

Decision Notice

Decision 32/2022: Bermuda Gaming Commission

Records on finances, third party agreements and a consultant

Reference no: 20190122-02

Decision date: 30 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 its finances, third party agreements and a specified consultant. The Commission denied public access to all requested records, stating they consisted of exempt commercial information and exempt information received in confidence.

During the Information Commissioner's review, the Commission decided to change its position on all but a few records, and the Applicant also agreed to no longer challenge some aspects.

The Information Commissioner has affirmed the Commission's decision for certain parts of the records, finding them exempt from public disclosure in accordance with sections 25(1)(c) (adverse effect to commercial interests), 30(1)(b) (operations of public authorities) and 35(1) (legal professional privilege). The Information Commissioner has varied the ground for the Commission's refusal of one part of the PATI request. Further, the Information Commissioner has affirmed and, where appropriate, varied the basis of refusal for any exempt personal information of identifiable individuals.

In reversing the remaining aspects of the Commission's decision, the Information Commissioner has ordered the Commission to disclose the records, excluding any properly exempt information, in accordance with this Decision.

Relevant statutory provisions

Public Access to Information Act 2010: section 16(1)(a) (record does not exist); section 23 (personal information); section 24 (definition of personal information); section 25 (commercial interests); section 26 (information received in confidence); section 30(1)(b) (management functions); and section 35 (legal professional privilege).

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

Background

1. On 16 October 2018, the Applicant made a Public Access to Information (**PATI**) request to the Bermuda Gaming Commission¹ (**Commission**), seeking the following:
 - a. the total amount spent by the Commission on its legal fees in relation to a court proceeding, to date (**item 1**);
 - b. the Commission's past and current memorandums-of-understanding (**MOUs**) with any outside agency (**item 2.1**);
 - c. for any MOU that might have been terminated, its termination date and reasons for termination (**item 2.2**);
 - d. details on any agreement with the UK Gambling Commission (**UKGC**) (**item 3.1**);
 - e. records on any UKGC visit to Bermuda, showing the dates, reasons, costs and involved persons (**item 3.2**);
 - f. records on any visit by the Commission to the UK, showing the dates, reasons, costs and involved persons (**item 3.3**);
 - g. the consultancy agreement between the Commission and George Rover² (**item 4.1**);
 - h. records showing how much Mr. Rover had been paid, to date (**item 4.2**);
 - i. records showing how many times Mr. Rover had visited Bermuda on the Commission's business (**item 4.3**); and
 - j. records on the details of the Commission's income and expenditures for financial years 2017/2018 and 2018/2019, to date (**item 5**).
2. On 27 November 2018, the Commission issued a timely initial decision for the PATI request, which the Commission assigned reference no. 0008. Access to the requested records was refused in full under the exemptions in sections 25(1)(c), 25(1)(d) and 26(1)(a) of the PATI Act 2010.

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 The Commission gazetted these consultancy contracts on 22 January 2019, under company names Rover Strategic Advisors and Princeton Global Strategies, LLC, via [Gazette Notice GN0107/2019](#). The Commission also had announced the consultancy with Mr. Rover earlier, as reported by Bernews in [BCGC working with NJ casino gaming expert](#), 19 April 2017.

3. The Applicant requested an internal review, and the Commission issued a timely internal review decision on 22 January 2019, which upheld its initial refusal.
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 exemptions was justified.
7. On 28 January 2019, the Information Commissioner's Office (**ICO**) notified the Commission of the valid application and requested its withheld records. The Commission provided them between 19 February and 26 April 2019. The ICO also inspected the Commission's accounting files to clarify initial gaps amongst the records submitted. Once reconciled, 41 records remained for the Information Commissioner's review.
8. The Commission also shared with the ICO three documents it voluntarily created when processing the PATI request to summarise the total values and visit dates sought.
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 Princeton Global Strategies, LLC and Mr. Rover (**Consultant**) as third parties concerned within the meaning of section 47(4) in relation to the records responsive to items 4.1-4.3 of the PATI request. The Commission, the Applicant and the Consultant were invited to make submissions to the Information Commissioner for her consideration. The ICO Investigation Officer also shared a preliminary view with the Commission that, based on the exemptions cited, its reason to withhold some records was likely not justified.
10. The ICO received submissions from the Commission in November-December 2022. The Commission took the opportunity to change its position before the Information Commissioner's review by:

- a. Limiting its reliance on sections 25(1)(c) and 26(1)(a) to withhold only records 6 and 26 and parts of records 34 and 37;
 - b. Invoking the exemption in section 35(1) to withhold legal advice in record 6;
 - c. Invoking section 30(1)(b) to withhold the Commission's banking details in parts of records 33, 38 and 43-46;
 - d. Invoking section 23(1) to withhold personal banking details in parts of record 33;
 - e. Accepting that, for item 2.1, it should have relied on section 16(1)(a), based on its explanation to the ICO that the Commission had not terminated any MOU, thus no record actually existed; and
 - f. Abandoning its original position on the remaining records and agreeing to disclose: the Commission's income and expenditure summary³ (item 5); a total figure for the legal costs (item 1); its signed MOUs with 2 overseas foreign gaming regulators and 2 public authorities (items 2.1 and 3.1); various records showing itineraries and travel-related expenses for the Commission's representatives and consultants (items 3.2 and 3.3); 4 signed agreements with the Consultant (item 4.1); and other records on payments made to the Consultant and on his visits (items 4.2 and 4.3).
11. During the investigation, the Applicant took the opportunity to withdraw any challenge to the Commission's position on the underlying records used to create the summary for item 1 (total legal costs), as referred to in paragraph 8, and agreed to receive only the total figure. The ICO also did not receive a submission from the Consultant.
 12. Given this context, this Decision assesses the Commission's reliance on the administrative denial in section 16(1)(a) and the exemptions in sections 25(1)(c), 26(1)(a), 30(1)(b), 35(1) and 23(1) for records 6, 26, 33, 34, 37, 38 and 43-46 only. Further, the Information Commissioner considers section 25(1)(c) for a private company's banking details in record 42. Finally, the Information Commissioner applies the personal information exemption in section 23(1) for any other part of the 41 records containing information about an identifiable individual, beyond the Commission's submissions and on her own accord.

³ The Information Commissioner reminds public authorities that section 6(5) of the PATI Act grants the public a right to inspect any public authority's unaudited quarterly expenditures, without needing to file a PATI request.

13. Finally, the Information Commissioner expresses appreciation to the Commission and the Applicant for their willingness to narrow the issues in this review and, at the same time, to ensure that the Applicant's information needs were addressed.

Information Commissioner's analysis and findings

14. 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.
15. 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.

Record does not exist – section 16(1)(a)

16. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it.
17. As set out in [Decision 24/2022](#), Department of Education, paragraphs 16-19, when reviewing a public authority's reliance on section 16(1)(a), the Information Commissioner will consider the quality of the public authority's analysis of the PATI request; the scope of the search the public authority made based on that analysis; and the rigour and efficiency with which the search was conducted.
18. The Information Commissioner is not determining with certainty whether a record exists, but whether the public authority took all reasonable steps to locate the record before relying on section 16(1)(a).
19. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.

Discussion

20. As noted above, in paragraph 10(e), the Commission clarified during this review that it relied on section 16(1)(a) to deny the Applicant's request for details on any terminated MOU. These representations were made by the Commission's Head of Authority, and the Applicant was invited to accept the Commission's revised position.

21. Although the Applicant did not respond to the ICO's additional invitation to narrow the issues for review, the Information Commissioner accepts the Commission's late reliance on section 16(1)(a).
22. The Commission understood that the straightforward request was for details on any terminated MOU and was aware that it had not terminated any MOU during the relevant time period. The Information Commissioner has no reason to question the veracity of the representations made during the review.
23. The Information Commissioner is satisfied that the Commission's reliance on section 16(1)(a) was justified.

Management functions – section 30(1)(b)

24. A public authority may rely on section 30(1)(b) to deny access to a public record whose disclosure could reasonably be expected to have a significant, adverse effect on a public authority's performance of any of its functions relating to management.
25. A public authority must identify the relevant management function involved. Further, it must show how disclosure could reasonably be expected to cause the specific harm, i.e., a significant, adverse effect on the performance of any management function.⁴
26. Section 30(1)(b) refers to two examples of the relevant functions, namely a public authority's industrial relations and management of its staff. Generally, 'management functions' relate to a public authority's internal management of its routine operations. They may include strategic planning, financial resource management, security of IT functions, complaints handling and operational assessments (for instance, reviewing existing processes, proposing new ones and piloting them). Management functions should be understood as a narrower category of activity than a public authority's performance of its statutory functions that are assigned to it in law.
27. 'Having a significant, adverse effect' is not defined in the PATI Act.⁵ By its ordinary definition, it means bringing about an unfavourable or harmful result whose damage is severe, which is a stronger showing of harm than the usual standard of 'prejudice'.

⁴ The Information Commissioner has published [ICO Guidance: operations of public authorities \(section 30\)](#) (August 2018).

⁵ This harm standard is different from 'prejudice', which applies to most other exemptions in the PATI Act. It may be understood in the same terms as the harm standard for section 31(1), i.e., having a 'serious adverse effect'.

28. Further, the likelihood must be that a reasonable person may expect the anticipated harm to occur considering all circumstances of the case. The expectations have to be likely, plausible or possible based on real and substantial factual grounds.
29. If section 30(1)(b) is properly engaged, the public interest test must be applied. Where the public interest would, on balance, be better served by disclosure than by non-disclosure, then the records must still be disclosed.
30. In sum, when applying the exemption in section 30(1)(b), a public authority must ask:
 - [1] What is the relevant function relating to management of the public authority?
 - [2] What is the specific significant, adverse effect?
 - [3] How could disclosure cause the significant, adverse effect on the identified management function?
 - [4] What is the likelihood of the significant, adverse effect occurring?
 - [5] If the exemption is engaged, does the balance of the public interest require disclosure?
31. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 30(1)(b) to deny access to the records.

Public authority's submissions

32. During this review, the Commission revised its position to withhold its banking details under the exemption in section 30(1)(b).

Applicant's submissions

33. The Applicant did not comment on why this exemption might not apply.

Discussion

- [1] What is the relevant function related to management of the public authority?
34. The Information Commissioner is satisfied that the Commission's management of its financial transactions and related security, including banking matters, was a relevant management function.
 - [2], [3] and [4] How could disclosure reasonably be expected to cause the specific, significant, adverse effect on the identified management functions?

35. The Information Commissioner accepts that a breach of the Commission's security protocols, in place to prevent account fraud and the like, could have amounted to a significant and adverse effect on its finance functions. Its management would reasonably include a need to safeguard its banking information. In a climate of cybersecurity risks, disclosing confidential banking details could reasonably have been expected to undermine the Commission's security protocols and increase its exposure to fraud, cybersecurity attacks or similar risks.

[5] If the exemption is engaged, does the balance of the public interest require disclosure?

36. The public has a general interest in transparency and understanding the Commission's operations more fully.

37. At the same time, the public has an interest in preserving the integrity of financial security protocols and the orderly administration of a public authority's management functions. Banks also benefit from security protocols implemented by their commercial clients, which include public authorities. Such arrangements support the public's general confidence in the security of financial systems.

38. On balance, disclosing this information would undermine the public interest in maintaining the confidentiality of banking arrangements, while offering the public little insight into the Commission's operations and decision making. The balance of the public interest, therefore, did not require disclosure.

Conclusion

39. The Information Commissioner is satisfied that the Commission was justified to rely on section 30(1)(b) to deny access to its banking details in parts of records 33, 38 and 43-46.

Adverse effect on commercial interests – section 25(1)(c)

40. Public authorities are justified under section 25(1)(c) to refuse public access to a record consisting of information which, if disclosed, would or could reasonably be expected to have an adverse effect on the commercial interests of any person to whom the information relates.

41. In accordance with the Interpretation Act 1951 (**Interpretation Act**), 'person' includes "any company or association or body of persons, whether corporate or unincorporated".

42. 'Commercial interests' and 'adverse effect' in section 25(1)(c) should be read in their ordinary meaning, because neither the PATI Act nor the Interpretation Act provides the

definitions of the phrases. The ordinary meaning of 'commercial' is "concerned with or engaged in commerce" and 'commerce' is defined as "the activity of buying and selling" or "making or intended to make a profit". As such, a commercial interest relates to a person's ability to participate in commercial activity, such as the sale of goods or services or collection of a debt.⁶

43. 'Adverse effect' is "bringing about an unfavourable or harmful result".
44. The standard of likelihood in section 25(1)(c) is 'would' or 'could reasonably be expected to'. 'Would' means that there is a high probability that the anticipated harm can occur, and 'could reasonably be expected to' is a lesser likelihood of the adverse effect occurring.⁷
45. The exemption in section 25(1)(c) is subject to the public interest test. This means a record that is exempt under this section would still have to be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.
46. In sum, to appropriately refuse access to records under section 25(1)(c), public authorities must consider and demonstrate the following questions⁸, after satisfying themselves that none of the exceptions in section 25(2) is applicable:
 - [1] Who is the person to whom the information relates?
 - [2] What are the commercial interests of this person that are of concern?
 - [3] What adverse effect could disclosure cause?
 - [4] How likely is this to occur?
 - [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?
47. A 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.

⁶ [Decision 12/2018, Ministry of Finance Headquarters](#), para. 66.

⁷ [Decision 12/2018, Ministry of Finance Headquarters](#), paras. 71-72.

⁸ [Decision 12/2018, Ministry of Finance Headquarters](#), para. 83.

Public authority's submissions

48. The Commission submitted that record 26 was shared in confidence and otherwise consisted of exempt commercial information whose disclosure would prejudice the UKGC's interests.
49. The Commission also submitted that another third party's commercial information, in parts of records 34 and 37 containing a private sector company's banking details, was exempt. The same applied to the Consultant's banking details shown in parts of records 43-46, which were responsive to items 4.2 and 4.3 of the PATI request.

Applicant's submissions

50. The Applicant did not comment on why this exemption might not apply.

Discussion

51. The Information Commissioner considers the exemption in section 25(1)(c) for records 26 in full and parts of records 34, 37 and 43-46 which contain banking details of a private sector company and the Consultant. The Information Commission also considers section 25(1)(c) for the banking details of a private company in record 42. As noted, the Consultant did not make a submission to the Information Commissioner.

[1] Who is the person to whom the information relates?

52. Record 26 was a report by the UKGC for the Commission dated May 2018. It was one of two reports submitted as part of a visit by the UKGC to assist the Commission's technical officers, as the Commission prepared for its functions to expand to regulating the betting sector. (The Commission agreed to disclose the other report (record 25) in full.) Record 26 set out the UKGC representative's views on potential challenges and opportunities for Bermuda in establishing an effective betting regulatory framework. The Information Commissioner accepts the Commission's submission that record 26 contained information related to the UKGC as a relevant legal person of concern.
53. Record 26 also discussed the four operating betting shops directly, including details from the UKGC representative's candid interviews with their operators, and an overall assessment of the sector was given by the UKGC, with reference to these businesses. As such, the Information Commissioner is satisfied that the betting shops were legal persons of concern in relation to parts of record 26.
54. Record 34 related to the then-Chairperson and then-Executive Director's expense reimbursements for travel to the 2016 International Casino Exhibition (**ICE**) in London,

UK. Record 37 was for the then-Chairperson travel to the 2017 ICE. They contained invoices sent by the then-Chairperson's private sector employer to the Commission for reimbursing travel expenses when carrying out his role with the Commission, but which were initially incurred on his employer's account. As such, the legal person of concern in relation to the banking details in parts of records 34 and 37 was the employer.

55. Record 42 includes the banking details of a hotel.
56. Records 43-46 showed the Commission's documentation for payments made to the Consultant as at the PATI request date, including invoices and supporting receipts submitted to the Commission by the Consultant. As such, a legal person of concern in relation to the banking details in parts of records 43-46 was the Consultant.

[2] What are the commercial interests of this person that are of concern?

57. The Information Commissioner is not satisfied that record 26 related to an identifiable commercial interest of the UKGC, in light of a lack of detailed reasoning from the Commission and based on a plain reading of its content. However, the Information Commissioner is satisfied that the betting shops had a plainly identifiable commercial interest to continue offering and profiting from their businesses.
58. In relation to records 34 and 37, the Information Commissioner accepts that the private sector employer had a plainly identifiable interest as a commercial entity providing for-profit legal services within Bermuda. For records 43-46, the Information Commissioner accepts that the Consultant maintained a similar commercial interest in relation to their consultancy services. Similarly, for record 42, the hotel has a commercial interest in profiting from its services.

[3] What adverse effect could disclosure cause?

59. Although the Information Commissioner cannot discuss record 26 in detail, after a careful review of its content, she is satisfied that its disclosure could have caused an adverse effect on the ability of the betting shops to conduct their commercial activities.
60. In relation to records 34, 37, 42 and 43-46, it is reasonable to assert that publicly disclosing a private entity's commercial banking details, including for wire transfers, could have placed their businesses at risk, by creating a vulnerability in their security protocols for preventing account fraud, cyberattacks and the like. This could have undermined their commercial activity, in addition to causing reputational damage. Such banking details would usually be shared with a client, but not otherwise publicly available.

[4] How likely is this to occur?

61. For record 26, the Information Commissioner is satisfied that, in light of public and regulatory scrutiny on the betting sector at the relevant time, an adverse effect could reasonably have been expected to occur, if disclosure were made. The content in the UKGC's assessment of the sector was not presented in an anonymised form. At a minimum, its disclosure could reasonably have been expected to impact commercial activities within the industry, for all four businesses or a single one.
62. The Information Commissioner further accepts that the local betting sector was a competitive commercial environment, as supported by the information contained in one of the withheld records.
63. For the private company's banking details in records 34, 37, 42 and 43-46, the Information Commissioner is satisfied that, in the recent climate of cybersecurity risks, disclosing such confidential information could reasonably have been expected to undermine its security protocols and increase its risk of fraud, a cybersecurity attack or the like.

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

64. For record 26, the Information Commissioner is satisfied that, at the time of the PATI request, there was a strong public interest in ensuring the Commission was appropriately preparing for its anticipated role to supervise the betting sector. Disclosing the full contents of the UKGC's report could have informed the public on the Commission's 'due diligence' efforts, showing what a public authority was contemplating in assessing proposed approaches for effective betting regulations.
65. On the other hand, most of the commercial information in record 26 had been obtained through local businesses' voluntary cooperation during the Commission's stakeholder consultation. Such information was valuable, and the public had an interest in ensuring that business owners would continue to speak freely during ongoing consultations. In these particular circumstances, the public had an interest in promoting the quality of the consultation.
66. On balance, the public interest in accountability and understanding some aspects of the Government's decision making process related to betting shops was furthered by other

published reports.⁹ The minimal value added by disclosing discrete information on the UKGC's assessment related to four specific businesses was appropriately outweighed by the public interest in promoting robust and fulsome consultation by the regulators.

67. For records 34, 37, 42 and 43-46, the Information Commissioner is satisfied that, no public interest factors required the disclosure of a private company's bank account details. Public interest factors in favouring of maintaining the exemption included the need for private companies to retain control over their banking details and exercising agency in determining when and to whom this information would be shared. In this sense, the Information Commissioner is satisfied that the public benefitted from maintaining the confidentiality of the banker-customer relationship.

Conclusion

68. The Information Commissioner is satisfied that the Commission has justified its reliance on section 25(1)(c) for withholding the private sector employer's banking account details in records 34 and 37, the hotel's banking details in record 42, and the Consultant's banking account details in records 43-46 as well as for certain information only related to the local betting shops' operations in record 26, for which the public interest did not require disclosure.

Legal professional privilege – section 35(1)

69. 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. At issue here is legal advice privilege.
70. 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.

⁹ See, for instance, National Anti-Money Laundering Committee, [The Assessment of Bermuda's National Money Laundering and Terrorist Financing Risk Report](#) (May 2018), at pp. 80-81; and Caribbean Financial Action Task Force, [Anti-Money Laundering and Counter-Terrorist Financing Measures, Bermuda Mutual Evaluation Report](#) (January 2020), at paras. 121, 133, 357 and 410.

71. The communication also must be connected to obtaining legal advice. It could involve legal rights, liabilities, obligations, or remedies. The communication will not qualify if it is about business, financial, operational, strategic, or other non-legal advice.¹⁰
72. 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, which would mean “the information can no longer be considered to be confidential”.¹¹
73. 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 by non-disclosure.
74. In sum, to appropriately rely on section 35(1), 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?
75. 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

76. The Commission submitted that record 6, which included an email received from its external counsel providing advice concerning a draft MOU, was subject to legal professional privilege, though it did not elaborate on its reasons for asserting the exemption.

¹⁰ See, for example, the UK’s leading judgment of Lord Scott of Foscote in [Three Rivers District Council and other v Governor and Company of the Bank of England](#) [2004] UKHL 48, at para. 38.

¹¹ UK Information Commissioner’s Office, [Legal Professional Privilege \(section 42\)](#) (April 2016), at para. 28.

Applicant's submissions

77. The Applicant did not comment on why this exemption might not apply.

Discussion

78. The Information Commissioner considers the Commission's reliance on section 35(1) to deny public access to record 6.

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

79. The Information Commissioner is satisfied that parts 2 and 3 of record 6 were written communications between the external counsel for the Commission and the then-Executive Director. The Information Commissioner is also satisfied that part 1 of record 6 consisted of an internal email between the Commission's then-General Counsel and then-Executive Director.

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

80. The Information Commissioner is satisfied that, on the face of the record, parts 2 and 3 concerned the external counsel's legal advice to the Commission on its rights and responsibilities under a draft agreement, which included proposing changes to the draft for the Commission's benefit.

81. On the face of part 1 of record 6, the communication did not consist of any legal advice. The exemption in section 35(1) is not considered further for part 1.

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

82. The Information Commissioner is satisfied that the Commission has not waived privilege, nor has the quality of confidentiality of the legal advice been lost, in relation to the topic discussed in record 6. The Commission has not disclosed the content of parts 2 and 3 to the world at large.

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

83. While acknowledging the general public interest in transparency, the Information Commissioner is satisfied that the public has a heightened interest in maintaining the confidentiality of this attorney-client communication. After a careful review of the record, nothing in its content suggested maladministration or any other issue that could have possibly outweighed maintaining the exemption.

Conclusion

84. The Information Commissioner is satisfied that the Commission has justified its reliance on section 35(1) for withholding the main content in parts 2 and 3 of record 6, but not for part 1.

Information received in confidence – section 26(1)(a)

85. A public authority may rely on section 26(1)(a) to deny access to information that “is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential” and “the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions”.
86. If section 26(1)(a) is properly engaged, the public interest test must be applied. Where the public interest would, on balance, be better served by disclosure than by non-disclosure, then the records must still be disclosed.
87. The exemption in section 26(1)(a) focuses on whether the process or circumstances by which the information was provided indicate that it was given in confidence and with the understanding that it would be treated confidentially. The assessment considers factors related both to how the third party gave the information and how the public authority received or agreed to hold the information.
88. In deciding whether the information was given ‘in confidence’ by a third party, relevant factors may include:
- a. the expectation of the person or entity giving the information to the public authority;
 - b. any assurances sought regarding the confidentiality of the information;
 - c. the purpose for which the information was provided; and
 - d. any other action that the person or entity giving the information may have taken with respect to the information, e.g., the information was given to other parties and under what circumstances.¹²

¹² See Ireland Office of the Information Commissioner, [Guidance Note, Freedom of Information Act 2014 – Section 35: Information Obtained in Confidence \(Section 35 Guidance Note\)](#) (March 2016), at para. 2.2.5. The Ireland provision has language similar to section 26(1)(a) of the PATI Act, and the Information Commissioner finds the Ireland guidance helpful in interpreting this exemption.

89. The information must also have been given with the understanding on behalf of the public authority that the public authority would treat the information as confidential. This would include doing so on an ongoing basis. The understanding of confidentiality may be express or implied.
90. When determining how the public authority received the information, the relevant factors are similar to those in paragraph 88, and may include:
- a. any statement or assurances given at the time the information was provided;
 - b. the purpose for which the information was sought or provided;
 - c. the practice, procedure, or policy of the public authority with regard to such information generally;
 - d. any action which the public authority may be expected to take in relation to the information; and
 - e. the nature of the relationship between the provider of the information and the public authority receiving it.¹³
91. Section 26(1)(a) also requires that disclosure of the information in the record ‘would be likely’ to prevent the authority from receiving further similar information in the future that is required by the public authority to properly fulfil its functions. Speculation is not sufficient to justify the exemption. ‘Would be likely’ means that some significant, real risk must exist that the public authority would be prevented from receiving such information in the future.
92. As set out in the Interpretation Act, the ‘functions’ of a public authority should be understood as ‘powers conferred, or duties imposed, on the authority or officer by or under any provision of law’.
93. As explained in Decision 06/2021, Cabinet Office at paragraph 106, a public authority must consider five questions when seeking to justify the exemption for adverse effects on commercial interests:

[1] Was the information given by a third party (other than another public authority)?

¹³ See [Section 35 Guidance Note](#), at para. 2.2.6.

[2] Was the information given in confidence and with the understanding that it would be held confidentially?

[3] How would disclosure likely prevent the public authority from getting such information again in the future?

[4] Was that information required for the public authority to fulfil its functions?

[5] If the exemption is engaged, does the balance of the public interest require disclosure?

94. A public authority bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.

Public authority's submissions

95. The Commission asserted that record 6, described above at paragraph 76, was exempt as information received in confidence.

96. The Commission also submitted that record 26, the 2018 UKGC report, generally consisted of information it was believed to have been shared in confidence.

Applicant's submissions

97. The Applicant did not comment on why this exemption might not apply.

Discussion

98. The Information Commissioner considers section 26(1)(a) for the remaining parts of records 6 and 26 not withheld under the exemptions discussed above.

[1] Was the information given by a third party (other than another public authority)?

99. The Information Commissioner is satisfied that, for the remaining parts of record 6, this exemption was not correctly relied on. Part 1, an internal email, was not itself received by a third party and did not contain any such information. The same applied to the email details in parts 2 and 3 in record 6, which were not upheld under section 35(1).

100. For record 26, the Information Commissioner accepts that the report in its entirety was given to the Commission by the UKGC as a third party.

[2] Was the information given in confidence and with the understanding that it would be held confidentially?

101. The Commission has not sufficiently evidenced to the Information Commissioner that record 26 had been provided by the UKGC in confidence and with an understanding that it would be held confidentially in its entirety. For the sake of completeness, the Information Commissioner reviewed the records described as relating to its consultation with the UKGC and found no such explicit reference.
102. In addition, the Information Commissioner briefly reviewed the public information on the UKGC's website for any specific reference to the Bermuda visit or its reports, or to any statement that its consultations with fellow gaming regulators were generally pursued with an understanding of confidence. No such reference was found.

[3] How would disclosure likely prevent the public authority from getting such information again in the future?

103. In any event, disclosing the parts of the UKGC's report in record 26, which were not properly withheld as exempt commercial information in section 25(1)(c), could not reasonably have been expected to prevent the Commission from engaging in future consultation with this body or others. If another regulator were concerned about preserving the confidentiality of an assessment being provided to the Commission, they could simply negotiate an appropriate confidentiality agreement to withhold certain parts of their work product from public access.

Conclusion

104. Given a lack of detailed reasoning, the Information Commissioner is not satisfied that the Commission has sufficiently justified a reliance on section 26(1)(a).

Personal information – section 23(1)

105. 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). Certain information is excluded from the definition of personal information in section 24(1), which is not relevant in this case.
106. The exemption in section 23(1) does not apply to limited circumstances set out in 23(2). Relevant in this case is section 23(2)(d), which states that the exemption does not apply to "information that was given to the public authority concerned by the individual to whom it relates and the individual was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public".

107. The exemption for personal information is subject to the public interest test. This means that a record consisting of a third party's personal information should be disclosed if the public interest would, on balance, be better served by disclosure. When considering the public interest against and in favour of disclosing personal information, public authorities should take into account the following factors¹⁴:

- 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 interests that have been identified.

108. In sum, to appropriately rely on the personal information exemption in section 23(1), public authorities must consider¹⁵:

[1] Whether the record consists 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?

109. The personal information exemption is the only exemption that the Information Commissioner will invoke on her own accord, as has occurred in this case.

Public authority's submissions

110. The Commission submitted that record 33 contained the personal banking details for some former employees, and such should be withheld as exempt personal information.

¹⁴ [Decision 02/2019, Office of the Governor](#), para. 51.

¹⁵ [Decision 02/2019, Office of the Governor](#), para. 56.

Applicant's submissions

111. The Applicant did not comment on why this exemption might not apply.

Discussion

112. In addition to record 33, the Information Commissioner considers this exemption for parts of records 1-27 and 34-46, i.e., the parts of records not exempt under sections 25(1)(c), 26(1)(a) or 35(1) and those the Commission has agreed to disclose.

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

113. 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 in Bermuda;
- c. consultants hired by public authorities;
- d. individuals associated with foreign gaming regulators; and
- e. individuals associated with private entities, including the local betting shops.

114. The type of information in these records included details such as an individuals' names, titles and signatures; their private and work contact details; some personal banking information; other non-work contact details; and a person's photo.

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

115. 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'.

116. The Information Commissioner finds that section 24(2)(b) applied to records 1, 2, 13-16, 18, 27 and 43-46, for the name of the Consultant's representative, Mr. Rover, and information on the performance of their services, such as their contract terms and value. Such information was excluded from the definition of exempt personal information. The same applied in record 6 to the company part of an email address identifying an

employee of a law firm that contracted with the Commission.¹⁶ Where the exclusion has applied, such information will be ordered for disclosure.

117. Section 24(2)(b) did not extend to certain other information about the Consultant's representative, Mr. Rover, which was not related to the services performed and thus met the definition of exempt personal information; for instance, their signature, home address, personal banking details and other non-work information. The Information Commissioner moves on to consider the exemption for that type of information in records 2, 13, 14, 16, 27 and 43-46.

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

118. 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?

119. The public has a general interest in transparency and being informed about what public authorities do and how they decide to spend public funds. When thinking about the public interest in disclosing records with personal information, this general interest in transparency must be balanced against an individual's right to privacy. The Information Commissioner considers whether disclosing the parts of records with personal information would have been fair to the individual and necessary to further the public interest.
120. Most of the personal work information in these records for officers or employees of public authorities did not relate to their private lives and was not otherwise sensitive. Some records had brief references to individuals' personal health and finances. No public interest would have favoured disclosing this type of personal information.
121. Generally, public scrutiny should be directed to individuals with final authority for public spending and other strategic decisions. In this matter, the Commission's then-Executive Director and then-Chair had a lower expectation of privacy, compared with people who worked under their instruction. Disclosing these individuals' personal work information

¹⁶ See [Gazette Notice GN0107/2019](#) for the Commission's gazetted details of its contract with Conyers Dill & Pearman Ltd. for legal services, as published on 22 January 2019.

would have been necessary to show accountability in decision making by public sector leadership, for most instances in these records. This would include the fact that they attended a local or overseas event and details on how they incurred expenses while travelling on official Commission business. The Information Commissioner also finds that, due to the involved role of the Commission's board members, the public interest supported disclosing the names and titles of other Commissioners, besides the Chairperson, where certain records showed their attendance at a local or overseas event. The same applied to Bermuda's elected officials and permanent secretaries, as well as chief executives of foreign regulators, when named in the records.

122. On the other hand, employees of Bermuda's public authorities who did not hold a public-facing or decision-making role had a reasonable expectation that their personal work information would not be made public usually. The same applied to the names of individuals working with the Commission on behalf of the contracted firm as well as with the foreign regulators. The Information Commissioner is satisfied that these individuals had a higher expectation for their privacy to be maintained than those in executive-level roles or whose names were officially gazetted as contractors with a public authority.
123. The Information Commissioner acknowledges that the PATI request specifically asked for the names of all individuals who had travelled to and from Bermuda on the Commission's business. The Information Commissioner does not find that the public interest in increasing accountability for public spending would have outweighed the privacy rights of persons besides those key executives, elected officials and appointed Commissioners. She is satisfied that the parts of the Commission's travel expense reports showing other staff's names and positions were exempt. The public interests will have been met by learning, from the overall content of the records, the total number of individuals who had travelled on the Commission's business.
124. The same position applied for the work information of those individuals associated with foreign regulators, who would have had a higher expectation of privacy than those in executive-level roles within their organisations. Generally, disclosure of their personal work information under these circumstances would have been unfair and unnecessary to fulfil the public interest in accountability for Bermuda's public sector. In parts of record 11, however, the Information Commissioner is satisfied that disclosing these individuals' positions alone would have promoted the public interest in eliminating unnecessary secrecy, given the size of their organisations (i.e., where it would be difficult to ascertain the individual's identity based on the position being disclosed).

125. The Information Commissioner also finds that the public interest would have favoured non-disclosure of some identifying information for the local betting shop operators in records 19-23.
126. Some records contained information for some key decision makers in Bermuda's public authorities, which did not directly relate to their work performance. Disclosing these individuals' home contacts, personal banking details and signatures would have been an unnecessary invasion of privacy and could even have created a vulnerability for risk of fraud. Such information would not be needed to further any public interest for assessing value for public spending, performance of public services or other accountability interests. The same applied to consultants' signatures and other non-work information.
127. Finally, the Information Commissioner finds that no public interest would outweigh the fact that non-work personal information of any identifiable individual was exempt, as well as identifying information for persons employed with private entities such as transportation agencies, restaurants and banks.

Conclusion

128. The Commission was justified in withholding a part of record 33 under the exemption in section 23(1) for personal information. In addition to other parts of record 33, the Information Commissioner finds that certain parts of records 1-8, 10-27 and 34-46 were appropriately withheld as containing exempt personal information.

Conclusion

129. The Information Commissioner is satisfied that the Commission justified its reliance on sections 25(1)(c) and 35(1) to refuse access to certain commercial information and legal advice in records 6, 26, 34 and 37, where the public interest did not require disclosure. The Information Commissioner is further satisfied that section 25(1)(c) is justified for parts of records 42 and 43-46.
130. The Information Commissioner is not satisfied that the Commission justified its reliance on sections 25(1)(c), 26(1)(a) and 35(1) for refusing access to other parts of records 6 and 26.
131. The Information Commissioner is satisfied that the exemption for personal information in section 23(1) applied to withholding parts in most of the 41 records.
132. 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 justified in denying public access to certain parts of records 6, 26, 33, 34, 37, 38, 42 and 43-46 under sections 23(1), 25(1)(c), 30(1)(b) and 35(1) of the Public Access to Information (**PATI**) Act 2010, as well as in refusing a part of the PATI request under section 16(1)(a). Further, the Information Commissioner finds that other parts of the records consisted of personal information that was exempt under section 23(1).

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

- affirms the Commission's reliance on section 25(1)(c) to refuse access to certain parts of records 26, 34, 37, 42 and 43-46;
- varies the Commission's decision to deny item 2.2 of the PATI request under section 16(1)(a);
- varies the Commission's denial of access for parts of record 6 under section 35(1);
- varies the Commission's refusal for access to its banking details in records 33, 38 and 43-46 under section 30(1)(b);
- affirms and otherwise varies the Commission's refusal for parts of records 1-8, 10-27 and 33-46 under section 23(1);
- reverses the Commission's denial of access to the remaining parts of records; and
- orders the Commission to disclose the 41 records, in whole or in part, and the summary information for item 1, as agreed to by the parties, as instructed in the Confidential Annex (Appendix 2), which forms part of this Decision.

The Information Commissioner requires the Commission's to disclose the records or parts of records, as directed by this Decision and the accompanying Order, on or before **Friday, 17 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 Department 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
30 December 2022

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Refusal of request on administrative grounds

- 16 (1) A public authority may refuse to grant a request if—
- (a) the record requested does not exist or cannot be found after all reasonable steps have been taken to find it;
 - ...

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;

Commercial information

- 25 (1) Subject to subsections (2) or (3), a record that consists of the following information is exempt from disclosure—
- ...
- (c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates;
- ...
- (3) A record shall be disclosed if disclosure of it is in the public interest.

Information received in confidence

- 26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—

(a) information—

(i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and

(ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or

...

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

Operations of public authorities

30 (1) Subject to subsection (2), a record is exempt if its disclosure could reasonably be expected to—

...

(b) have a significant, adverse effect on the performance by the public authority of any of its functions relating to management (including industrial relations and management of its staff); or

...

(2) 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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