

Decision Notice

Decision 06/2020: Regulatory Authority

Market Review records

Reference no: 28092017-02

Decision date: 24 July 2020

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Regulatory Authority for records relating to a market review that the Regulatory Authority initiated in 2015. The Regulatory Authority refused the request in full because it considered the records to be exempt under section 34(1)(c) of the PATI Act (prejudice to a fair trial).

The Regulatory Authority's internal review decision upheld the refusal of access to the responsive records on the same ground.

During the Information Commissioner's review, the Regulatory Authority disclosed some of the responsive records, and the Applicant narrowed the scope of this review. Consequently, the Regulatory Authority revised its position to rely only on the exemption in section 25(1)(d) (prejudice to negotiations) to withhold a more narrow set of records.

The Information Commissioner has affirmed the Regulatory Authority's reliance on section 25(1)(d) of the PATI Act to deny access to information in the records about Deloitte's rates by resource level. The Information Commissioner has also varied the decision and denied access to personal information about Deloitte's employees on grounds that this information is exempt under section 23(1) (personal information). Finally, the Information Commissioner has reversed the decision to deny access to the remainder of the parts of the records and ordered the Regulatory Authority to disclose them.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 12 (access to records); section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); and section 25(1)(d) (prejudice to negotiations).

Public Access to Information Regulations (**PATI Regulations**) 2014: regulation 2 (interpretation) and 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 under the Public Access to Information (**PATI**) Act 2010 considered in this review seeks records related to an invitation for submission of an Expression of

Interest (**EOI**) the Regulatory Authority published in August 2015. The Regulatory Authority sought submissions of an EOI on the 2015 Market Review (**2015 Market Review**). The market review was to determine whether a communications provider had a significant market power in the electronic communications or subscription audio-visual programming content markets. In January 2016, the Regulatory Authority selected Deloitte as the successful vendor.¹

2. On 13 June 2017, the Applicant made a PATI request to the Regulatory Authority for records relating to the 2015 Market Review referred to in the EOI. The request explained its reference to the 2015 Market Review and sought the following items:

We refer to the invitation for submissions of an Expression of Interest (“Eoi”) for a 2015 “comprehensive review of the electronic communications market in Bermuda” (“the 2015 Market Review”) further to the [Regulatory Authority’s] published desire to “appoint experienced and qualified persons to advise it” in the 2015 Market Review at that time, being on or around 14 August 2015.

...

Specifically, we request the following documents and records which may have been produced in or around the years 2015 and 2016 up until the present time:

1. Executive Committee Meeting Minutes, particularly those that contemplate, consider, touch or concern:
 - a. the Eoi for the 2015 market review;
 - b. the selection of a contractor for the 2015 Market Review;
 - c. any draft or actual contract for the 2015 Market Review following submissions received further to the Eoi;
 - d. the sum of money committed by the [Regulatory Authority] to spend on any contract entered into for the 2015 Market Review following submissions received further to the Eoi;

¹ See Market Review of Telecommunications Industry, BerNews, January 27, 2016, [available at http://bernews.com/2016/01/rab-market-review-telecommunications-industry/](http://bernews.com/2016/01/rab-market-review-telecommunications-industry/).

- e. the sum of money actually spent by the [Regulatory Authority] on any contract for the 2015 Market Review;
 - f. the identity of a contractor ultimately selected for the 2015 Market Review;
 - g. whether a contract was initially agreed for the 2015 Market Review, then ultimately cancelled, and any reasons why;
 - h. whether, if a contract was agreed for the 2015 Market Review and then cancelled, a penalty was payable by the [Regulatory Authority];
- 2. Any and all internal email correspondence including and/or between the employees and/or board of the [Regulatory Authority] that contemplates, considers, touches or concerns items described within 1.a. – h. above;
- 3. Any and all internal memoranda including and/or between the employees and/or Board of the [Regulatory Authority] that contemplates, considers, touches or concerns the items described within 1.a. – h. above;
- 4. The number of submissions made to the EOI;
- 5. Copies of any and all submissions made to the EOI in writing;
- 6. Copies of any and all contractual documentation regarding any review ultimately undertaken further to the 2015 Market Review;
- 7. Any and all documentation regarding the 2015 Market Review ultimately undertaken; and
- 8. Any and all documentation (which may or may not include any of the words 'Deloitte Market Review Report' in the title) providing information and data as to the findings of any review undertaken further to the 2015 Market Review, published and provided to the [Regulatory Authority] at a time in the first six months' of 2016.
- 3. On 25 July 2017, the Regulatory Authority refused the Applicant's request under section 34(1)(c) because disclosure of the records could reasonably be expected to prejudice fair proceedings or an impartial adjudication.

4. On 28 July 2017, the Applicant sought an internal review by the head of the Regulatory Authority.
5. On 12 September 2017, the Regulatory Authority issued an internal review decision affirming the refusal on the basis of section 34(1)(c). Without citing sections of the PATI Act, the internal review decision also referred to the language used in various provisions in the PATI Act, including those concerning frivolous requests, administrative burden, prejudice to its deliberations, information provided in confidence, trade secrets, prejudice to commercial interests, prejudice to negotiations and adverse effects to management functions.
6. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the Regulatory Authority's internal review decision refusing the PATI request.

Investigation

7. 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.
8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Regulatory Authority to determine whether its reliance on the exemption was justified.
9. On 24 October 2017, the Information Commissioner's Office (**ICO**) notified the Regulatory Authority of the Applicant's valid application.
10. Throughout this lengthy review, the Regulatory Authority conducted a number of additional searches and issued a new initial decision on the additional records that it located. The Regulatory Authority also reconsidered its denial of access to some existing records. As a result, the Regulatory Authority disclosed a number of records to the Applicant. In response, the Applicant narrowed the issues in this review to consider the denial of records responsive only to items 1, 2, 3 and 6 of the original PATI request. The Regulatory Authority also revised its position in this review to rely only on the exemption in section 25(1)(d) (prejudice to negotiations) to withhold five remaining records: 8a, 8b, 25a, 29a and 39. The Regulatory Authority maintained the position that record 43 does not fall within the more narrowed scope of this review, but, in the alternative, would rely upon section 25(1)(d) to withhold it.

11. The ICO identified Deloitte as a third party during the review because some of the information in the withheld records relates to it.
12. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, applicant and any concerned third party a reasonable opportunity to make representations. The ICO invited the Regulatory Authority, the Applicant and Deloitte to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The Regulatory Authority was further asked specific questions to justify its reliance on section 25(1)(d) of the PATI Act and to show the reasonableness of the search it conducted. The Regulatory Authority, the Applicant and Deloitte made submissions.

Information Commissioner's analysis and findings

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

Preliminary issue – record 43

14. The Regulatory Authority disputes that record 43 remains responsive to the items still at issue in this review because record 43 is not an Executive Committee meeting minute (item 1), an internal email (item 2), nor an internal memorandum (item 3). The Regulatory Authority further submits that record 43 is not a contractual document (item 6).
15. Contrary to this assertion, record 43 is an attachment to an internal email that related to the draft or actual contract for the 2015 Market Review. This makes record 43 responsive to item 2 of the PATI request. Considering an internal email without its attachments would be inconsistent with the purposes in section 2 of the PATI Act to provide public access to information to the greatest extent possible within the provisions of the Act.
16. The Information Commissioner is satisfied that record 43 is responsive to item 2 and continues to be at issue in this review.

Reasonable search – section 12(2)(b) and regulation 5

17. Section 12(2)(b) of the PATI Act requires a public authority to make every reasonable effort to respond to requests completely and accurately. Regulation 5 of the PATI

Regulations requires a public authority to make reasonable efforts to locate records responsive to the request. Read together, these provisions require a public authority to conduct a reasonable search in response to a PATI request.

18. In determining whether a public authority's search was reasonable, the Information Commissioner considers the following:
 - [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.
19. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, the search it performed was reasonable.

Public authority's submissions

20. The Regulatory Authority submitted that it understood items 1, 2, 3 and 6 of the PATI request to be asking for:
 - a. Executive Committee meeting minutes, internal email correspondence and internal memorandum that relate to the following subject matter:
 - i. Draft or actual contracts for the 2015 Market Review following submissions received further to the EOI;
 - ii. The amount of money committed by the Regulatory Authority to spend on any contract entered into for the 2015 Market Review pursuant to the submissions;
 - iii. The amount of money actually spent by the Regulatory Authority on any contract for the 2015 Market Review; and
 - iv. Whether a contract was initially agreed for the 2015 Market Review, then cancelled. If so, the reason for the contract being cancelled and information about if any penalty was payable by the Regulatory Authority for cancelling such contract.
 - b. Contractual documents, which are limited to any review ultimately undertaken further to the 2015 Market Review and consists of "copies of any and all contractual documentation in relation to an external party that the Authority

may have engaged for the purpose of carrying out any review of the electronic communications market of Bermuda which the Authority may have conducted or begun to conduct in the year 2015”.

21. With respect to the scope and rigour of its searches, the Regulatory Authority explained that it searched the email accounts of its former interim Chief Executive, former Chief Financial Officer, former Director of Legal Services, former Head of Regulatory Finance and Chief Technical Officer. The Regulatory Authority provided screenshots of its searches of the former interim Chief Executive. Although the Regulatory Authority could not confirm that it initially searched the email of the Chief Executive during the responsive time period, this email account was searched during the ICO’s review.
22. The Regulatory Authority also searched its physical files and shared drive, using specific keywords. The Regulatory Authority provided the ICO with screenshots documenting its electronic searches.
23. The Information Officer primarily conducted the search, with assistance from other staff members including the Director of Legal Services, the Chief Technical Officer and a junior technical staff member. The Information Officer is familiar with the structure of the shared drive and the market review process.

Applicant’s submissions

24. The Applicant explained that the part of the PATI request identifying any “contractual document regarding any review ultimately undertaken further to the 2015 Market Review” seeks “any contractual documentation and records produced further to the [EOI] and/or any contract ultimately entered into by the Authority for the production of data to review the market. [It] is seeking the contractual documents entered into by the [Regulatory Authority] in order to effect a review undertaken further to the [EOI]”.
25. The Applicant also submitted that the disclosures made by the Regulatory Authority appear to be incomplete. Some key records and details appear to be omitted from disclosure, including the engagement letter with Deloitte; the final termination letter; the context for records previously disclosed; and a ‘report’ referred to in record 40, which was disclosed to the Applicant.
26. The Applicant also highlighted the absence of any record related to any discussion and/or correspondence from mid-2016 until the Deloitte contract was terminated, which the Applicant believed to have occurred around May 2017. The Applicant

argues that in that interim period there must have been records subject to disclosure that involve the status or lack of progress on the 2015 Market Review work.

Discussion

27. As an initial matter, the Information Commissioner notes that during this review, the ICO identified deficiencies in the Regulatory Authority's initial searches. When the ICO brought this to the Regulatory Authority's attention, the Regulatory Authority identified additional potential locations for records, conducted additional searches and processed additional records in accordance with the PATI Act. The Applicant was kept informed throughout this process.
28. In the end, the Applicant continued to dispute the reasonableness of the Regulatory Authority's additional searches, raising the concerns outlined above. This review focuses on the reasonableness of the Regulatory Authority's searches, including those during this review, and responds to the Applicant's ongoing objections concerning the completeness of the records.

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

29. The only point of contention on the quality and nature of the Regulatory Authority's analysis of the request concerns its understanding of item 6, which seeks 'contractual documentation'. The Regulatory Authority appears to have limited its understanding to market reviews that were initiated in 2015, while the Applicant maintains that item 6 should be read in the context of the entire PATI request and therefore refers to any contractual documents which were meant to effect a market review further to the relevant EOI, regardless of the year the market review was started or conducted.
30. Under other circumstances, such a difference in the understanding of the request might impact the reasonableness of the search. In this review, however, it is inconsequential because the only agreement entered into in relation to the relevant EOI was the 2016 contract with Deloitte and its related records that are considered in this case.

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

31. The ICO verified the extensive additional searches by the Regulatory Authority, which resulted in the identification of additional responsive records that the Regulatory Authority processed and then issued an initial decision for on 8 July 2020.

32. The Information Commissioner is satisfied that the scope of the Regulatory Authority's search was reasonable.

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

33. During this review, the Regulatory Authority engaged in rigorous searches of the newly identified locations, and these searches were conducted with reasonable efficiency in light of the circumstances.
34. The Applicant's ongoing concerns that the resulting records were incomplete does not, in this case, impact the reasonableness of either the scope or rigour and efficiency of the search. The Applicant is correct to note that the disclosed records did not include the documents or information the Applicant identified, as described above in paragraphs 25-26. Such records may not have been part of the disclosed records for a number of reasons, unrelated to the reasonableness of the Regulatory Authority's search. This might include that a record was never created or never existed; that a record was not retained after being created; or that a record was no longer responsive to the narrowed issues in this review.
35. The Information Commissioner is satisfied that the rigour and efficiency of the search was reasonable.

Conclusion

36. The Information Commissioner is satisfied that any initial deficiencies in the reasonableness of the Regulatory Authority's search have been remedied and that the Regulatory Authority has met the reasonable search requirement of section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.

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

37. Section 25(1)(d) allows a public authority to refuse access to a record when disclosure would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates. This exemption is subject to exceptions that are not relevant in this case.
38. Before refusing access to records under section 25(1)(d), public authorities must consider the following questions²:

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

² Decision 09/2019, Department of Public Lands and Buildings, para. 148.

- [2] What are the negotiations of this person that are of concern?
 - [3] What is the specific prejudice to either the conduct or outcome that is of concern?
 - [4] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?
 - [5] Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?
39. The exemption in section 25(1)(d) generally applies to ongoing negotiations. If the negotiations are finished, the responsive records should be disclosed unless there is a real and significant risk to identifiable future negotiations.
40. Prejudice in this exemption should be understood as an actual, real and significant harm. It implies a negative or detrimental effect. It cannot be a speculative or hypothetical harm.
41. The prejudice required for this exemption is 'would prejudice' or 'could reasonably be expected to prejudice'. 'Would' prejudice means there is a high probability that the harm anticipated can occur. 'Could reasonably be expected' to prejudice is a lesser likelihood of harm. Reasonable refers to what a reasonable person would expect considering all the circumstances of the case.
42. Finally, a public authority or third party 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

43. The Regulatory Authority submitted that some of the responsive records contain details about Deloitte's rates by resource level, e.g., employee position, which if disclosed, could place Deloitte at a competitive disadvantage when Deloitte bids for other projects, either in relation to the potential client or to its competitors. The potential client could use this information as a benchmark when negotiating with Deloitte, even though the information may no longer be accurate for various reasons, such as increased costs, inflation or discounts. Deloitte's competitors could also use the information to undercut Deloitte's fees when bidding for projects.

Deloitte's submissions

44. Deloitte argued that the responsive records represent its confidential commercial negotiations with the Regulatory Authority, which relate to proprietary elements around its engagement, rates and methods of contracting. It submits that this information is exempt from disclosure.

Applicant's submissions

45. The Applicant submitted that the Regulatory Authority has not demonstrated any harm that might arise from public disclosure of the information surrounding the work done by Deloitte for the 2015 Market Review.
46. The Applicant clarified that they are not interested in confidential carrier data, but in the Regulatory Authority's process and financial management of the project, its deliberations regarding the work done before termination of the engagement with Deloitte and how the information may have been dealt with after termination.
47. The Applicant also submitted that the confidentiality of the market information has expired because it is now available in the public domain through the normal course of the market unfolding. It is also in the public domain because the Authority reported on its assessment and review findings in subsequent market review consultation documents in 2017 and 2019.
48. Disclosure, in the Applicant's view, would help protect the public from unsafe products or dubious practices, even though this might involve revealing information that may adversely affect the commercial interests of a company. The Applicant also raises the public interest in the use of public funds. The Applicant stated that over \$3.2 million dollars are spent each year in regulating electronic communications and those funds are raised through taxes and fees paid by customers of electronic communications service providers. Given the ubiquitous nature of telecommunications, the customers amount to the general public of Bermuda. The public has a clear interest in ensuring that the Regulatory Authority manages its public funds responsibly and that the public is receiving value for money.
49. With respect to public spending, the deadline for the 2015 Market Review was 29 April 2017, and the Applicant estimates that the Regulatory Authority may have spent up to \$1.8 million on the incomplete 2015 Market Review, even though the original estimated cost was only \$225,000.

50. In the Applicant's view, the Regulatory Authority has not been transparent about the spending, processes and outcomes for the 2015 Market Review. As a result, the public is ill-equipped to hold the Regulatory Authority accountable for its public spending.

Discussion

51. As noted above, the Information Commissioner considers the Regulatory Authority's reliance on the exemption in section 25(1)(d) to withhold records 8a, 8b, 25a, 29a, 39 and 43.

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

52. The Information Commissioner agrees with the Regulatory Authority and Deloitte that the responsive records relate to Deloitte.

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

53. Although the exemption in section 25(1)(d) is generally applicable to ongoing negotiations, the Information Commissioner accepts that Deloitte will engage in negotiations for contracts for consultations similar to the 2015 Market Review in the future. Deloitte regularly engages in consultations on projects, which are preceded by contract negotiations as part of its core business. Even with respect to market reviews, the Regulatory Authority had issued its next Market Review Request for Quotation in May 2017³, several months before the July 2017 request for an internal review in this case.

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

54. The prejudice identified by the Regulatory Authority and Deloitte is that disclosure of information about Deloitte's rates by specific resource level could give future competitors and potential clients an unfair advantage over Deloitte during the bidding and negotiation process for future consultations.
55. The Information Commissioner accepts that such an unfair advantage would constitute prejudice to the conduct or outcome of the future contract negotiations for consultation projects.
56. Deloitte has also raised general concerns about proprietary information in the withheld records, but neither Deloitte nor the Regulatory Authority have identified

³ *One Communications, et al. v. Regulatory Authority of Bermuda*, [2017] SC (Bda) 97 Civ (14 November 2017), paragraph 7.

what that proprietary information might be, other than the rates by resource level. Without more, the Information Commissioner cannot ascertain prejudice to the conduct or outcome of future negotiations for consultation project contracts that would arise from the disclosure of the remaining information in the withheld records. The exemption in section 25(1)(d) is further considered only for the information in records 8a, 25a, 39 and 43 about Deloitte's rates by resource level.

[4] *How can disclosure cause the identified prejudice?*

57. The Information Commissioner agrees that if information about Deloitte's rates by resource level is disclosed, both Deloitte's future competitors and potential clients could use it as a benchmark for the costs of Deloitte's services. Disclosure could enable future competitors to underbid Deloitte for consultation projects. It could also enable potential clients to seek the same or lower rates by resource level, without taking into consideration any costs adjustment due to time, discounts given and so on for the 2015 Market Review.

[5] *Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?*

58. The prejudice identified by the Regulatory Authority and Deloitte could reasonably be expected to occur because Deloitte regularly bids for, negotiates and engages in project consultation contracts similar to the one it had with the Regulatory Authority. Deloitte operates in a competitive market, as has been shown by the number of competitors making submissions for the EOI about the 2015 Market Review, and Deloitte's rates by resource level are not publicly available. It is reasonable to expect that other firms and potential clients would seek to take advantage of knowing Deloitte's rates by resource level.
59. The Information Commissioner agrees that the exemption in section 25(1)(d) is engaged with respect to the disclosure of information about Deloitte's rates by resource level, and next will consider whether the balance of the public interest requires disclosure.

[6] *Does the balance of the public interest require disclosure?*

60. As regulation 2 of the PATI Regulations states, and as the Applicant correctly points out, promoting accountability for public spending is a strong public interest factor. The Regulatory Authority received significant funds through taxes and fees. The public has an interest in ensuring those funds are managed effectively and the public is receiving value for money for costs that it bears.

61. The public's interest in public spending, however, is balanced against the public's interest in ensuring that private companies are able to operate their business in a fair market. Here, the disclosure of Deloitte's rates by resource level would place Deloitte in a disadvantaged position during bidding and negotiations in relation to its competitors and potential clients.
62. Further, the public interest in accountability for public spending is met by the disclosure of the total amount of payments the Regulatory Authority made to Deloitte, as well as by other information in both the records disclosed to the Applicant already during this review and the withheld records still at issue in this Decision.
63. Given this, the Information Commissioner is satisfied that disclosure of Deloitte's rates by resource level is not in the public interest.

Conclusion

64. The Information Commissioner is satisfied that the Regulatory Authority was justified in relying on section 25(1)(d) of the PATI Act to withhold information in records 8a, 25a, 39 and 43 about Deloitte's rates by resource level because disclosure could reasonably be expected to prejudice Deloitte's future negotiations. The Information Commissioner is further satisfied that the balance of the public interest does not require disclosure of this part of the records.
65. The Information Commissioner is not satisfied that the Regulatory Authority was justified in relying on section 25(1)(d) to withhold records 8b and 29a, and the remainder of records 8a, 25a, 39 and 43 because disclosure of these records, or parts of the records, could not reasonably be expected to prejudice Deloitte's future negotiations.

Personal information – section 23

66. Section 23(1) allows a public authority to withhold records containing personal information, subject to exceptions in section 23(2) that are not relevant in this case.
67. Personal information is broadly defined in section 24(1) as "information recorded in any form about an identifiable individual". Section 24(1) also provides a non-exhaustive list of categories of personal information.
68. To invoke the personal information exemption, a public authority or third party must ask⁴:

⁴ Decision 01/2018, Bermuda Tourism Authority, para. 37; Decision 02/2019, Office of the Governor, paras. 34-59.

- [1] Whether the records consist of information about an identifiable individual?
- [2] Whether the information falls within any of the exclusions to the definition of personal information in section 24(2)?
- [3] Whether any of the exceptions in section 23(2) to the exemption apply to the records?
- [4] If the exemption for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure, or whether disclosure would benefit the individual?

69. Finally, a public authority or third party bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the position. Note, however, that the Information Commissioner may invoke section 23(1) on her own accord to safeguard an individual's privacy rights⁵.

Parties' submissions

- 70. Although no further argument was provided, Deloitte invoked the personal information exemption to protect identifying information about its individual employees in the withheld records.
- 71. Neither the Regulatory Authority nor the Applicant made submissions related to the exemption in section 23(1) for personal information.

Discussion

- 72. The Information Commissioner considers the application of the personal information exemption to records 8b and 29a and the remaining parts of records 8a, 25a, 39 and 43 that are not exempt under section 25(1)(d).

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

- 73. Records 8a, 8b, 25a, 29a and 39 contain information identifying employees of Deloitte. Record 43 does not contain any information identifying employees of Deloitte and is not considered further.

⁵ Decision 01/2018, Bermuda Tourism Authority, para. 27.

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

74. The exclusions in section 24(2) are inapplicable. The Information Commissioner notes that Deloitte's employees' identifiable information does not fall within the exclusion in section 24(2)(b) because the entity contracted to provide services to the Regulatory Authority is Deloitte, not the employees as individual contractors.

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

75. None of the exceptions in section 23(2) are applicable to these records.

[4] *If the exemption for personal information is engaged, whether the balance of the public interest requires disclosure or whether disclosure would benefit the individual?*

76. The personal information in the withheld records relates to employees of a private company. Although the 2015 Market Review was a very public project by the Regulatory Authority to fulfil its regulatory functions, the company Deloitte was selected as the project consultant. If any of the employees assigned to staff the project had become unavailable, for example, Deloitte would presumably have shifted other employees to work on the project. It would be unfair under these circumstances to subject employees of a private company to public scrutiny. The records also involved the Regulatory Authority's market reviews, which led to litigation (see footnote 3). In light of the controversial nature of the topic, it would be particularly unfair to disclose the personal information of the employees of Deloitte.
77. It is also unnecessary to disclose the information to further the public interest in accountability for public spending and the management of public contracts. The public's understanding of these issues can be furthered by disclosure of the remaining records, or parts of the records, along with other records which the Regulatory Authority has disclosed during this review.
78. The Information Commissioner is satisfied that the balance of the public interest does not require disclosure of the personal information of Deloitte's employees in records 8a, 8b, 25a, 29a and 39.

Conclusion

79. The Information Commissioner is satisfied that record 43 does not contain information about an identifiable individual and is therefore not exempt under section 23(1) of the PATI Act.
80. The Information Commissioner is also satisfied that parts of records 8a, 8b, 25a, 29a and 39 are personal information and exempt under section 23(1). The balance of the public interest does not require disclosure of this information in the records.

Conclusion

81. The Information Commissioner is satisfied that record 43 is responsive to item 2 in the PATI request at issue in this review.
82. The Information Commissioner is satisfied that, regardless of any deficiencies in the initial search, the Regulatory Authority has now met the reasonable search requirement in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.
83. The Information Commissioner is satisfied that the Regulatory Authority justified its reliance on the exemption in section 25(1)(d) to withhold information about Deloitte's rates by resource level in records 8a, 25a, 39 and 43. The Information Commissioner is further satisfied that disclosure of this information is not in the public interest. The Regulatory Authority did not justify its reliance on section 25(1)(d) to deny public access to records 8b and 29a and the remainder of records 8a, 25a, 39 and 43.
84. The Information Commissioner is further satisfied that parts of records 8a, 8b, 25a, 29a and 39 are exempt under the personal information exemption in section 23(1) of the PATI Act and the balance of the public interest does not require disclosure.

Decision

The Information Commissioner finds that record 43 is responsive to item 2 of the request made under the Public Access to Information (**PATI**) Act 2010. The Information Commissioner further finds that the Regulatory Authority has remedied any prior deficiencies in its search and has now met the reasonable search requirement in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the Public Access to Information Regulations 2014.

The Information Commissioner also finds that the Regulatory Authority was justified in relying upon the exemption in section 25(1)(d) to withhold information about rates by resource level in records 8a, 25a, 39 and 43, but was not justified in withholding records 8b and 29a and the remainder of records 8a, 25a, 39 and 43 on this ground. Finally, the Information Commissioner finds that parts of records 8a, 8b, 25a, 29a and 39 are exempt under section 23(1) as personal information.

In accordance with section 48(1) of the PATI Act, the Information Commissioner:

- varies the Regulatory Authority's decision and finds record 43 is responsive to the PATI request;
- affirms the Regulatory Authority's decision to deny access to information about Deloitte's rates by resource level in records 8a, 25a, 39 and 43 on the basis that this information is exempt in accordance with section 25(1)(d) of the PATI Act;
- varies the Regulatory Authority's decision and denies access to personal information about Deloitte's employees in records 8a, 8b, 25a, 29a and 39 on the basis that this information is exempt under section 23(1) of the PATI Act; and
- reverses the decision to deny access to the remaining parts of the records and orders the Regulatory Authority to disclose these records in part by redacting the exempt information as instructed in the Confidential Annex, which forms part of this Decision.

The Information Commissioner requires that the Regulatory Authority grant access to the parts of the records listed above, as directed by this Decision and the accompanying Order **on or before Friday, 4 September 2020**.

Judicial Review

The Applicant, the Regulatory Authority, Deloitte or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Regulatory Authority 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
24 July 2020

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Section 12 – Access to records

- (1) ...
- (2) Public authorities shall make every reasonable effort to—
 - (a) ...
 - (b) respond to requests completely, accurately and in a timely manner.

Section 21 – Public interest test

For the purposes of this Part, the test of whether disclosure by a public authority of a record of 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.

Section 23 – Personal information

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

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

Section 24 – Definition of personal information

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

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

(b) information about an individual who is or was performing services under contract for a public authority that relates to the services performed including the terms of the contract and the name of the individual;

Section 25 – Commercial information

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

...

(d) Information, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates.

...

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

Public Access to Information Regulations 2014

Regulation 2 – interpretation

In these Regulations—

...

“public interest” means but is not limited to things that may or tend to—

- (a) promote greater public understanding of the process or decisions of public authorities;
- (b) provide reasons for decisions taken by the Government;
- (c) promote accountability of and within the Government;
- (d) promote accountability for the public expenditure or the more effective use of public funds;
- (e) facilitate public participation in decision-making by the Government;

- (f) improve the quality of services provided by the Government and the responsiveness of the Government to the needs of the public or of any section of the public;
- (g) deter or reveal wrong-doing or maladministration;
- (h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (i) reveal untrue, incomplete or misleading information or acts of a public authority.

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.

**Information Commissioner for Bermuda
Maxwell Roberts Building
4th Floor
One Church Street
Hamilton, HM 11
www.ico.bm
441-543-3700**