

Decision Notice

Decision 06/2021: Cabinet Office

Records related to the Government's relationship with MM&I

Reference no: 20180905

Decision date: 27 July 2021

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Economic Development and Tourism Headquarters (**Economic Development and Tourism**) for records about the Bermuda Government's business relationship with MM&I Holdings (**MM&I**). Economic Development and Tourism disclosed some records and denied access to the remaining records under sections 4(1)(b)(vi) (inapplicability of the PATI Act) and 26 (information received in confidence) of the PATI Act, as well as another exemption not considered in this review. This Decision further considers the exemptions in section 25 (commercial information) that were raised in the first instance by MM&I as a third party during the Information Commissioner's review.

During the course of this review, the ministries were restructured and responsibility for this review was moved to the Cabinet Office.

The Information Commissioner has upheld the public authority's decision to deny access to record 18, in part, in accordance with section 26(1)(b) because disclosure would constitute a breach of a duty of confidence, and has varied the decision to deny access to records 1-8, 10-12 and 14-19, in part, in accordance with the exemption for personal information in section 23(1). The Information Commissioner has reversed the decision to withhold the remaining records or parts of records. The Information Commissioner also has found that the public authority did not meet the requirements for a reasonable search in section 12 of the PATI Act.

The Information Commissioner has ordered the public authority to disclose the remaining records, or part of records, in accordance with the Decision, and to process the records that it previously located after conducting additional searches during this review, in accordance with this Decision and the provisions of the PATI Act.

Relevant statutory provisions

Public Access to Information Act 2010: section 12 (reasonable search); section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 25 (commercial information); and section 26 (information received in confidence).

Public Access to Information Regulations 2014: regulation 5 (reasonable search).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

Background

1. The development of casino gambling in Bermuda has had a lengthy, and at times controversial, history. In 2008, the Government began a feasibility study of legalised gambling in Bermuda that culminated in a detailed 2010 Green Paper on Gaming for Bermuda¹. In the years to follow, several Governments of the day promised to hold a referendum on casinos that did not materialise, the Casino Gaming Act 2014 was passed, the Bermuda Casino Gaming Commission (**BCGC**) was established in 2015, and extensive secondary legislation was enacted to enable the establishment and operation of casino gambling².
2. In the midst of this process, and prior to the passage of any casino gaming legislation, MM&I Holdings Ltd. (**MM&I**), a Bermudian company partnered with Florida-based Banyan Gaming (**Banyan**), sought to become the service provider for a cashless gaming network management system through arrangements with the Government. In June and July 2013, MM&I delivered presentations to then Attorney General Mark Pettingill and then Tourism Minister Shawn Crockwell.³ The Bermuda Government entered into a Non-Disclosure Agreement (**NDA**) in July 2013 and a Memorandum of Understanding (**MoU**) in December 2013 with MM&I related to potential services MM&I hoped to provide⁴.
3. The Government later issued a Request for Qualifications (**RFQ**) on the “Implementation and Operation of a Gaming Network Management System” in May 2015, and the BCGC commenced operations in September 2015. By July 2016, the Government terminated the MoU with MM&I⁵. Mr. Crockwell and Mr. Pettingill resigned from the governing party in 2016 and 2017, respectively. At some point prior

¹ Cabinet Office, Green Paper on Gaming for Bermuda (March 2010) available at <https://cloudfront.bernews.com/wp-content/uploads/2014/02/200511938-Gaming-Green-Paper.pdf>.

² For a listing of these regulations, rules, orders and notices, see the BCGC website at <https://www.bdcasinogaming.com/acts-and-subsiary-legislation/>.

³ See ‘Bermuda Gaming Industry Corporate Memory Timeline Highlights’ disclosed by the BCGC and published by the Royal Gazette on 18 October 2017 at <https://rgb-prod-public-pdfs.s3.us-east-2.amazonaws.com/RG3748591018.pdf>.

⁴ The MoU was disclosed by the BCGC and published by the Royal Gazette on 18 October 2017 at <https://rgb-prod-public-pdfs.s3.us-east-2.amazonaws.com/RG3748591018.pdf>.

⁵ The notice of termination of the MoU was disclosed by the BCGC and published by the Royal Gazette on 18 October 2017 at <https://rgb-prod-public-pdfs.s3.us-east-2.amazonaws.com/RG3748591018.pdf>.

to October 2017, they also began representing MM&I in their private capacity as lawyers⁶.

4. In the midst of these events, the Applicant filed a Public Access to Information (**PATI**) request on 13 September 2017 to the Ministry of Economic Development and Tourism Headquarters (**Economic Development and Tourism**) for the following:
 - a. Records regarding the Bermuda Government's relationship with MM&I from 17 December 2012 to 13 September 2017, including all communications and correspondence, memorandum of understanding, minutes of meetings and other records (**item 1**).
 - b. Details of a trip to Florida taken by then Minister Shawn Crockwell around May 2015 with members of the BCGC and MM&I principals, including itineraries, expenses, emails, participants and any other records (**item 2**).
5. Separately in October 2017, the Royal Gazette published a special media report on MM&I, which featured records disclosed by the BCGC under the PATI Act⁷.
6. Although the Applicant and Economic Development and Tourism communicated after the PATI request was made, Economic Development and Tourism never issued an initial decision in response to the request.
7. On 23 May 2018, the Applicant sought an internal review, which Economic Development and Tourism failed to respond to in a timely manner.
8. In response to the Information Commissioner's Decision Notice 07/2018, Ministry of Economic Development and Tourism Headquarters, Economic Development and Tourism issued an internal review decision on 23 August 2018. The internal review decision granted the Applicant access to an email responsive to item 2 of the PATI request but denied access to the remaining responsive records. Economic Development and Tourism decided that the PATI Act did not apply to some of the records created or obtained by the Attorney-General's Chambers (**AG's Chambers**), in accordance with section 4(1)(b)(vi) of the PATI Act. Economic Development and

⁶ Royal Gazette, 'MM&I responds to special report' (19 October 2017), available at <http://ourac.royalgazette.com/news/article/20171019/mmandi-responds-to-special-report>.

⁷ Royal Gazette, 'Concern as MM&I jostles for a seat at the table' (18 October 2017), available at <https://www.royalgazette.com/other/news/article/20171018/concern-as-mmi-jostles-for-a-seat-at-the-table/>; 'Gambling with our future' (18 October 2017), available at <https://www.royalgazette.com/other/news/article/20171018/gambling-with-our-future/>; and 'Casino: Timeline of events' (18 October 2017), available at <http://ourac.royalgazette.com/news/article/20171018/casino-timeline-of-events>.

Tourism also denied public access to records under sections 26 and 27(1) of the PATI Act for information received in confidence and Cabinet documents, respectively.

9. The Applicant made a timely application for an independent review by the Information Commissioner.

Investigation

10. 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.
11. 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.
12. The Information Commissioner notified Economic Development and Tourism of the Applicant's valid application on 14 September 2018 and requested the withheld records. Although Economic Development and Tourism provided a copy of the withheld records on 28 September 2018, it did not include a completed Schedule of Records clarifying the grounds for withholding specific records, as the Information Commissioner's Office (**ICO**) had requested.
13. In November 2018, the Government dissolved Economic Development and Tourism and restructured ministerial responsibilities. In July 2019, the Government clarified that the records responsive to the PATI request had been transferred to and were held by the then Ministry of Tourism and Transport Headquarters (**Tourism and Transport**).
14. During the review, Tourism and Transport conducted additional searches and identified 43 newly located records that may be responsive to the PATI request. These newly located records have not been processed under the PATI Act and are not considered in this review.
15. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any concerned third party a reasonable opportunity to make representations. Tourism and Transport, the Applicant and MM&I were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review. Tourism and Transport was further

asked specific questions to justify its reliance on the exemptions in the PATI Act. Tourism and Transport, the Applicant and MM&I made submissions.

16. Several times during this review, Tourism and Transport revised its position on disclosing the originally withheld records as well as the exemptions it relied upon. This review considers the public authority's position as presented by the time of this Decision – that records 14 and 15 are exempt under section 26(1)(a) and record 16 is exempt under sections 25(1)(b)-(d), but that the rest of the records considered in this review are not exempt and can be disclosed to the public. This review also considers MM&I's objection to the disclosure of all records under the two exemptions for information received in confidence in section 26 and the four exemptions for commercial information in section 25.
17. In July 2020, Tourism and Transport was dissolved and matters related to tourism were transferred to the remit of the Cabinet Office. As a result, responsibilities for responding to the Information Commissioner's review was transferred to the Cabinet Office.

Information Commissioner's analysis and findings

18. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the public authority, the Applicant and MM&I. She is satisfied that no matter of relevance has been overlooked.
19. It has been nearly three years since the Applicant sought a review by the Information Commissioner of the public authority's internal review decision denying access to the relevant records, which is very regrettable indeed. Although it is not excusable, the Information Commissioner acknowledges that the limitations on resources within her office contributed to the delay. These challenges were compounded by the restructuring within government that shifted responsibility for this review to a new department twice during the course of the ICO's investigation. The Information Commissioner apologises unreservedly to the Applicant for these delays.

Preliminary issue – Information Commissioner's mandate and reviews, Parts 6 and 7

20. In the third party's submissions through its counsel, MM&I made a number of statements concerning the role of the Information Commissioner which are incorrect. Of particular concern are statements from MM&I making an assumption that the Information Commissioner previously required disclosure of records containing

MM&I's business information, without affording MM&I a reasonable opportunity to make submissions. Despite the ICO's explanations concerning the role of the Information Commissioner and the scope of the Information Commissioner's reviews, MM&I through its counsel continued to submit inaccurate statements on these matters. In light of the ongoing misunderstanding of the mandate and role of the Information Commissioner and the work of the ICO, the Information Commissioner is of the view that clarity is required.

21. MM&I raised concerns based on its misbelief that the Information Commissioner disclosed MM&I's confidential information as a result of four previous PATI requests made in 2017 and 2018. MM&I argued that disclosing the records responsive to these PATI requests circumvented section 47(4) of the PATI Act, which requires the Information Commissioner to provide a reasonable opportunity to the parties, including a third party concerned, to make representations. MM&I asserted that this was "unequivocally a violation of the PATI Act and consequently subject to legal action".
22. When the ICO provided additional information to MM&I about the records considered in this review, MM&I replied that many of these records "were previously denied by the Information Commissioner for disclosure under a PATI request made by the Royal Gazette".
23. In accordance with section 45(1) of the PATI Act, the Information Commissioner conducts an independent review of the internal review decision by the head of a public authority (or the failure to issue one) on a PATI request. As the ICO explained to MM&I, any disclosure of records in a public authority's initial response to a PATI request, or as a result of its internal review decision, occurs during that public authority's handling of the PATI request. Neither the Information Commissioner nor the ICO is involved in a public authority's decision making process under the PATI Act.
24. MM&I's assertion that the Information Commissioner violated section 47(4) of the PATI Act, by not consulting MM&I prior to the disclosure of records in the four prior PATI requests, is misplaced. The requirement in section 47(4) to afford a reasonable opportunity to the parties, including a concerned third party such as MM&I, applies only after the Information Commissioner commences a review under section 47(1), and not during a public authority's initial handling of a PATI request.
25. More generally, when public authorities are issuing the initial response to a PATI request or their internal review decision, section 63 of the PATI Act provides for the protection against liability for any public authority, its employees or agents in respect

of the disclosure “by any of them of any record under this Act, or any action taken or omitted to be taken under this Act”. Liability may only be found when it “is shown that the authority, employee or agent acted in bad faith”. Section 63 provides the same protection from liability for the Information Commissioner and the ICO’s officers. The Information Commissioner highlights section 63 with the hope that its provisions provide reassurance to public authorities, its employees and agents when they fulfil their obligations under the PATI Act in good faith – placing threats of legal action and any accompanying hyperbole in their proper context.

26. Correspondingly, third parties have a proper avenue to invoke their rights in accordance with the PATI Act. Parts 5 and 6 of the PATI Act afford third parties the right to seek a review under the PATI Act, and section 39 of the PATI Act requires notice to be given to third parties by public authorities prior to an initial disclosure of records, under specific circumstances.
27. As a practical matter, disagreement or good faith errors may arise, resulting in third parties not receiving prior notice of disclosures. The overarching purpose of the PATI Act in section 2 emphasises public disclosure to promote transparency and accountability within the public sector, in contrast with transactions conducted solely within the private sector. At the same time, adherence to good practice concerning third party notification, when appropriate, will further the Act’s “protection of the rights of others”⁸.

Reasonable search – section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations

28. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to requests completely and accurately. Regulation 5 of the PATI Regulations requires public authorities to make reasonable efforts to locate records responsive to the request. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.
29. The Information Commissioner has set out the test for determining whether a public authority’s search was reasonable in Decision Notice 04/2017, Department of Health.

⁸ For further information on third party notifications, see the PATI Administrative Code of Practice for Public Authorities issued by the Cabinet Office in January 2020, at paragraphs 22.3-22.19, available at <https://www.gov.bm/sites/default/files/PATI-Administrative-Code-of-Practice.pdf>.

Public authority's submissions

30. The public authority has accepted that it did not conduct a reasonable search during the original processing of the PATI request, because it did not search the government email accounts of the relevant former Ministers.

Applicant's submissions

31. The Applicant did not make submissions on this point.

MM&I's submissions

32. MM&I was not invited to make submissions on the reasonableness of the public authority's search, as this issue does not relate to its third party interests.

Discussion

33. The Information Commissioner is not satisfied that the public authority conducted a reasonable initial search to locate records responsive to items 1 and 2 of the PATI request. The public authority did not search the government email accounts of the relevant former Ministers.
34. The Information Commissioner notes that, during this review, the public authority conducted additional searches and identified 43 newly located records responsive to the request, which remain to be processed under the PATI Act.

Breach of confidence – section 26(1)(b)

35. A public authority or, as in this case, a third party may rely on section 26(1)(b) as justification for denying access to a public record if the record's disclosure would constitute a breach of a duty of confidence arising under any provision of law.
36. In accordance with the Interpretation Act 1951, 'any provision of law' means "any provision of law which has the effect for the time being in Bermuda, including any statutory provision, any provision of the common law, any provision of the Constitution, and any right or power which may be exercised by virtue of the Royal Prerogative". A duty of confidence may be created by a provision of an agreement or may arise in equity.
37. A party asserting a duty of confidence arising from agreement must show that the records would fall within the scope of the relevant confidentiality or non-disclosure clause.

38. A breach of an equitable duty of confidence requires a showing that:
 - a. the information has the necessary quality of confidence;
 - b. it was given in circumstances which create an obligation that the information be kept confidential; and
 - c. there must have been an unauthorised use of the information, which in some circumstances must be to the detriment of the confider.
39. Section 26(1)(b) also requires that the disclosure 'would' constitute a breach of confidence. 'Would' means that there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring.
40. The exemption in section 26(1)(b) is subject to the public interest test. 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.
41. In sum, a public authority or third party seeking to rely on the exemption under section 26(1)(b) for a breach of a duty of confidence must ask:
 - [1] Does a duty of confidence arise under the law?
 - [2] Would disclosure constitute a breach of that duty of confidence under the law?
 - [3] If the exemption is engaged, whether the balance of the public interest requires disclosure?
42. 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 26(1)(b), the public authority, or any third party concerned, 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

43. The public authority did not rely upon section 26(1)(b) as the basis for denying access to the responsive records and made no submissions on this issue.

Applicant's submissions

44. The Applicant's submissions did not address whether the exemption was engaged. Instead, the Applicant made fulsome submissions on the public interest factors set forth in regulation 2 of the PATI Regulations. The Applicant submitted that disclosure was in the public interest because it would promote a greater understanding of the process or decisions of public authorities; provide reasons for decisions taken by the Government; promote accountability of and within Government; promote accountability for public expenditures or more effective use of public funds; deter or reveal wrong-doing or maladministration; and reveal untrue, incomplete or misleading information or acts of a public authority.
45. More specifically, the Applicant referred to a special report published by the Royal Gazette to highlight a potential conflict of interest raised when the former Ministers who urged the Government to sign a MoU with MM&I then subsequently became the attorneys for MM&I upon their departure from the Cabinet. The Applicant also argued that these former Ministers later urged that casino gambling be legalised in Bermuda, when they remained in their role as Members of Parliament.
46. The Applicant highlighted that the MoU related to a potential contract worth millions of dollars for a cashless gaming system. The Applicant also referred to concerns raised by the BCGC on whether the arrangement outlined in the MoU was still under consideration and whether the arrangement could prove problematic due to regulatory issues surrounding the gaming licenses of MM&I's partner company, Banyan, in two states in the United States of America. The Applicant pointed out that Banyan had made a public presentation on the need for a cashless gaming system in Bermuda at a town hall meeting on responsible gaming, organised by the then opposition (now governing) political party on 3 May 2017.
47. The Applicant further explained that, although both MM&I and Banyan have publicly expressed their loss of interest in being involved in Bermuda's casino gaming industry, the Finance Minister and Premier have indicated that a cashless gaming system remains the preferred approach in Bermuda.
48. The Applicant also noted that following publication of the Royal Gazette's special reports, MM&I claimed publicly that it had planned to give most of its profits to charity, and disclosure of the withheld records may be able to confirm this commitment.
49. The Applicant asserted that although the Royal Gazette's special reports brought to light major issues of public interest, the taxpayers still do not know what occurred

behind closed doors. Bermuda's casino gaming industry remains an issue of major public interest, including who will benefit, how it will be regulated, what measures will be in place to ensure there is no corruption. Disclosure of the records could shed light on any conflicts of interest, how MM&I came to get the MoU, whether the deal was still under consideration after the 2017 election, and whether the BCGC was justified in raising concerns about the MoU with MM&I.

50. Finally, the Applicant submitted that the public interest would be served by the disclosure of information about the connections the principals of MM&I and Banyan have with elected officials and how those ties may have influenced decision making and plans for the spending of public money.

MM&I's submissions

51. MM&I relies upon section 26(1)(b) to object to the disclosure of any of the records being considered in this review. MM&I referred to the NDA between MM&I and the Bermuda Government executed on 5 July 2013, and the confidentiality clause contained in the MoU between these same parties.
52. Bearing in mind the NDA and MoU, MM&I submitted that it was 'unequivocally understood and agreed' that all its business communications, correspondence, presentations, submittals and meeting discussions with the Bermuda Government were confidential and business sensitive in nature. MM&I submitted that this understanding and agreement extended to both the BCGC and Tourism and Transport.
53. In support of this assertion, MM&I provided a copy of the NDA and its correspondence with the BCGC discussing the applicability of the NDA to the BCGC.
54. MM&I stated that the previous disclosure of records relating to it as part of the initial response to prior PATI requests had resulted in severe personal stress to its principals, significant reputational damage and financial loss of business opportunity.

Discussion

55. The Information Commissioner considers MM&I's assertion of the exemption in section 26(1)(b) to all records at issue in this review, i.e., records 1-8, 10-12 and 14-19.

[1] Does a duty of confidence arise under the law?

56. MM&I asserted a duty of confidence arising out of the NDA and MoU executed with the Government. Specifically, MM&I referred to the NDA as a whole and clause 9 of the MoU. MM&I broadly claimed that these created a non-disclosure agreement for all of “MM&I’s business communications, correspondence, presentations, submittals and meeting discussions with the Bermuda Government”.
57. MM&I has not offered any further details, arguments or evidence to carry its burden in support of its position. With this in mind, the Information Commissioner will consider objectively whether the NDA and clause 9 of the MoU create the public authority’s duty of confidence to MM&I.
58. Turning first to the NDA, it was signed by the Government and MM&I in July 2013 and terminated in July 2018, one month before the internal review decision was issued. Clause 7 of the NDA requires the Bermuda Government to “hold confidential all Contractor-provided information” that related to the specific subject matter of the NDA, e.g., the “marketing, design, configuration, implementation, operation and management of gambling” in Bermuda (**the gambling program**). Clause 7 prohibits the Government from copying, duplicating or distributing information relating to the gambling program, without obtaining MM&I’s express permission.
59. The NDA describes additional obligations on the Government and describes services to be provided by MM&I, which are conditional on future agreements and would go beyond the scope of an NDA.
60. The signed NDA contains contradictory indications of whether it created an obligation on the parties as well as the extent of any obligation. It contains an express statement that the parties executed it “intending to be legally bound”, and clause 7 is a material term creating a duty of confidence owed by the Government to MM&I specifically concerning (a) “all Contractor-provided information” and (b) the gambling program.
61. At the same time, the former Tourism Minister’s signature is qualified by hand-written initials with a dated statement that his signature and agreement are “conditional on future engagement”.
62. Further, the entire NDA is written as if MM&I will be performing the anticipated services. The Government never entered into an agreement with MM&I to provide the services described in the NDA. Nor does the NDA clearly apply to information provided by MM&I as part of the Government’s consideration or evaluation of proposals for a cashless gaming solution, in response to the RFQ in 2015. In this respect, the former Minister’s note that the obligations are subject to further

agreements raises questions about the scope and applicability of the NDA that MM&I did not address in its submissions to the ICO.

63. The subsequent MoU is dated 3 December 2013 and contains a provision on 'Confidentiality and Solicitation' in clause 9 which is limited to "any information provided" to the parties "in connection with the transactions contemplated by this MoU". The transactions contemplated by the MoU were MM&I's provision of gaming network services to the Government, following the enactment of casino gaming legislation. Should those transactions come into effect, the parties agreed that the information "will be kept confidential". The MoU also acknowledges that disclosure may be made if "required to be disclosed by law".
64. Although the MoU contains clause 9, a duty of confidence did not arise from it because the parties' agreement to keep certain information confidential was expressly conditioned on a number of factors. Specifically, the MoU was expressly "subject to contract" (meaning the parties have not yet reached a legally binding agreement and executed a contract), and numerous provisions refer to the future transactions and services that would be governed by future legal agreements.
65. Notably, clause D of the MoU also clarifies that:

Any agreement(s) and each of them, which may be entered into by the Parties, will be subject to, and must be made expressly conditional upon, the legislation of casino style gaming and/or electronic gaming in Bermuda.

66. No further agreements were entered into by the parties, and casino gaming legislation was not enacted before the Government sent notice to MM&I on 17 July 2016 to terminate the MoU effective as of 16 August 2016. MM&I has also publicly stated that the MoU was deemed "null and void" by 13 December 2013, when the Government announced that it would not hold a referendum on gaming⁹.
67. In any event, even if a duty of confidence arose from the MoU's confidentiality provision in clause 9, this provision is limited to contemplated transactions and conditions that never materialised, and it has no effect on the records at issue in this review.

⁹ Royal Gazette, 'MM&I responds to special report' (19 October 2017), available at <http://ourac.royalgazette.com/news/article/20171019/mmandi-responds-to-special-report>.

68. Although clause 9 does not give rise to a duty of confidence, the MoU's recitation of the 'Entire Agreement' in clause 13.1 states that it includes '[t]his MoU together with the Non-Disclosure Agreement' dated 5 July 2013 and 'entered into by the Government and MM&I'. As a result, the duty of confidence arising from both the MoU and NDA is based upon the provisions of the NDA.
69. The NDA and MoU, taken together and considered in their entirety, do not support a conclusion that the confidentiality obligation was 'unequivocally understood and agreed', as MM&I claims through its counsel. Questions arise concerning its binding nature, scope and applicability, as highlighted above. It is also significant that the Government did not assert the exemption for breach of confidence in section 26(1)(b) in this case, by relying on the NDA or MoU as creating a duty of confidence.
70. Without explanation from MM&I addressing any of these issues, the Information Commissioner accepts only that the NDA created an agreement that the Government¹⁰ would hold confidential information from MM&I that specifically related to the "marketing, design, configuration, implementation, operation and management of gambling" in Bermuda. Although the NDA is anything but clear, the Information Commissioner will accept for the sake of argument, without deciding, that the language "relates to" is inclusive of both the actual provision of a future "gambling program" which was envisioned, as well as the information and presentations that MM&I gave to the Government as part of its effort to secure a contract for its services.
71. Objectively however, it is unreasonable to extend the provisions of the NDA to MM&I's submissions through the public procurement process that began in May 2015, following the enactment of the PATI Act.
72. The Information Commissioner also views the NDA as applying to information from MM&I that specifically relates to its provision of a gaming network system to the Government. That endeavour involves a private company seeking to sell its gaming network systems product. This is distinct from the Government's broader considerations related to the introduction of casino gambling legislation in Bermuda as a matter of public policy.

¹⁰ MM&I also asserts that the NDA extended to the BCGC, an independent statutory body established in 2015 in accordance with the Casino Gaming Act 2014. The Information Commissioner makes no finding on the applicability of the NDA to the BCGC because the records in this review are held by the Cabinet Office.

[2] Would disclosure constitute a breach of that duty of confidence under the law?

73. To determine whether disclosure would constitute a breach of the duty of confidence discussed above, the Information Commissioner next considers whether the records at issue fall within the scope of the NDA's confidentiality obligation.
74. The Information Commissioner does not further consider section 26(1)(b) for records 1-6, 11, 12 nor 16. The NDA only covers 'Contractor-provided' information specifically related to the defined scope of the 'gambling program'. MM&I has submitted no other argument to support the finding of a confidentiality obligation for these records.
75. Records 1-4, 6, 11 and 12 consist of email correspondence solely between public authorities that does not contain information provided by MM&I. Although record 5 includes an email provided by MM&I, it addresses public policy matters, not MM&I's potential provision of gaming network services.
76. Record 16, the MoU between the Government and MM&I, is not covered by clause 7 of the NDA because it contains terms that were mutually agreed by the respective parties and does not constitute information provided by MM&I¹¹.
77. Turning to the remaining records, records 7, 8 and 10 are email correspondence involving MM&I that are too far removed from the delivery of the gambling program services, which are the subject of the NDA.
78. Records 14, 15 and 18 contain information about MM&I's cashless gaming equipment business solutions and its efforts to market its gaming solution to the Bermuda Government and others.
79. MM&I provided records 14, 15 and 18 to the Government after the Government published its RFQ as part of its public sector procurement process, and after the PATI Act came into effect as part of the law of Bermuda on 1 April 2015.
80. Record 15 was specifically submitted to the Government in response to the RFQ, and contains much information that MM&I has otherwise made public. Objectively, it is in no way clear that a reasonable individual would view the 2013 NDA as applicable to

¹¹ See the UK Information Tribunal Decision No. EA/2008/0018, Department of Health v Information Commissioner, at paragraph 34: "If the Contract signifies one party stating: 'these are the terms upon which we are prepared to enter into a Contract with you' by the acceptance of that Contract the other party is simultaneously stating 'and these are the terms upon which we are prepared to enter into a Contract with you'. Consequently the Contract terms were mutually agreed and therefore not obtained by either party."

this public sector procurement process. The Information Commissioner does not accept that record 15 comes within the scope of the NDA.

81. Records 14 and 18 were provided to the Government outside the RFQ process. The Information Commissioner accepts that the part of these records containing information which MM&I has not otherwise made public falls within the scope of the NDA.
82. Records 17 and 19 are timelines of events that contain information provided by MM&I. It is questionable whether these timelines relate to the actual provision or marketing of the gambling program or related gaming equipment that is the subject of the NDA, rather than relating to the collateral issues arising out of the business relationship between the Government and MM&I.
83. For the sake of argument, the Information Commissioner will assume, without deciding, that the NDA covers the parts of records 7, 8, 10, 17 and 19 containing information provided by MM&I that MM&I has not already made public.
84. As noted above in paragraphs 56-57, MM&I relies upon the NDA and MoU agreements, and does not point to additional circumstances that may give rise to an equitable duty of confidence. No material difference exists when considering the questions for an equitable duty of confidence, set out in paragraph 41 above, in light of the same set of facts. It leads to the same conclusion for both the existence of an equitable duty of confidence as well as whether that obligation would be breached by disclosure. Finally, the following public interest analysis is applicable regardless of the basis of the duty.

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

85. The balance of the public interest in disclosure is considered for records 7, 8, 10, 14 and 17-19.
86. The balance of the public interest requires disclosure of records 7, 8, 10, 14, 17 and 19, as well as record 18 in part, in accordance with section 26(2). MM&I has not made submissions on the balance of the public interests.
87. Favouring non-disclosure, there is a strong public interest in protecting confidentiality and honouring the duty of confidence. In this context, that could involve protecting propriety technical or business information. Potential vendors with public authorities must have assurance that their propriety information will be safeguarded to prevent

others from using public access to information laws to achieve a commercial advantage over them.

88. The Information Commissioner agrees with the Applicant, however, that significant public interest concerns weigh in favour of disclosure. As the Applicant pointed out, the public has a substantive question concerning how, prior to the enactment of the Casino Gaming Act 2014, MM&I facilitated the signing of a NDA and MoU with the Government. It further begs the question of the nature of the relationships between MM&I and the relevant elected officials at the time, particularly given that the former Minister of Tourism Development and Transport and the former Attorney General then became the legal representatives of MM&I in their private capacity. Disclosure of the records may shed some light on the relationship between MM&I and the Government prior to the enactment of casino gaming legislation.
89. Further, disclosure of those records that relate to the procurement process is also in the public interest. Transparency in procurement facilitates disclosure of any irregularities in the procurement process or deviations from known procurement practices. Alternatively, disclosure can demonstrate adherence to the publicly known procurement process, consistent with the published RFQ notice.
90. In light of the NDA and MoU, the public has a strong interest in understanding how MM&I conducted itself before, during and after the procurement process, which appears to have never been completed. MM&I's 'gaming partners' from Banyan urged the Government to include a cashless gaming system in the legislation during a public Town Hall Forum¹². It is unclear to the public what the relationship was between the public RFQ process and the parallel marketing efforts MM&I engaged in with the Government.
91. The public also has a wider interest in understanding the history of events surrounding the introduction of gaming as a new industry in Bermuda. Disclosure of the timelines in records 17 and 19 will further these public interest factors.
92. Overall, the public's strong interest in understanding the business relationship between MM&I and the Government, as well as the nature of the procurement process, outweighs the public interest in maintaining confidence. This is primarily because the records themselves contain little, if any, propriety information or information that cannot otherwise be ascertained publicly from observing the business services offered by MM&I or by reviewing its and its then business partner's

¹² Royal Gazette, 'Panel debates problem gaming' (5 May 2017), available at <https://www.royalgazette.com/other/news/article/20170505/panel-debates-problem-gambling/>.

own public statements. The exception to this is for a part of record 18 which contains more detailed information about MM&I's proprietary business practices than MM&I has otherwise made public.

93. The remaining information in these records concerns the manner in which elected officials conducted business with a company that sought to provide services to the Government at the public's expense. The public will benefit, or bear the burden of the costs arising, from this relationship. This is not a situation of wholly private interests. The need for accountability and transparency concerning such matters is a weighty public interest.
94. The Information Commissioner is satisfied that, even if the exemption were engaged for a breach of a duty of confidence, these concerns would constitute an overriding public interest in disclosure and lead to the balance of the public interests favouring disclosure, except for the part of record 18 described above.

Conclusion

95. The Information Commissioner is not satisfied that the exemption for a breach of a duty of confidence in section 26(1)(b) of the PATI Act is engaged for records 1-6, 11, 12, 15 or 16.
96. The Information Commissioner is satisfied that the exemption is engaged for records 14 and 18, and assumes, without deciding, that the exemption is engaged for records 7, 8, 10, 17 and 19.
97. The Information Commissioner is further satisfied that, even if the exemption in section 26(1)(b) were engaged for any of the records above, the balance of the public interest would be better served by disclosure for all of the records, except for a part of record 18.

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

98. Section 26(1)(a) allows a public authority 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".

Information communicated in confidence

99. Information is communicated in confidence when it was received under an express or implied understanding that the information would be kept confidential. The agreement does not need to be formal. It could arise from a general understanding that communications of a particular nature will be kept confidential.
100. The question for the exemption in section 26(1)(a) is not whether the information is so sensitive that it is confidential, but whether it was communicated in a manner or through a process that shows an expectation that it would be treated confidentially, such as a call to a confidential hotline.
101. The analysis focuses on how the third party gave the information and how the public authority received or agreed to hold the information. The fact that information is of a sensitive nature may be one of the factors relied upon to decide that there was an implied understanding that the information would be kept confidential. Other considerations may include the expectation of the party giving the information to a public authority; any assurances sought regarding the confidentiality of the information; the purpose for which the information was provided; and any other action that the parties may have taken with respect to the information, e.g., if the information was shared further and under what circumstances.
102. Relatedly, the information must have been given with the understanding that the public authority would treat the information as confidential. This understanding may be expressed or implied. The factors that should be taken into account when determining whether there was an understanding of confidentiality may include whether any statement or assurance of confidentiality was given at the time the information was provided; the purpose for which the information was sought or provided; the practice, procedure or policy of the public authority with regard to such information generally; any action which the public authority may be expected to take in relation to the information; and the nature of the relationship between the provider of the information and the public authority receiving it.

Would be likely to prevent

103. A public authority or third party must also show that disclosure 'would be likely to' prevent the public authority from receiving further similar information in the future that is required to properly fulfil the public authority's 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, even if the likelihood did not amount to being more probable than not.

104. The public authority or third party must also show how the information is necessary for the public authority to fulfil one of its functions. The PATI Act and Regulations do not define 'functions'. Section 7 of the Interpretation Act 1951, however, defines 'functions' as "the power conferred or duties imposed on the authority or officer by or under any provisions of law". In the context of section 4 of the PATI Act, the Information Commissioner has explained that the unique functions of a public authority are distinct from its general administrative duties that many public authorities share¹³. Thus, the functions of a public authority are generally those identified by the Constitution, statute or other provision of law.
105. The exemption for information received in confidence is also a qualified exemption subject to the public interest test. If the exemption in section 26(1)(a) is engaged, the public interest test must be considered.
106. In sum, to invoke the exemption for information received in confidence, a public authority must ask:
 - [1] Whether the information was given by a third party (other than another public authority)?
 - [2] Whether the information was given in confidence and with the understanding that it would be held confidentially?
 - [3] Whether disclosure would be likely to prevent the public authority from getting such information again in the future?
 - [4] Whether that information is required for the public authority to fulfil its functions?
 - [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?
107. Finally, the public authority, or third party, has the burden to show, on the balance of probabilities, that it has provided sufficient support to justify applying the exemption to deny public access.

¹³ See Decision Notice 02/2019, Office of the Governor, at paras. 19-21.

Public authority's submissions

108. The public authority relies on the exemption in section 26(1)(a) to withhold records 14 and 15, but did not provide any arguments or reasoning to support the application of the exemption.

Applicant's submissions

109. The Applicant made the same submissions as detailed above in paragraphs 44-50.

MM&I's submissions

110. MM&I made the same submissions as detailed above, in paragraphs 51-54, to invoke section 26(1)(a) to withhold all of the records.

Discussion

111. The Information Commissioner considers the application of section 26(1)(a) to records not properly withheld under section 26(1)(b), i.e., 1-8, 10-12, 14-17, 19, and the remaining part of 18.

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

112. Records 1-4, 6, 11 and 12, as well as parts of 5, 7, 8 and 10 are email correspondence between employees or officers of public authorities. These records and parts of records do not contain information given by a third party and are not considered further for section 26(1)(a).

113. As explained above in paragraph 76, record 16 also is not information given by a third party, but instead is a MoU negotiated between MM&I and the Government, and will not be considered further for this exemption.

114. The remaining records 14, 15, 18 and 19, along with the remaining parts of records 5, 7, 8, 10 and 17 contain information that was given by a third party (i.e., MM&I) to a public authority.

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

115. For the reasons stated above in paragraphs 78-81, the Information Commissioner accepts that records 14 and 18 were provided by MM&I in confidence and arguably with the expectation that it would be held confidentiality.

116. Also as explained above, MM&I submitted record 15 in response to a public RFQ process, after the PATI Act came into effect. MM&I had an expectation that it would be the successful vendor. Objectively, these circumstances do not demonstrate that the RFQ submissions was given in confidence, with the exception of personal information in the submission that MM&I requested be kept confidential. Further, the public authority offered no understanding that it would hold the submission in confidence. Rather, the law, policy and practice at the time suggested otherwise.
117. MM&I's cover page to its submission labels the entire document 'Strictly Private & Confidential'. It is well settled that such labelling, on its own, is insufficient to impose an understanding of confidence¹⁴. This is particularly true when the Office of Project Management and Procurement guidelines, in place in May 2015, made clear the impact of the PATI Act upon procurement. This would include the need to specify the information in a submission that a bidder seeks to keep confidential.
118. It is not clear whether record 19 along with parts of records 5, 7, 8, 10 and 17 were given in confidence and with the understanding that the information would be held confidentially. The public authority does not invoke section 26(1)(a) for these records. MM&I relies on the NDA and MoU but, as discussed above at paragraphs 69-72, MM&I has failed to support its assertions. MM&I has not provided other evidence to support that the information in these records was provided in confidence and with the understanding that it would be held confidentially.
119. For the sake of completeness, however, the Information Commissioner will consider the remaining elements of section 26(1)(a) for record 19 and the remaining parts of records 5, 7, 8, 10 and 17, along with record 14 and the remaining part of record 18, which she accepts to have been given in confidence and with the understanding that they would be treated as confidential.

¹⁴ See Decision Notice 13/2018, Ministry of Finance Headquarters, where the Information Commissioner discussed confidentiality in the context of the exemption in section 32(1)(b) (international relations – information communicated in confidence). In paragraph 86, the Information Commissioner stated that, although the fact that a document is marked as 'confidential' is one of the factors to be taken into consideration when determining whether it was communicated in confidence, "this will not be conclusive of the matter". This position is well accepted in other jurisdictions, such as Ireland. See, for example, Ireland's Office of the Information Commissioner's 'Guidance Note, Freedom of Information Act 2014 – Section 35: Information Obtained in Confidence', at paragraph 3.4.6: "Where records are marked 'Confidential' or something similar, this may be a relevant consideration. However, the Commissioner takes the view that such labelling is not sufficient". The Guidance Note is available at [https://www.oic.ie/guidance-and-resources/guidance-notes/Guidance-Note-Section-35-\(March-2016\)-Vii.pdf](https://www.oic.ie/guidance-and-resources/guidance-notes/Guidance-Note-Section-35-(March-2016)-Vii.pdf).

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

120. The Information Commissioner disagrees that disclosure of records 14 and 19, and parts of records 5, 7, 8, 10, 17 and 18 would prevent the public authority (or the BCGC, who is now responsible for gaming-related matters) from receiving similar information in the future. Neither the public authority nor MM&I address this question. In any event, MM&I gave the information to the public authority as part of MM&I's bid to provide gaming network management system services to Bermuda. Many of these records were provided prior to any solicitation or RFQ by the public authority. In the future, the public authority, or the BCGC, would be likely to receive similar information from any party interested in providing similar services. Other service providers are available, as evidenced by responses other than MM&I's to the RFQ.

121. Furthermore, as the Information Commissioner highlighted in Decision Notice 09/2019, Department of Public Lands and Buildings, disclosure is more likely to result in future service providers or consultants adapting their business practices to conform to the need for accountability concerning public funds and public procurement processes, instead of deciding not to conduct business with or refusing to provide information to the public authorities altogether. Vendors may place commercial information in schedules, with a specific explanation of why it is exempt, or otherwise prepare their submissions with the knowledge that, if successful, their submission may be subject to public access.

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

122. Even if it was accepted that disclosure would be likely to prevent the public authority from getting similar information in the future, no argument was offered by the public authority or MM&I which explained or supported a finding that the relevant information in records 14 and 19 and parts of records 5, 7, 8, 10, 17 and 18 is required for the public authority to fulfil its functions. Neither the public authority nor MM&I identified the relevant public authority's functions.

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

123. Although the exemption is not engaged, the Information Commissioner maintains the view that if the exemption were engaged, the balance of the public interest would

require disclosure for the reasons set forth above in paragraphs 86-94, discussing records 7, 8, 10 14 and 17-19.

124. Further, the balance of the public interest test also requires disclosure of record 5. It contains no propriety or otherwise confidential information, and no public interests have been identified that would favour maintaining the exemption. The public interests in favour of disclosure include furthering the public's understanding of the development of gaming legislation as a matter of public policy.

Conclusion

125. The Information Commissioner is not satisfied that the exemption for information received in confidence in section 26(1)(a) of the PATI Act is engaged for records 1-4, 6, 11, 12 and 16 and certain parts of records 5, 7, 8 and 10, because none contained information given by a third party. While the Information Commissioner is satisfied that the exemption is engaged for those remaining records, she is not satisfied that its application is justified. Even if section 26(1)(a) were engaged, the balance of the public interest would still require the disclosure of records 14 and 19 as well as the remaining parts of records 5, 7, 8, 10, 17 and 18.

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

126. Section 25(1)(c) allows a public authority to deny access to information if it consists of information which, if disclosed, would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates. This exemption is subject to exceptions in section 25(2) that are not applicable in this case.

127. As explained in Decision Notice 12/2018, Ministry of Finance Headquarters at paragraph 74, a public authority, or third party, must consider five questions when seeking to justify the exemption for adverse effects on commercial interests:

- [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?

128. Finally, a public authority or third party has the burden to show that, on the balance of probabilities, the application of the exemption is justified.

Public authority's submissions

129. The public authority submitted that record 16 is exempt under section 25(1)(c), although did not elaborate further.

Applicant's submissions

130. The Applicant did not comment on the application of the exemption, but made submissions focused on the public interest test, as set forth above in paragraphs 44-50.

MM&I's submissions

131. MM&I invoked section 25(1)(c) for all of the records. It submitted that disclosure of the records would result in severe personal stress to its principals, significant reputational damage and financial loss of business opportunity. MM&I stated that this had occurred previously due to the disclosure of records in response to prior PATI requests, which are not the subject of this review. MM&I stated that the reputational damage prevented MM&I from achieving a return on its investment. It submitted that the disclosures have also denied MM&I potential earnings from involvement with the gaming industry in Bermuda.

Discussion

132. The Information Commissioner considers the application of section 25(1)(c) to records 1-8, 10-12, 14-17 and 19 and the remaining part of record 18.

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

133. MM&I is the corporate person to whom the information in the records relates.

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

134. The personal stress of MM&I's principals does not fall within the scope of a 'commercial interest' for purposes of the exemption in section 25(1)(c).

135. MM&I also identifies its business reputation as a commercial interest. As the Information Commissioner explained in Decision Notice 09/2019, Department of Public Lands and Buildings, at paragraph 128, a third party's reputation, on its own, does not qualify as a commercial interest. MM&I, however, tied its reputation to its

ability to receive a return on its investments and to receive potential earnings from the gaming industry in Bermuda. The Information Commissioner accepts that this constitutes a commercial interest.

[3] What adverse effect could disclosure cause?

136. MM&I expresses concern that disclosure could damage its reputation which, in turn, would affect its ability to receive a return on its investment and to receive income from the gaming industry. Damage to one's reputation, on its own, does not amount to an adverse effect on commercial interests. The Information Commissioner agrees, however, that because MM&I claims that damage to its reputation might result in MM&I's loss of investment return and income, this would amount to an adverse effect on MM&I's commercial interests.

[4] How likely is this to occur?

137. Neither the public authority nor MM&I specified how the disclosure of the records at issue could reasonably be expected to cause the identified adverse effect. The Information Commissioner notes that at the time of the PATI request and the internal review decision, MM&I's efforts to become the gaming system service provider for the Bermuda had already ceased. Third parties asserting the loss of a return on an investment must ensure that they demonstrate that such a loss of a return on the investment could reasonably have been expected to occur because of disclosure. That is not the case here. Finally, MM&I has not shown the Information Commissioner that it is engaged in any current or non-speculative, future commercial activity which could reasonably be affected by disclosure of the records at issue.

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

138. In any event, even if the exemption in section 25(1)(c) were engaged, the balance of the public interest would require disclosure for the reasons explained above in paragraphs 86-94 and 124.

Conclusion

139. The Information Commissioner is not satisfied that reliance on section 25(1)(c) is justified for records, or parts of records, 1-8, 10-12 or 14-19.

Trade secret – section 25(1)(a)

140. Under section 25(1)(a), a public authority may refuse public access to a record if the record consists of trade secrets of any person. The trade secret exemption is subject to exceptions in section 25(2) that are not relevant in this review.

141. Neither the PATI Act nor any other legislation provides a definition of ‘trade secret’. A number of sources of law in the UK assist in defining a trade secret for purposes of the PATI Act. The common law in the UK has long protected a wide range of information as trade secrets¹⁵, and the UK Information Tribunal has adopted the common law understanding in the context of the UK Freedom of Information Act 2000¹⁶. The UK’s official definition of a ‘trade secret’ has recently been codified in section 2 of the UK Trade Secrets (Enforcement, etc.) Regulations 2018 (**Trade Secrets Regulations**)¹⁷:

- a. It is secret in the sense that it is not, in whole or in part, generally known among or readily accessible to persons within the circles of people that normally deal with this kind of information;
- b. It has commercial value because it is secret; and
- c. The person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret.

142. The UK courts have found that the Trade Secrets Regulations codified “principles which were already established in English law”¹⁸.

143. Accordingly, the Information Commissioner finds it appropriate for clarity and consistency to adopt the definition of a ‘trade secret’ set out in section 2 of the UK Trade Secrets Regulations for purposes of section 25(1)(a) of the PATI Act. This definition incorporates the elements at common law, namely that the information is commercial and would cause harm to its owner if disclosed (i.e., ‘has commercial

¹⁵ In Lansing Linde v Kerr [1991] 1 WLR 251, the Court of Appeal explained that information would constitute a trade secret if (a) it was used in trade or business; (b) the owner had ensured limited dissemination or publication of it; and (c) its disclosure would cause real or significant harm to the owner.

¹⁶ In Department of Health v Information Commissioner, EA/2008/0018, the UK Information Tribunal applied the test for trade secrets from Kerr.

¹⁷ www.legislation.gov.uk/uksi/2018/597/contents/made.

¹⁸ See Celgard, LLC v Shenzhen Senior Technology Material Co Ltd., [2020] EWHC 2072 (Ch), at para. 14. See also Trailfinders v TCL [2020] EWHC 591 (IPEC); Shenzhen Senior v Celgard [2020] EWCA Civ 1293.

value because it is secret') and the owner has made reasonable efforts to keep it secret¹⁹.

144. The exemption in section 25(1)(a) is class-based. This means that it does not have a harm test within the exemption. For the exemption to be engaged, the public authority or third party needs to show that the requested records fall within a specific class of records, namely trade secrets.

145. The definition of trade secrets, however, requires a showing that the information has commercial value because it is kept secret and, in turn, that it will lose that value if it were disclosed.

146. A public authority, or third party, must consider three questions when seeking to justify the exemption for trade secrets:

[1] Whether the information is secret because it is not, in whole or in part, generally known among or readily accessible to persons within the circle of people that normally deal with this kind of information?

[2] Whether it has commercial value because it is secret?

[3] Whether the person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret?

147. Finally, a public authority or third party relying on this exemption has the burden to show that the information in the relevant records constitutes a trade secret.

Public authority's submissions

148. The public authority did not invoke this exemption.

Applicant's submissions

149. The Applicant did not comment on the application of the exemption, but made submissions focused on the public interest test, as set forth above in paragraphs 44-50.

¹⁹ See the Information Commissioner's [Guidance on commercial information exemptions \(section 25\)](#), para. 34.

MM&I's submissions

150. Although MM&I specifically referred to all of the exemptions available in section 25 of the PATI Act, it did not provide any specific submissions on the trade secret exemption in section 25(1)(a).

Discussion

151. The Information Commissioner considers the application of section 25(1)(a) to records 1-8, 10-12, 14-17 and 19, as well as the remaining part of record 18.

152. In the absence of MM&I's explanation of how the specific records or parts of records fall within the scope of 'trade secrets', the Information Commissioner is not satisfied that the application of section 25(1)(a) is justified.

Information with commercial value – section 25(1)(b)

153. Section 25(1)(b) allows a public authority to refuse access to a record if it consists of information whose commercial value would, or could reasonably be expected to be, destroyed or diminished by disclosure. Section 25(1)(b) is also subject to exceptions in section 25(2) that are not relevant in this case.

154. A public authority, or third party, should ask the following questions when seeking to rely on the exemption for information with commercial value²⁰:

- [1] Does the information have commercial value, and can the specific nature of the commercial value be described?
- [2] What is the destruction or diminishment of the commercial value of the information that could occur?
- [3] How could disclosure cause this destruction or diminishment?
- [4] Could it reasonably be expected to occur under the circumstances?
- [5] If the exemption is engaged, does the balance of the public interest still require disclosure?

155. Finally, a public authority, or third party, invoking section 25(1)(b) has the burden to show that, on the balance of probabilities, disclosure could reasonably be expected to destroy or diminish the commercial value of the information in the records.

²⁰ Decision Notice 09/2019, Department of Public Lands and Buildings, para. 174.

Public authority's submissions

156. The public authority relied on section 25(1)(b) to withhold record 16 but did not elaborate on its reasoning or support.

Applicant's submissions

157. The Applicant did not comment on the application of the exemption, but made submissions focused on the public interest test, as set forth above in paragraphs 44-50.

MM&I's submissions

158. Although MM&I referred to all of the exemptions available in section 25 of the PATI Act, it did not provide any specific submissions on the exemption in section 25(1)(b) for information with commercial value.

Discussion

159. The Information Commissioner considers the application of section 25(1)(b) to records 1-8, 10-12, 14-17 and 19, and the remaining part of record 18.

160. Neither the public authority nor MM&I identified, with any meaningful specificity, the information in the records that had commercial value. Nor did they explain how the commercial value of the information could be destroyed or diminished if the records were disclosed, nor the likelihood of this occurring. Similarly absent was any discussion of the balance of the public interest.

161. In light of this, the Information Commissioner is not satisfied that the application of section 25(1)(b) is justified for records, or parts of records, 1-8, 10-12 or 14-19.

Prejudice to negotiations – section 25(1)(d)

162. Section 25(1)(d) allows a public authority to refuse access to a record if its disclosure would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates. Section 25(1)(d) is also subject to exceptions in section 25(2) that are not relevant in this case.

163. To rely upon the exemption in section 25(1)(d), a public authority, or third party, must consider the following questions²¹:

²¹ Decision Notice 24/2019, Bermuda Hospitals Board, para. 85.

- [1] Who is the person to whom the information relates?
- [2] What are the negotiations of this person that are of concern?
- [3] What is the specific prejudice to either the conduct or outcome that is of concern?
- [4] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?
- [5] Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?
- [6] If the exemption is engaged, whether the balance of the public interest requires disclosure?

164. Finally, a public authority, or third party, invoking section 25(1)(d) has the burden to show that, on the balance of probabilities, the application of the exemption is justified.

Public authority's submissions

165. The public authority relied on section 25(1)(d) to withhold record 16 but did not elaborate on its reasoning or support.

Applicant's submissions

166. The Applicant did not comment on the application of the exemption, but made submissions focused on the public interest test, as set forth above in paragraphs 44-50.

MM&I's submissions

167. As with the other exemption in section 25, MM&I did not provide any specific submissions on the exemption for prejudice to negotiations in section 25(1)(d).

Discussion

168. The Information Commissioner considers the application of section 25(1)(d) to records 1-8, 10-12, 14-17 and 19, as well as the remaining part of record 18.

169. Neither the public authority nor MM&I addressed any of the elements of the exemption in section 25(1)(d), nor did they provide reasoning or explanation to justify

its application to the records at issue. Neither discussed the balance of the public interest.

170. In light of this, the Information Commissioner is not satisfied that the application of section 25(1)(d) is justified for records, or parts of records, 1-8, 10-12 or 14-19.

Personal information – section 23(1)

171. Under section 23(1), public authorities may refuse access to a record if it consists of personal information, subject to exceptions in section 23(2), which are not relevant in this review.

172. ‘Personal information’ is broadly defined in section 24(1) as ‘information recorded in any form about an identified individual’. Section 24(1) also provides a non-exhaustive list of categories of personal information.

173. Certain categories of information about an identifiable individual, however, do not fall within the definition of ‘personal information’. Section 24(2) dictates that these categories include, among other things, information an individual who is or was an officer or employee of a public authority that relates to the position or functions of the individual or the details of a contractor providing services to the government. As the Information Commissioner has explained, however, routine personal work information of public sector employees as well as the personal information of elected officials and other public officials still fall within the definition of ‘personal information’ in section 24(1)²².

174. Records consisting of personal information should be disclosed if the public interest would be better served, on balance, by disclosure than non-disclosure. Factors that should be taken into account when balancing the public interest related to a disclosure of personal information are²³:

- a. Whether the disclosure will further public interest;
- b. Whether disclosure would be fair to the individual under all of the circumstances; and

²² Decision Notice 02/2019, Office of the Governor, paras. 43-47.

²³ Decision Notice 02/2019, Office of the Governor, para. 51.

- c. Whether disclosure is necessary to further the public interest that has been identified.

175. In sum, to rely upon the exemption for personal information, a public authority or third party must ask²⁴:

- [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?
- [3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?
- [4] If the exemption for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure, or whether disclosure would benefit the individual?

176. The personal information exemption in section 23(2) is the only exemption the Information Commissioner will consider on her own initiative.

Public authority's submissions

177. The public authority did not rely on section 23(1).

Applicant's submissions

178. The Applicant did not comment on the application of this exemption, but made submissions focused on the public interest test, as set forth above in paragraphs 44-50.

MM&I's submissions

179. MM&I invoked the exemption for personal information generally.

Discussion

180. The Information Commissioner considers the application of section 23(1) to records 1-8, 10-12, 14-17 and 19, as well as the remaining part of record 18.

²⁴ Decision Notice 02/2019, Office of the Governor, para. 56.

[1] Whether the records consist of information about an identifiable individual?

181. The Information Commissioner accepts that the records at issue contain information about identifiable individuals. These individuals can be categorised into three groups:

- a. Current or former officers or employees of public authorities, along with former elected officials;
- b. MM&I's principals and staff; and
- c. Other individuals in the private sector.

[2] Whether the information falls within any of the exclusions to the definition of personal information?

182. Records 17 and 19 contain the name of a contractor providing services to the Government. This information falls within the exclusion from the definition of personal information, in accordance with section 24(2)(b). Having carefully reviewed the remaining withheld records, the Information Commissioner accepts that none of the other exclusions in section 24(2) to the definition of personal information are applicable to the information in the records.

183. Of note, the information about the officers or employees of public authorities contained within the records related to their performance of the positions or functions, rather than to the positions or functions themselves as required by the exclusion in section 24(2)(a).

[3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?

184. None of the exceptions in section 23(2) are applicable to the personal information in the records.

185. The exemption for personal information in section 23(1) is engaged for the information about identifiable individuals, as described generally in paragraph 175 above.

[4] If the exemption for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure?

186. There is a general public interest in transparency, which includes informing the public of the decision makers within the public sector. Such transparency has the potential

to reveal conflicts of interest or the absence of them. It may potentially reveal other concerns related to good public administration. In this manner, disclosure enables the public to hold accountable the individuals in decision making positions within public authorities.

187. At the same time, because the information involved is personal information, careful consideration must be given to whether disclosure of the personal information at issue would be fair to the relevant individual and would be necessary to further the identified public interests.

Employees, officers and elected officials

188. The Information Commissioner is of the view that disclosure of the personal information of current or former employees or officers of public authorities who had no senior or decision making role would be both unfair and unnecessary. These employees or officers assumed a non-public facing role and have legitimate expectations that their work information would not be made public unnecessarily. Nor is disclosure of this personal information necessary to further accountability. These individuals lacked significant influence over the public authorities' decisions.

189. In contrast, the names and other routine work information for individuals holding senior and decision making positions in the public authorities should be disclosed. This includes, for example, Permanent Secretaries, Acting Permanent Secretaries, board members and Executive Directors. Similarly, the information related to elected officials should be disclosed.

190. For these senior individuals holding public decision making positions, disclosure of their information in these records would be both fair and necessary. Given their seniority, public facing roles and their involvement in the introduction and development of a gaming industry in Bermuda, these individuals have a lower expectation of privacy for this public work. Further, disclosure is necessary to inform the public how these individuals navigated the early development of the gaming industry in Bermuda, or at least the early consideration of a vendor for a cashless gaming system. This reasoning, however, would not extend to information solely about the private life of an individual, such as a residential address, which would remain exempt from public disclosure.

MM&I's principals and staff

191. MM&I's principals have been very public concerning their role in MM&I's bid to provide a gaming system to Bermuda. Disclosure of their names in the records would

reveal their association with MM&I, which is already well-known. It is also necessary to further the accountability interests discussed above, at paragraph 121.

192. It would be neither fair nor is it necessary, though, to disclose the personal information concerning MM&I's other staff in the records. The administrative and other less senior staff have a legitimate expectation that their work information would not be made public, particularly as employees of a private sector company.

Other individuals in the private sector

193. Interspersed throughout the records are the names and, in some instances, other personal information of individuals from the private sector that MM&I had included in its correspondence to the public authorities. These individuals did not exercise a choice to be included in MM&I's correspondence, nor did the individuals have anything other than a role within the private sector. Disclosure of their personal information would be unfair and is unnecessary to address the public interest concerns above.

Conclusion

194. The Information Commissioner is satisfied that the personal information exemption in section 23(1) is engaged for parts of records 1-8, 10-12 and 14-19. The balance of the public interest, however, requires disclosure of the personal work information of senior officers and employees of public authorities, elected officials, and the names and positions of the MM&I principals. The balance of the public interest favours maintaining the exemption for the remaining personal information in records 1-8, 10-12 and 14-19.

Conclusion

195. The Information Commissioner finds that the public authority did not conduct a reasonable search for records responsive to items 1 and 2 of the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.
196. The Information Commissioner further finds that the reliance on the exemptions in sections 25(1)(a)-(d) and 26(1)(a) and (b) was not justified, except for the application of section 26(1)(b) to a part of record 18.
197. The Information Commissioner also finds that the exemption for personal information is engaged for parts of records 1-8, 10-12 and 14-19. The routine work personal information of senior employees or officers of a public authority and elected officials

as well as the names and positions of MM&I's principals should be disclosed because the balance of the public interest favours disclosure. Disclosing the remaining personal information is not required by the public interest, and records 1-8, 10-12 and 14-19 are appropriately withheld, in part, in accordance with section 23(1) of the PATI Act.

Decision

The Information Commissioner finds that the former Ministry of Economic Development and Tourism Headquarters did not conduct a reasonable search for records responsive to items 1 and 2 of the request in accordance with section 12(2)(b) of the Public Access to Information (**PATI**) Act and regulation 5 of the PATI Regulations 2014. The Information Commissioner further finds that the application of the exemptions in sections 26(1)(a)-(b) and 25(1)(a)-(d) was not justified except for the application of section 26(1)(b) to a part of record 18.

Finally, the Information Commissioner finds that the exemption in section 23(1) was engaged for the personal information in parts of records 1-8, 10-12 and 14-19. The balance of the public interest still requires disclosure of the routine work personal information of senior employees or officers of a public authority and elected officials, as well as the names and positions of MM&I's principals. Disclosure of the remaining personal information is not required by the public interest and the records are exempt, in part, in accordance with section 23(1) of the PATI Act.

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

- requires the Cabinet Office to process the forty-three (43) newly located records responsive to the PATI request, i.e., determine whether the records should be disclosed and issue an initial decision on these records to the Applicant;
- upholds the decision to deny access to record 18, in part, for information that is exempt under section 26(1)(b);
- varies the decision on records 1-8, 10-12 and 14-19 to deny public access, in part, for certain personal information that is exempt under section 23(1);
- reverses the decision to deny access to the remaining records or parts of records; and
- orders the Cabinet Office to disclose the records, in whole or in part, as instructed in the Confidential Annex, which forms part of this Decision.

The Information Commissioner requires that the Cabinet Office process the 43 records and grant access to the records or parts of records listed above, as directed by this Decision and the accompanying Order on or before **Tuesday, 7 September 2021**.

Judicial Review

The Applicant, the Cabinet Office, MM&I 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 Cabinet Office 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
27 July 2021

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

12 . . .

(2) Public authorities shall make every reasonable effort to—

. . .

(b) respond to requests, completely, accurately and in a timely manner.

Public interest test

21 For the purposes of [Part 4], the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure.

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) and (3), a record that consists of the following information is exempt from disclosure—

(a) trade secrets of any person;

(b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by 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;
 - (d) information, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates.
- (2) Subsection (1) does not apply if—
- (a) the information concerned relates to the requester;
 - (b) the person to whom the information relates consents in writing to its disclosure; or
 - (c) the information was given to the public authority concerned by the person to whom it relates and the person 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.
- (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
 - (b) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.
- (2) A record shall be disclosed if disclosure of it is in the public interest.

Public Access to Information Regulations 2014

Reasonable search

- 5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.
- (2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

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