

## Decision Notice

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**Decision 13/2018: Ministry of Finance Headquarters**

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**Legal opinion and correspondence related to letter of entrustment**

**Reference no: 08042016**

**Decision date: 31 December 2018**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Finance Headquarters (**Ministry**) for the legal opinion from Bennett Jones on whether a letter of entrustment was needed and correspondence with the UK Government related to the airport redevelopment agreement with the Canadian Commercial Corporation (**CCC**). The Ministry's initial decision granted the request in part and denied it in part in reliance on sections 26, 28, and 35(1) of the PATI Act. It did not specify an exemption provision for section 26. The Ministry referred the Applicant's request for an internal review to the Information Commissioner and it was treated as an application for an independent review by the Information Commissioner, in accordance with section 44(2) of the PATI Act. This Review addresses the Applicant's challenge to the Ministry's reliance on the exemptions in sections 35(1) (legal professional privilege) and 32(1)(b) (international relations – information communicated in confidence) to deny access to the records requested.

The Information Commissioner found that the Ministry justified its reliance on sections 35(1) and 32(1)(b) of the PATI Act to deny access to the content of the legal opinion and the correspondence to the UK Government. The Information Commissioner also found that the balance of the public interest required disclosure of the date of the legal opinion. Finally, the Information found that the Ministry did not meet the requirements of the right to access in section 12(2)(b) of the Act by failing to process some records that are responsive to the PATI request, in accordance with section 12 of the PATI Act.

The Information Commissioner required the Ministry (1) to complete its processing of the records in accordance with this Decision and the provisions of the PATI Act and (2) to disclose the date of the legal opinion.

## Relevant statutory provisions

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Public Access to Information (**PATI**) Act 2010: section 12(1) (entitlement); section 12(2)(b) (complete response); section 14(1) and (2) (decision on request); 21 (public interest test); section 32(1)(b) (international relations – information communicated in confidence); and section 35(1) (legal professional privilege).

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

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1. On 23 February 2016, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Finance Headquarters (**Ministry**) for the following records:
  - a. The legal opinion given by law firm Bennett Jones on whether the Bermuda Government needed a letter of entrustment from the UK to proceed with the airport redevelopment plan (**legal opinion**), and
  - b. The Bermuda Government's correspondence with the UK Government on the agreement with the Canadian Commercial Corporation (**CCC**), including the initial approach to the UK from Bermuda on the topic and its response to the July 17, 2015 letter of entrustment (**correspondence**).
2. On 5 April 2016, the Ministry refused the Applicant's request for the legal opinion under the exemption for legal professional privilege in section 35(1) of the PATI Act. The Ministry granted access to some of the records responsive to the request for correspondence. It refused the remaining records under section 26, 28 and 35 of the PATI Act, without referring to specific exemption provisions.
3. The records disclosed to the Applicant were:
  - Ministerial Statement on UK Entrustment Letter, dated 28 November 2014 (record 4);
  - Foreign & Commonwealth Office, Letter to the Governor, dated 17 July 2015 (record 11); and
  - Minister of Finance Letter to the Governor, dated 21 July 2015 (record 12).
4. The Ministry also provided the Applicant with a copy of a Press Release on the Entrustment Letter, dated 22 July 2015.
5. On 7 April 2016, the Applicant sought an internal review.
6. On 8 April 2016, the Ministry referred the internal review request to the Information Commissioner under section 44(1) of the PATI Act, on the basis that the Financial Secretary, who is the head of the Ministry of Finance Headquarters, was substantially involved in the initial decision to the extent that the decision was understood to be made by the Financial Secretary.
7. On 15 April 2016, the Applicant was informed of the Ministry's referral of the internal review request to the Information Commissioner. The notice also informed the Applicant

that the internal review request would be treated as an application for review by the Information Commissioner in accordance with section 44(2) of the Act.

## Investigation

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8. 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 for an internal review. The Information Commissioner also confirmed that it was appropriate to treat the request for an internal review as an application for an independent review by the Information Commissioner in accordance with section 44(1). Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
9. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Ministry to determine whether its reliance on the exemptions was justified.
10. The Ministry provided the ICO with copies of twelve records that are responsive to the request. It indicated that it had already disclosed copies of three of these records to the Applicant, listed in paragraph 3 above.
11. During the investigation, the Ministry disclosed all of the records to the Applicant except for record 1 (the legal memorandum from Bennett Jones) and record 10 (correspondence with an attachment from the Government of Bermuda to the United Kingdom).
12. The Ministry clarified that to deny access to record 10, it relied on the exemption for legal professional privilege in section 35(1) and sought to rely on a new exemption for international communications made in confidence in section 32(1)(b). The Information Commissioner accepted the late reliance on the new exemption.
13. The Ministry abandoned any reliance on sections 26 and 28 to deny access to the records. These exemptions were not considered in this review.
14. The Applicant was notified of the new exemption the Ministry relied upon to deny access to record 10.
15. In reviewing the records that were submitted, the ICO identified an apparent gap in the correspondence between 9 July 2015 and 17 July 2015. The Ministry provided the ICO with copies of three additional records that it had not processed but that were responsive to the PATI request.

16. In light of this, the Ministry agreed to review the completeness of the correspondence it located for the dates of 9 July 2015 to 17 July 2015. The Ministry also agreed to process these records in accordance with the provisions of the PATI Act to determine if the records could be released to the Applicant. As of the date of this Decision, the Ministry is engaged in this process and has not yet determined whether it will disclose or deny access to these records.
17. Section 47(4) of the PATI Act requires the Information Commissioner to give the parties to the review a reasonable opportunity to make representations. The ICO invited the Applicant and the Ministry to comment on this application, including the new exemption ground, and to make submissions to the Information Commissioner for consideration in this review. The Ministry was also asked specific questions to justify its reliance on sections 32(1)(b) and 35(1) of the PATI Act.
18. Both the Ministry and the Applicant provided submissions to the ICO.

### **Information Commissioner's analysis and findings**

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

#### ***Procedural matters – additional records***

20. Section 12(1) of the PATI Act affords Bermudians and residents of Bermuda the right to access records held by a public authority unless the record is exempt or subject to an administrative denial under the Act. A response to a PATI request must be “complete” and “accurate” (section 12(2)(b)).
21. During the investigation, the Ministry identified additional records responsive to the request for correspondence. Specifically, the records relate to correspondence between the Government and Government House, dated from 9 July 2015 to 17 July 2015.
22. The Ministry understands that it is required to determine whether it holds any additional records from this time period that are responsive to the request. The Ministry also understands that it must process these records in accordance with the PATI Act to determine whether the records can be disclosed or whether access to the records is denied. The Information Commissioner accepts that the Ministry understands the steps it must take to process these records.

23. The Information Commissioner is satisfied that the Ministry has not yet complied with section 12 with respect to the records dated between 9 July 2015 to 17 July 2015 that are responsive to the request for correspondence between the UK Government about the agreement with CCC.

*Preliminary issues – late reliance on new exemption*

24. During the course of this investigation, the Ministry sought to invoke a new exemption to justify withholding record 10. Specifically, the Ministry sought to rely on section 32(1)(b) (international relations – information communicated in confidence).

25. Section 12(2)(b) of the PATI Act requires public authorities to respond to a PATI request completely. Section 14(1)-(2) 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.

26. 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.

27. 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.

28. 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.

29. Here, the Ministry invoked a new exemption after disclosing all but two of the responsive records. When narrowing the scope of the records at issue, the Ministry notified the ICO that it sought to invoke a new exemption. The Information Commissioner accepted the late assertion of the exemption because this was one of the earlier PATI requests received by the Ministry and the Ministry has since developed its PATI practice. The Ministry abandoned reliance on other exemptions. Further, the Applicant was provided an

opportunity to make submissions on the late exemption and did not object to their consideration.

30. The issues in this review were revised to include consideration of the new exemption and discontinue consideration of the exemptions in section 26(1)(a), 28(1), and 35(3).

### ***Legal Professional Privilege – section 35(1)***

31. Section 35(1) of the PATI Act allows public authorities to refuse access to a record if the record is of such a nature “that it would be exempt from production in legal proceedings on the ground of legal professional privilege”. In legal proceedings, legal professional privilege encompasses both legal advice privilege and litigation privilege.<sup>1</sup> At issue here is legal advice privilege.

32. The exemption in section 35(1) is a qualified exemption subject to the public interest test. If the exemption in section 35(1) is engaged, the public interest test must be considered.

33. The public authority bears the burden of justifying its reliance on the exemption.

### ***Legal advice privilege***

34. Legal advice privilege refers to communications between a lawyer and client for the main purpose of giving or receiving legal advice in both the litigation and non-litigation context.

35. Under the common law, for legal advice privilege to attach to all or part of a document, there must be written or oral communication between a lawyer and a client.

36. The communication must also be connected to obtaining legal advice. It could involve legal rights, liabilities, obligations, or remedies. The communication will not qualify if it is about business, financial, operational, strategic, or other non-legal advice.<sup>2</sup>

### ***Loss of confidentiality***

37. If the record, or part of a record, falls within the definition of legal advice, it can only be withheld under this exemption if it has not lost its confidentiality as a result of prior disclosures to the world at large.

38. As the UK Information Commissioner’s Guidance on legal professional privilege<sup>3</sup> explains:

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<sup>1</sup> See Chubb Bermuda Insurance Ltd v Ford Motor Company [2017] SC (Bda) 88 Civ (citing the leading UK authority on legal professional privilege, Three Rivers DC v Bank of England (No. 6) [2004] UKHL 48), available at [www.gov.bm/sites/default/files/Chubb--Bermuda-Insurance-Ltd-v--Ford-Motor-Company-2.pdf](http://www.gov.bm/sites/default/files/Chubb--Bermuda-Insurance-Ltd-v--Ford-Motor-Company-2.pdf).

<sup>2</sup> See, for example, the leading judgment of Lord Scott of Foscote in Three Rivers District Council and other v Governor and Company of the Bank of England [2004] UKHL 48, at paragraph 38, available at <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>.

<sup>3</sup> UK Information Commissioner’s Office, Legal Professional Privilege (section 42), at paras. 26-27, available at [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf).

Waiver is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings . . .

However, arguments about waiver . . . have no relevance in the context of considering disclosure of information under [public access to information]. This is because under [public access to information] we are concerned with disclosures to the world at large rather than disclosures to a limited audience. In a [public access to information] context, [legal professional privilege] will only have been lost if there has been previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.

39. The key question is “whether privilege has been lost because previous disclosure to the world at large means the information can no longer be considered confidential”.<sup>4</sup>
40. When public authorities disclose a summary of the full legal advice they have obtained, they risk a waiver of confidentiality that results in a loss of the privilege. This could occur, for example, through press releases or during legislative sessions that are on the record. If the reference to the legal advice, however, only discloses part of the advice or does not reveal the reasoning in the advice, this part of the advice may maintain its quality of confidentiality and remain privileged.<sup>5</sup>

#### *Public interest test*

41. If the exemption is engaged, the public authority must then consider whether the balance of the public interest would require disclosure.
42. The test of whether disclosure by a public authority of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than non-disclosure (section 21). Pursuant to regulation 2 of the PATI Regulations, public interest factors include, but are not limited to, things that may or would tend to promote greater public understanding of the process or decisions of public authorities; provide reasons for

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<sup>4</sup> See UK Guidance, Legal Professional Privilege (section 42), at para. 28.

<sup>5</sup> See, e.g., Mersey Tunnel Users’ Association v Information Commissioner and Merseytravel (EA/2007/0052, 15 February 2008), at paragraph 27 available at [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i46/MerseyTunnelDecision\\_website.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i46/MerseyTunnelDecision_website.pdf). The UK Information Tribunal found that although the public authority had referred to the legal advice it received, legal professional privilege was not lost because “None of the references ... reveal the full advice, or anything approaching that, or quote directly from it” and the reference did not reveal “the reasoning behind the legal advice or the other options considered”.



decisions taken by the Government; promote accountability of and within the Government; and deter or reveal wrong-doing or maladministration.

43. In sum, to invoke the legal professional privilege exemption to withhold privileged legal advice, a public authority must ask:

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

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

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

[4] Whether, even if the legal professional privilege exemption is engaged, the balance of the public interest requires disclosure?

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

#### *Public authority's submissions*

45. The Ministry relied on section 35(1) to withhold record 1 in full and to withhold the attachment to the correspondence in record 10. The Ministry submitted that record 1 contains legal advice and is protected by legal professional privilege within the meaning of section 35(1) as the record would be exempt from production in legal proceedings.

46. Record 10 contains reference to an attachment generated by Bennett Jones for the Government that the Ministry states would be subject to legal professional privilege on the same grounds.

47. The Ministry did not address the balance of the public interest.

#### *Applicant's submissions*

48. The Applicant submitted that there is significant public interest in releasing records regarding the \$250 million airport redevelopment project. The Government's agreement with the CCC was a highly contentious issue which led to public protests, including one which shut down a parliamentary session. Significant public concern exists about how the airport agreement came into existence.

49. The Applicant asserts that disclosure of the records could hopefully shed further light on the decision making for taxpayers.

## *Discussion*

50. The Information Commissioner is satisfied that no litigation was pending or reasonably contemplated in relation to the airport redevelopment project. The Ministry has not made any submission to the contrary. The Information Commissioner only considers the legal advice privilege prong of the legal professional privilege exemption.

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

51. The Information Commissioner has carefully reviewed the withheld records.

52. The Information Commissioner is satisfied that record 1 is a written communication between a lawyer and client. It is a memorandum of advice authored by the lawyers of Bennett Jones addressed to the Minister of Finance as well as the Attorney General and Minister of Legal Affairs. The Attorney General is the principal legal advisor for the Government.<sup>6</sup> The memorandum expressly identifies the Government of Bermuda as the client.

53. The Information Commissioner is also satisfied that the relevant part of record 10, an attachment, is also a written communication between a lawyer and client. The content of the attachment supports the Ministry's statement that Bennett Jones prepared the attachment for the Government. The correspondence with the attachment was also sent on behalf of the Government of Bermuda.

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

54. The contents of record 1 and relevant part of record 10 indicate that the communications were prepared in connection to the legal advice obtained by the Government on issues related to the airport redevelopment project.

### ***[3] Whether confidentiality or privilege has been waived?***

55. During the House of Assembly session on 28 November 2014<sup>7</sup>, the Minister of Finance made a number of statements in relation to record 1, the legal memorandum received by Bennett Jones. The Information Commissioner has compared these statements published in Hansard with the content of the legal advice.

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<sup>6</sup> Section 71(1) of the Bermuda Constitution Order 1968.

<sup>7</sup> Official Hansard Report, 28 November 2014, available at <http://parliament.bm/admin/uploads/hansards/393683c249f80adced7a5cf73f62205b.pdf>.

56. The Minister of Finance disclosed that the Government received a legal opinion from Bennett Jones<sup>8</sup> and that the conclusion of the opinion was that a letter of entrustment from the UK was not needed to conclude the agreement with CCC.<sup>9</sup>

57. The Minister of Finance's most detailed statement concerning the content of the legal memorandum was in response to a question from the Opposition asking whether the legal advice indicated that a separate entrustment agreement was needed:

I believe that we have stated that the nature of this transaction does not stray into external affairs. The entrustment letters that we have [deal] with external affairs. And the legal opinion that we have obtained says that CCC is not the Government of Canada it is a Crown Corporation... So, CCC as a Crown corporation is not the Government of Canada. It is not covered under external affairs. It is a commercial transaction that has to do ... that is encompassing commercial law, as opposed to law dealing with treaties and international law in that respect.<sup>10</sup>

58. Given these public statements recorded in Hansard, the Information Commissioner assesses whether the quality of confidentiality of the legal advice has been lost. Having compared the information disclosed by the Minister of Finance, above, with the legal memorandum, the Information Commissioner is satisfied that the Minister of Finance only revealed the high-level conclusions in the legal advice, not the full advice or the reasoning behind the legal advice.

59. The Information Commissioner is also satisfied that record 1 has not lost its legal advice privilege.

60. With respect to the attachment in record 10, the Information Commissioner is satisfied that the limited disclosure by the Bermuda Government to the UK Government does not constitute a disclosure to the public at large.

61. The Information Commissioner is also satisfied that the attachment to record 10 has not lost its legal advice privilege.

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<sup>8</sup> Hansard p. 298.

<sup>9</sup> Hansard pp. 284, 295, and 297.

<sup>10</sup> Hansard p. 229.

***[4] Whether the balance of the public interest requires disclosure?***

62. As the UK Information Tribunal explained, “there is a strong element of public interest inbuilt into the [legal professional] privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.<sup>11</sup> Factors that will be relevant may include whether the matter is still live and whether the legal advice was stale, the number of individuals affected by the issue, the amounts of money involved, the absence of litigation, and the lack of transparency in the authority’s actions and reasons<sup>12</sup>.
63. The Ministry did not make submissions on the public interest test in its decision to the Applicant or in its submissions to the ICO. The Applicant, as set out above in paragraphs 48-49, submitted that there are significant public interests favouring disclosure involving public spending concerns, the public controversy surrounding the airport redevelopment agreement, and lack of transparency concerning how the agreement came into being.
64. In considering the public interest test, the Information Commissioner considers each legally privileged record and the issues involved.

***Record 1***

65. The Information Commissioner is of the view that a number of the factors in favour of disclosure have weight. These include that the issues about the letter of entrustment are no longer live. The Government obtained a letter of entrustment and the contract with CCC has been signed. The final 17 July 2015 Entrustment Letter from the UK has also been disclosed.
66. The Ministry has not provided any evidence that there is an anticipated or actual litigation involved in this case. The legal advice in record 1 also involves issues of pure public administration, where no significant personal interests are involved.<sup>13</sup> If the issues addressed in the advice do not affect individuals significantly, there is less weight attaching to the public’s inbuilt interest in upholding the confidentiality of communications between lawyers and clients.

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<sup>11</sup> Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006), at para. 35, available at [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf).

<sup>12</sup> See Mersey Tunnel, paras. 45-51.

<sup>13</sup> This is in contrast, for example, to legal advice in the context of regulatory or enforcement action against an individual or business.

67. The amount of money involved in the airport redevelopment project as a whole is substantial, and affects many Bermudians and residents of Bermuda in a number of ways.
68. Finally, the Information Commissioner notes that weighing in favour of disclosure is always a general public interest in transparency, accountability, and strengthening democratic processes.
69. The Information Commissioner next considers the factors in favour of maintaining the exemption. With the legal professional privilege exemption, there is a strong inbuilt public interest in protecting the openness in communications between client and lawyer. This ensures access to full and frank legal advice, which in turn is fundamental to the administration of justice. A client and their lawyer should be able to communicate without any fear that their communication will be made public.
70. The Information Commissioner accepts that the overall airport redevelopment project was a significant public undertaking with broad impact upon the public. The project was controversial and faced widespread criticism for the lack of transparency in the process at the time of the PATI request.<sup>14</sup>
71. The Information Commissioner is not convinced, though, that disclosure of the legal memorandum in record 1 will contribute to the public's understanding of the decision making process surrounding the redevelopment project. The legal memorandum concerned only whether an entrustment letter was necessary for the CCC agreement. It did not address the public interest issues discussed above, nor the provisions of any proposed agreement. Further, the Minister of Finance disclosed the summary and high-level conclusions in the legal advice during parliamentary debate. The final Letter of Entrustment has also been disclosed.
72. Importantly, the Minister of Finance disclosed during the House Assembly debate on 28 November 2014 that the legal advice concluded that no letter of entrustment was necessary. This information was not withheld from the public at the time of the controversy. The public is aware that the substance of the legal advice was not relied upon in practice as the Bermuda Government still proceeded to obtain an entrustment letter from the UK for good measure.<sup>15</sup>

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<sup>14</sup> See, e.g., PLP: unanswered questions about airport plan, Royal Gazette, 3 Feb. 2016, available at [www.royalgazette.com/article/20160203/NEWS01/160209876](http://www.royalgazette.com/article/20160203/NEWS01/160209876); BTUC calls for transparency over airport, Royal Gazette, 2 Dec. 2014, available at [www.royalgazette.com/article/20141201/NEWS/141209958](http://www.royalgazette.com/article/20141201/NEWS/141209958). The Public Accounts Committee began considering the airport redevelopment project as early as 2015. See, e.g., PAC to Meet on Airport Project, Auditor's Report, Bernews, 18 Nov. 2015, available at <http://bernews.com/2015/11/pac-to-meet-on-airport-project-auditors-report/>.

<sup>15</sup> Hansard, p. 300.

73. The details of the reasoning and full legal advice in record 1 would provide little information to further the transparency of the public spending issues or decision making involved with the airport redevelopment.
74. Disclosure would, though, undermine the principle of legal professional privilege, a fundamental requirement for our legal system. While the Information Commissioner recognises there is always a public interest in favour of transparency and accountability, she is not satisfied that any specific factors or combination of factors related to record 1 are significant enough to outweigh the strong public interest in the protection of legally privileged communications.
75. This balancing of the public interest does not reach the same conclusion with respect to the date of the legal opinion. It is publicly known that the Government receive a legal opinion from Bennett Jones on the question of whether an entrustment letter was need for the CCC agreement. The timeline of Cabinet's various decisions concerning the entrustment letter and CCC agreement was a subject of extensive parliamentary debate<sup>16</sup>. The disclosure of the date of the legal advice would provide the public with a fuller understanding of the Government's decision making process with respect to these matters of public administration, without compromising the principles underlying the confidentiality of lawyer and client confidentiality.
76. In the absence of a significant and specific public interest in disclosing record 1, and given the important public interest in protecting legal professional privilege, the Information Commissioner is satisfied that the public interest in favour of maintaining the exemption for the contents of record 1 outweighs the public interest in favour of disclosure at this time.
77. The Information Commissioner is also satisfied that the balance of the public interest requires the Ministry to disclose the date of the legal opinion, if it has not done so already.

#### *Record 10*

78. With the inbuilt public interest in upholding the principle of legal professional privilege in mind, the Information Commissioner considers factors specific to the attachment to record 10. The Information Commissioner has carefully reviewed the attachment in record 10, and compared its contents with the information that was publicly available concerning the airport redevelopment project at the time of the request.

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<sup>16</sup> See, e.g., Hansard, p. 303.

79. The Information Commissioner is satisfied that disclosure of the attachment in record 10 would not further the public's understanding, or improve transparency or accountability to a degree significant enough to overcome the public interest in protecting confidential communications between a lawyer and a client.

### *Conclusion*

80. The Information Commissioner is satisfied that the exemption for legal professional privilege is engaged for the content of record 1 and for the attachment in record 10. The Information Commissioner is also satisfied that the balance of the public interest favours maintaining the exemption with respect to the content of record 1 and the attachment in record 10.

81. The Information Commissioner is also satisfied that, if the Ministry has not already publicly disclosed the date of the legal advice, the balance of the public interest requires the disclosure of the date of record 1, the legal opinion.

### *International relations – information communicated in confidence – section 32(1)(b)*

82. Section 32(1)(b) of the PATI Act exempts information from disclosure if the record contains information communicated in confidence by a State or an international organization of States. 'State' includes the United Kingdom and any overseas territory of the United Kingdom. (section 32(2))

83. The exemption in section 32(1)(b) is a qualified exemption subject to the public interest test. If the exemption in section 32(1)(b) is engaged, the public interest test must be considered.

84. The public authority bears the burden of justifying its reliance on the exemption.

### *'Communicated in confidence'*

85. 'Confidence' is not defined in the PATI Act. Section 27 of the UK Freedom of Information Act (FOIA) 2000 has a similar provision as section 32(1)(b) of the PATI Act and provides useful guidance.<sup>17</sup> Section 27(3) of the UK FOIA law defines confidential information in this context: when "the terms on which it was obtained require it to be held in confidence" or "while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held". The Information Commissioner finds it appropriate to adopt a similar meaning of confidence for purposes of section 32(1)(b) of the PATI Act.

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<sup>17</sup> Section 27(2) of the UK FOIA law exempts information "if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court".

86. The Information Commissioner will consider the totality of the circumstances under which the information was communicated before making a judgment on whether it was communicated in confidence. Factors that may be considered include:

- i. Whether there was a statement by the State or body which supplied the information, indicating that confidentiality is required;
- ii. Whether a document may have been marked as confidential by the State or body supplying it, although this will not be conclusive of the matter;
- iii. Whether similar information was previously provided in confidence and the same terms of its provision can reasonably be presumed to continue to exist; and
- iv. Whether, apart from any formal identification, the information is of a sort considered to be confidential by convention.<sup>18</sup>

87. The Information Commissioner will also consider whether the information is already in the public domain. If it is, the information is unlikely to be confidential. Similarly, if the information might be obtained on request under the public access to information legislation of the other State or international organization, then it is unlikely to be considered confidential.

88. In sum, for a public authority to deny access to a record, or part of a record, by relying on section 32(1)(b), a public authority must ask:

- [1] Whether a State or international organisation of States communicated the information?
- [2] Whether, under the totality of the circumstances, the information was communicated in confidence?
- [3] Whether, even if the exemption is engaged, the balance of the public interest requires disclosure?

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

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<sup>18</sup> See, e.g., FOISA Guidance, Section 32: International Relations, at para. 29 (discussing similar factors with respect to comparable exemption provision of the Freedom of Information (Scotland) Act 2002), available at [www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.aspx](http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.aspx).



*90. Public authority's submissions*

91. The Ministry relied on section 32(1)(b) to withhold record 10, correspondence between the Government of Bermuda and the UK Government.

92. The Ministry submitted that record 10 contains information communicated in confidence by the Government of Bermuda to the UK Government. The Ministry maintains that record 10 involves a confidential matter of relations between Bermuda and the UK.

*Applicant's submissions*

93. The Applicant did not make additional submissions related to section 32(1)(b).

94. The Applicant's submissions on the public interest test, above at paragraphs 48-49, are considered here as well.

*Discussion*

***[1] Whether a State or international organisation of States communicated the information?***

95. Record 10 is correspondence expressly sent on behalf of the Government of Bermuda. Section 32(2) makes clear that, for purposes of this exemption, any overseas territory of the United Kingdom falls within the definition of 'State'.

96. The Information Commissioner notes that it is well established that the UK FOIA law treats communications between the Government of Bermuda and the UK as international communications between two States.<sup>19</sup> The provisions of the PATI Act adopt the same structure.

***[2] Whether, under the totality of the circumstances, the information was communicated in confidence?***

97. The Government did not mark Record 10 as confidential at the time it was sent, nor does record 10 contain any statement that the information is provided in confidence.

98. The Ministry referred to the fact that the correspondence was a 'government-to-government' communication, which the Information Commissioner understands to be a

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<sup>19</sup> See, e.g., Foreign and Commonwealth Response to Freedom of Information Act 2000 Request Ref: 0196-16, dated 9 May 2016 (relying on the exemption in section 27(1)(a) to exempt information whose disclosure would be likely to prejudice relations between the United Kingdom and any other State, including the British Overseas Territory of Bermuda), [available at](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/536314/FOI_0196-16_response.pdf) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/536314/FOI\\_0196-16\\_response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/536314/FOI_0196-16_response.pdf).

reference to the sort of international communications viewed as confidential as a matter of convention.

99. The Information Commissioner has carefully reviewed the content of the correspondence. The difference in the nature and content of record 10 and the records disclosed by the Ministry is clear.

100. The Information Commissioner is satisfied that, despite the lack of a formal designation as confidential, the nature and circumstances of the correspondence indicates that it is of the sort considered to be communicated confidence by convention by the parties at the time it was provided.

***[3] Whether the balance of the public interest requires disclosure?***

101. The parties submissions with respect to the balance of the public interest are the same as provided for the legal professional privilege exemption, discussed above at paragraphs 47-49.

102. The Information Commissioner has carefully reviewed record 10 and compared its content with the information publicly known about the airport redevelopment project.

103. The Information Commissioner acknowledges that there is a significant interest in furthering the public's understanding of a substantial investment of public money. The Information Commissioner is satisfied, however, that disclosure of record 10 will not provide new information that meaningfully increases the public's understanding of the project, nor would disclosure further public accountability.

104. Further, as discussed above, the Government of Bermuda included an attachment to the correspondence that contained privileged legal advice. This also suggests that the correspondence was intended to be held in confidence and that the disclosure was restricted to the UK Government.

105. The Information Commissioner is satisfied that the balance of the public interest supports maintaining the exemption.

***Conclusion***

106. The Information Commissioner is satisfied that the Government of Bermuda communicated the information in record 10 in confidence to the UK Government and that the exemption for international communications made in confidence is engaged for record 10. The Information Commissioner is also satisfied that the balance of the public interest favours maintaining the exemption.

## Decision

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The Information Commissioner finds that the Ministry of Finance Headquarters (**Ministry**) complied in part, and failed to comply in part, with Part 3 of the Public Access to Information (**PATI**) Act in responding to the Applicant's PATI request. Specifically, the Ministry was justified in relying on the exemptions in section 32(1)(b) and 35(1) to deny access to the content of the records responsive to the Applicant's PATI request.

The Ministry was not justified in relying on section 35(1) to withhold the date of the legal opinion because the balance of the public interest requires its disclosure. The Ministry also did not meet the requirements of the right to access in section 12(2)(b) of the Act by failing to process some records that are responsive to the PATI request, in accordance with sections 12 and 14 of the PATI Act.

In accordance with section 48(1)(a) and (b) of the PATI Act, the Information Commissioner varies the Ministry's decision and requires it to comply with the PATI Act as follows:

- The Information Commissioner affirms the Ministry's decision to deny access to the content of record 1 on the basis that it is exempt under section 35(1);
- The Information Commissioner affirms the Ministry's decision to deny access to record 10 on the basis that it is exempt under sections 32(1)(b) and 35(1)
- The Information Commissioner varies the Ministry's decision to find that the balance of the public interest requires disclosure of the date of the legal advice and requires the Ministry to disclose that date; and
- The Information Commissioner requires the Ministry to complete its processing of records dated between 9 July 2015 and 17 July 2015 and inform the Applicant of its initial decision on those records, in accordance with this Decision and the provisions of the PATI Act.

The Information Commissioner requires the Ministry to comply with the requirements of this Decision and accompanying Order **on or before 11 February 2019**.

## Judicial Review

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Should the Applicant, the Ministry of Finance Headquarters, 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  
31 December 2018

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Access to records

12 (1) Subject to this Act, every person who is a Bermudian or a resident of Bermuda has a right to and shall, on request, be given access to any record that is held by a public authority, other than an exempt record.

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

...

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

#### Decision on Request

14 (1) Subject to the provisions of this Act, a public authority shall, not later than 28 days after receipt, or deemed receipt, of a request under section 13, decide—

(a) whether to grant or refuse to grant the request in whole or in part; and

(b) if the request is to be granted, the form and manner in which the right of access to the record concerned is to be given, and the amount of any fee payable for the provision of access.

(2) A public authority shall immediately after a decision has been made give notice in writing of the decision to the requester, and to any third party who made representations under section 39, specifying—

(a) the reasons for the decision, including findings on any material issues relevant to the decision and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision; and

(b) the provisions of this Act regarding review and appeal of the decision.

...

#### Public interest test

21 For the purposes of this Part, 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.

### **National security, defence and international relations**

32 (1) Subject to subsection (3), a record is exempt from disclosure if—

...

(c) the record contains information communicated in confidence by a State or an international organization of States.

(c) For the purposes of this section “State” includes the United Kingdom and any overseas territory of the United Kingdom.

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

### **Legal professional privilege**

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

(2) Subject to subsection (3), a record shall be disclosed if disclosure of it is in the public interest.

...

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