulty with this is that not every Caymanian holds a passport. Furthermore, Mr. Howell stated that requiring newly registered Caymanian voters to go through this process of formal acknowledgement of their immigration status with WORC could be seen as an attempt to obstruct voting rights.

If an applicant has an acknowledgment letter we will and do accept that. However, I fundamentally do not agree with a mandate that all persons registering to vote must have to first apply for an acknowledgment letter. Requiring Caymanians by birth or entitlement, who make up a large portion of those registering to vote, to first apply for a formal acknowledgement letter from WORC, would be a barrier to voter

registration that would disproportionately affect generational Caymanians (Birth/Entitlement). Mandating this requirement in the case of a person who was born in the Cayman Islands prior to March 27, 1972 (the date of the commencement of the Caymanian Protection Law) and is registering to vote for the first time would in my view be disproportionate and discriminatory. Similarly, for those cases where the right to be Caymanian can be accurately assessed by the registering officers in a straightforward manner such as birth certificates matching an applicant to a parent or grandparent who was Caymanian by right.

Conclusions/Recommendations

The requirements for voter registration are clearly set out by the Constitution, but the development of local legislation over the years that defines the right to be Caymanian is a legal quagmire and has made determining voter eligibility significantly more complicated.

One solution might be for the relevant authorities to maintain an up-to-date list of Caymanian residents in the same way that a list is maintained of non-Caymanian residents. Such an internally managed list could be made available, with proper data protection in place, to government entities, including the Elections Office. **We recommend that the Cayman Islands Government consider creating a comprehensive list of all individuals holding the right to be Caymanian, but only in conjunction with the requirements of the Data Protection Act. The form that this list takes, whether an internally managed database, a national ID card or some other form, is a matter for the Government.**

The issue of identifying individuals who possess the right to be Caymanian goes far beyond registering as an elector. There are dozens of Government (and private sector) functions for which proof of this immigration status is required. For instance, registering for public assistance with the Needs Assessment Unit, applying for Caymanian-only job vacancies and even taking part in the ongoing Green Iguana Cull project require proof of the right to be Caymanian. It is important that Government agencies are not left to their own devices in attempting to navigate complex legislation.

Issue No. 2: What are the requirements for obtaining a Cayman Islands birth certificate and passport? Do either of these documents constitute proof of the right to be Caymanian?

Cayman Islands birth certificates are obtained through the Office of the Registrar following the issuance of a report of a live birth at a local hospital, typically within a few days of that birth. These are provided to all individuals born in the Cayman Islands, whether Caymanian or non-Caymanian. More recent versions of birth certificates list the country or countries in which the parents of the child were born, whereas older birth certificates do not.

British Overseas Territories Citizen (BOTC) passports may be issued through the Cayman Islands Passport Office following the completion of a naturalisation process that is administered by the Deputy Governor's Office.¹⁵ The naturalisation application process is separate from the process of applying for, or receiving acknowledgement of, the right to be Caymanian. Although naturalisation is a required step under the current immigration law for certain individuals who wish to obtain the right to be Caymanian, naturalisation itself confers no voting rights upon an individual.

It is impossible to set out every individual circumstance that could arise in someone's attempt to register as an elector. It is possible under the current laws for a person born in the Cayman Islands to be non-Caymanian. It is also possible for a person born overseas to Caymanian parents to be Caymanian from birth. It is also possible for a person born in Cayman to be non-Caymanian at the date of their birth but to later obtain that status. It is also possible for a person not born in Cayman to obtain Caymanian status and later lose it. Possession of a Cayman Islands birth certificate, taken in isolation, is not proof of the right to be Caymanian unless the person was born in Cayman prior to 27 March 1972.

Mr. Howell explained:

If the person was born before 27 March 1972 the birth certificate is evidence that the person is Caymanian. But if born on or after the 27th of March 1972, a Cayman Islands birth certificate alone is not proof that the person is Caymanian, though it may prove that the person is the child of a Caymanian by producing birth certificates/status/right to be Caymanian certificates of the parents along with the birth certificate of the applicant. As such, birth certificates are useful in identifying Caymanians.

¹⁵ <http://odg.gov.ky/portal/page/portal/odghome/what-we-do/register-as-a-british-citizen>

In certain cases, individuals who are Caymanian by descent will be required to present their parents' marriage certificates and birth certificates to Elections Office personnel to determine family lineage.

BOTC passports cannot be considered proof of the right to be Caymanian unless, as per section 26(2) of the Immigration (Transition) Act, the holder has an acknowledgment of that right stamped in the document. A voter registration applicant who could present a passport stamped in this way would presumably not need to show anything else to a registering officer to register to vote. However, according to the Elections Office website, those who can present this acknowledgment are still required to show their birth certificate when registering. Similarly, birth certificates are currently required for individuals who can present Caymanian Status certificates issued by the relevant Government board.

Conclusions/recommendations

Do birth certificates or BOTC passports constitute proof of the right to be Caymanian? The answer, based on the findings of the investigation, is "sometimes". A passport, unless it is stamped with an acknowledgement, is not proof of the right to be Caymanian. A birth certificate may not be considered proof of that right either, depending on the individual circumstances.

The requirements stated on the Elections Office website that Caymanian Status holders or those with proof of acknowledgment of that immigration status must show birth certificates to register as electors are considered unnecessary. **Therefore, we recommend that the Elections Office consider removing all requirements to produce non-essential personal documents for those registering as electors from its website and removing any references to those documents from form 4.**

Issue No. 3: Could non-Caymanians potentially be registered to vote? What steps are taken to ensure the integrity of the registration process?

The Elections Office confirmed that its registering officers do not have the legal authority to decide whether a person is Caymanian or not, but ultimately they must determine whether or not someone qualifies to be an elector, with the right to be Caymanian being the crucial qualifying factor. Mr. Howell stated that he believed it was reasonable and proportionate for the registering officers to decide on voter eligibility given that they do have substantial collective experience in determining voter eligibility and that the Elections Act puts the

onus on the registering elector to provide accurate and true information during the registration process.

Mr. Howell, in clarifying this point further, stated:

The list of electors is subject to public scrutiny, by way of the publication of revised list, by which the qualification/disqualification of any voter application and even existing voters can be challenged. As such, I believe it is reasonable and proportionate for the registering officers to decide on voter qualification. Requesting additional information, in cases i.e. acknowledgment letters, when they deem it necessary to do so.

The entire registration process, including the responsibilities of registering officers and prospective electors, is set out in considerable detail in sections 12-21 of the Elections Act.¹⁶ We found that this process was carried out in both a robust and a very transparent manner.

Given Mr. Howell's comments above, our office decided to observe the voter objections process in early December 2020 when the Elections Office reviewed hundreds of objections to the voter lists in each of Cayman's 19 single-member constituencies. This was done in front of presiding Chief Magistrate Nova Hall, who ultimately ruled on whether the objections were successful.

During this process, more than 80 voters were struck from the voter lists in the seven single-member constituencies in the George Town district, the country's largest voting district. Some of the issues identified at the hearings included the following:

- A registered voter who left Cayman in 2002 and had not returned could not be reached and was excluded, as they did not meet the residency requirements.
- Another registered voter had left Cayman in 2006 and had been back in the Islands for only 28 days since then, again not meeting the residency requirements.

¹⁶ https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/1983/1983-0036/ElectionsAct_2021%20Revision.pdf

- One voter had inadvertently been registered in two different constituencies. It was suggested that this had occurred because the person was identified by her married name in one district and her maiden name in another. It was agreed to remove her from the list for one of the districts but leave her on the list for the other.
- Another voter's name was confused with that of a deceased person. The deceased person had been taken off the voter list, but elections staff thought that the living voter was the deceased voter and inadvertently removed them as well.

It is unknown, as the issue was not raised during the hearings, whether any of these voters, or indeed any of the dozens of others who were struck off the lists, had participated in earlier elections with a lapsed registration. However, it is at least possible that this could have occurred. In any case, the hearings process was able to correct the situation prior to the April 2021 general election.

In the four single member constituencies of Bodden Town district, only eight names were ordered to be removed from the voter lists and most of the others, more than 30, were left on the voters lists. A number of these registered voters who were objected to had been "grandfathered in" for residency requirements. This means that they had been registered prior to the commencement of the Cayman Islands Constitution.

Dozens of voters were struck off the lists in George Town during the December hearings because they had not been in the Islands for two of the four years prior to the voter registration date. Chief Magistrate Hall did give substantial leeway in relation to the residency rule because of the impact of Covid-19 on international travel, but a significant number of voters were still removed based on not meeting residency requirements.

According to Mr. Howell, this would have affected only voters who registered on or after the date the Constitution commenced. Caymanian voters registered prior to 6 November 2009 are apparently not required to meet the two out of four years residency threshold or any of the other requirements listed for elector qualification in the section 90(1)(b)(i-iv) of the Constitution – including the requirement to be Caymanian.

In theory, someone who registered to vote prior to 6 November 2009 who then moved away for a significant period of time and lost their Caymanian Status, would still be allowed to vote in Cayman elections as they would be “grandfathered in”.

Mr. Howell said that the Elections Office is aware of these issues and has requested that the Cayman Islands Solicitor General’s Chambers explore seeking a Grand Court declaration on the interpretation of this section of the Constitution.

Another matter identified in our investigation involved section 90(1)(c) in Schedule 2 of the Constitution concerning a young person’s eligibility. The section provides:

(c) on the day of the issue of a writ ordering an election, he or she is otherwise qualified under paragraph (b) but has not attained the age of eighteen years, but he or she will attain that age on or before the polling day at the election.

The Elections Act further addresses this matter in section 11(2):

(2) Where a person who has not attained the age of eighteen years is registered as an elector under section 90(1)(c) of Schedule 2 to the Cayman Islands Constitution Order 2009 –

(a) his entry in the register shall give the date on which he will attain that age; and

(b) until the date given in the entry, he shall not by virtue of the entry be treated as an elector for any purposes other than those of an election subsequent to that date.

These sections relate to voters who, at the final date of registration prior to an election, will not be 18, but will have reached that age by the election date. This was included in the Consitution Order so as not to disenfranchise young people who wish to participate in elections. However, depending on how those young people received their Caymanian Status, some may lose it at age 18 unless they apply to obtain that status in their own right. If they do not, it is possible that they could vote without having formally obtained the right to be Caymanian.

Mr. Howell explained this as follows:

If the registering officers, as part of an application receive an acknowledgment document which indicates that the person has the right to be Caymanian until the age of 18 but fails to apply for that continuation at the age of 18 (they) fall into a case where the acknowledgement continuation is (a) straightforward process once applied for, however, the right to be Caymanian is not in effect unless applied for.

Again, we were not made aware of any specific cases where younger voters whose Caymanian Status had lapsed at age 18 were placed on the voter lists. The Immigration (Transition) Act does make provision for these younger voters to apply to regularise their immigration status in such cases.

Conclusions/recommendations

The investigation identified situations where individuals who no longer met voter registration requirements were removed from voter lists. It also identified certain circumstances where non-Caymanians could inadvertently be registered or improperly left on the voter rolls. However, the process currently used by the Elections Office to review the voter lists seemsto be quite robust and more than adequate in resolving these concerns. A few mistakes will likely be made from time to time, but we found the overall process to be unremarkable. **To further assist the Elections Office staff in its work, the Ombudsman supports, and would recommend that Government supports, the Elections Supervisor's effort to clarify the interpretation of section 90(1)(a) of the Constitution.** A similar issue has been raised in a previous report by the Cayman Islands Constitutional Commission.¹⁷

Overall Conclusion

Our combined report has made a number of significant recommendations that we hope will assist the Elections Office in furthering its most important mission of registering voters and bringing all eligible Caymanians to the polls every four years to use their participatory rights in our robust democracy. These recommendations are also made to ensure voter data processing is carried out in a way that is necessary and proportionate to meeting its goals in line with the right to privacy contained within the Bill of Rights.

¹⁷ <https://www.constitutionalcommission.ky/constitutional-matters>

Although many recommendations are made herein, we found that the Elections Office has a robust, transparent system in place to both register electors and remove ineligible voters. In addition, the data processing practices of the Elections Office are in line with requirements of the Elections Act and, therefore, do not breach the Data Protection Act.


Sharon Roulstone
Ombudsman

Consolidated List of Recommendations

- The Elections Office should consider removing all requirements to produce non-essential personal documents for those registering as electors from its website and removing any references to those documents from form 4 **(see page 24)**.
 - The Elections Office should produce a privacy notice that explains to individuals how their personal data will be used. This may help to allay the fears of some individuals about the collection and publication of their data **(see page 8)**.
 - In line with the recommendations of the Domestic Observers' Report, the Elections Act should be reviewed to ensure that all personal data that it requires is necessary for the relevant purpose. Any forms used to collect personal data as part of this process should also be reviewed to ensure that only necessary data is collected **(see page 8)**.
 - We encourage the Elections Office to consider including a right for individuals to opt out of appearing on the online version of the register, as part of any amendment to the Elections Act **(see page 12)**.
 - The requirement to publish the date of birth of individuals about to turn 18 should be reviewed to ensure that it is necessary and proportionate for the relevant purposes **(see page 13)**.
 - The Elections Office should work with the National Archive to draw up and implement an appropriate file plan and disposal schedule for the records for which it is responsible **(see page 15)**.
 - The Cayman Islands Government should consider creating a comprehensive list of all individuals holding the right to be Caymanian. The form this list takes, whether an internally managed database, a national ID card or some other form, is a matter for the Government **(see page 22)**.
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- To further assist the Elections Office staff in its work, the Ombudsman supports, and would recommend that Government support, the Elections Supervisor's effort to clarify the interpretation of section 90(1)(a) of the Constitution (**see page 28**).