

Decision Notice

Decision 35/2019: Ministry of Finance Headquarters

NAMLC records

Reference no: 13032018

Decision date: 19 December 2019

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Finance Headquarters (**Ministry**) for records related to attendance sheets and assignment sheets for the National Anti-Money Laundering Committee (**NAMLC**) meetings, as well as records related to requests for this information by the government.

The Ministry granted partial access to the Applicant for the attendance sheets and assignment sheets, with no explanation for the redactions. The Ministry denied access to records related to requests for this information by the government on the grounds that no records existed, relying on section 16(1)(a) of the PATI Act.

The Information Commissioner has varied the Ministry's internal review decision to affirm its reliance on section 23(1) to deny access to part of the records and reverses the Ministry's decision to deny access to the names of representatives of public authorities contained in the records and the Ministry's reliance on the administrative denial in section 16(1)(a). The Information Commissioner has also required the Ministry to conduct a reasonable search in accordance with section 12 and to issue a new initial decision.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 12 (access to records); section 16(1)(a) (records do not exist).

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

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

Background

1. The request considered in this review involves the work of the National Anti-Money Laundering Committee (**NAMLC**). NAMLC was established in January 1998 under section 49(1) of the Proceeds of Crime Act 1997. It is responsible for advising government on anti-money laundering (**AML**) and counter-terrorist financing (**CTF**) issues and provides guidance on compliance with the AML/CTF regime. It also facilitates the coordination of activities among the relevant government authorities and agencies concerned with

AML/CTF issues. The Office of NAMLC, which provides secretariat services to NAMLC, was established as a unit within the Ministry of Legal Affairs in or about 2009. The Office is now a unit within the Ministry of Finance. The National Coordinator, who is the head of the Office, is also a statutory member of NAMLC.

2. The members of NAMLC are set out in section 49(2) of the Proceeds of Crime Act 1997 and consist of the heads of government departments and Ministries and certain public authorities that are concerned with AML/CTF issues. This includes the Attorney General's Chambers, the Ministry of Finance, the Bermuda Police Service, the Financial Intelligence Agency, the Bermuda Monetary Authority, the Department of Public Prosecutions, the Ministry of Legal Affairs, the Department of Customs, the Registry General, the Registrar of Companies and the Bermuda Casino Gaming Commission.¹
3. NAMLC has established several permanent Working Groups to consider specific thematic issues and to facilitate the provision of information to the Ministry of Legal Affairs and the Ministry of Finance on AML/CTF issues. These Working Groups include the Policy and Legislative Working Group, the Sanctions Working Group, the Operations Working Group, and the Supervisory Forum. Other working groups may be established ad hoc to tackle specific projects or participate in various AML/CTF exercises.
4. In the international context, the Financial Action Task Force (**FATF**) – an inter-governmental body – was established in 1989 to set standards and promote the effective implementation of legal, regulatory and operational measures related to AML/CTF. Bermuda is a member of the FATF-style regional body (**FSRB**), namely the Caribbean Financial Action Task Force, which is an associate member of the FATF. The FATF's Recommendations² are recognised as the international standard for combating money laundering and financing of terrorism and proliferation of weapons of mass destruction. The FATF has also established a Methodology for assessing a country's technical compliance with the FATF Recommendations and the effectiveness of its AML/CTF systems³.
5. The FATF (and by extension, all FSRBs, such as the CFATF) monitors progress in implementing the FATF Recommendations through their 'mutual evaluations' of member

¹ The Barristers and Accountants AML/ATF Board is designated as a supervisory authority by the Minister and works closely with the NAMLC agencies but is not a member of NAMLC.

² Available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

³ Available at <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>.

countries. The FATF regularly conducts these evaluations to assess members' level of compliance with the FATF Recommendations and makes recommendations in areas requiring improvement. The FATF assesses effectiveness primarily on the basis of eleven Immediate Outcomes, each one of which represents a key goal, which an effective AML/CTF system should achieve.

6. As a member, Bermuda is subject to the CFATF's mutual evaluations process. The 3rd Round Mutual Evaluation Report on Bermuda was published in January 2008⁴. Bermuda's 4th Round mutual evaluation was launched in October 2017 and officially started in March 2018. NAMLC and all relevant Bermudian authorities and private sector entities have been preparing for the Mutual Evaluation exercise since 2014.
7. In order to track Bermuda's readiness for the 4th Round Mutual Evaluation, Cabinet required NAMLC to account, on a bi-weekly basis, on the progress and status of the AML/CTF initiatives being led by each NAMLC agency. These status updates were mapped against each of the FATF's 40 Recommendations and the 11 Immediate Outcomes, in a spreadsheet known internally as the 'Tracking Document'. The first report in the Tracking Document was due to be submitted to the Office of NAMLC by all NAMLC agencies on 18 October 2017.⁵ The reports were then submitted by the Chair of NAMLC to the members of the National Anti-Money Laundering Cabinet Committee. The Cabinet Committee was briefed on these matters by the Chair of NAMLC at their bi-weekly meetings.
8. The 2017 National Risk Assessment on Money Laundering was included as an initiative required by FATF's Recommendation 1 and Immediate Outcome 1. It began in April 2017 and was led by NAMLC. The entire project was coordinated by the Office of NAMLC, which provides secretariat services to NAMLC. There was a Project Manager appointed to manage the National Risk Assessment. The Office of NAMLC was responsible for reporting on the National Risk Assessment.
9. The 2017 National Risk Assessment used the World Bank's risk assessment model (**World Bank Tool**) to conduct the assessment. The World Bank Tool identified seven modules to assess vulnerability of the national AML framework and of each sector. These included the banking/credit union sector, the securities sector, the insurance sector, other financial sectors and non-financial sectors.
10. The 2017 National Risk Assessment comprised the following 15 specialised Working Groups established to deal with each module and sectoral risk analysis: National Threats,

⁴ Available at <https://www.fatf-gafi.org/countries/a-c/bermuda/documents/mutualevaluationofbermuda.html>.

⁵ It should be noted that the FATF Tracking Document was not used to track the National Risk Assessment.

National Vulnerabilities, Banking, Securities, Insurance, Money Service Businesses, Bermuda Stock Exchange, Trust Service Providers, Corporate Service Providers, Legal, Accounting, Real Estate, High Value Dealers, Dealers in Precious Metals and Stones, Betting, Casino Gaming, Coordination and Project Management and High-level Strategic Team. The Betting Working Group and the Casino Gaming Working Group were chaired by the Bermuda Casino Gaming Commission.

11. The work of each working group was carried out in meetings held every two weeks between April 2017 and early October 2017. Analytical findings and ratings were recorded by the Project Manager and input into the spreadsheets of the World Bank Tool during each meeting. The Tool automatically generated scores/ratings when all the relevant fields were completed. This process was managed by the Project Manager and did not require the participation of the NAMLC agencies (apart from attendance at the meetings themselves). It should be noted that the Tracking Document referred to above was not used to track the analyses and findings of the working groups established under the National Risk Assessment.
12. Following the conclusion of the working group meetings, the Chairs of the working groups prepared PowerPoint presentations and chapter write-ups for their respective sectors. On 25 and 26 October 2017, a two-day national-level workshop was held with all stakeholders. During the workshops, the preliminary findings from each of the working groups, as well as the aggregate analysis was presented.
13. On 21 November 2017, the Applicant filed a PATI request with the Ministry seeking:
 - a. all attendance sheets by agencies at NAMLC meetings [**item 1**];
 - b. all completed assignment sheets listing all agencies [**item 2**]; and
 - c. all requests for this information by the government [**item 3**].
14. The Applicant's email to the Ministry attaching the PATI request stated that the request "covers the entirety of NAMLC's existence, as opposed to being for a specific year".
15. The Ministry sought clarification from the Applicant regarding the timeframe for item 1 (attendance sheets) and the context of item 2 (assignment sheets).
16. The Applicant explained that the applicable timeframe for item 1 was starting from NAMLC's inception or, if that was not possible, from the inception of the Gaming Commission. The Ministry and Application had no further communications.
17. With regard to item 2, the Applicant responded by explaining that the request arose out of a statement in the House of Assembly by the then-Tourism Minister that the Bermuda

Casino Gaming Commission (**Gaming Commission**) had failed to participate in the NAMLC National Risk Assessment and in other areas⁶. The Applicant stated that they wanted to know which agencies were involved, what they had been asked to do by NAMLC and whether they had completed the tasks assigned in the required timeframe.

18. The Applicant stated that the Applicant presumed NAMLC kept a record of the assignments it had given out to the various agencies and that NAMLC kept a record of which agencies had completed the required tasks.
19. On 19 December 2017, the Ministry issued its initial decision granting partial access to the records responsive to the PATI request.
20. With regard to item 1, the Ministry stated that it did not have records of attendance at NAMLC meetings going back to NAMLC's inception by law in 1998 and its inception in its current form in 2009 due to changes in staffing and two previous office relocations. The Ministry also stated that the Gaming Commission did not become a member of NAMLC until 3 November 2017⁷, although it was established by law in December 2014⁸. Therefore, prior to 3 November 2017, the attendance of the Gaming Commission at NAMLC meetings was by invitation, not by requirement.
21. The Ministry also stated that it would be unreasonable to expect the Ministry to try to find attendance records going back to 2009, given that the underlying purpose of the request was relevant only to the Gaming Commission's involvement with NAMLC. Additionally, the Ministry stated that given the fact that the Gaming Commission was not a statutory member of NAMLC until 3 November 2017, producing records prior to that would not represent a true picture, because records showing it was absent might suggest that the Gaming Commission was not participating, rather than the fact that it had not been invited to attend.
22. Based on this, the Ministry granted the Applicant access to one redacted attendance sheet of a NAMLC meeting held on 30 November 2017, and which had occurred after the date of the PATI request.

⁶ See Ministerial Statement to the House of Assembly by The Hon. Jamahl S. Simmons, JP, MP, Minister of Economic Development, *Updating on Gaming in Bermuda*, Hansard Report, 10 November 2017, pp. 498-99. The former Minister of Economic Development and Tourism, Jamahl Simmons, stated at 499 that the attitude of the Gaming Commission [against the government] could be seen in "the recent non-participation in the National Anti-Money Laundering Committee's National Risk Analysis, failure to provide the requested presentation for the related workshops and failure to provide the analysis and conclusions of the working group that the [Gaming Commission] was chairing".

⁷ Pursuant to an amendment of the Proceeds of Crime Act 1997.

⁸ See the Casino Gaming Act 2014.

23. With regard to item 2 (assignment sheets), the Ministry granted the Applicant access to redacted copies of:
- a. Attendance sheets of the meetings of the 'National Vulnerability Working Group', which was convened to assess Bermuda's national vulnerability to money laundering during the National Risk Assessment;
 - b. Attendance sheets of the meeting of the Gaming and Betting Working Group, chaired by a member of the Gaming Commission, and convened to assess the money laundering risk in the casino gaming and betting industries during the National Risk Assessment; and
 - c. Attendance sheets of the national 2-day workshop during which all of the Working Groups presented preliminary results of the National Risk Assessment to both the public sector and the industry stakeholders from the regulated sectors.
24. With regard to item 3, requests by the government for this information, the Ministry refused the request on administrative grounds in accordance with section 16(1)(a) of the PATI Act because the records did not exist.
25. The Applicant requested an internal review.
26. The Ministry issued its internal review decision on 11 March 2018, upholding the initial decision in full.
27. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the Ministry's internal review decision.

Investigation

28. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
29. 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 search for records was reasonable and whether its redactions were justified.

30. The Information Commissioner notified the Ministry that the Applicant had made a valid application. The Ministry provided the Information Commissioner's Office (**ICO**) with unredacted copies of the records that are responsive to the PATI request.
31. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review a reasonable opportunity to make representations. The ICO invited the Applicant and the Ministry to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The Ministry provided submissions on the searches it conducted and was asked specific questions to justify its redactions and administrative denial. Both the Applicant and the Ministry made submissions.

Information Commissioner's analysis and findings

32. 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.
33. As explained above, the Ministry invoked section 16(1)(a) of the PATI Act to administratively deny access to records responsive to item 3 because the records did not exist. In this case, this is essentially a question of the reasonableness of the search. Therefore, the Ministry's denial of records responsive to item 3, e.g., requests from government for attendance or assignment sheets, is considered with the reasonable search issues below, together with items 1 and 2.

Reasonable search – section 12

34. Section 12(2)(b) of the PATI Act requires public authorities to make a reasonable effort to provide a response to a PATI request that is complete and accurate.
35. Regulation 5(1) of the PATI Regulations further requires that the public authority, through its Information Officer and delegates, make a reasonable effort to locate a record that is responsive. Should the Information Officer not locate a responsive record, he or she is required by Regulation 5(2) to make a record of the efforts taken. This record is often referred to as a "search log".
36. Together, these provisions require the public authority to conduct a reasonable search in support of the right to access public records set out in section 12(1).
37. To determine whether the Ministry complied with its duty to conduct a reasonable search, the Information Commissioner will consider:

- [1] the quality of the public authority's analysis of the request,
- [2] the scope of the search that it decided to make on the basis of that analysis, and
- [3] the rigour and efficiency with which the search was then conducted.

38. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has conducted a reasonable search.

Public authority's submissions

- 39. The Ministry understood the "essence" of the Applicant's PATI request to be concerning the attendance of the Gaming Commission at the meetings of NAMLC and regarding the participation of the Gaming Commission in the 2017 National Risk Assessment. With respect to item 1, the Ministry understood the timeframe of the PATI request to be limited to the date the Gaming Commission officially joined NAMLC.
- 40. Based on the Ministry's understanding of the scope of the request, the Ministry did not take any steps to locate records responsive to item 1 dating back to 2009. The Ministry limited its search of NAMLC's records of meetings attendances to 2017 in relation to the National Risk Assessment.
- 41. The Ministry submitted that the records of the attendance sheets of the relevant working groups were collated by the Project Manager for the National Risk Assessment and are located within the Office of NAMLC, which is a small office. The Ministry also submitted that all National Risk Assessment records are on the computer and/or in a finite number of large binders. These are located in the Office of NAMLC in the Project Manager's office.
- 42. The Ministry submitted that the search was carried out in under an hour.
- 43. With regard to items 2 and 3, the Ministry understood that the Applicant narrowed the focus of the PATI request to the nature of the Gaming Commission's participation in the 2017 National Risk Assessment exercise undertaken by NAMLC.
- 44. The Ministry submitted that the National Risk Assessment was carried out in numerous meetings of 15 specialist working group (listed in the Ministry's submissions) and a two-day national-level workshop with all stakeholders. During the workshops, the preliminary findings from each of the working groups, as well as the aggregate analysis was presented.

45. Because the National Risk Assessment process was structured around the attendance of agency representatives at the relevant working group meetings, no 'assignments' were given to agencies or participants. Therefore, neither NAMLC nor the Office of NAMLC issued 'assignment sheets' to any agency participating in the National Risk Assessment, including the Gaming Commission.
46. The Ministry stated that the roles of the Working Groups were dictated by the international assessment tool used by Bermuda to conduct the risk assessment. Analytical findings and ratings were recorded in the meetings by the Project Manager and input into the spreadsheets of the tool in real time during meetings. The tool automatically generated scores/ratings when all the relevant fields were completed. At the end of the working groups' work, the Chairs of the working groups prepared the power point presentations and the chapter write-up for the sectors.

Applicant's submissions

47. The Applicant stated that they believed the Ministry made a wrong assumption about which records the Applicant would like to have disclosed and which ought to be disclosed. The Applicant submitted that the request was for all attendance sheets, and not for those of the meetings that took place after the Gaming Commission became a statutory member. The Applicant would like all records that exist because the Applicant was not sure when the Gaming Commission began attending NAMLC meetings and also because the Applicant would like to compare the Gaming Commission's participation to that of other agencies.
48. With regard to items 2 and 3, the Applicant submits that the Minister's statement suggests that NAMLC issued assignments and tracked completion of assignments and therefore the Applicant believes the records must exist.

Discussion

[1] *The quality of the public authority's analysis of the request*

Item 1

49. The Ministry asked the Applicant to clarify the scope of the PATI request. The Applicant then informed the Ministry that the Applicant was seeking records from the inception of NAMLC, and if not possible, since the inception of the Gaming Commission. The Ministry did not respond to this explanation. Instead, it interpreted the request to only include records since the Gaming Commission became a member of NAMLC in November 2017. As a result, the Ministry only disclosed, in part, one responsive record.

50. The Ministry justified its response on the basis of the Ministry's understanding of the Applicant's purpose for making the PATI request, i.e. the 2017 National Risk Assessment. The Applicant, however, expressly states that they wanted records going back to NAMLC's inception, if possible, and if this was not possible, then going back to the date the Gaming Commission was established.
51. Despite the Applicant's reference to specific dates, the Ministry used 2017, and the date the Gaming Commission became a statutory member of NAMLC as the relevant date.
52. The Ministry also stated that it used 2017 as the reference date because the Gaming Commission was not required to attend meetings prior to it becoming a statutory member, and therefore records regarding their attendance before this date would be misleading. It is the Information Commissioner's view that this explanation is not a basis for limiting the scope of the PATI request in circumstances where the Applicant had clearly stated in a follow up email to the Ministry that the Applicant sought records from NAMLC's inception or to the date the Gaming Commission was established, if the date of NAMCL's inception was not possible.
53. Although the Ministry indicated in its internal review decision that it did not have earlier attendance records because of staffing changes and two office relocations, the Ministry also stated that it did not make an attempt to actually locate the records prior to 2017 as a result of its analysis of the request.
54. The Information Commissioner is of the view that the limiting of the scope of the PATI request by the Ministry was not justified and that, as a result, its analysis of the request was not adequate.

Items 2 and 3

55. With regard to items 2 and 3, the Ministry limited its analysis of the PATI request to the Gaming Commission's participation in the 2017 National Risk Assessment only. This was on the basis of the Ministry's assessment of the 'essence of the Applicant's request', which it inferred from the Applicant's email to the Ministry. Based on the Ministry's submissions, it appears that the Ministry understood the Applicant's email to narrow the scope of the request. The Information Commissioner is of the view, however, that the Applicant was providing the Ministry with context regarding the PATI request rather than narrowing the scope of the request.
56. The Applicant made the PATI request in the context of the statement made by the former Tourism Minister on 10 November 2017. The Applicant did not, however, have enough information about the work and processes of NAMLC to further specify the

types of records the Applicant was seeking. In an email to the Ministry about the PATI request, the Applicant specifically stated “NAMLC doesn’t make a great deal public in relation to its work so my request is framed around what the Minister told MPs in the House”. The Applicant was dependent on the Ministry’s assistance to formulate the request. It is for these reasons that the PATI Act imposes a duty on public authorities to assist requesters. The Information Commissioner has considered the Ministry’s compliance with its duty to assist below, paragraphs 63-83.

57. The Gaming Commission’s involvement in AML/CTF initiatives led by NAMLC was not limited to the National Risk Assessment, but also to the Gaming Commission’s responsibilities for all AML/CTF matters. The Applicant was seeking records related to the Gaming Commission’s participation in NAMLC generally. The Ministry was not justified in narrowing the scope of the Applicant’s PATI request based on its assumption about the purpose of the request.

58. The Information Commissioner is not satisfied that the Ministry’s analysis of items 2 and 3 of the PATI request was adequate.

59. Consistent with its duty to assist, the Ministry should have explained the various areas of involvement of the Gaming Commission with respect to the work of NAMLC. The Applicant would then have been given a meaningful opportunity to specify the request based on a full understanding of the Gaming Commission’s involvement with NAMLC.

[2] *The scope of the search that it decided to make on the basis of that analysis*

60. Given that the Ministry’s analysis of the PATI request was not adequate, the Information Commissioner is of the view that the scope of the search was also not adequate for items 1, 2 and 3.

[3] *The rigour and efficiency with which the search was then conducted*

61. Because the analysis of the PATI request and scope of the search based on this analysis were not adequate, the Information Commissioner is not satisfied that the search was conducted with adequate rigour and efficiency.

Conclusion

62. With regard to items 1, 2 and 3, the Information Commissioner is not satisfied that the Ministry conducted reasonable searches for responsive records in accordance with

section 12 of the PATI Act. The Information Commissioner is further not satisfied that the records responsive to item 3 do not exist.

Duty to assist – section 12(2)(a)

63. The plain language of section 12(2)(a) imposes upon a public authority an express duty to assist a requester: “public authorities shall make every reasonable effort—to assist persons in connection with requests”. The duty to assist is a fundamental duty that supports the right to access public information and stands separate from other obligations imposed by the Act. It is also a well-established doctrine within access to information jurisprudence⁹.

64. As part of their duty to assist, public authorities have an obligation to assist requesters in defining their requests and in making them as specific as possible. This requires public authorities to provide a requester with sufficient information about the nature of a public authority’s records and processes.

65. As the Information Commissioner stated in Decision 04/2018, Board of Immigration:

Where requests do not correctly describe a public authority’s records, a public authority has an obligation under section 12(2)(a) to attempt to contact a requester to clarify the request and explain the records it holds. Without assistance from a public authority, a requester may not be able to specify what records satisfy their information needs.

66. The duty to assist is also essential to fulfilling the purposes of the PATI Act, as set out in section 2 of the Act. The reasonableness of a public authority’s efforts to assist a requester must be viewed in light of these purposes: to give the public the right to access information held by public authorities to the greatest extent possible, subject to the exemptions within the Act; to increase transparency and eliminate unnecessary secrecy; to increase the accountability of public authorities; and to inform the public about a public authority’s activities and decision making.

Public authority’s submissions

67. With respect to Item 1, the Ministry submits that it narrowed the disclosure to the timeframe which was relevant to the requester’s intent, i.e. the time period when the Gaming Commission was a statutory member of NAMLC.

⁹ See, e.g., Phillip Coppel, Information Rights: Law and Practice (4th ed. 2014), at 389-394 (discussing the duty to assist).

68. With respect to Items 2 and 3, the Ministry submits that it sought clarification on what was meant by “assignment sheets” and asserts that the Applicant’s response made it clear that the nature, scope and purpose of the requester’s interest was to determine the role played by the Gaming Commission in the 2017 National Risk Assessment and to compare it with other public authorities in that exercise. The Ministry submits that it used its best efforts to provide alternate records to enable the requester to compare the performance of the Gaming Commission in the National Risk Assessment relative to other participating agencies. The Ministry also submitted that its search covered the full scope of the records sought, but that records responsive to Item 3 do not exist.
69. The Ministry also made submissions regarding the Information Commissioner’s interpretation of the duty to assist in section 12(2)(a) as set out in Decision 04/2018, Board of Immigration. The Ministry is concerned that the interpretation is overly broad and that the interpretation will be problematic in respect of requests covering technical/specialist matters because the level of assistance required from officers who are not Information Officers will potentially require a breach of the anonymity obligation in section 12(4).
70. The Ministry argues that “as this widened interpretation was not known to public authorities prior to 15 May 2018, the Ministry represents that our conduct at the material time of the request (and follow up query with the requester) was consonant with a reasonable interpretation of the plain language of the provisions of the PATI Act referred to above. Further, we remind you that no PATI guidelines were in place at the material time of this request in order to displace an interpretation of the ordinary meaning of the language in the relevant provisions of the PATI Act.”
71. The Ministry therefore asserts that a retrospective application to the Ministry’s handling of the PATI request is not justified in the circumstances.
72. The Ministry also seeks to distinguish Decision 04/2018, Board of Immigration, from the circumstances in this review, on the following bases:
- a. There were no reasonable means for either the Ministry to know, or understand what the requester meant by “all completed assignment sheets listing all agencies” as this concept was and is completely outside of any known process or function within NAMLC.
 - b. The Ministry sought and received additional details and clarification from the requester within two weeks of receiving the request.
 - c. Based on the Applicant’s clarification, the Ministry was able to narrow the timeframe of the records sought in Item 1, and use its best efforts to identify and

provide alternate records responsive to the interest expressed by the requester in respect of Item 2 and search for items responsive to Item 3.

Applicant's submissions

73. The Applicant acknowledged that the Ministry sent an email as an attempt to better understand the scope of the PATI request. The Applicant stated that they responded by providing a fairly detailed explanation of what had prompted the request and what was being sought. The Ministry, however, came back only to clarify the timeline and not the other aspects of the request.

74. The Applicant believed more information could have been provided to help the Applicant understand the records that the Ministry holds, particularly because not much information about the work of NAMLC is available in the public domain.

Discussion

75. With regard to the Ministry's submissions on the plain language interpretation of section 12(2)(a), the Information Commissioner's interpretation in Decision 04/2018, Board of Immigration is consistent with the purposes of the PATI Act and that such a provision must be read in the light of those purposes. There is no 'retrospective application' of the provision in this case – it is simply what is required by a public authority under the plain language of the PATI Act.

76. In this case, the Applicant sought "all completed assignment sheets" and "all requests for this information by the government". The Ministry submitted that it did not have assignment sheets and also limited the scope of the Applicant's request, as discussed above.

77. In an email from the Applicant to the Ministry, however, the Applicant explained that the request was seeking records on tasks assigned to NAMLC agencies, including information on the nature of the tasks and whether the NAMLC agencies had performed these tasks. The Applicant used the phrase 'assignment sheets' because the Applicant had no information on how tasks were assigned to NAMLC agencies and/or tracked by NAMLC. The phrase was used in a broad sense to capture any and all tasks assigned to NAMLC agencies.

78. In the context of the National Risk Assessment – although the Information Commissioner has found that the Ministry was not justified in limiting its search to records related to the National Risk Assessment – it is clear that tasks were assigned to NAMLC agencies that chaired the various Working Groups. The Ministry stated in its submissions that the Chair of each Working Group was required to prepare PowerPoint presentations and write a

chapter for the final report. The Ministry has not explained how these requirements were communicated to the relevant NAMLC agencies during the National Risk Assessment process.

79. Information about how NAMLC works, and its interaction with the NAMLC agencies during the National Risk Assessment, as well as generally, was not obtained until the ICO investigation. In response to the ICO's investigation questions, the Ministry provided full explanations on the work NAMLC is engaged in and how NAMLC carries out such work.
80. The information that has been provided to the ICO is the information that the Ministry should have made a reasonable effort to convey to the Applicant at the initial request stage. A discussion about the nature of NAMLC's work and the nature of NAMLC agencies' participation would not have required extensive staff or time resources.
81. If the Ministry had discussed NAMLC's processes and procedures with the Applicant, it may have led to the identification of alternative records held by the Ministry that would have satisfied the Applicant. At a minimum, it would have enabled the Applicant to specify the types of records sought.
82. The duty to assist required the Ministry to engage the Applicant with the aim of fulfilling the purposes set out in section 2 of the PATI Act. Specifically, to strive to provide the Applicant with access to the information it holds to the greatest extent possible under the Act. The Ministry must also take an approach that seeks to increase the transparency around how NAMLC works, its activities, and the participation of NAMLC agencies. This in turn will promote the accountability of NAMLC to the public, consistent with the purposes of the PATI Act.
83. Through additional dialogue with the Applicant, it is more likely than not that the Ministry would have gained an understanding of the information the Applicant sought, and would have enabled it to process the request in accordance with the requirements and aims of the PATI Act.
84. The Information Commissioner is not satisfied that the Ministry met the requirements of the duty to assist in accordance with section 12(2)(a) of the PATI Act.

Personal information – section 23

85. 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.
86. Personal information is defined in section 24(1) as "information recorded in any form about an identifiable individual". Section 24(2) excludes specific categories of information from the broad definition of personal information.

87. To withhold records, or parts of records, under the personal information exemption, the following must be considered¹⁰:

- [1] Does the record, or part of the record, contain information about an identifiable individual?
- [2] Is the information excluded from the definition of personal information because it falls within an exclusion in section 24(2)?
- [3] Do any of the exceptions in section 23(2) prevent the personal information exemption from applying?
- [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?

88. In the context of personal information, the public interest test requires a balancing of the public interest in favour of knowing an individual's personal information, on the one hand, against the privacy rights of the individual and any other public interest in favour of confidentiality on the other.

89. As set out at length in Decision 02/2019, Office of the Governor, the personal work information of public sector employees and of elected and other public officials falls within the definition of personal information. As with other categories of personal information, the balance of the public interest consideration determines whether personal work information is disclosed under the PATI Act.

90. 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.

Public authority's submissions

91. The Ministry in its submissions stated that the names and signatures of persons from agencies not understood to be public authorities were redacted as personal information. The Ministry, however, conceded that the Financial Intelligence Agency, the Bermuda Monetary Authority and the Gaming Commission are public authorities for the purposes of the PATI Act 2010.

¹⁰ See Decision 01/2018, Bermuda Tourism Authority, para. 37 and Decision 09/2019, Department of Public Lands and Buildings, para. 186.

Applicant's submissions

92. The Applicant did not understand the basis on which the redactions were made, and without seeing the unredacted versions did not know what was missing. The Applicant submitted, however, that the majority of agencies which attend NAMLC meetings are public bodies and so redaction would not be necessary.
93. The Applicant stated that section 23(1) should not be an issue because those attending NAMLC meetings are doing so in their professional capacity as representatives of the various agencies (majority of which are public bodies).
94. The Applicant is not challenging the redaction of the signatures of the individuals listed in the disclosed records.

Discussion

95. The records that have been disclosed to the Applicant with redactions can be divided into the following three categories:
- a. Attendance sheets from the National Vulnerabilities Working Group and the Gaming and Betting Working Groups for the National Risk Assessment;
 - b. Attendance sheets from the 2-day National Workshop for the National Risk Assessment; and
 - c. Attendance sheets from a NAMLC general meeting.
96. The personal information contained in the records can also be divided between (a) the names of public sector employees and (b) the names of private sector employees.
97. Representatives from the following public authorities are named in the records:
- a. the Financial Intelligence Agency,
 - b. the Bermuda Monetary Authority,
 - c. the Gaming Commission,
 - d. the Bermuda Police Service,
 - e. the Licencing Authority,
 - f. the Bermuda Shipping Registry, and
 - g. the Registrar of Companies.

[1] *Does the record, or part of the record, contain information about an identifiable individual?*

98. The Information Commissioner is satisfied that the names of the representatives on the attendance sheets at NAMLC-related meetings amount to information about an identifiable individual.

[2] *Is the information excluded from the definition of personal information because it falls within an exclusion in section 24(2)?*

99. Section 24(2)(a) provides that the definition of personal information does not include information about an individual, who is or was an officer or employee of a public authority that relates to the position or functions of the individual.

100. As discussed in Decision 02/2019, Office of the Governor, routine personal work information of public sector employees still falls within the definition of 'personal information' in section 24(1) of the PATI Act, and it is the public interest test that will determine whether this information is disclosable under the PATI Act.

101. The Investigator is satisfied, therefore, that the names of the individuals on the attendance sheets, who were representing public authorities, amounts to routine personal work information and therefore is not excluded from the definition of personal information.

102. The Investigator is also satisfied that the names of individuals that were representing private entities does not fall within the exceptions in section 24(2).

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

103. The Information Commissioner is satisfied that none of the exceptions in section 23(2) prevent the personal information exemption from applying.

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

104. Strong public interest factors favour disclosure of the names of the representatives of NAMLC agencies that attended NAMLC meetings and the Working Group meetings for the National Risk Assessment. These individuals attended the meetings as part of their publicly funded duties as a representative of their public authorities. The individuals named in the records also hold senior positions in their respective public authorities and should expect that information related to their public functions will be made public.

105. The names of representatives of private sector entities are included in the attendance sheets of some of the Working Group meetings and the 2-day National Workshop for the National Risk Assessment. It is unlikely that the private sector representatives had an expectation that their names and attendance at the Working Groups and/or the Workshop would be made public. Apart from disclosure of the name of the private sector entity that they represented (which has been disclosed), there is little public interest in the name of the representative also being disclosed under the circumstances of this case.

106. The Information Commissioner is satisfied that the public interest in non-disclosure of the individuals' signatures outweighs any public interest in disclosure of the signatures. In any event, the Applicant does not seek this information.

Conclusion

107. The Information Commissioner is satisfied that the information in the records consists of personal information and that the balance of the public interest requires disclosure of the names of the representatives from the following entities:

- a. the Financial Intelligence Agency,
- b. the Bermuda Monetary Authority,
- c. the Gaming Commission,
- d. the Bermuda Police Service,
- e. the Licencing Authority,
- f. the Bermuda Shipping Registry, and
- g. the Registrar of Companies.

Conclusion

108. The Information Commissioner is not satisfied that the Ministry conducted reasonable searches for records responsive to items 1, 2, and 3.

109. The Information Commissioner is satisfied that the information in the records listed in paragraph 98 is personal information, and that the balance of the public interest requires disclosure of the names of representatives of the public authorities.

110. Finally, in its submissions to the ICO, the Ministry has raised a concern that this review and decision have been delayed in contravention of section 47(6) of the PATI Act, which requires the Information Commissioner to complete a review and issue a decision

“as soon as practicable”. In light of the limited resources of the Office of the Information Commissioner and a backlog of cases, this Decision has been issued as soon as practicable. Although the backlog of the ICO is rapidly coming to a close, which will address any such concerns in the future, the Information Commissioner acknowledges the Ministry’s concern and apologises to both the Applicant and the Ministry in this review.

Decision

The Information Commissioner finds that the Ministry of Finance Headquarters (**Ministry**) complied, in part, with Part 3 of the Public Access to Information (**PATI**) Act 2010 when responding to the Applicant’s request. Specifically, the Ministry justified, in part, its reliance on section 23(1) to deny access to personal information in the disclosed records.

The Information Commissioner also finds that the Ministry did not justify its reliance on section 23(1) to refuse access to the names of representatives of public authorities in the responsive records or its reliance on section 16(1)(a) to deny access to records responsive to item 3 of the request. Finally, the Information Commissioner finds that the Ministry did not conduct a reasonable search for records in accordance with section 12 of the PATI Act.

In accordance with section 48(1) of the PATI Act, the Information Commissioner varies the Ministry’s internal review decision, as follows:

- affirms the Ministry’s reliance on section 23(1) to deny access to part of the records;
- reverses the Ministry’s decision to deny access to the names of the representatives of public authorities and requires the Ministry to disclose records responsive to items 1 and 2 of the PATI request with this information unredacted; and
- requires the Ministry to fulfil its duty to assist in accordance with section 12(2)(a) by explaining the various areas of involvement of the Gaming Commission with NAMLC, providing the Applicant with a reasonable opportunity to specify the records sought in the PATI request, and confirming the scope of the PATI request;
- requires the Ministry to conduct a reasonable search for records responsive to the request, in accordance with section 12 of the PATI Act and regulation 5 of the PATI Regulations, and based on the confirmed scope of the PATI request; and
- requires the Ministry to issue a new initial decision,

as directed in this Decision and accompanying Order on or before **Thursday, 30 January 2020**.

Judicial Review

The Applicant, the Ministry, or any party aggrieved by this Decision have the right to seek and apply for judicial review to the Supreme Court according to section 49 of the PATI Act. Any such application must be made within six months of this Decision.

Enforcement

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



Gitanjali S. Gutierrez
Information Commissioner
19 December 2019

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Section 12- Access to records

- (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—
 - (a) assist persons in connection with requests; and
 - (b) respond to requests completely, accurately and in a timely manner.
- (3) A requester is not required to give any reasons for making a request.

...

Section 16(1)(a) – Refusal of request on administrative grounds

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

...

Section 23 – Personal information

- (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.
- (2) Subsection (1) does not apply if—
 - ...
 - (3) ...
 - (4) ...
 - (5) ...
- (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.

Section 24 – Definition of personal information

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

...

- e. the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;

...

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

- a. information about an individual, except where the individual is a police officer of the Bermuda Police Service who is or was engaged in a surveillance function during the course of his employment; who is or was an officer or employee of a public authority that relates to the position or functions of the individual;

...

Public Access to Information Regulations 2014

Regulation 5 – Reasonable search

(1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

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