



Decision Notice

Decision 01/2018: Bermuda Tourism Authority

Employee compensation

Reference no: 03092015

Decision date: 25 January 2018

Summary

Bermuda Tourism Authority (BTA) was asked for information related to employee compensation. BTA denied access to the entire record under the exemption in section 25(1)(d) of the Public Access to Information (PATI) Act for prejudice to negotiations, and to part of the record under the exemption in section 30(1)(b) for operations of public authorities. The Information Commissioner accepted a late assertion of the exemption in section 23(1) for personal information.

The Information Commissioner reversed BTA's decision to withhold the entire record. The Information Commissioner found that part of the record contained personal information, which engaged the exemption from disclosure under section 23(1) of the PATI Act. The public interest in transparency and accountability for public spending, however, requires disclosure of more narrow bands for the actual salary, actual maximum incentive information, and actual performance incentive payments. BTA is required to disclose the responsive record, amended to remove personal information. The Information Commissioner also found that the responsive record contained information related to a discretionary benefit of a financial nature that was not personal information, consistent with section 24(2)(c); and that BTA was not justified in denying access to this part of the record under the exemption in section 25(1)(d) because no prejudice to its management functions was identified. Because section 30(1)(b) was not invoked for the discretionary financial benefit, it is not considered in this decision. Under section 48(1) of the PATI Act, BTA is required to grant access to the information related to the discretionary financial benefit and to the redacted responsive record.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010, sections 12(1) (general entitlement to access non-exempt public records); 23(1) (personal information); 24(1); (2)(a) & (c) (definitions of personal information); 25(1)(d) (prejudice to negotiations); 30(1)(b) (operations of public authorities).

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. On 15 July 2015, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Tourism Development and Transport (**Ministry**) for information related to compensation for employees of the Bermuda Tourism Authority (**BTA**). The Ministry transferred the request to BTA on 17 July 2015.
2. Specifically, the Applicant sought:
 - Item 1: The names of employees who had been paid ‘bonuses’ between 15 February 2014 and 14 June 2015;
 - Item 2: The monetary amount that each employee received for their ‘bonus’; and
 - Item 3: The yearly salary paid to Mr. Bill Hanbury, the then-Chief Executive Officer (**CEO**) of BTA at that time.
3. On 18 August 2015, the then-CEO of BTA, Mr. Hanbury, voluntarily released the details of his final 2014 compensation, including his actual incentive payment. This satisfied Item 3 of the PATI request.
4. On 26 August 2015, BTA denied the Applicant access to the remaining responsive records, relying upon the exemptions under section 25(1)(d) for prejudice to negotiations and section 30(1)(b) for prejudice to the operations of public authorities.
5. In its initial decision, BTA also clarified that the ‘bonus’ was actually an incentive payment to its employees that was dependent on meeting their objectives. BTA explained that each position and accompanying employment contract had a market based compensation. It was composed of a base salary that was 95% to 70% of the market-rate compensation and an additional performance incentive for the remainder of the market rate compensation. BTA provided an example that if the market rate compensation is \$100, a typical employee might be hired at a base salary of \$70 and would then need to meet certain performance objectives to earn the remaining \$30.
6. On 27 August 2015, the Applicant made a written request to BTA for an internal review of its decision to deny access to the record.
7. The BTA issued an internal review decision on 1 September 2015, upholding the denial of records on the same grounds as the initial decision.

8. The Applicant filed a valid application for an independent review by the Information Commissioner on 3 September 2015, challenging BTA's reliance on the exemptions in sections 25(1)(d) and 30(1)(b) of the PATI Act.

Investigation

9. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority to conduct an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
10. The Information Commissioner decided early resolution under section 46 of the PATI Act was not appropriate because review of the withheld materials was necessary for her to determine whether BTA's reliance on the exemptions was justified.
11. On 23 October 2015, BTA was notified in writing of the valid application and the case was allocated to an investigating officer.
12. BTA provided the withheld record to the Information Commissioner's Office (ICO). It is an excel spreadsheet with each employee's 2014 total compensation, which included the annual incentive payments BTA made to employees in early 2015. This data supported the figures BTA reported in aggregate amounts in for the year ending 2014 in a document accompanying its 2014 Financial Statements.
13. Section 12(1) of the PATI Act grants a right to access the public record. This means that when a public authority finds a record responsive to a PATI request, the authority must consider disclosure of the entire record, not just a piece of information within it. The information in the withheld record is related to each named employee's:
 - base salary;
 - maximum incentive payment for which the employee was eligible;
 - start date and number of working days;
 - performance evaluation; and
 - actual performance incentive payment.
14. The responsive record also includes information about a discretionary financial benefit for some employees, as well as the total amount of performance incentive payment made to all BTA employees. BTA has already released the total amount of performance incentive

payments it paid for 2014 with the aggregate salary information accompanying its 2014 Financial Statements.

15. Section 47(4) of the PATI Act requires the Information Commissioner to give a reasonable opportunity to the public authority and the Applicant to make representations. BTA and the Applicant were invited to comment on this application. BTA was also asked to answer specific questions to justify its reliance on sections 25(1)(d) and 30(1)(b) of the PATI Act.
16. During the investigation, BTA sought to add the exemption in section 23(1) for personal information as further grounds to justify withholding the responsive record, which was accepted for the reasons explained below.
17. In addition to the information provided in its initial and internal review decisions, BTA made two formal submissions to the Information Commissioner between March 2017 and November 2017, as well as provided submissions during meetings with ICO investigators and in response to follow up questions. The ICO also conducted interviews with certain BTA employees.
18. The Applicant was invited to make submissions on three separate occasions, including after BTA gave notice of its late reliance on the personal information exemption. The Applicant made submissions on the exemptions but did not comment on BTA's invocation of a late exemption.
19. The Information Commissioner acknowledges that this was one of the first applications for review received by the ICO after the PATI Act went into effect, and expresses appreciation to the parties for their cooperation during the investigation.

Information Commissioner's analysis and findings

20. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by both the Applicant and BTA. She is satisfied that no matter of relevance has been overlooked.

Procedural matters: late reliance on new exemption

21. During the course of this investigation, BTA sought to add an exemption to further justify withholding the responsive records. It claimed that the records were exempt under section 23(1) because they contain personal information.

22. Section 12(2)(b) of the PATI Act requires public authorities to respond to a PATI request completely. Section 14 further requires that the public authority's decision on the request must give the Applicant the reasons for the decision, including the relevant facts and arguments as well as the particulars of any public interest considerations. Section 43(2) of the PATI Act creates similar requirements for an internal review decision. The Information Commissioner notes that any revisions to the claimed exemptions should be made in the internal review decision.
23. Together, these provisions require the public authority to fully inform an Applicant of the grounds for withholding access to responsive records, including the applicable exemptions. This allows the Applicant to make an informed decision about seeking an independent review by the Information Commissioner.
24. During a review, the Information Commissioner must determine whether the public authority's decisions under the PATI Act were justified. The Information Commissioner's decision is not a fresh consideration of whether the records should be disclosed or withheld. A public authority's assertions of additional exemptions during the Information Commissioner's review goes beyond the public authority's earlier decisions. Newly asserted exemptions will not be considered unless it is fair to do so under the circumstances and keeping in mind the fundamental purpose of the PATI Act to provide access to public records to the greatest extent possible.
25. In cases where the Information Commissioner agrees to consider the public authority's assertion of a late exemption, the Applicant will be notified of the new grounds and provided an opportunity to respond.
26. Here, BTA sought to add the exemption under section 23(1) for personal information during the ICO's investigation. BTA explained that it had considered, but initially misunderstood, the applicability of the personal information exemption to the withheld records.
27. The Information Commissioner accepted the late assertion of the personal information exemption for two reasons:
- First, the personal information exemption is one of the only exemptions the Information Commissioner will consider on her own initiative. Although the protections of the Personal Information Protection Act (2016) are not yet in effect, the importance of the right to privacy is particularly heightened in a small jurisdiction. As a matter of policy, and consistent with section 48(1)(a) of the PATI Act, the Information Commissioner may vary a decision to withhold a record based upon the 23(1) personal information exemption. Here, the Information

Commissioner would have addressed whether information in the withheld record fell within the personal information exemption, regardless.

- Second, the Applicant was provided an opportunity to make submissions on the addition of the late exemption and did not object.

28. The issues in this review were revised to include whether BTA could properly rely upon the exemption in section 23(1) for personal information to withhold the responsive record, or part of the responsive record.

Personal information – section 23

29. Section 23(1) allows public authorities to withhold records containing personal information, subject to exceptions in section 23(2) that are not applicable in this case.

The definition of ‘personal information’

30. Personal information is defined in section 24(1) as ‘information recorded in any form about an identifiable individual’. Section 24(1) also provides a non-exhaustive list of categories of personal information, such as race, religion, medical or employment history, and education.

The meaning of ‘position or function’ of a public employee

31. This definition of personal information, however, does not include the categories of information listed in section 24(2), which cannot be withheld as personal information. As set forth in section 24(2)(a), these categories include information about a current or former employee of a public authority that relates to the individual’s position or functions.

32. The PATI Act and Regulations do not provide a definition of ‘position’, and it should be understood in its plain meaning as a ‘job’. A job description is an example of information about an individual that relates to their position that would normally be excluded from the definition of personal information under the PATI Act.

33. The PATI Act and Regulations also do not provide a definition of ‘functions’. Section 7 of the Interpretation Act 1951, however, defines ‘function’ as ‘the power conferred or duties imposed on the authority or officer by or under any provisions of law’. If the information relates to the individual’s duties, it cannot be withheld as personal information.

A ‘discretionary financial benefit’

34. Section 24(2)(c) also makes clear that the information about a discretionary financial benefit given by a public authority cannot be personal information. When public authorities spend public money to award a discretionary financial benefit to an individual, the public is entitled to know the name of the individual and the exact nature of the benefit.

The public interest test

35. The personal information exemption under section 23(1) is a qualified exemption subject to a public interest test. Section 23(6) sets out that the information must be disclosed if it would be in the public interest, or if it would benefit the individual to whom the information relates. Relevant in this case is that a record containing personal information shall be disclosed if it is in the public interest to do so.
36. Regulation 2 of the Public Access to Information Regulations 2014 also provides a non-exhaustive list of factors that may be considered when balancing the 'public interest'. These include factors that may, or tend to, promote greater understanding of the processes or decisions of public authorities and that promote accountability for public expenditures or the more effective use of public funds. Overall, the public interest refers to the public good, not something that is only of individual interest.

Personal information exemption questions

37. For a public authority to establish that information should be withheld as personal information under section 23(1), the public authority must ask:

- [1] Whether the record, or part of a record, contains information about an identifiable individual?
- [2] If so, whether any of the information is excluded from the definition of personal information because it falls within an exception in section 24(2)?
- [3] If it is personal information, whether any of the exceptions in section 23(2) prevent the exemption from applying?
- [4] Whether, even if the personal information exemption applies, disclosure is required because it would be in the public interest or would benefit the individual to whom the information relates?

38. Finally, the public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption. If not, the public authority cannot rely on the exemption to deny access to the record.

Public authority's submissions

39. BTA submitted that the personal information exemption in section 23(1) applies to the responsive record because the record contains details of its employee's personal work performance. It stated that the staff performance records go 'beyond [their] position or functions'.
40. BTA explained that each employee's total compensation includes a base salary and an incentive payment that is tied to the employee's work performance. BTA's performance management process measures each employee annually against their individual performance objectives. The key factor for the incentive payment calculation is the individual's actual performance, not the duties or functions assigned to the position.
41. In response to specific investigation questions, BTA submitted that both the actual base salaries for the employees as well as the maximum incentive percentage could be individually negotiated, regardless of the position or level. The exact base salaries for individuals are established, in part, by the individual's unique factors, including their experience and qualifications. Other factors external to the individual also influence the base salary, including the scarcity of applicants, the size of the candidate pool, and whether the position requires special knowledge or skills.
42. The ICO sought further information concerning the discretionary financial benefit BTA provided to some employees. BTA and its employees provided various explanations of the purpose and process for the discretionary financial benefit. BTA also confirmed that no BTA employee plays a role in the decision making process for determining their own discretionary financial benefit.
43. BTA also supported its assertions by providing information about its compensation processes.
44. For each of the exemptions it invoked, BTA submitted that the balance of the public interest does not require disclosure of the withheld record.
45. BTA noted the important public interest in BTA's accountability for the expenditure of public funds. BTA highlighted its extensive transparency concerning its aggregated and total payroll costs. Its public disclosures included publication of its organisational chart by position and post holder's name; the actual salary bands by level of positions (i.e., Chiefs, Directors, Administration, etc.); actual performance ratings ranges by band; and actual incentive payment ranges by band. From this information, the public knows the actual salary ranges of its employees, as well as the ranges of their incentive eligibility and performance ratings and the total incentive payment amount BTA paid.

46. BTA further noted that its unqualified audit for 2014 and its accreditation as an International Marketing Organisation reflected its good financial governance.
47. BTA concluded for each exemption that further disclosure would not promote additional accountability for public spending, nor would it deter or reveal wrong-doing or maladministration, or untrue, incomplete or misleading information or acts within BTA. It would also not promote greater understanding of its processes or decisions.

Submissions by Applicant

48. The Applicant was formally invited to make submissions about the exemption in section 23(1) for personal information. The Applicant submitted general comments that BTA cannot rely on the personal information exemption because BTA set a precedent when it published the salary and compensation details of the then-CEO in 2015.
49. With respect to the balance of the public interest for all of the exemptions, the Applicant highlighted that the issues concerning BTA's expenditure of public funds received extensive public and media attention. The Applicant also noted that public interest in additional details about BTA's payroll expenditures was particularly heightened given the economic climate on the island in 2015.

Discussion

[1] Does the responsive record contain information about an identifiable individual?

50. The responsive record contains information described in paragraphs 12-14 above. This includes information about each employee's base salary, maximum incentive payment eligibility amount, start date, days worked, performance evaluation score, and actual discretionary financial benefit, if applicable, and performance incentive award.
51. The Information Commissioner accepts that this information relates to identifiable individuals.
52. The responsive record also contains the names of the BTA employees in 2014, which were listed in the BTA's organisational chart published on its website. Although the employees' names are in the public domain, they appear in the record along with potential personal information, such as actual salary information or performance scores. In this case, the otherwise publicly-known names are considered personal information within the meaning of section 24(1)(e), if other information in the record is determined to be personal information.

[2] Is any of the information excluded from the definition of personal information?

Does certain information relate to the individual's position or function within BTA?

53. Whether this information fits within the definition of personal information turns on whether it relates to the individual, or instead relates only to their position or functions as an employee of a public authority. If it is related to their position or function, it is excluded from the definition of personal information by virtue of section 24(2).
54. Some of the categories of information in the withheld record clearly relate to the individual. This includes information concerning an employee's start date, the number of days an employee has worked, and performance evaluations.
55. The withheld record also contains the actual base salary paid to each employee. BTA provided detailed information and documentation concerning the factors that were taken into consideration to set an employee's base salary. Each position begins with salary range related to the duties and requirements of the position, and the salary ranges for some positions are very broad. The salary ranges relate to the position and are not dependent upon the individual holding the position.
56. The Information Commissioner accepts, after verification during the investigation, however, that the actual salary is established on an individual basis and decided based upon the employee's individual factors, such as experience and qualifications. The actual salary will not necessarily carry to the next individual in that position, who may negotiate their own individual base salary. The actual salary of a BTA employee relates to the individual, not the post or function.
57. BTA also provided sufficient and detailed evidence during the investigation for the Information Commissioner to accept that, while a range for the maximum incentive eligibility amount is established for each post, the actual maximum incentive eligibility amount could be negotiated by individuals during their salary negotiations. The Information Commissioner accepts that these actual amounts and percentages do not relate to the position or function, but are individual to the employee.
58. Finally, the actual performance incentive pay given to each employee is also in the withheld record. BTA has explained that the incentive amounts are calculated based on a number of variables including their base salary, potential incentive eligibility amounts, and their performance score. These factors are specific to the employee. As a result, the Information Commissioner accepts that the actual performance incentive payment for an employee is related to the individual, not the position or function.
59. The Information Commissioner is satisfied that this information in the responsive record relates to the individual and not to their position or function. It comes within the definition

of personal information in section 24(1) and engages the exemption for personal information in section 23(1).

Does certain information relate to a discretionary financial benefit received from BTA?

60. Finally, part of the responsive record, Column K, contains information about a discretionary financial benefit BTA made to some employees.
61. The Information Commissioner is satisfied that the information in Column K of the withheld record is a discretionary financial benefit given by a public authority and is excluded by section 24(2)(c) from the definition of personal information. Because it is not personal information, the information in Column K cannot be withheld under the exemption in section 23(1) for personal information.
62. The Information Commissioner notes that disclosure is particularly important with respect to discretionary financial benefits paid from public money because such an award is not based on set criteria for granting the benefit or calculating its amount, as is the case with contract payments or performance incentive payments. Disclosure through the PATI Act allows for public accountability for the discretionary spending of public funds.

[3] Do any of the exceptions in section 23(2) prevent the exemption from applying?

63. The exceptions which prohibit the application of the personal information exemption are not relevant in this case.
64. Specifically, the Information Commissioner is satisfied that the employees of BTA did not consent in writing to the disclosure of their personal information.

[4] Whether disclosure of the personal information is required because it would be in the public interest?

65. Except for the information about the discretionary financial benefit, the withheld record contains personal information and the section 23 exemption is engaged. Both the Applicant and BTA addressed the public interest in accountability and transparency in public spending. This must be weighed against the public interest in safeguarding privacy protections, which both parties also discussed.

66. Part of this personal information includes the start working date; the number of working days; and information related to work performance. Disclosure of this information would be highly intrusive and provide little to no value to the public interests in promoting accountability or greater public understanding of how public authorities make decisions or their activities. The Information Commissioner is satisfied that the public interest does not require disclosure of this personal information in the responsive record, and it is exempt as personal information under section 23(1).
67. The remaining personal information is related to each employee's actual salary, actual maximum incentive eligibility, and actual incentive payment.

Factors in favour of disclosure

68. A number of factors favour disclosure of this part of the exempt record:

- The information relates directly to BTA's expenditure of public funds in the form of employee compensation. One of the key purposes of the PATI Act is to increase the accountability for public expenditures.
- The Information Commissioner accepts the Applicant's assertion that during the relevant time, the public's scrutiny of public spending on salaries and compensation packages was heightened. This can be seen not only in the extensive media coverage given to this specific PATI request, but also by the broader attention to public salaries reflected, for example, in the controversies in 2015 over furlough days for public officers and the related protests and Government responses. Public sector compensation spending, and the effective use of public funds, was in the public's eye throughout the year.
- Disclosure would also promote a greater understanding of BTA's innovative compensation scheme for a public body. Although BTA explained that its incentivised compensation program is common within the tourism industry, significantly, it is not familiar to the public sector and has been the subject of much misunderstanding. Disclosure would assist the public in better understanding that the additional payments to employees are not 'bonuses' in the traditional sense. They are a portion of the employee's market-based salary that is not automatically given but instead must be earned by meeting performance measures.

Factors against disclosure

69. The substantial privacy interests of individuals who are BTA employees must be weighed against these strong interests in accountability and transparency for public expenditures and the need for better understanding of BTA's compensation process.

70. The factors against disclosure are focused on the need to safeguard individual privacy:

- There is a broad public benefit in safeguarding legitimate expectations of privacy about employees' actual salary and work performance. The recent passage of the Personal Information Protection Act in 2016 reflects the increasing importance of the right to privacy.
- Disclosing the actual base salary of an employee, rather than the salary range, will reveal what an individual receives in their bank account each month. Further, disclosing the actual performance incentive amounts will reveal details about that individual's work performance. Such disclosures may be unfair when individuals had no expectation that such information would become public. During the investigation, employees of BTA expressed concern about the impact of the disclosure of their personal information.
- Once an individual's salary or performance details have been disclosed, their friends, family, business associates, and acquaintances will have these details and the disclosure will follow the individual forever. The irreversible nature of the disclosure of personal information in a small community gives significant weight to these interests, as noted below.

71. The Applicant urges that because the then-CEO voluntarily disclosed the details of his actual compensation package, BTA cannot consider the privacy concerns of its remaining employees. The Information Commissioner cannot accept that a voluntary disclosure of a CEO's compensation package removes the privacy expectations of the remaining employees. The most senior employee of the public authority—who holds a public-facing role—should have a lesser expectation of privacy for their compensation package. The CEO holds substantial decision making power within the organisation over BTA's finances, budgets, and programs. As a result, the CEO should expect stricter public scrutiny of all aspects of their service.

72. These expectations are not the same for other employees, such as an Executive Assistant or Program Officer, who are accountable to their managers and supervisors, and who do not have substantial decision making authority. While these employees should expect their salary ranges to be public, they retain a legitimate expectation of privacy in their actual

compensation details that they negotiated, as well as any performance-related information.

Weighting and balancing the public interest

73. In weighing these legitimate public interest considerations in favour of and against disclosure, the Information Commissioner notes the extensive public disclosures BTA has already made to facilitate accountability and transparency in its public expenditure. BTA has released various actual payroll expenses in aggregated bands, based upon the level of the employee, i.e., Chiefs, Managers, Professional and so on. The public has been informed of BTA's overall expenditures for its various payroll costs in 2014. During this investigation, the Information Commissioner also verified BTA's representations and its processes for determining compensation during the relevant period. BTA explained its processes to the Information Commissioner's satisfaction. BTA's openness is commendable and goes far to satisfy these public interests. The Information Commissioner is satisfied that disclosure would neither deter nor reveal wrong-doing or maladministration.
74. The question then becomes whether the additional disclosure of actual amounts for each individual will further accountability, transparency, and understanding about BTA's processes to an extent great enough to outweigh the substantial privacy interests of the individual.
75. The Information Commissioner places great weight upon the privacy interests at stake. The public interest lies in understanding BTA's public expenditures in sufficient detail to determine whether it has used public funds effectively. Providing the details of an individual's compensation, other than the most senior employee, i.e., the CEO, goes beyond meeting this public interest and creates an unjustified intrusion into the personal information of employees of the BTA. The Information Commissioner is satisfied that the balance of the public interest does not require disclosure of actual compensation figures.
76. In balancing these interests, however, the Information Commissioner also notes that the salary bands published by BTA do not provide sufficient detail for the public. This is because the band ranges are too wide, making it difficult for the public to get a true picture of the effectiveness of its public spending. In other jurisdictions, such as the Cayman Islands, public salary ranges in \$10,000 bands have been found to be an acceptable range to meet the requirements of access to information laws.¹ Here, too, the salary ranges for public

¹ See, e.g., Information Commissioner's Decision 1-01009 (Cayman Islands), at page 16; UK ICO Guidance, *Request for personal data about public authority employees*, paragraph 43, available at https://ico.org.uk/media/1187/section_40_requests_for_personal_data_about_employees.pdf.

officers within the Government of Bermuda are also disclosed in bands of three pay scales (PS), i.e., PS 33-35, that generally prevents bands that exceed \$10,000.

77. In highlighting its openness about its public spending, BTA relies on its publicly-disclosed bands related to compensation. BTA's salary bands, however, particularly at the senior level, are broad. The salary band at the Chief level, for example, is between \$225,000 to \$295,000. The salary band at the Bermuda-based Director level is \$115,000 to \$130,000. Only the bands for the Bermuda-based Administrative staff and the Managers are within an acceptable range of \$10,000, taking into consideration the salary bands in comparable jurisdictions.
78. The Information Commissioner notes that setting the bands by employee level resulted in several instances in which the compensation figures for Chief level employees were subject to less transparency than for the employees at middle and junior levels. For example, with respect to the actual performance incentive payment figures, the bands for all employees other than the Chiefs falls with the acceptable \$10,000 range. The Chief level range for actual performance incentive payments, however is \$31,000 to \$88,000, subjecting their compensation to less transparency and scrutiny. Such a broad range could reflect a very high figure for all but one employee, or the reverse.
79. Similarly, the maximum incentive range for the Chiefs is too broad. The published maximum incentive performance percentage, for example, for the Chiefs is 'up to 30%'. Yet, the published ranges for the employees below them are narrower: 5-10% for Administrative level, 10-20% for the Professionals and Managers, and 15-20% for the Directors.
80. The Information Commissioner is satisfied that to promote the public interest in transparency and the effective use of public funds, while continuing to protect the privacy interests of the employees, the responsive record must be amended to attach the bands to positions rather than names, and to reflect more narrow bands, specifically:
- Actual staff salary in bands of a maximum of \$10,000;
 - Actual maximum incentive percentages for Chiefs in bands of a maximum of 5%; and
 - Actual performance incentive payments for Chiefs in bands of a maximum of \$10,000.

Section 25(1)(d) – prejudice to negotiations

81. In denying access to information related to discretionary financial benefits in Column K, BTA also relied upon the exemption under section 25(1)(d) of the PATI Act for records whose disclosure would, or could reasonably be expected to, prejudice the conduct or outcome of contractual or other negotiations of any person to whom the information relates. The exemption for prejudice to ongoing negotiations requires a public authority to identify the relevant negotiations, and then to meet the harm test. There are also exceptions set out in section 25(2) when the exemption is not available, which are not relevant in this case.
82. The public authority must be able to identify the negotiations that will be harmed, whether these are contractual or other types of negotiations. The Oxford Dictionary of English defines 'negotiation' as 'discussion aimed at reaching an agreement'. It goes on to define the verb 'negotiate' as to 'obtain or bring about by discussion' or to 'try to reach an agreement or compromise by discussion'. Generally, this exemption will apply to ongoing negotiations involving the person to whom the information relates to ensure that premature disclosure of information does not harm their position in process or outcome. If the negotiations are finished by the time of the PATI request, the requested information must be released unless there is a real and significant risk to identifiable future negotiations.
83. The public authority must also satisfy the harm test for section 25(1)(d). The harm test requires that disclosure would, or could reasonably be expected to, prejudice the conduct or outcome of negotiation of any person to whom the information relates. The public authority must explain what the prejudice is, how disclosure can cause that prejudice, and why the prejudice would, or could reasonably be expected, to occur.
84. 'Prejudice' is not defined in the PATI Act but should be understood as an actual, real, and significant harm. It cannot be a speculative or hypothetical harm. Prejudice also implies a negative or detrimental effect. The prejudice must be against the person to whom the information relates, not simply any person involved in the negotiations.
85. The public authority must also explain how disclosure will cause the prejudice. It cannot be remote or speculative. The public authority must be able to describe the circumstances or events arising out of disclosure that can lead to the harm.
86. Finally, the public authority must show that this harm would, or could reasonably be expected to, cause the prejudice. 'Would' means that there is a high likelihood that the prejudice can occur. It refers to a significant and weighty chance of the harm occurring. 'Could reasonably be expected to' is a lesser likelihood that refers to what a reasonable person would expect considering all of the circumstances. The reasonable expectations

should be likely, plausible or possible based on real and substantial factual grounds, not speculation.

87. In sum, for a public authority to establish that a record is exempt under section 25(1)(d) because disclosure would, or could reasonably be expected to, prejudice ongoing negotiations of any person to whom the information relates, it must ask:

[1] Do any of the exceptions in section 25(2) apply and preclude reliance on the exemption?

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

[3] What are the negotiations of this person that are of concern?

[4] What is the specific prejudice to either the conduct or outcome that is of concern?

[5] How disclosure can cause that prejudice, by describing the circumstances or events that can lead to the prejudice; and ensuring that these are not speculative?

[6] What is the likelihood that the prejudice would, or could reasonably, be expected to occur, showing either that there is a high likelihood that the prejudice can occur, or that a reasonable person would expect the prejudice to occur under the circumstances?

Public authority's submissions

88. BTA concluded that disclosure of the information could reasonably be expected to prejudice the conduct or outcome of BTA's future negotiations related to hiring and retention of employees. This, in turn, would put BTA at a competitive disadvantage. BTA did not identify any specific pending or anticipated negotiations existing at the time of the PATI request which would be prejudiced by disclosure.

Applicant's submissions

89. The Applicant disagreed with BTA's conclusions. The Applicant pointed out that all of the details of the then-CEO's compensation package were disclosed without causing any harm as claimed.

Discussion

[1] Do any of the exceptions in section 25(2) apply and preclude reliance on the exemption?

90. None of the exceptions in section 25(2) are relevant. In particular, the Information Commissioner is satisfied that the individuals did not consent to the disclosure of this information.

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

91. In general, BTA identified all of the information in the withheld record as the details for individual's compensation, such as actual employee's salary, an employee's maximum incentive payment information, and performance appraisal information. This information relates to the existing employee, not BTA.

[3] What negotiations of this person are of concern?

92. Although invited to provide further detail during this investigation by answering specific investigation questions, BTA did not identify any specific ongoing or future negotiations involving its employees where the process or outcome of the negotiations would be prejudiced by disclosure.

93. The Information Commissioner is satisfied that no negotiations have been identified that involve the employees to whom the discretionary financial benefit relates.

94. Instead, BTA relied generally on its own unspecified future hiring of new employees and subsequent negotiations of new employment contracts. Even if the discretionary financial benefits could be considered information that related to BTA, BTA did not indicate whether any positions were in the process of being recruited at the time of the PATI request. It indicated a concern about its competitive advantage with respect to recruiting and hiring more generally, rather than identifying specific negotiations that could be prejudiced.

95. The Information Commissioner is satisfied that no negotiations have been identified that could be prejudiced by disclosure of information related to the discretionary financial benefit. Because BTA has the burden of meeting each of the requirements of the exemption, it has failed to justify its withholding of information related to the discretionary financial benefit under section 25(1)(d).

96. BTA did not invoke the exemption in section 30(1)(b) for management functions for the discretionary financial benefit. For this reason, and because the Information Commissioner

is satisfied that section 23(1) is applicable to the other parts of the record, the Information Commissioner does not need to consider the applicability of section 30(1)(b).

Conclusion

97. The Information Commissioner finds that the information about the discretionary financial benefits in Column K is not personal information, consistent with section 24(2)(c). The Information Commissioner also finds that this information was not properly withheld under section 25(1)(d). This information must be disclosed.
98. The section 23(1) exemption for personal information is engaged for the remaining part of the responsive record.
99. The public interest in accountability and transparency for effective public spending does not require disclosure of BTA employees' personal information. The existing 2014 public bands, however, for actual staff salaries, other than the existing bands for Bermuda-based Administrators and Managers; for the maximum incentive percentages for Chiefs; and for the actual performance incentive payments for Chiefs are too wide to satisfy these public interests. To balance these public interests and the privacy of its employees, the Information Commissioner reverses BTA's decision to withhold the record in its entirety and requires disclosure of a redacted version, as directed below.

Decision

The Information Commissioner reverses the decision of Bermuda Tourism Authority (BTA) to withhold the responsive record in whole. Specially, the Information Commissioner finds that while the responsive record contains personal information, the public interest requires access to more narrow bands for the actual salary, maximum incentive percentages for Chiefs, and actual performance incentive payments.

The Information Commissioner also reverses BTA's decision to deny access to records related to information about the discretionary financial benefit. The Information Commissioner finds that it is not personal information in accordance with section 24(2)(c) and the requirements for the exemption in section 25(1)(d) were not met. BTA is required to disclose the names of the employees and the dollar amount of the discretionary financial benefit.

Under section 48(1)(b), BTA is required to provide access to the discretionary financial benefit information and to the redacted document, amended as follows to safeguard

personal information and narrow the relevant bands, within **28 days, on or before 22 February 2018**:

- Column A: disclose by position title only
- Column B: disclose in band ranges of a maximum of \$10,000
- Column C: redact under 23(1)
- Column D: disclose for Chiefs by bands of maximum of 5%
- Column E: blank column
- Columns F – J: redact under 23(1)
- Column K: disclose
- Column L: redact under 23(1)
- Column M: disclose for Chiefs in band ranges of a maximum of \$10,000

Judicial Review

Should the Applicant, Bermuda Tourism Authority, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez
Information Commissioner
25 January 2018

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Personal information

23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.

...

(6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

Definition of personal information

24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—

...

(2) But “personal information” does not include—

(a) information about an individual...; who is or was an officer or employee of a public authority that relates to the position or functions of the individual.

...

(c) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual by a public authority, including the name of the individual and the exact nature of the benefit.

Commercial information

25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—

...

(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—

...

(b) the person to whom the information relates consents in writing to its disclosure;

...

(3) 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.

Interpretation Act 1951

Section 7 – Definitions of miscellaneous expressions

7 (1) In every Act and in every statutory instrument—

.....

“functions”, in relation to a public authority or public officer, means powers conferred, or duties imposed, on the authority or officer by or under any provision of law;

.....

**Information Commissioner for Bermuda
Valerie T. Scott Building
60 Reid Street
Hamilton, HM 12
www.ico.bm
441-294-9181**