



## Decision Notice

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**Decision 28/2022: The Cabinet Office**

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**Records related to Savvy Entertainment Limited**

**Reference no: 20210324**

**Decision date: 16 December 2022**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Cabinet Office (**Cabinet Office**) for various records related to Savvy Entertainment Limited (**Savvy**) and a loan agreement dated 2 April 2018. The Cabinet Office denied access to the responsive records under section 34(1)(a) and (c) of the PATI Act. The Cabinet Office explained in its decision that the matter is the subject of an active police investigation in which at least two arrests have been made.

The Acting Information Commissioner has found that the Cabinet Office did not conduct a reasonable search for records responsive to the request, in accordance with section 12(2)(b) and regulation 5 of the PATI Regulations 2014. The Acting Information Commissioner has further found that the Cabinet Office's reliance on section 34(1)(a) and (c) was not justified.

The Acting Information Commissioner has varied, in part, the Cabinet Office's internal review decision to deny access to parts of some records under the section 23(1) exemption for personal information and has reversed, in part, the internal review decision to deny public access to the remaining records. The Acting Information Commissioner has ordered the Cabinet Office to disclose the records in whole or in part, and to conduct a reasonable search and issue a new initial decision to the Applicant on newly identified records, if any.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 12(2)(b) (reasonable search); section 23(1) (personal information); section 34(1)(a) (law enforcement investigation); section 34(1)(c) (fair trial).

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

Appendix 1 provides the text of these statutory provisions and forms part of this Decision.

## Background

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1. On 2 April 2018, the Government of Bermuda (**Government**) as represented by the Ministry of Economic Development and Tourism entered into an agreement with Savvy Entertainment Ltd (**Savvy**) for a loan in the amount of \$800,000. The loan was made on the condition that it was to be used for the purpose of, among others, establishing a

music studio at Moresby House, 26 Pender Road, Ireland Island in Dockyard<sup>1</sup>. Savvy was to repay the loan on a monthly basis in equal payments over a period of 36 months, or until the loan was fully paid off. By 24 September 2020, the Premier had acknowledged that the loan had not been paid back<sup>2</sup>.

2. On 25 September 2020, the Applicant sent a Public Access to Information (**PATI**) request to the Ministry of Tourism Headquarters (**Ministry Headquarters**) asking them to provide:
  - a. Any and all records held by the Ministry Headquarters regarding Savvy and the loan agreement. This would include but not be limited to records which show how financial orders were followed, advice from technical officers for the protection of Government and any due diligence performed. It would include but not be limited to corporate governance records such as contingencies related to the loan, conditions of the loan, guarantees, memorandums of understanding, resolutions, securities, drawdown schedules, escrow agreements, permissions from the Accountant-General and so-on (**item 1**);
  - b. Any and all communications concerning Savvy and its principal (**item 2**);
  - c. Calendar or diary entries showing meetings between government officials, which include elected officials, technical officers and civil servants, and Savvy principals (**item 3**);
  - d. Any agreement between Savvy and the Government for the management of Cross Island and the use of Moresby House and the Star of India building (**item 4**).
3. The Applicant did not receive an initial decision by 6 November 2020, the statutory deadline. By that time, the Cabinet Office had assumed responsibility for tourism after a ministry restructuring. The Applicant sent a request for an internal review to the Cabinet Office on 3 December 2020, which the Cabinet Office acknowledged.
4. On 23 March 2021, the Cabinet Office issued its internal review decision and declined to disclose the requested records under section 34(1)(a) and (c) of the PATI Act<sup>3</sup> because disclosure would prejudice an investigation of a breach of law and prejudice the right to a fair trial, respectively.

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<sup>1</sup> The loan agreement is publicly available at <https://rgb-prod-public-pdfs.s3.us-east-2.amazonaws.com/RG422919924.pdf>.

<sup>2</sup> See Bernews, 'Audio: Premier David Burt on \$800K Loan' (25 September 2020).

<sup>3</sup> Issued in response to the Information Commissioner's [Decision 02/2021](#), [Cabinet Office](#).

5. On 24 March 2021, the Applicant made a timely application for an independent review by the Acting Information Commissioner of the Cabinet Office's internal review decision.

## Investigation

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6. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine whether its reliance on the exemptions was justified.
8. On 1 April 2021, the Information Commissioner's Office (**ICO**) notified the Cabinet Office of the valid review application and requested the Cabinet Office to submit a copy of the records responsive to the PATI request.
9. On 1 July 2021, the Cabinet Office provided the ICO with unredacted copies of six responsive records.
10. Although six records were provided, most parts of record 3, the loan agreement between the Government and Savvy, were already in the public domain at the time of the request. This review considers records 1, 2, 4, 5, 6 and the withheld parts of record 3.
11. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. Both the Cabinet Office and the Applicant were invited to comment on this application. The Cabinet Office was further asked specific questions to justify its reliance on the exemptions in sections 34(1)(a) and (c) of the PATI Act.
12. Neither the Cabinet Office nor the Applicant provided submissions.
13. In November 2022, the ICO attempted to notify Savvy of this review as a concerned third party and invite its submissions. The ICO found that Savvy's published email address no longer functioned. The ICO also did not receive a response after leaving a voicemail message on Savvy's published phone number in the United States.

## Acting Information Commissioner's analysis and findings

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14. In coming to this Decision, the Acting Information Commissioner considered all of the relevant information in the Cabinet Office's internal review decision, the withheld records, the ICO's communications with the parties and publicly available information. She is satisfied that no matter of relevance has been overlooked.
15. The Acting Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

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

16. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to PATI requests completely and accurately. Regulation 5 of the PATI Regulations 2014 requires the public authority to make reasonable efforts to locate records responsive to the request. A public authority is required to document its efforts if it has been unable to locate the records. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.
17. In reviews where the reasonableness of a public authority's search is in question, the Information Commissioner's task is to assess whether the search was reasonable, in accordance with the provisions of the PATI Act and Regulations. Further, it is not her role to establish the existence or non-existence of a record to a point of certainty<sup>4</sup>.
18. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following<sup>5</sup>:
  - [1] the quality of the public authority's analysis of the PATI request;
  - [2] the scope of the search that it decided to make based on that analysis; and
  - [3] the rigour and efficiency with which the search was then conducted.

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<sup>4</sup> See [Decision 08/2021, Police Complaints Authority](#), para. 92.

<sup>5</sup> See, for example, [Decision 11/2020, Department of Education](#), para. 14.

19. Finally, the public authority bears the burden to establish, on the balance of probabilities, that the search it conducted to locate records responsive to a PATI request was reasonable.

*Public authority's submissions*

20. The Cabinet Office did not make submissions despite its burden to explain the reasonableness of its search.

*Applicant's submissions*

21. The Applicant did not make submissions.

*Discussion*

22. The Acting Information Commissioner considers the reasonableness of the Cabinet Office's search to locate records responsive to the PATI request.

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

23. The PATI request asked broadly for (a) any and all records regarding Savvy and the loan agreement with the Government; (b) any and all communications concerning Savvy and its principals; (c) calendar or diary entries for meetings with Savvy principals; and (d) any agreement between the Government and Savvy for the management of Cross Island and use of Moresby House and the Star of India building. Based on a plain reading of the PATI request, it sought any and all records regarding Savvy's communications and contractual dealings with Government involving the \$800,000 loan.

24. Based on the withheld records provided to ICO, the Cabinet Office understood the request to be asking for any and all records pertaining to the loan agreements between Savvy and the Government. The Acting Information Commissioner is satisfied that the Cabinet Office's analysis of the PATI request was adequate.

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

25. The Cabinet Office did not explain the locations that were searched, nor did it provide a search log detailing the steps it took to locate records, as required by regulation 5(2). For example, the Cabinet Office failed to advise who conducted the search, the level of familiarity of the individual conducting the search with the records and locations, the dates of the search and the approximate time spent searching.

26. The Cabinet Office also failed to provide specific additional records requested by the ICO during this review in an attempt to address obvious gaps in the records provided to the ICO.
27. Finally, the Cabinet Office did not confirm if it searched the emails of the then-Permanent Secretary for the Ministry Headquarters.
28. Because no information was provided concerning a search of the emails of the then-Permanent Secretary or any other aspect of the search that the Cabinet Office conducted, the Acting Information Commissioner is not satisfied that the scope of the Cabinet Office's search was adequate.
29. Because the scope of the search was inadequate, the Acting Information Commissioner need not consider the rigour and efficiency with which the search was conducted.

#### *Conclusion*

30. The Acting Information Commissioner is not satisfied that the Cabinet Office conducted a reasonable search to locate records responsive to the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.

#### ***Prejudice to investigation of breach of law – section 34(1)(a)***

31. A public authority may rely on section 34(1)(a) to deny access to a public record whose disclosure would, or could reasonably be expected to, prejudice the prevention, detection or investigation of a breach or possible breach of the law.
32. The public authority must clearly identify the breach or possible breach of law and show that the harm to the prevention, detection or investigation of the breach or possible breach of law could reasonably be expected to occur.
33. 'Prejudice' means bringing about a negative or detrimental effect, as the Information Commissioner explained in [Decision 01/2018](#), Bermuda Tourism Authority, paras. 81-86.
34. The minimum likelihood of harm is that the prejudicing the prevention, detection or investigation of a possible breach of law 'could reasonably be expected to' occur. This is a lesser likelihood of harm compared to 'would', which is a high probability that the harm will occur. 'Reasonably' refers to what a reasonable person may expect considering all circumstances of the case, and they must be likely, plausible or possible based on real and substantial factual grounds.
35. The exceptions and public interest test that apply to section 34 differ from all other harm-based exemptions in the PATI Act. A public authority must consider the public interest

test only when a record falls within a category listed in section 34(2)(a) as an exception. If the record does not fall within a section 34(2)(a) exception, the public interest test does not apply.

36. Where disclosure of a record falling within section 34(2)(a) would be in the public interest, the exemption does not apply, and the record must be disclosed as it properly falls within an exception. If, however, the public authority decides the public interest weighs against disclosing a record falling within section 34(2)(a), the exception no longer applies, and the exemption may be justified to withhold the record.
37. In sum, when applying the exemption in section 34(1)(a), a public authority must ask:
  - [1] What is the breach or possible breach of law?
  - [2] How can disclosure prejudice the prevention, detection or investigation of this breach?
  - [3] Could this reasonably be expected to occur?
  - [4] Does the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?

38. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 34(1)(a) to deny access to the records.

*Public authority's submissions*

39. The Cabinet Office did not provide submissions to support its reliance on section 34(1)(a).

*Applicant's submissions*

40. The Applicant did not make submissions.

*Discussion*

41. The Acting Information Commissioner considers the Cabinet's Office's reliance on section 34(1)(a) to withhold records 1, 2, 4, 5 and 6, as well as parts of record 3.

[1] What is the breach or possible breach of law?

42. The Cabinet Office has not pointed to a specific breach of law in its communications with the ICO.



43. In December 2021, the Bermuda Police Service (**BPS**) made public statements indicating that the police were expected to submit a file to the Department of Public Prosecution for review and charge approval in relation to Savvy<sup>6</sup>. Further, the BPS had previously confirmed that it had arrested two people in connection with the ongoing investigation into the \$800,000 government loan<sup>7</sup>. The Cabinet Office also referred to the two arrests in its internal review decision.
44. More recently, the public record further indicates that a Savvy principal has been charged with obtaining a money transfer by deception<sup>8</sup>. This offence is enshrined in section 346 of [the Criminal Code Act 1907](#).
45. From the information readily available in the public domain, the Acting Information Commissioner accepts the existence of a possible breach of law, although the Cabinet Office has not specified the exact nature of the breach beyond the fact that it arises from the failure of Savvy to pay back the loan agreement. The possible breach of law is concrete, real, and not mere speculation, as supported through publicly available sources.

[2] How can disclosure prejudice the prevention, detection or investigation of this breach?

46. The Cabinet Office maintained in its communications with the ICO that disclosure could prejudice the investigation of the breach or possible breach of law. It did not, however, explain how this could occur. In the absence of any explanation by the Cabinet Office, and having carefully reviewed the withheld records, the Acting Information Commissioner is not satisfied disclosure could prejudice the investigation.
47. By the date of the internal review decision, 23 March 2021, the nature of the BPS investigation was already known, including that two arrests had been made.
48. Further, none of the withheld records contained information such as police intelligence, e.g., transcripts from conversations obtained through wiretapping or bank records obtained through a subpoena, or other evidence that the Savvy principles would not know the Government already has. Disclosure of information of this nature could prematurely inform the target of an investigation of evidence collected against them in a manner that prejudices the effectiveness of the investigation. In contrast, no such

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<sup>6</sup> The Royal Gazette, '[Police expect to send Savvy file to DPP early next year](#)' (15 December 2021).

<sup>7</sup> Bermuda Police Service, '[Arrest in Savvy Entertainment Probe](#)' (3 October 2020).

<sup>8</sup> The Royal Gazette, '[Zane DeSilva charged with money laundering](#)' (27 October 2022).

information is contained in the withheld records in this review. The majority of the withheld records consist of communications between the Government and Savvy principles.

49. In general, some of the records replicate the information contained in the contract between the Government and Savvy, which is available in the public domain.
50. Because the Cabinet Office has not shown that disclosure could prejudice the investigation of a possible breach of law, the Acting Information Commissioner does not need to consider the Cabinet Officer's reliance on section 34(1)(a) further.

#### *Conclusion*

51. The Acting Information Commissioner is not satisfied that the Cabinet Office was justified in finding that the exemption under section 34(1)(a) was engaged for records 1, 2, 4, 5, 6 and parts of record 3.

#### ***Prejudice to fair trial or impartial adjudication – section 34(1)(c)***

52. A public authority may rely on section 34(1)(c) to deny access to a public record whose disclosure would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case.
53. Section 34(1)(c) of the PATI Act is very similar to section 31(1)(b) of the FOI Act in Victoria, Australia. The Victoria ICO's guidance on its similar provision is helpful to understanding what is required to apply section 34(1)(c)<sup>9</sup>.
54. As explained in the Victoria ICO's guidance, a document or information is exempt under section 31(1)(c) if (a) "the information relates to the trial of a person or adjudication of a particular case" and (b) "the disclosure of the information would, or would be reasonably likely to prejudice the fair trial of the person or adjudication of the particular case".
55. A public authority applying section 34(1)(c) must establish that the information relates to the trial of a person or the impartial adjudication of a particular case that is either a current legal proceeding, or one that is contemplated in the future. When identifying the trial or adjudication, the public authority may need to specify the party or parties subject to the legal proceedings, the offence or cause of action, and the relevance of the document to the legal proceeding. It also must indicate the status of the proceeding at

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<sup>9</sup> Office of the Victorian Information Commissioner, '[SECTION 31\(1\)\(B\) – Prejudice the fair trial of a person or the impartial adjudication of a case](#)' (June 2020).

the time of the PATI request, e.g., whether the trial or adjudication was current or anticipated.

56. The public authority must also show how disclosure could prejudice the fair trial of the person or adjudication of the particular case. The PATI Act and the Interpretation Act 1951 do not provide a definition of ‘fair trial’ or ‘impartial adjudication’. Section 6(1) of the [Bermuda Constitutional Order 1968 \(Bermuda Constitution\)](#), however, speaks to impartiality and fair trial: “If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law”. Relatedly, section 6(2)(a) states: “Every person who is charged with a criminal offence . . . shall be presumed to be innocent until he is proved or has pleaded guilty”.

#### Fair trial

57. The Bermuda Court has accepted that section 6(1) of the [Constitution](#) is derived from Article 6(1) of the [European Convention on Human Rights \(ECHR\)](#)<sup>10</sup>. Guidance on Article 6 of the Convention<sup>11</sup> states that the key principle governing the application of Article 6 is fairness. What constitutes a fair trial, however, cannot be the subject of a single unvarying rule but must depend on the circumstances of a particular case.
58. The European Court of Human Rights (ECtHR) “has held that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, the jurors called upon to decide the guilt of an accused. . . . In this way, a virulent press campaign risks having an impact on the impartiality of the court under Article 6 § 1 as well as the presumption of innocence enshrined in Article 6 § 2”<sup>12</sup>.
59. The ECtHR explained that, “[a]t the same time, press coverage of current events is an exercise of freedom of expression, guaranteed by Article 10 of the Convention”<sup>13</sup>. As the ECtHR had made clear, access to public information can be “instrumental for the

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<sup>10</sup> See case of [Tafari Wilson v Fiona Miller](#), [2018] SC (Bda) 6 App (23 January 2018), at para. 16..

<sup>11</sup> European Court of Human Rights, ‘[Guide on Article 6 of the European Convention on Human Rights](#)’ (31 August 2022), at para. 1.

<sup>12</sup> *Ibid* at para. 271.

<sup>13</sup> *Ibid* at para. 272.

individual's exercise of his or her right to freedom of expression"<sup>14</sup> and "the Court considers it inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be in it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them"<sup>15</sup>.

60. The ECtHR also states that "[w]hen it is called up to adjudicate on a conflict between two rights which enjoy equal protection under the Convention, the Court must weigh up the interest at stake"<sup>16</sup>. With respect to Articles 6 and 10 in the context of a criminal trial, generally, the ECtHR's focus is on the impact of a virulent press campaign or similar information, not media coverage of neutral factual information.
61. Specifically, some of the factors identified in the case-law as relevant to the ECtHR's assessment of the impact of a negative press campaign on the fairness of a trial include: "the time elapsed between the press campaign and the commencement of the trial, and in particular the determination of the trial court's [judge or jury]; whether the impugned publications were attributable to, or informed by, the authorities, and whether the publications influenced the judges or the jury and thus prejudiced the outcome of the proceedings"<sup>17</sup>.

#### Independent and impartial adjudication

62. Under the Bermuda Constitution and ECHR, any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation or of any criminal charges shall be established by law and shall be independent and impartial<sup>18</sup>. That right, guaranteed by the ECHR, is properly described as fundamental. In her decision in E Brown v DPP et al & R v Brown, Justice Subair-Williams expressed that the right to be tried by an independent and impartial Court established by law is the most vintage and sacred assurance any Constitution can offer as a safeguard

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<sup>14</sup> European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights' (31 August 2022), at para. 425.

<sup>15</sup> Ibid at para. 482.

<sup>16</sup> Ibid at para. 474.

<sup>17</sup> European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights' (31 August 2022), at para. 273.

<sup>18</sup> See section 6(1) and (8) of the [Bermuda Constitution Order 1968](#) and article 6(1) of the [ECHR](#).

to a fair trial<sup>19</sup>. As Justice Subair-Williams affirmed, “All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases, but because she shuts her eyes to all considerations extraneous to the particular case”<sup>20</sup>.

### Prejudice

63. A public authority relying on section 34(1)(c) must show how disclosure could cause prejudice to a fair trial of a person or impartial adjudication of a case. The meaning of ‘prejudice’ is explained above at paragraph 33.
64. The likelihood of harm required is that prejudicing the proceeding’s fairness ‘could reasonably be expected to’ occur. This is a lesser likelihood of harm compared to ‘would’, which means a high probability that the harm will occur. For further explanation of the required likelihood of harm, see paragraph 34, above. The mere fact that the records may relate to the proceeding does not, of itself, establish a link between disclosure and prejudice to the fairness or impartiality of the trial or adjudication.
65. The exceptions and public interest test that apply to the exemptions in section 34(1), including section 34(1)(c), are explained above in paragraphs 35-36.
66. In sum, when applying the exemption in section 34(1)(c), a public authority must ask:
  - [1] What is the relevant trial or adjudication?
  - [2] How can disclosure prejudice the fairness of the trial or impartiality of the adjudication?
  - [3] Could this prejudice reasonably be expected to occur?
  - [4] Does the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?
67. 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 its reliance on section 34(1)(c) to deny access to the records.

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<sup>19</sup> [Brown v DPP](#), [2021] SC (Bda) 74 Civ (10 September 2021), para 1.

<sup>20</sup> [Brown v DPP](#), at para. 69 (quoting [Locabail \(UK\) Ltd v Bayfield Properties Ltd](#) [2000] QB 451, paras. 2-3).

*Public authority's submissions*

68. The Cabinet Office did not provide submissions to support its reliance on section 34(1)(a).

*Applicant's submissions*

69. The Applicant did not make submissions.

*Discussion*

70. The Acting Information Commissioner considers the Cabinet's Office's reliance on section 34(1)(a) to withheld records 1, 2, 4, 5 and 6, as well as parts of record 3.

[1] What is the relevant trial or adjudication?

71. At the time of the PATI request as well as the internal review decision, no ongoing civil or criminal trial existed because the Government has been unsuccessful in its efforts to serve a Savvy principal and no extradition to Bermuda had occurred. The Government has, however, publicly confirmed that "efforts continue to bring proceedings against a [Savvy principal] to recover the \$800,000 loan monies due to the Government of Bermuda"<sup>21</sup>.
72. From information readily available in the public domain, the Acting Information Commissioner accepts that a civil or criminal trial, or both, were at least contemplated at the time of the PATI request.

[2] How can disclosure prejudice the fairness of the trial or impartiality of the adjudication?

73. The Cabinet Office did not clarify how disclosure could prejudice the fair trial of a person or the impartial adjudication of a proceeding.
74. After carefully reviewing the withheld records, the Acting Information Commissioner has considered the content of the records, the existing public statements by the Government and the BPS, as well as the media attention surrounding this matter. She has assessed whether further disclosures and press coverage could adversely affect the fairness of a trial by negatively influencing the public and, in turn, any potential jurors called upon to decide the rights and obligations or the guilt of the accused in a civil or criminal proceeding, respectively.

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<sup>21</sup> The Royal Gazette, 'Government to use 'international law option' to serve papers over Savvy loan' (28 June 2022).

75. When closely evaluating the content of the records, disclosure could not prejudice the fair trial of the Savvy principals or prejudice the impartial adjudication in the proceedings, whether civil or criminal. Nothing in the content of the records places the Savvy principals in a worse position than presently exists, in such a manner that would negatively influence the public or potential outcome of a trial. Further, some of the information within the withheld records is already in the public domain through official statements by the Government or the BPS. The information in the records is incomparable to the information found in ‘virulent press campaigns’.
76. Disclosure of the records could not, therefore, cause prejudice to the fair trial of the Savvy principals or an impartial adjudication of proceedings related to the \$800,000 loan.
77. Because disclosure could not prejudice the fair trial of a person or the impartial adjudication of a proceeding, the Acting Information Commissioner need not consider the Cabinet Office’s reliance on section 34(1)(c) further.

*Conclusion*

78. The Acting Information Commissioner is not satisfied that the Cabinet Office was justified in finding that the exemption under section 34(1)(c) was engaged for records 1, 2, 4, 5, 6 and parts of record 3.

***Personal information – section 23***

79. Public authorities are justified in denying public access to a record under section 23(1) if it consists of personal information. Section 24(1) defines personal information as information about an identifiable individual, subject to exclusions to this definition in section 24(2) that are not relevant in this review.
80. If the information in the record includes reference to a specific person, it is personal information. A record will also contain personal information if the individual’s identity is reasonably ascertainable from the information. This means that the individual’s identity can be determined by comparing the information with other public information, e.g., the woman who was the first female premier of Bermuda.
81. The Information Commissioner explained in her [Decision 02/2019, Office of the Governor](#), that routine personal work information of elected officials and public employees still falls within the definition of personal information. This does not mean their personal information will always have to be withheld. Rather, the disclosure of their personal information should be based on the consideration of the public interest test.

82. The personal information exemption does not apply in certain circumstances set out in section 23(2). The exemption does not apply, for example, if the information relates to the requester or if the individual to whom the information relates has given their written consent for disclosure.
83. The personal information exemption is subject to the public interest test. In the context of personal information, the public interest test requires a balancing of the public interests 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.
84. When considering the public interest test against and in favour of a personal information disclosure, public authorities should take into account the following factors<sup>22</sup>:
  - a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations;
  - b. Whether disclosure would be fair to the individual under all of the circumstances, which would include consideration of whether sensitive personal information was involved, the potential consequences of disclosure on the individual, and the individual's reasonable expectations of privacy; and
  - c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.
85. If the information is 'sensitive' personal information, the fairness concerns surrounding disclosure may be heightened. Section 7(1) of the [Personal Information Protection Act 2016](#) defines 'sensitive personal information' as "any personal information relating to an individual's place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information".
86. The disclosure of the personal information must also be necessary. The Acting Information Commissioner will consider whether the public interest concerns can be met by disclosure of other information in the records that interferes less with an individual's right to privacy.

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<sup>22</sup> [Decision 02/2019](#), [Office of the Governor](#), para. 51.



If so, the public interest concerns in favour of disclosure may be given less weight in the balance than the individual's privacy rights and freedoms.

87. In sum, to appropriately rely on the personal information exemption in section 23(1), public authorities must consider<sup>23</sup>:

- [1] Whether the record consists of information about an identifiable individual?
- [2] Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?
- [3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?
- [4] If the exemption on personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure?<sup>24</sup>

88. The personal information exemption is the only exemption which the Acting Information Commissioner would invoke on her own accord, as has happened in this review.<sup>25</sup>

#### *Discussion*

89. The Acting Information Commissioner considers the personal information exemption in section 23(1) in relation to the records or parts of records which are not exempt under section 34(1)(a) or 34(1)(c) and which contain information about individuals, e.g., records 1, 2, 4, 5 and page 4 of record 3.

- [1] Whether the records contain information about an identifiable individual?

90. Records 1, 2, 4, 5 and parts of record 3 contain information about identifiable individuals. The individuals can be categorised as:

- a. the relevant Minister and Permanent Secretary during the relevant time, and
- b. individuals associated with two private companies, including Savvy.

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

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<sup>23</sup> [Decision 02/2019](#), [Office of the Governor](#), para. 56.

<sup>24</sup> Disclosure of records consisting of personal information should also be made if disclosure would benefit the individual, in accordance with section 23(6) of the PATI Act, which is irrelevant in this case.

<sup>25</sup> [Decision 01/2018](#), [Bermuda Tourism Authority](#), para. 27.

91. None of the exclusions to the definition of personal information in section 24(2) is applicable to the information about individuals identified above. Section 24(2)(a) does not apply to the information about the Minister, officers or employees of public authorities in the records because it does not relate to the positions or functions of these individuals. The Investigator is satisfied that the identified information falls within the definition of 'personal information' for the purposes of the PATI Act.

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

92. The Acting Information Commissioner is satisfied that the exceptions to the exemption in section 23(2) do not apply to records 1, 2, 4, 5 and parts of record 3.

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

93. A general public interest exists in transparency of the government's contractual arrangements and spending, as well as in strengthening the public's understanding of the specific arrangements between the Government and Savvy. The \$800,000 that was loaned to Savvy was public money, which heightens the public's right to know how and why the money was spent, and whether the Government is taking the appropriate steps to retrieve the money.
94. These interests favouring disclosure must be weighed against the privacy interests of the identified individuals, considering the fairness and necessity of any disclosures. Disclosure of the names and titles of the Minister and Permanent Secretary is both fair and necessary due to their senior and public facing roles. A minister and permanent secretary should expect a certain level of transparency and public scrutiny of their work. These roles have an inherent lesser expectation of privacy in the professional capacity and disclosure of this information is necessary to further their accountability with the public. The accountability of government officials for their decision making is an expressed purpose of section 2 of the PATI Act.
95. Similarly, the disclosure of the names and titles of individuals associated with Savvy would be both fair and necessary to further accountability. The Government had publicly announced the agreement with Savvy, and identified the principals involved with the loan and planned development projects. It would be customary and fair to disclose the names of individuals who have already been associated with the loan, and such individuals have little privacy expectation under these circumstances.
96. Disclosure of the remaining personal information of individuals would not be fair nor necessary. For example, individuals have an expectation of privacy concerning their

signatures, which could be used for forgery, and disclosure of the signature of the Permanent Secretary would be unfair and would not further any public interest.

97. The disclosure of other personal information of individuals associated with private companies also would be unfair when considering the expectation of privacy surrounding home addresses, email addresses, telephone numbers, work titles of private sector employees and signatures. Other information in the records amounts to sensitive personal information and, therefore, has a heightened level of privacy protection.
98. Finally, even if it were fair to disclose the personal information, it is not necessary to further the public interests in transparency and accountability regarding public spending and decision making. Disclosure of some personal information of individuals associated with Savvy as well as individuals in the private sector not associated with the company would not assist the public with gaining a better understanding of the arrangements between the Government and Savvy. Neither would it assist the public to better understand how and why their money was being spent or whether the Government is taking the appropriate steps to retrieve the money.

#### *Conclusion*

99. The Acting Information Commissioner is satisfied that the parts of records 1, 2, 3, 4 and 4 are exempt under section 23(1) as personal information. The Acting Information Commissioner is further satisfied that the public interest requires disclosure of the names and titles of the Minister, Permanent Secretary, and Savvy principals.

#### *Conclusion*

100. The Acting Information Commissioner is not satisfied that the Cabinet Office conducted a reasonable search, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.
101. The Acting Information Commissioner is not satisfied that the Cabinet Office was justified in relying on the exemptions in section 34(1)(a) or (c) to deny public access to records 1, 2, 4, 5 and 6, and part of record 3.
102. Finally, the Acting Information Commissioner is satisfied that the exemption for personal information in section 23(1) is applicable to withhold parts of records 1, 2, 3, 4 and 5.

## Decision

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The Acting Information Commissioner finds that the Cabinet Office did not conduct a reasonable search, as required by section 12(2)(b) of the Public Access to Information (**PATI**) Act and regulation 5 of the PATI Regulations. The Acting Information Commissioner also finds that the Cabinet Office was not justified in denying access to the requested records under section 34(1)(a) or (c) of the PATI Act. Finally, the Acting Information Commissioner finds that some information in the records is exempt under section 23(1) of the PATI Act as personal information.

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

- orders the Cabinet Office to conduct a reasonable search for records as instructed in the confidential cover letter to this Decision and issue a new initial decision on any additional responsive records that are identified, i.e., decide to withhold or disclose them;
- varies the refusal for parts of records 1, 2, 3, 4 and 5 to deny public access to personal information under section 23(1); and
- reverses the decision to deny public access to the remaining parts of records 1, 2, 3, 4 and 5 as well as record 6 in whole.

The Acting Information Commissioner requires the Cabinet Office to disclose records 1, 2, 3, 4 and 5 in part and record 6 in whole, to conduct a reasonable search and to issue a new initial decision, as directed by this Decision and the accompanying Order, on or before **Friday, 3 February 2023**.

## Judicial Review

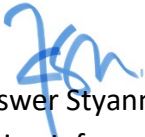
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The Applicant, the Cabinet Office, or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months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

## Enforcement

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The Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Cabinet Office fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Answer Styannes  
Acting Information Commissioner  
16 December 2022

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Access to records

12 ...

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

(a) ...

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

...

#### Personal information

23 (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 –

(a) Subject to subsection (3), the information concerned relates to the requester;

...

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

#### Definition of personal information

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

...

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

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

#### Law enforcement

34 (1) Subject to subsection (2), a record is exempt if its disclosure would, or could reasonably be expected to—

(a) Prejudice the prevention, detection or investigation of a breach or possible breach of law;

...

- (c) Prejudice the fair trial of a person or the impartial adjudication of a particular case;
- (2) Subsection (1) does not apply if –
  - (a) it consists of –
    - ...
  - (b) its disclosure would be in the public interest.

## **Public Access to Information Regulations 2014**

### **Reasonable search**

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

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