

Decision Notice

Decision 31/2022: Bermuda Gaming Commission

Local betting shop records

Reference no: 20190221

Decision date: 29 December 2022

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Gaming Commission (**Commission**) for records about local betting shops. The Commission denied public access to the requested records under section 29(1) of the PATI Act, explaining that disclosing them at the time would undermine the deliberative process between the Commission and the Government, which remained underway.

During the Information Commissioner's review, the Commission abandoned its reliance on section 29(1) (deliberations of public authorities) for all but a few records and asserted another exemption, in section 35(1) (legal professional privilege), for one record.

The Information Commissioner has reversed the Commission's decision that the relevant records were exempt from public disclosure in accordance with section 29(1) or 35(1). The Information Commissioner also has found that the personal information exemption in section 23(1) is applicable to parts of some records. Finally, the Information Commissioner has ordered the Commission to disclose to the Applicant the records or parts of records that were not appropriately withheld.

Relevant statutory provisions

Public Access to Information Act 2010: section 23 (personal information); section 24 (definition of personal information); section 29 (deliberations of public authorities); section 35(1) (legal professional privilege).

Appendix 1 provides the text of these statutory provisions and forms part of this Decision.

Background

1. On 21 November 2017, the Applicant made a Public Access to Information (**PATI**) request to the Bermuda Gaming Commission¹ (**Commission**), asking for all records related to local betting shops, including (but not limited to) the Commission's correspondence with other public authorities, legal opinions and meeting minutes.

¹ At the time, the public authority was known as the Bermuda Casino Gaming Commission. Its name change came about once its original mandate was expanded beyond regulating casino gaming, by legislative amendments in 2021.

2. On 24 January 2018, the Commission issued an initial decision, stating that access would be granted once the requested information fell outside of section 29(1) of the PATI Act 2010, i.e., once governmental deliberations were complete.
3. The Applicant requested an internal review, and the Commission issued its internal review decision on 19 February 2019, which upheld its initial refusal under section 29(1).²
4. The Applicant made a timely application for an independent review by the Information Commissioner.

Investigation

5. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions were required from the public authority to determine whether its reliance on the exemption was justified.
7. On 6 March 2019, the Information Commissioner's Office (**ICO**) notified the Commission of the valid application and requested a copy of the withheld records. The Commission provided the withheld records on 18 March 2019.
8. After the ICO removed duplicates and non-responsive records, 59 records remained for the Information Commissioner to review in this Decision. The ICO specifically invited the Commission to re-consider whether the passage of time would impact its position to continue withholding the records sought, in light of the Commission's explanation in its initial decision that the records could be provided after the deliberations were completed, without the need for another PATI request. In its submissions of November 2021, the Commission took the opportunity to abandon its reliance on section 29(1) for all but four records and informed the ICO that 55 records could be disclosed to the Applicant. The Commission also invoked the exemption for legal professional privilege in

² The Commission issued its internal review decision to the Applicant in compliance with the Information Commissioner's [Decision 03/2019](#). The Information Commissioner explained the Commission's procedural errors in handling the PATI request, which created a misleading timeline for the Applicant to exercise their right of review (see paragraphs 2-7).

section 35(1), as an alternative to continue withholding one record. The Information Commissioner accepted the Commission's change in position before her review.

9. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any third party concerned a reasonable opportunity to make representations. The ICO identified two third parties concerned (a law firm and a gaming consultant) within the meaning of section 47(4). The Commission, the Applicant and the third parties concerned were invited to make submissions to the Information Commissioner for her consideration. The ICO received submissions from the Commission and the Applicant, but not from either third party.
10. As a result of efforts during the investigation, this Decision considers the Commission's reliance on the exemptions in sections 29(1) or 35(1) only for records 15, 31, 45, and 52. Finally, this Decision considers the applicability of the personal information exemption in section 23(1), on the Information Commissioner's own accord, for all the records ordered to be disclosed that contained information about an identifiable individual. These include the 55 records which the Commission is no longer withholding yet has not disclosed to the Applicant. The parties were given notice of the narrowed scope of this Decision, and the Information Commissioner expresses appreciation for their cooperation through her review.

Information Commissioner's analysis and findings

11. In coming to this Decision, the Information Commissioner considered all the relevant submissions, or parts of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.
12. The Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

Legal professional privilege – section 35(1)

13. Section 35(1) of the PATI Act allows public authorities to refuse access to a record if the record is of such a nature "that it would be exempt from production in legal proceedings on the ground of legal professional privilege". In legal proceedings, legal professional

privilege encompasses both legal advice privilege and litigation privilege.³ At issue here is legal advice privilege.

14. Legal advice privilege refers to communications between a lawyer and client for the main purpose of giving or receiving legal advice in both the litigation and non-litigation context. Under the common law, for legal advice privilege to attach to all or part of a document, there must be written or oral communication between a lawyer and a client.
15. The communication also must be connected to obtaining legal advice. It could involve legal rights, liabilities, obligations or remedies. In the absence of a relevant legal context, the communication will not qualify if it is about business, financial, operational, strategic, or other non-legal advice.⁴
16. If the record, or part of a record, falls within the definition of legal advice, it can only be withheld under this exemption if it has not lost its confidentiality as a result of prior disclosures to the world at large. This would mean that “the information can no longer be considered confidential”.⁵
17. The exemption in section 35(1) is subject to the public interest test. If the exemption is engaged, the records or parts of records must still be disclosed if the public interest would, on balance, be better served by disclosure than non-disclosure.
18. In sum, to appropriately rely on section 35(1) on the basis of legal advice privilege, a public authority must consider the following:

[1] Whether there was a written or oral communication between a lawyer and a client?

[2] Whether the communication was connected to obtaining legal advice?

[3] If so, whether confidentiality or privilege has been waived?

[4] If the exemption is engaged, whether the balance of the public interest requires disclosure?

³ See [Chubb Bermuda Insurance Ltd v Ford Motor Company](#) [2017] SC (Bda) 88 Civ, at paras. 30-31, citing the leading UK authority on legal professional privilege, [Three Rivers District Council and other v Governor and Company of the Bank of England](#) [2004] UKHL 48.

⁴ See, for example, Lord Scott of Foscote’s opinion on the scope of legal advice privilege, in [Three Rivers District Council and other v Governor and Company of the Bank of England](#), at para. 38.

⁵ See UK Information Commissioner’s Office, [Legal professional privilege \(section 42\)](#) (April 2016), at para. 28.

19. Finally, the underlying presumption of the PATI Act is that requests for access to records will be granted, subject only to the exemptions or other administrative restrictions in the PATI Act. For section 35(1), the public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption to deny access to public records.

Public authority's submissions

20. The Commission submitted that record 45, an email chain, contained information subject to legal professional privilege, but did not provide its reasoning to support this exemption's application.

Applicant's submissions

21. The Applicant's submissions did not address the Commission's late reliance on section 35(1).

Discussion

22. The Information Commissioner considers the Commission's reliance on section 35(1) to deny public access to record 45.

[1] Whether there was a written or oral communication between a lawyer and a client?

23. The Information Commissioner is satisfied that the initial email in record 45, sent in April 2017 by a law firm to the Commission, was a written communication between a lawyer and the Commission. The remaining emails within record 45 were not.
24. Though it was not clear to the Information Commissioner whether the Commission was a client of the law firm at the time of this written communication, there is sufficient basis for her to consider the Commission's reliance on this exemption further.⁶

⁶ Legal advice privilege covers consultations seeking legal advice, even if the lawyer was not ultimately hired. As Justice Williams described in his UK judgment, "the duty [arising in legal professional privilege] arises whether the parties formally entered into a legal relationship or not. The imparting of information in contemplation of such a relationship would suffice"; see [ZS v FS \(Application to prevent solicitor acting\)](#) [2017] EWHC 2660 (Fam), at para. 10.

[2] Whether the communication was connected to obtaining legal advice?

25. The Information Commissioner is not satisfied that the communication was connected to a client obtaining legal advice from their lawyer.
26. Record 45 set out the law firm's draft overview of its proposal to advise the Commission on betting and gaming matters. But based on the actual content, it does not appear to the Information Commissioner that the communication was connected to the law firm providing legal advice on rights and responsibilities to the Commission, which the legal professional privilege exemption is meant to protect.
27. Here, the proposal was for the potential provision of a consultant's advice for regulatory work. Legal advice privilege would not necessarily extend to a law firm's proposed consultation in the context of advising a public authority on best-practice regulations. In the absence of further reasoning from the Commission, this communication lacked a relevant legal context that could have attracted legal advice privilege.
28. The Information Commissioner is not satisfied that section 35(1) was properly engaged for record 45. The Information Commissioner moves on to consider the Commission's reliance on section 29(1) to the same record, as well as the remaining withheld records.
29. As noted, the Information Commissioner invited the law firm to raise its own third party interests in withholding record 45 from public disclosure and did not receive a submission.

Deliberations of public authorities – section 29(1)

30. Section 29(1) of the PATI Act allows public authorities to deny access to records when the record consists of information whose disclosure would undermine, or could reasonably be expected to undermine, the deliberative process of a public authority, including free and frank discussion and provision of advice in the course of that process.
31. For reliance on section 29(1) to be justified, disclosure of the information in the records must undermine a public authority's 'deliberative process'. The Information Commissioner understands a 'deliberative process' in section 29(1) as referring to the consideration or evaluation of competing arguments, information and facts with a view

to making a decision⁷. A deliberative process is, at its most basic, the thinking process of an agency⁸. This exemption is in place to safeguard the integrity of this process for public authorities' decision making.

32. To rely on section 29(1), a public authority must demonstrate that, at a minimum, disclosure 'could reasonably be expected to' undermine a public authority's deliberative process. The plain meaning of 'undermine' is "lessen the effectiveness, power or ability of, especially gradually or insidiously"⁹. Whether it is reasonable to think that the harm will occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
33. The exemption in section 29(1) does not apply to certain categories, such as factual or statistical information (section 29(2)(a)); information resulting from an investigation or analysis of the efficiency or effectiveness of a public authority's performance of its functions (section 29(2)(b)); information in the nature of a report, study or analysis of a scientific or technical expert (section 29(2)(c)); or information in the nature of the reasons of a public authority for making a particular decision (section 29(2)(d)).
34. 'Factual information' is not defined in the PATI Act or the Interpretation Act 1951. The Irish Freedom of Information Act 2014 has a provision similar to section 29(2)(a) of the PATI Act, and the Irish Information Commissioner's discussion of that provision offers a useful definition of 'factual information' in this context. The Irish Information Commissioner has adopted the following plain meaning of "factual" as: "[s]omething that has really occurred or is actually the case; something certainly known to be of this character; hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it"¹⁰. Factual

⁷ See Decision 02/2019, [Office of the Governor](#), at para. 168.

⁸ See Queensland's Office of the Information Commissioner, [Interpreting the legislation – Right to Information Act 2009, Deliberative Process](#) (9 December 2022), at para. 3.1; see also Office of the Information Commissioner (Western Australia), [FOI Guide No. 3, Deliberative Process](#) (October 2001), at page 1.

⁹ Oxford Dictionary of English (3rd ed. 2010).

¹⁰ Ireland's Office of the Information Commissioner (August 2015), [Guidance Note, Freedom of Information Act 2014 Section 29 – Deliberations of FOI Bodies](#), at para. 3.3.1. The decisions cited in the Guidance Note relied on the definition provided by the Oxford English Dictionary.

information is “distinguishable from information in the form of [a] proposal, opinion or recommendation”¹¹.

35. Generally, the release of factual information will not reveal deliberations or otherwise threaten a public authority’s deliberative process. Two contexts arise when this distinction between factual and deliberative materials may not stand¹². First, in some records, the factual information may be so inextricably connected with the deliberative material that disclosure would reveal and cause harm to the public authority’s deliberation. The second context arises when a record contains selective facts collated from a larger group of facts, and the distilling of facts itself is a deliberative process. It indicates the facts the author found relevant or significant and those deemed irrelevant or insignificant to the matter at hand.
36. The exemption in section 29(1) is subject to the public interest test. If the exemption is engaged, the records or parts of records must still be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.
37. In sum, to appropriately rely on section 29(1), a public authority must consider the following:
 - [1] What is the relevant deliberative process involved?
 - [2] Does any of the information fall within the exceptions listed in section 29(2)?
 - [3] Could disclosure of the record reasonably be expected to undermine the identified deliberative process of a public authority?
 - [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?
38. Finally, the public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption to deny access to public records.

¹¹ Ireland’s Office of the Information Commissioner, [Guidance Note, Freedom of Information Act 2014 Section 29 – Deliberations of FOI Bodies](#), at para. 3.3.1.

¹² See, for example, Office of the Australian Information Commissioner (December 2016), [FOI Guidelines, Part 6 – Conditional exemptions](#), para. 6.73.

Public authority's submissions

39. When originally handling the PATI request, the Commission decided that disclosing the information requested would undermine its deliberative decision making process, because the relevant deliberation between the Commission and the Government (as represented by the responsible Ministry) remained underway. The Commission's initial decision stated that the timing of the PATI request led to its denial, such that the "outcome of these deliberations will result in a decision in the near future", which thereafter would allow the Commission to release the requested information "without delay...once it falls outside of section 29"—and without a new PATI request.
40. During this review, the Commission continued to rely on section 29(1) to refuse access to records 15, 31, 45 and 52 because their disclosure at the time of the PATI request could reasonably be expected to undermine the deliberations involving government entities or that were internal to the Commission. The Commission did not, however, provide additional reasons during this review to justify its reliance on section 29(1).

Applicant's submissions

41. The Applicant raised a number of concerns in their submissions, which still apply to the narrowed issues in this Decision. To frame the context of the PATI request, the Applicant highlighted a contemporaneous [article](#) published in the Royal Gazette on 22 November 2017. The article referred to the current Premier stating that Bermuda's laws governing the gaming industry with respect to money laundering and anti-terrorism were 'outdated' and to the Commission's then-Executive Director being concerned with lacking controls over gambling and risks this presented.
42. The Applicant challenged whether, in processing their PATI request, the Commission had considered the exceptions in section 29(2), which would remove from the exemption's scope any information that was factual or statistical; information resulting from an investigation or analysis of the efficiency or effectiveness of a public authority's performance of its functions; reports from technical experts; and the reasons for a public authority making a particular decision. The Applicant believed that many of the records would fall within these exceptions.
43. Much of the Applicant's submissions focused on the proper application of the public interest test, urging that the balance of the public interests favoured disclosure of the records. The Applicant explained that the Commission's initial and internal review decisions made no reference to whether and how it had applied the public interest test.

44. The Applicant further challenged that, consistent with section 29(3) and the ICO's guidance¹³, the public has a general interest in accessing the records to promote transparency and accountability, as well as public understanding and involvement in the democratic process. Specific public interest concerns arose with this PATI request, in the Applicant's view, because they believed lack of regulations around the ownership of betting shops raised a suspicion of wrongdoing—beyond a mere allegation—where public authorities have exercised a lack of due diligence and engaged in potential maladministration.
45. Although this PATI request was five years old, the Applicant emphasised that the public interest remained strong, because the gaming and betting shop sectors were vulnerable to problems like money laundering. The Applicant noted that, in the intervening years, responsibility for betting shops was moved between various public authorities. In the Applicant's view, the public still has limited understanding of how betting shops are being regulated. The Applicant further noted that, according to a recent article¹⁴, betting shops were closed as of June 2022, having failed to submit licence renewal applications to the Commission. The Applicant wanted the records disclosed so the public might be able to determine whether the betting sector was now properly regulated.

Discussion

46. The Information Commissioner considers the Commission's reliance on section 29(1) to deny public access to records 15, 31, 45 and 52.

[1] What is the relevant deliberative process involved?

47. Having considered the Commission's initial and internal review decisions against the information in all the records provided, the Information Commissioner is satisfied that records 15, 31, 45 and 52 contained information about an identifiable deliberative decision making process.
48. This process could be described as the government's deliberations on policy and legislation related to the betting sector, which would align with the government's efforts to introduce casino gaming to Bermuda via an integrated resort model. These deliberations included the weighing of different views on whether to expand the Commission's functions beyond regulating casino gaming, and which public authority in

¹³ See the ICO's Guidance on the Public Interest Test, [Exemption & Key Provision Guidances](#).

¹⁴ Royal Gazette, [Betting shops still closed – two months after licences expired](#), 8 June 2022.

Bermuda should assume responsibility for regulating betting shops and other gaming activities.

49. During this review, the Commission did not explain when the relevant deliberative process ended or when the Government made a final decision concerning the policy and legislation needed for betting shops nor the Commission's role within the new framework. Based on the Caribbean Financial Action Task Force's '[Mutual Evaluation Report for Bermuda](#)' published in January 2020 (**Mutual Evaluation Report**), it appeared that some aspects of these deliberations concluded at least by 2019: "[T]he Authorities decided to have the betting sector supervised by the [Commission] both in a prudential and an [anti-money laundering] capacity by 2019" (paragraph 121). This is supported by the then-Minister of Finance's statement, that "The Commission [was] poised to complete the legislative framework including [anti-money laundering and anti-terrorist financing] controls for licensing and supervision of betting and other non-casino gaming activities in 2019".¹⁵ The legislation required to formally transfer these functions for the betting sector to the Commission eventually took effect in 2021.¹⁶
50. On balance, and after a careful review of the records, the Information Commissioner accepts that some aspect of the deliberative decision making process was ongoing when the PATI request was submitted in November 2017 and still later when the internal review decision was issued in February 2019.

[2] Does any of the information fall within the exceptions listed in section 29(2)?

51. The Applicant properly emphasised that careful consideration must be given to determine if the withheld records fell within the exceptions in section 29(2), particularly the exceptions for factual information and the reasons for public authorities' decisions.
52. The Information Commissioner is satisfied that, where relevant, the names and email addresses of the senders and recipients, dates and times as well as the subjects of the emails and the filename of any email attachment (**email details**) in the records fell within the exception for factual information listed in section 29(2)(a). Because the exemption in section 29(1) was not properly engaged for the emails details, the Information

¹⁵ See Minister Dickinson's statement, '[Update on the Work of the Bermuda Casino Gaming Commission](#)' (1 March 2019), at page 5, when Parliament was updated on the Government's intention to transfer regulatory responsibility for betting shops to the Commission, from the Betting Licensing Authority.

¹⁶ The Premier stated before Parliament that the [Betting Act 2021](#) and [Gaming \(Transfer of Functions\) Act 2021](#) were tabled "after wide-ranging consultation with local stakeholders, including all relevant agencies in the anti-money laundering and counter terrorist financing framework and with current betting operators"; see [Official Hansard Report](#), 7 May 2021, at page 1386.

Commissioner will later apply the personal information exemption to those parts of the records, as needed.

53. The records, on their face, did not generally contain information expressed as standalone facts (section 29(2)(a)). Records 15 and 52 included certain information which, on their own, could have been viewed as factual. But when the relevant context for this factual recounting is considered—to advocate for a particular view as an alternative to what another party proposed—the factual information could not have been clearly separated from the deliberative material.
54. The information contained in these records also did not amount to an analysis of the Commission's or another public authority's performance, efficiency or effectiveness in relation to its functions, which would fall within section 29(2)(b). Nor did the records present a technical report (section 29(2)(c)). For instance, this exception could have applied to the Government's 2009 ['Report of the Task Force on Gaming'](#), a published technical report which set out an assessment and recommendations for the then-Cabinet's deliberation and decision on the state of gaming. But the nature of records 15, 31, 45 and 52 were not similar to that public report.
55. Similarly, having carefully reviewed these records, they would not fall under the exception in section 29(2)(d), because they did not contain the final reasons on why the Government adopted the decision ultimately taken to amend the Casino Gaming Act 2014 and fold the betting sector into the Commission's statutory supervision, contrary to the Applicant's assertion.
56. Only the email details fell within one of the exceptions, namely section 29(2)(a). Therefore, the Information Commissioner continues to assess the application of the exemption to records 15, 31, 45 and 52, besides the email details.

[3] Could disclosure of the record reasonably be expected to undermine the identified deliberative process of a public authority?

57. Here, the Information Commissioner must decide whether, when the PATI request was filed or the internal review decision issued, the Commission had a reasonable expectation that publicly releasing the records could have lessened the effectiveness of the process of freely and frankly exchanging views and advice, between and within public authorities, in support of the government's identified deliberative process, i.e., its decision making related to the betting shops, or other similar deliberations the government might have undertaken in the future.

58. Because the Commission did not raise any specific argument during the Information Commissioner's review, she considers this part of the exemption's test on the face of the records alone.
59. For the matter at hand, some general information on the state of betting legislation, as contained in the records, had been disclosed to the public even before the Commission's internal review decision.¹⁷ On this basis, the Commission could not maintain that disclosure of any similar general references within the records could reasonably have been expected to undermine the government's deliberative process. Disclosing any information similar to what was already in the public domain would not have prevented executive and senior officers from continuing to provide their views and advice.
60. The Information Commissioner has carefully examined the content of the four remaining records at issue, which can generally be described as follows:
 - a. Record 15 was a communication from September 2016 about the betting sector.
 - b. Record 45 was an email chain from April 2017 and later re-forwarded in November 2017, related to a law firm's email on betting and gaming matters.
 - c. Record 31 was an email chain from July 2017 on the Commission's responsibilities.
 - d. Record 52 was an email chain from November 2017 related to the Commission's responsibilities.
61. The Information Commissioner is not satisfied that the exemption was properly engaged for parts of records 31, 45 and 52 consisting of routine communications between executive and other senior officers. Their disclosure could not reasonably have been expected to have had any impact on the individuals' providing their professional feedback as these specific deliberations progressed, or to have inhibited their provision of expertise and advice in the future. Nor did these parts of the records contain discussions of actual strengths and weaknesses in various options with recommended courses of action.
62. Other parts of records 31, 45 and 52, as well as record 15 as a whole, revealed public officers freely and frankly evaluating options along with their sharing opinions and advice on recommended actions relating to the betting sector and the role of the Commission. As such, the Information Commissioner now considers whether disclosing this

¹⁷ See '[Mutual Evaluation Report](#)', at pages 80-81.

information could reasonably have been expected to undermine the then-ongoing deliberative process.

63. In the absence of further reasoning from the Commission, it is unclear, from the face of the four remaining records, why and how their disclosure could reasonably have been expected to undermine the deliberative process, either by having a chilling effect on the contributions of senior officers or prematurely disclosing proposed courses of action. The Information Commissioner considers the Commission's willingness to disclose the other 55 records and has carefully compared them with records 15, 31, 45 and 52. She notes that the content and nature of records 15, 31, 45 and 52 were similar to those the Commission had agreed to disclose.
64. Senior public officers are expected to carry out their duties, including sharing their views, in a professional and diligent manner regardless of the potential for some of their views to be made public. The Commission has not explained, for the Information Commissioner's assessment, how the senior public officers involved in the deliberations would somehow be inhibited in expressing their views in the regular course of carrying out their duties in the future, had their statements in records 15, 31 and 52 been disclosed in February 2019. The Information Commissioner therefore is not satisfied that a loss of candour could reasonably have been expected to result from their public disclosure. Nor would disclosure have risked premature disclosure of the deliberations or a potential course of action in light of the ongoing public debate concerning gaming in Bermuda.
65. The Information Commissioner is not satisfied the Commission has adequately shown that disclosing records 15, 31, 45 and 52 could reasonably have been expected to undermine the deliberative process; therefore, the exemption was not properly engaged.

[4] If the exemption is engaged, whether the balance of the public interest requires disclosure?

66. In any event, even if the exemption in section 29(1) were engaged for parts of records 15, 31, 45 and 52, the Information Commissioner finds that the balance of the public interest would have required their disclosure to promote the purposes in section 2 of the PATI Act.
67. The Information Commissioner agrees generally with the public interest factors urged by the Applicant, in paragraphs 43-44. Disclosing records 15, 31, 45 and 52 would have assisted in increasing the public's understanding of public authorities' decision making and enabling the public to hold public authorities accountable for fulfilling their

functions. Without question, records 15, 31, 45 and 52, along with the records that the Commission has agreed to disclose, would assist the public in understanding some aspects of the Commission's thinking in its representations and advocacy with the Government on addressing the betting sector. The Information Commission agrees with the Applicant that, at least with respect to the records at issue, the public has a right to be informed about the background on enhancing the regulatory framework for supervising existing betting shops. This would allow the public to remain vigilant on whether the regulatory approach taken was effective and being well-implemented.

68. The Commission has not urged any public interest in favour of non-disclosure, during this review. In the absence of further explanation from the Commission, the balance of the public interest would have favoured disclosure.

Conclusion

69. The Information Commissioner is not satisfied that the Commission was justified in relying on section 29(1) to deny access to records 15, 31, 45 and 52, having failed to demonstrate that the exemption was properly engaged.

Personal information – section 23(1)

70. Under section 23(1) of the PATI Act, public authorities may refuse access to a record if it consists of personal information, i.e., information about an identifiable individual as defined by section 24(1).
71. Section 24(2) contains a number of exceptions to the broad definition of personal information in section 24(1). Under section 24(2)(a), personal information does not include information about an individual who is or was an officer or employee of a public authority that relates to the position or functions of the individual. The Information Commissioner has consistently explained that the definition of personal information in section 24(1) is very broad and the exclusion in section 24(2)(a) is very narrow. Routine personal work information of public officials still falls within the definition of personal information. This does not mean their personal information will always have to be withheld. Rather, the disclosure of their personal information should be based on consideration of the public interest test in section 23(6).¹⁸
72. The exemption in section 23(1) also does not apply to limited circumstances set out in section 23(2).

¹⁸ [Decision 18/2022, Ministry of Health Headquarters](#), para. 185.

73. The exemption for personal information is subject to the public interest test in section 23(6). In the context of personal information, the public interest test requires a balancing of the public interests in favour of knowing an individual's personal information, on the one hand, against the privacy rights of the individual and any other public interest in favour of confidentiality, on the other.
74. When considering the public interest against and in favour of disclosing personal information, public authorities should take into account the following factors¹⁹:
- a. whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations;
 - b. whether disclosure would be fair to the individual under all of the circumstances, including a consideration of whether sensitive personal information was involved, the potential consequences of disclosure on the individual and the individual's expectation of privacy; and
 - c. whether disclosure of the personal information is necessary to further the public interest that have been identified.
75. In sum, to appropriately rely on the personal information exemption in section 23(1), public authorities must consider²⁰:
- [1] Whether the records consist of information about an identifiable individual?
 - [2] Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?
 - [3] Whether any of the exceptions to the exemptions in section 23(1) apply to the record?
 - [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?
76. The personal information exemption is the only exemption that the Information Commissioner will invoke on her own accord, as has occurred in this review²¹.

¹⁹ [Decision 02/2019](#), [Office of the Governor](#), para. 51.

²⁰ [Decision 02/2019](#), [Office of the Governor](#), para. 56.

²¹ [Decision 01/2018](#), [Bermuda Tourism Authority](#), para. 27.

Discussion

77. The Information Commissioner considers this exemption for 52 (of the 59) records, where they contained information about an identifiable individual or were not already published online, including those the Commission has agreed to disclose: records 1, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 30, 31, 33, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, 52, 54, 55, 56, 58, 64, 75, 76, 77, 80, 81, 85, 89, 93, 97, 98 and 101.

[1] Whether the record consists of information about an identifiable individual?

78. The Information Commissioner groups the individuals identified in the records as follows:
- a. officers or employees of public authorities, including the Commission, government departments and other statutorily appointed bodies;
 - b. elected officials;
 - c. consultants hired by public authorities; and
 - d. individuals associated with private or overseas entities.
79. The type of information in these records included these individuals' names and titles, work and private contact details, as well as views and opinions on work and non-work matters.

[2] Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?

80. The exclusion in section 24(2)(a) did not apply to these records, because the routine personal work information for officers and employees of public authorities was attached to them as individual people—and not generally to their 'position or function'.
81. The Information Commissioner finds that section 24(2)(b) applied to records 1, 24, 25, 26, 27, 28, and 43 for the names of consultants hired by public authorities as well as information on the performance of their services, such as attending a meeting and commenting on a public authority's works. Such information was excluded from the definition of exempt personal information and, therefore, is not further considered.

[3] Whether any of the exceptions to the exemptions in section 23(1) apply to the record?

82. The Information Commissioner is satisfied that no exception in section 23(2) applied to these records. The personal information in the records did not relate to the Applicant, and no express consent to disclosure was given by a concerned individual.

[4] If the exemption is engaged, whether the balance of the public interest requires disclosure?

83. The public interests favouring disclosure, discussed at paragraph 67, were equally relevant for balancing the public interest in the context of personal information. These included promoting the public's understanding of, and accountability for, the government's decision making on regulating the betting sector.
84. Generally, public scrutiny should be directed to individuals with final authority for policy recommendations and other strategic decisions. Key decision makers in public facing roles—such as ministers, permanent secretaries, chairs, executive officers and other heads of department—had a reasonable expectation that information about their work performance could be disclosed. This was especially for individuals working in a sector subject to heightened public scrutiny, such as the Commission's then-Executive Director and then-Chairperson. Disclosing these individuals' personal work information would have been necessary to show accountability in decision making by public sector leadership. This would include the fact that they were associated with authoring a document, named as part of an email chain, or contributed during a formal meeting. It also might extend to disclosing some views or opinions they expressed while carrying out their public duties. The public interest would, on balance, be better served by disclosure than non-disclosure of their personal work information.
85. On the other hand, officers or employees who did not hold public facing or decision making roles in public authorities had a reasonable expectation that their personal work information would not usually be made public. This expectation of privacy was particularly reasonable when those persons were involved in matters subject to heightened public scrutiny, such as regulating the betting sector. The same applied to the names and contact details for all individuals associated with private or overseas entities who were identified in these records. Disclosing such personal work information under these circumstances would have been unfair and unnecessary to fulfil the public interest in accountability.
86. Further, no public interest would have favoured disclosing any personal information related to the private lives of certain individuals, such as brief references to their

personal health and private travel, as contained in parts of certain records. The same applied to any personal information for key decision makers unrelated to their public sector work (for instance, an email address attached to their private sector employment) as well as their direct work contacts (for instance, personally identifying parts of their email addresses, direct telephone extensions and personnel references).

Conclusion

87. The Information Commissioner is satisfied that certain parts of records 1, 4-7, 11-19, 21-22, 24-28, 30-31, 33, 35-37, 40-46, 52, 54-56, 58, 64, 75-77, 80-81, 85, 89, 93 and 97 were appropriately withheld as containing exempt personal information under section 23(1).

Conclusion

88. The Information Commissioner is not satisfied that the Commission justified its reliance on sections 29(1) and 35(1) to refuse access to records 15, 31, 45 and 52.
89. The Information Commissioner is satisfied that the exemption for personal information in section 23(1) was applicable to some records, in part, as identified in paragraph 87.
90. Finally, the Information Commissioner acknowledges the regrettable delays in this review, as well as several related reviews involving the Commission, that arose from circumstances both internal and external to her office. For this, she apologises to the Commission, Applicant, third parties and the public.

Decision

The Information Commissioner finds that the Bermuda Gaming Commission (**Commission**) was not justified in denying access to the records in this review under section 29(1) or 35(1) of the Public Access to Information (**PATI**) Act 2010. The Information Commissioner also finds that the exemption for personal information in section 23(1) of the PATI Act is applicable to certain parts of some of the records responsive to the PATI request.

In accordance with section 48 of the PATI Act, the Information Commissioner:

- varies the Commission's refusal for parts of records 1, 4-7, 11-19, 21-22, 24-28, 30-31, 33, 35-37, 40-46, 52, 54-56, 58, 64, 75-77, 80-81, 85, 89, 93 and 97, now affirming that public access was properly denied under section 23(1);
- reverses the Commission's denial of access to records 2, 3, 53, 63A, 79, 84, and 98-101 in full, and to the remaining parts of 1, 4-7, 11-19, 21-22, 24-28, 30-31, 33, 35-37, 40-46, 52, 54-56, 58, 64, 75-77, 80-81, 85, 89, 93 and 97; and
- orders the Commission to disclose a full copy of records 2, 3, 53, 63A, 79, 84 and 98-101 and a redacted copy of records 1, 4-7, 11-19, 21-22, 24-28, 30-31, 33, 35-37, 40-46, 52, 54-56, 58, 64, 75-77, 80-81, 85, 89, 93 and 97, as instructed in the Confidential Annex (Appendix 2), which forms part of this Decision.

The Information Commissioner requires the Commission to disclose the records or parts of records, as directed by this Decision and the accompanying Order, on or before **Thursday, 16 February 2023**.

Judicial Review

The Applicant, the Bermuda Gaming Commission, the third parties, or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Bermuda Gaming Commissions fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez
Information Commissioner
29 December 2022

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Personal information

- 23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.
- ...
- (6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
- ...
- (2) But “personal information” does not include—
- (a) information about an individual . . . who is or was an officer or employee of a public authority that relates to the position or functions of the individual;
 - (b) information about an individual who is or was performing services under contract for a public authority that relates to the services performed, including the terms of the contract and the name of the individual;
- ...

Deliberations of public authorities

- 29 (1) Subject to subsections (2) and (3), a record is exempt from disclosure if it consists of information, the disclosure of which would undermine, or could reasonably be expected to undermine, the deliberative process of a public authority, including free and frank discussion and provision of advice in the course of that process.
- (2) Subsection (1) does not apply to information contained in a record that is—
- (a) factual or statistical information;
 - (b) information resulting from an investigation or analysis of the performance, efficiency or effectiveness of a public authority in relation to its functions;
 - (c) information in the nature of a report, study or analysis of a scientific or technical expert; or
 - (d) information in the nature of the reasons of a public authority for making a particular decision.
- (3) A record shall be disclosed if disclosure of it is in the public interest.

Legal professional privilege

35 (1) Subject to subsection (2), a record is exempt if it is of such a nature that it would be exempt from production in legal proceedings on the ground of legal professional privilege.

(2) . . . a record shall be disclosed if disclosure of it is in the public interest.

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