

## Decision Notice

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**Decision 23/2023: Office of the Tax Commissioner**

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### **Tax debt records**

**Reference no: 20211019-01**

**Decision date: 17 August 2023**

## Summary

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The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Office of the Tax Commissioner (**OTC**) for records about tax debts. The OTC's internal review decision refused access to certain responsive records under the exemption in section 34(1)(c) (prejudice to fair trial). A Third Party identified during the Information Commissioner's review objected to any of its records being disclosed under the commercial information exemptions in sections 25(1)(a), (b) and (c).

The Acting Information Commissioner has varied the OTC's decision, finding that the OTC was not justified in relying on section 34(1)(c), while the Third Party was justified in asserting that certain records were exempt under section 25(1)(c) (adverse effect on commercial interests). She also has found that two records identified during her review were responsive to the PATI request and thus must be processed by the OTC.

The Acting Information Commissioner therefore has ordered the OTC to disclose the non-exempt parts of the records and to issue an initial decision on the newly identified records, in accordance with this Decision and the accompanying Order.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 21 (public interest test); section 25(1)(a) (trade secrets); section 25(1)(b) (information with commercial value); section 25(1)(c) (adverse effect on commercial interests); section 34(1)(c) (prejudice to fair trial).

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

## Background

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1. On or around 3 July 2020, the Office of the Tax Commissioner (**OTC**) entered into a consultancy contract with OARRS Inc. Ltd (**OARRS**). Based on a notice published in the Government of Bermuda's Official Gazette, OARRS was contracted to provide ongoing liaison between the Government and taxpayers, or their authorised agents, with past due land tax accounts.<sup>1</sup>

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<sup>1</sup> The OTC gazetted this consultancy contract via [Gazette Notice GN0103/2021](#), as published on 1 February 2021.

2. On 8 April 2021, the Applicant made a Public Access to Information (**PATI**) request to the OTC, asking for:
  - a. the amount of land tax owed to the Government to date, the proportion of this amount that was greater than 90 days in arrears, and the same information for payroll, corporate services and hotel occupancy taxes (**items 1-3**);
  - b. all records on the contract held by OARRS with the OTC which would include, but not be limited to, records on the tendering process, ownership of OARRS (including beneficial ownership), the start date of the contract, taxes recovered by OARRS and money paid to OARRS (**item 4**); and
  - c. any reports provided to the Government by OARRS (**item 5**).
3. On 1 July 2021, the OTC issued an initial decision which provided the Applicant with the information responsive to items 1-3 in full. For items 4 and 5, the OTC responded with descriptive information but did not disclose any actual record to the Applicant. In response, the Applicant requested an internal review which noted that they were seeking the actual records and reports for items 4 and 5. The Applicant did not challenge the OTC's response to items 1-3.
4. On 7 October 2021, the OTC issued its internal review decision, denying access to all records under the 'prejudice to fair trial' exemption in section 34(1)(c).<sup>2</sup> It explained that, because OARRS had initiated legal action against the Tax Commissioner, all records would be exempt for the duration of the court proceedings.
5. On 19 October 2021, the Applicant made a timely application for an independent review by the Information Commissioner of the OTC's internal review decision on items 4 and 5 of the PATI request.

## 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 issue the Applicant wanted her to review.

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<sup>2</sup> The OTC issued its internal review decision to the Applicant, out-of-time, during a 'failure-to-decide' review by the Information Commissioner, as described in [Decision 11/2021](#).

7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions were required from the OTC to determine whether its reliance on the exemption was justified.
8. On 16 November 2021, the Information Commissioner's Office (**ICO**) notified the OTC of the Applicant's valid application and asked for a copy of the withheld records. Between November 2021 and November 2022, the OTC provided the ICO with a total of 35 records. They were labelled as records 1, 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4 and 5-8.
9. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any third party concerned a reasonable opportunity to make representations. The OTC, the Applicant and OARRS as a Third Party were invited to make submissions during this review. The ICO received submissions from the Applicant and OARRS. While the OTC did not respond substantively to the formal invitation to make submissions, it provided relevant information in its initial and internal review decisions as well as in other correspondence with the ICO.
10. During the Information Commissioner's review, the Applicant clarified that they were not seeking individual taxpayers' identifying information. The Applicant further accepted the ICO Investigator's preliminary view that certain information about other individuals in the records would be appropriately withheld from public disclosure under the personal information exemption in section 23(1). In light of these and with the parties' agreement, taxpayer information in the responsive records as well as certain personal information were redacted from the records and are not considered in this Decision.
11. In its third party submission, OARRS relied on the commercial information exemptions in sections 25(1)(a), (b) and (c) of the PATI Act to justify its objection to the disclosure of the records it had submitted to the OTC.
12. In light of the Applicant's confirmation and OARRS's submissions, the scope of this Decision is limited to considering the OTC's reliance on section 34(1)(c) as well as OARRS's reliance on sections 25(1)(a), (b) and (c). Before discussing the exemptions, this Decision first considers the responsiveness of records 5 and 6.

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

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13. In coming to this Decision, the Acting Information Commissioner considered all the relevant submissions, or parts of submissions, from the OTC, the Applicant and OARRS. She is satisfied that no matter of relevance has been overlooked.

14. 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.

***Preliminary issue – records 5 and 6***

15. Record 5 was a signed contract between the OTC and OARRS dated 3 July 2020. Record 6 was an email from the OTC notifying OARRS of the contract termination.
16. The OTC initially queried the responsiveness of record 5 to the PATI request because the OTC was of the view that the contract itself had not been requested. The OTC's arguments applied to record 6, which the OTC did not identify until later in this review. Therefore, the Acting Information Commissioner considers the OTC's arguments on the responsiveness of both records to the PATI request.
17. Item 4 of the PATI request asked for all records on the contract held by OARRS. While the PATI request did not explicitly ask for the contract, the Applicant's framing of item 4 ("all records on the contract" and "the start date of the contract", read together) could reasonably be read to mean that the contract itself was responsive, along with the email notice from the OTC terminating the contract. Item 4's specific references to certain records, such as those relating to tender, taxes recovered and money paid to OARRS, should be understood as examples only, which can be concluded from the phrase "would include, but not be limited to" in the PATI request.
18. The Acting Information Commissioner is satisfied that records 5 and 6 were responsive to item 4 of the PATI request.
19. Because the OTC had not made a decision on whether records 5 and 6 could be disclosed to the public under the PATI Act, it must be given the opportunity to do so. This Decision does not consider whether any exemption invoked by the OTC or OARRS applies to them. Instead, the OTC is now required to issue an initial decision on these two records.

***Prejudice to fair trial – section 34(1)(c)***

20. 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. This exemption aims to prevent the release of records that could result in unfairness in the conduct of a trial or adjudication. It safeguards the integrity of the court, or other adjudicating body, and protects a person's right to a fair trial.

21. As explained in [Decision 28/2022, Cabinet Office](#), a public authority applying section 34(1)(c) must first establish that the record relates to the trial of a person or adjudication of a particular case, which is either a current legal proceeding or one contemplated in future.<sup>3</sup> When identifying the trial or adjudication, the public authority may need to specify the parties to the proceeding, the offence or cause of action as well as the relevance of the record to the proceeding. The public authority also must indicate the proceeding's status at the time of the PATI request (or internal review), e.g., whether the trial or adjudication was ongoing, concluded or anticipated.
22. The PATI Act and the [Interpretation Act 1951 \(Interpretation Act\)](#) do not define 'fair trial' or 'impartial adjudication'. However, the Bermuda Court has accepted that section 6(1) of the [Bermuda Constitution](#) derives from Article 6(1) of the [European Convention on Human Rights](#).<sup>4</sup> In the context of civil proceedings, fair trial encompasses a wide range of both institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning of judicial decisions.<sup>5</sup>
23. The Bermuda Constitution requires any court prescribed by law to determine the existence or extent of any civil right or obligation, or of any criminal charges, to be independent and impartial. Citing a UK Court judgment, Justice Subair Williams stated:

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>6</sup>
24. 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 likelihood of harm required is that prejudicing the proceeding's fairness or the impartial adjudication 'could reasonably be expected to' occur. This is a lesser likelihood of harm compared to

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<sup>3</sup> See [Decision 28/2022, Cabinet Office](#), at para. 55.

<sup>4</sup> See [Tafari Wilson v Fiona Miller](#) [2018] SC (Bda) 6 App (23 January 2018), at para. 16.

<sup>5</sup> See European Court of Human Rights, '[Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#)' (31 August 2022).

<sup>6</sup> See [Locabail \(UK\) Ltd v Bayfield Properties Ltd](#) [1999] EWCA Civ 3004 (17 November 1999), at para. 2, as quoted in [Ewart Frederick Winslow Brown v Director of Public Prosecutions, Attorney General, Deputy Governor](#) [2021] SC (Bda) 74 Civ (10 September 2021), at para. 69.

‘would’, which means a high probability that the harm will occur. 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.

25. 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.
26. Where disclosure of a record falling within section 34(2)(a) would be in the public interest, the exemption does not apply. Unless another exemption applies, the record thus must be disclosed as it properly falls within an exception to section 34. 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.
27. In sum, when applying the exemption in section 34(1)(c), a public authority must ask:<sup>7</sup>
  - [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?
28. 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.

*Public authority’s submissions*

29. The OTC’s internal review decision explained to the Applicant that “the Ministry [had] designated the requested records as exempt for the duration of the Court proceedings”, due to OARRS filing “a writ in the Courts against the Tax Commissioner during the intervening period”. It also stated that, “once the matter [was] fully adjudicated, the Ministry [of Finance] will appropriately address the [PATI] request”.

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<sup>7</sup> See [Decision 28/2022, Cabinet Office](#), at para. 66.

### *Applicant's submissions*

30. While the Applicant did not comment on the OTC's reliance on section 34(1)(c), they asked the Information Commissioner to "consider whether everything contained within the records...really [were] exempt under 34(1)(c) or only parts of the records", and "for those parts that the Commissioner deemed to be exempt under 34(1)(c)...to consider whether the public interest required disclosure".
31. The Applicant also linked an online article that reported the relevant legal case had been settled.<sup>8</sup>

### *Discussion*

32. The Acting Information Commissioner considers the OTC's reliance on section 34(1)(c) to deny public access to records 1, 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8.

[1] What is the relevant trial or adjudication?

33. Based on the information made available to her, the Acting Information Commissioner is satisfied that the legal proceeding referred to by the OTC in its internal review decision was ongoing, or at the very least contemplated, at the time the internal review decision was made in October 2021.
34. The OTC provided the ICO with limited information about the legal proceeding. The Acting Information Commissioner considered the responsive records as well as the Minister of Finance's refusal to respond to a Parliamentary question in 2022, about the total receivables recovered by OARRS as well as the total fees due and paid to the consultant.<sup>9</sup> On that basis, the Acting Information Commissioner is satisfied that the legal proceeding initiated by OARRS against the Government related to payments to the company for its debt recovery services.
35. Having reviewed all 33 responsive records, the Acting Information Commissioner accepts that records 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8 were directly related to the identified legal proceeding. These records were invoices (some with the OTC's payment approvals), invoice details and reports from OARRS on its services.

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<sup>8</sup> The Royal Gazette, '[Government secretly settled lawsuit with debt collection company](#)' (9 July 2022).

<sup>9</sup> See House of Assembly, [Official Hansard Report](#), 4 February 2022, at page 267. The then-Minister of Finance stated that the Opposition's question "[was] likely to prejudice a matter which [was] under trial and therefore sub judice. With proceedings in train and counsel instructed on both sides, this question [went] to the heart of the matter at the bar with respect to" OARRS.



36. In the absence of sufficient explanation from the OTC, the Acting Information Commissioner is not satisfied that record 1 related to the identified legal proceeding. Record 1 was a pre-contractual, authority-to-authority discussion about the OTC's business need and proposed approach to engage consultant firms as land tax debt collectors. She does not consider the OTC's reliance on section 34(1)(c) to withhold record 1 further.

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

37. The Acting Information Commissioner considers this question for records 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8 only.
38. The OTC asserted that disclosure could have been prejudicial to the legal proceeding because it was ongoing at the relevant time, without explaining further. On this basis alone, the Acting Information Commissioner is satisfied that the OTC has not justified its reliance on section 34(1)(c) to justify withholding the relevant records. For the sake of completeness, however, she continues considering the exemption.
39. Both the Government and OARRS, who were parties in the identified legal proceeding, were aware of the existence of records 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8 at the time of the PATI request. Most had been submitted by OARRS to the OTC while working under contract. While parts of records 7 and 8 had not been submitted by OARRS, they did not contain any information that was not known by OARRS at the time of the internal review decision. It was not plausible that disclosing those records 'to the world at large' in October 2021 could have permitted either party to the proceeding to thereafter modify their position before the Court, in such a way that could have harmed the integrity of the Court's process. No new information about one party could have been learned by the opposing party, for instance by way of a premature disclosure to the other side. In that sense, no harm to the parties' standing before the Court could have occurred.
40. Record 3.12 contained handwritten information that might have been unknown by OARRS at the time of the OTC's internal review decision. Theoretically, this information might have factually contradicted one of the parties' submissions before the Court and, therefore, its disclosure might have had an adverse effect on that party's case. But it has remained unclear exactly how revealing the handwritten information in record 3.12 could have damaged the legal proceeding's fairness or impartiality, because an effect on a party's position in a court case is not necessarily the same as an adverse effect on the fairness of one's trial or the impartiality of the Court.

41. The Acting Information Commissioner considered the possibility of how the records, if disclosed at the time of the internal review decision, could have been used to generate adverse publicity. While she acknowledges that such adverse publicity might have had some negative impact on the legal proceeding, the Acting Information Commissioner has not been made aware by the OTC of any information or evidence showing that such negative impact could have undermined the integrity of the Court’s process. She recognises that adverse publicity could have made it more difficult for the disputing parties to have reached a settlement. But prejudice to a settlement potential or position was not the same as a prejudice to a trial’s fairness.<sup>10</sup>

[3] Could this prejudice reasonably be expected to occur?

42. In the absence of adequate submissions from the OTC, the Acting Information Commissioner is not convinced that there was a clear link between disclosure of records 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8 and any prejudice to the fair trial of any person or the impartiality of the Court. She does not need to consider the OTC’s reliance on section 34(1)(c) further.

#### *Conclusion*

43. The Acting Information Commissioner is not satisfied that the OTC was justified in finding that the exemption in section 34(1)(c) was engaged for records 1, 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8.

#### *Adverse effect on commercial interests – section 25(1)(c)*

44. A public authority, or a third party asserting its rights, may rely on section 25(1)(c) to deny access to a public record whose disclosure would, or could reasonably be expected to, have an adverse effect on the commercial interests of any person to whom the information relates. This commercial interest exemption is subject to exceptions in section 25(2), which set out circumstances when the exemption cannot apply.
45. Section 7(1) of the [Interpretation Act](#) defines ‘person’ to include “any company or association or body of persons, whether corporate or unincorporated”.

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<sup>10</sup> See Ireland’s Office of the Information Commissioner, ‘[Case 020179. Freedom of Information and Discovery in Legal Proceedings](#)’ (7 June 2007).

46. As explained in [Decision 12/2018, Ministry of Finance Headquarters](#), ‘commercial interest’ relates to a person’s ability to participate in a commercial activity, such as the sale or exchange of goods or services or the collection of a debt.<sup>11</sup>
47. By its ordinary definition, having an ‘adverse effect’ means leading to an unfavourable or harmful result.<sup>12</sup> A public authority, or the third party, must explain the circumstances anticipated to arise from disclosing the record at issue which could lead to such unfavourable or harmful result on the person’s commercial interests. The exemption in section 25(1)(c) cannot be used simply to avoid embarrassment to the public authority or concerned person.<sup>13</sup>
48. The likelihood of the harm must be that a reasonable person, considering all circumstances of the case, may expect the adverse effect to the person’s commercial interests to occur. The expectation must be likely, plausible or possible based on real and substantial factual grounds.
49. If section 25(1)(c) is properly engaged, the public interest test must be applied. Where the public interest would, on balance, be better served by disclosure than by non-disclosure, then the records must still be disclosed.
50. In sum, a public authority, or third party, must consider these questions when seeking to justify the exemption for information with commercial value:<sup>14</sup>

[1] Does any exception in section 25(2) apply?

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

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

[4] What adverse effect could disclosure cause?

[5] How likely is this to occur?

[6] If the exemption is engaged, does the balance of the public interest still require disclosure?

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<sup>11</sup> See [Decision 12/2018, Ministry of Finance Headquarters](#), at para. 66.

<sup>12</sup> See [Decision 12/2018, Ministry of Finance Headquarters](#), at para. 68, citing Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

<sup>13</sup> See [Decision 12/2018, Ministry of Finance Headquarters](#), at paras. 68-69.

<sup>14</sup> See [Decision 09/2019, Department of Public Lands and Buildings](#), at paras. 170-174.

51. A public authority, or third party asserting its right under section 25(1)(c), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.

*Third party's submissions*

52. OARRS submitted that disclosure could cause adverse effects on its commercial interests, in that it would have an adverse impact on its future contracts or employment opportunities by revealing, amidst a competitive environment, information about the company's designs, strategies and results.
53. OARRS explained that its actual report format was proprietary, because it was developed through its years of experience delivering relevant, performance-based reports to clients and reflected work plan strategies executed by the company. OARRS noted that it had not received reporting guidelines or templates from the OTC.
54. OARRS explained that its fee proposal to clients was subject to a portfolio review and based on the recovery opportunity for its clients. It further explained that the contract fee proposed to the OTC was specifically based on the land tax portfolio. Any future portfolios that would not have a similar 'portfolio DNA' to the land tax one might therefore warrant a different fee. OARRS submitted that any future proposal it might make for a different rate could be met with consternation if there was an expectation that it would charge the same fee it did to the OTC.
55. OARRS compared its performance with other agents contracted by the OTC and submitted that its results outperformed its competitors. OARRS attributed this difference in performance wholly to the company founder's experience, which reflected their industry success in dissecting and interpreting account data when crafting their work strategies and key performance indicators for clients. OARRS submitted that its trade experience was its trade secret. OARRS also believed that its performance results and corresponding contract value explained why details of OARRS's contract had been disclosed, as compared with other agents.
56. Because its contract fee and the total amount it recovered had been made public, OARRS submitted that additional disclosure would offer little to no benefit to the public.

*Public authority's submissions*

57. The OTC was not invited to comment on this exemption, because it was invoked by OARRS during the Information Commissioner's review.

### *Applicant's submissions*

58. The Applicant emphasised that the exemption in section 25(1)(c) was subject to the public interest test. They invited the Acting Information Commissioner to carefully weigh the public interest considerations in this case, noting circumstances surrounding this matter.
59. The Applicant submitted that it was a fact that OARRS was awarded a government contract to recover taxes with no tender and without the company having a debt collection licence, which the Applicant described as being required by law. In the Applicant's view, while the OTC had provided limited explanation on why the contract was not awarded through tender (i.e., due to COVID-19 and an 'urgent' need to procure services and bypass procurement rules), it had not explained the lack of licence issue. The Applicant understood that Consumer Affairs had initiated an investigation, but its outcome was never released.
60. The Applicant referred to a newspaper article which reported that, in response to a lawsuit filed by OARRS against the Government, the OTC claimed that OARRS committed a crime by collecting taxes without a licence and this was the reason for the contract termination. The article reported that OARRS insisted that it had been told by the Tax Commissioner that a licence was not needed and that the contract was terminated because of the amount of money owed to OARRS. The Applicant submitted that, while it was publicly unknown whether OARRS's allegations were true, the fact that the public authority had reached a settlement with the company suggested that OARRS's claim was not entirely without merit and that at least some of its allegations were true.
61. The Applicant believed that disclosure of the responsive records was still in the public interest. Specifically, given OARRS's serious allegations and contrasting claims from the OTC, the Applicant asserted that disclosure could deter or reveal wrong-doing or maladministration and reveal untrue, incomplete or misleading information or acts of a public authority. The Applicant submitted that the public had the right to know if public officials were telling the truth or otherwise and if any wrongdoing or maladministration had occurred. They believed disclosing the records might shed light on this.

### *Discussion*

62. The Acting Information Commissioner considers OARRS's reliance on section 25(1)(c) to object to the disclosure of records 2.1 to 2.13, 3.1 to 3.11, 3.13 and 4.1 to 4.4. Given the nature and content of records 3.12, 7 and 8 and a specific part of record 1, OARRS's arguments are also applied to them.

[1] Does any exception in section 25(2) apply?

63. The exceptions in section 25(2)(a) and (b) do not apply to the records being considered. The information in the records did not relate to the Applicant, and OARRS has not consented to the records being disclosed.
64. The Acting Information Commissioner is satisfied that the exception in section 25(2)(c) does not apply to parts of records 2.1 to 2.13 which noted the percentage contract fee. The contract fee is the type of contract information that public authorities are required to publish in the Official Gazette under section 6(6) of the PATI Act, and OARRS's contract was executed after the PATI Act came into effect. But the Acting Information Commissioner has no evidence of the OTC having notified the company that the contract fee belonged to a class of information that might be made available to the general public. For the same reason, the exception in section 25(2)(c) does not apply to the remaining information in the responsive records, including the individual paid figures shown in records 7 and 8.

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

65. The Acting Information Commissioner accepts that records 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8 as well as a certain part of record 1 related to OARRS.

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

66. Relevant for consideration was OARRS's commercial interest to maintain a competitive edge in securing and delivering on public and private sector debt recovery portfolios. With respect to its vendor number, its commercial interest was to ensure that payments made by the Government to OARRS were administered securely and honestly.
67. As the Information Commissioner has consistently stated, a company's reputation or image, on its own, does not qualify as a commercial interest. Because OARRS argued that its public image affects its future contracts and employment opportunities, the Acting Information Commissioner accepts that this constituted a commercial interest.

[4] What adverse effect could disclosure cause?

68. The Acting Information Commissioner accepts that the lessening of OARRS's ability to secure future contracts and employment opportunities amounted to adverse effects to the identified commercial interests. Having reviewed the responsive records, the Acting Information Commissioner further accepts that there was a direct link between those adverse effects and the potential disclosure of records 4.1 to 4.3, as well as certain information in records 1, 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8.

69. The relevant part of record 1 referred to fee negotiations. Records 2.1 to 2.13 were invoices that included the tax recovered by OARRS each month, the contract fee, and the amount payable to OARRS. Records 7 and 8 were also invoices, but with the OTC's payment approval stamps and handwritten notes. Records 3.1 to 3.11 and 3.13 were the invoice details, which set out the tax recovered per taxpayer, with other information that could have revealed, for example, the frequency of debt payments received. If disclosed, the information could have been analysed to generate statistics on taxpayer reactions to OARRS's strategy and, more generally, to assess taxpayer behaviour. Record 3.12 was a report generated from the OTC's system, which detailed OARRS's client tax portfolio. It also contained a handwritten note about payments to OARRS. Records 4.1 to 4.4 were reports that summarised OARRS's performance over time.
70. In the absence of evidence showing that the OTC had provided OARRS's with basic categories of information that were expected to be included in OARRS's performance report, the Acting Information Commissioner accepts that the details presented in the invoice details and the reports, as well as their formatting, were proprietary information which could have revealed OARRS's business strategies.
71. In short, records 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8 as well as a certain part of record 1 detailed information about OARRS's performance and business strategies which, if disclosed, could have placed OARRS at a commercial disadvantage to its competitors who were not required to disclose similar information to the public. This, in turn, could have negatively impacted OARRS's ability to secure future contracts and employment opportunities.
72. In contrast, the Acting Information Commissioner is not satisfied that disclosing certain parts of record 4.4, which revealed general details and the total amount of taxes assigned to and collected by OARRS during a period, could have negatively impacted OARRS's commercial interests. She is also not satisfied that those general details, including the percentage contract fee, in records 2.1 to 2.13, 3.12, 7 and 8 could have harmed OARRS's commercial interests. This information did not in any way reveal OARRS's business strategies. Disclosure would only reveal OARRS's overall performance and success rate during the relevant period. It would not reveal information that external parties could have used, for example, to attempt an uninformed or misleading evaluation on OARRS's monthly performance, nor could a competitor have deciphered the business strategies adopted by OARRS for this contract. It was the sort of summary information reasonably expected to be in the public domain about the public purse. Furthermore, the percentage contract fee in records 2.1 to 2.13 was already in public domain at the time the OTC had issued its internal review decision. The Acting Information Commissioner does not

further consider OARRS's reliance on section 25(1)(c) to object to disclosing these specific parts of records 2.1 to 2.13, 3.12, 4.4, 7 and 8.

73. Lastly, the Acting Information Commissioner accepts that disclosure of the vendor number could have placed OARRS's commercial interest at risk, in that the unique identifier could have been used to attempt to defraud the Government if someone were to dishonestly present themselves as a company representative.

[5] How likely is this to occur?

74. The Acting Information Commissioner considers this question for records 4.1 to 4.3 as well as certain parts of records 1, 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8 only.
75. The Acting Information Commissioner accepts that the credit industry remained a competitive field with several major companies present in Bermuda. She accepts that disclosure of records 4.1 to 4.3 as well as certain parts of records 1, 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8 could reasonably have been expected to lead to the adverse effects to the commercial interests, as described above.
76. In a climate of identity fraud and other cybersecurity risks, the Acting Information Commissioner also accepts that disclosure of the vendor number could reasonably have led to fraudulent transactions, which could have affected OARRS's commercial interests.

[6] If the exemption is engaged, does the balance of the public interest still require disclosure?

77. The public interest test is considered for records 4.1 to 4.3 as well as certain parts of records 1, 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8 only.
78. A factor in favour of disclosing the parts of records which OARRS claimed to be commercially exempt would be to promote the public's right of access to records on public spending, for the purpose of holding authorities to account for more effective uses of public funds. Importantly, the Auditor General's [2018/19 annual report](#) commented on how critical it was for the Government to "address the ongoing significant taxpayer indebtedness", which the Ministry of Finance had agreed with and noted that it "[was] working through the procurement process to engage relevant service providers that [could] assist".<sup>15</sup> Disclosure thus could have allowed the public to gain a better understanding of the actual value gained by the Government in having outsourced its tax debt recovery work to companies such as OARRS. Through access to OARRS's actual

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<sup>15</sup> See Office of the Auditor General, '[Report of the Auditor General on the Work of the Office of the Auditor General For the Financial Year Ended March 31, 2019](#)' (30 January 2020), pages 26-27.



performance data, the public could have more meaningfully opined on the extent of gains and losses to the public purse.

79. This public interest in informing the public of the value for money for OARRS's contract could have been met, however, by the more limited disclosure of the amount of land taxes assigned to OARRS, which was the contract deliverable, and the total amount that the company had recovered.
80. The Acting Information Commissioner agrees with the Applicant that there was a public interest in the public being informed of whether the OTC had followed the appropriate procedures prior to awarding the contract to OARRS. Such process would have considered if the hired contractors were required to hold a debt collection licence at the time. However, having carefully reviewed the records at issue, the Acting Information Commissioner is not satisfied that this specific public interest could have been satisfied by disclosing records 4.1 to 4.3 as well as certain parts of records 1, 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8, which only contained OARRS's commercial information and limited information about fee negotiations.
81. Several factors weighed in favour of maintaining the exemption. The Information Commissioner is satisfied that, if the assigned debt and recovered amounts were disclosed, there would have been little to no overriding public interest in disclosing OARRS's monthly performance or other information that could have revealed its business strategies. Given the role of private companies in Bermuda's economy, a public interest remained in ensuring they can protect their performance and strategy information, which give a competitive edge over their competitors.
82. Further, section 3 of the Government's [Code of Practice for Project Management and Procurement](#) explains that through its procurement process, the Government aims to (i) use its purchasing power to promote equality of opportunity with regard to disability, gender, and race; (ii) facilitate the establishment of a more level playing field and diverse contractor base by ensuring that specified businesses have access to, and the opportunity to win, Government contracts; and (iii) work with local contractors to support the local economy.<sup>16</sup> Here, disclosure of OARRS's information to that level of detail raises concerns that it could have harmed a small, local, woman-owned, Black-owned business operating amongst major international companies. The public interest

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<sup>16</sup> See Government of Bermuda, '[Code of Practice for Project Management and Procurement](#)' (July 2020, 2<sup>nd</sup> ed.), page 13. Also, section 7.3 states that "[c]ontracting opportunities must be easily accessible to specified businesses: to improve contractor diversity relative to a disability, gender and race; to help achieve the best value for money; to benefit from innovative solutions; and to deliver better quality goods or services".

in upholding fair competition amongst private companies delivering a service to the Government, as well as the public interest in promoting diversity amongst awarded contractors, favoured non-disclosure of more detailed information on OARRS's business information.

83. Given the above, the Acting Information Commissioner has found the balance of public interests favoured non-disclosure of records 4.1 to 4.3, on the basis of them being OARRS's report design and having content whose disclosure could have harmed OARRS's commercial interests, as well as certain parts of records 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8 whose disclosure could have revealed OARRS's business strategies and monthly performance. The balance of public interests also favoured the non-disclosure of negotiation details in record 1. Further, disclosure of the vendor number in the records was not in the public interest.
84. In contrast, the Acting Information Commissioner has found that the balance of public interests favoured disclosing the remaining parts of records 2.1 to 2.13, 7 and 8. Doing so would serve to eliminate unnecessary secrecy about a successful debt recovery effort.

#### *Conclusion*

85. OARRS has justified its reliance on the exemption to object to the disclosure of records 4.1 to 4.3, the negotiation details in record 1, as well as certain parts of records 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8.
86. OARRS has not justified its reliance on section 25(1)(c) of the PATI Act to object to the disclosure of the other parts of records 2.1 to 2.13, 3.12, 4.4, 7 and 8; therefore, the Acting Information Commissioner now considers the exemption in section 25(1)(b).

#### ***Information with commercial value – section 25(1)(b)***

87. Section 25(1)(b) allows a public authority to refuse access to a record if it consists of information with a commercial value and disclosure would, or could reasonably be expected to, destroy or diminish the value of such information. The commercial value exemption is subject to exceptions in section 25(2), which set out particular circumstances when the exemption cannot apply.
88. The PATI Act does not define 'commercial value'. As the Information Commissioner explained in [Decision 09/2019, Department of Public Lands and Buildings](#), information may have commercial value because it is important to the performance of the owner's

commercial activities or because it can be sold for value to an arms-length buyer, i.e., intrinsic commercial value.<sup>17</sup>

89. The PATI Act and Regulations do not define 'commercial' or 'commercial activities'. In [Decision 12/2018, Ministry of Finance Headquarters](#), the Information Commissioner read 'commercial' in its ordinary meaning, namely, "concerned with or engaged in commerce". 'Commerce' is defined as "the activity of buying and selling" or "making or intended to make a profit".<sup>18</sup>
90. Importantly, the exemption in section 25(1)(b) protects the commercial information of private sector businesses as well as public authorities that are engaged in commercial activities. A public authority relying on section 25(1)(b) must explain the commercial activity that is involved.
91. Commercial activity usually requires a business undertaking carried on to generate income or profit.<sup>19</sup> Under some circumstances, the activity may be indirectly related to a public authority's commercial activity, but is still necessary for the public authority to engage in the commercial activity.<sup>20</sup>
92. Unlike some other access to information laws<sup>21</sup>, section 25(1)(b) involves only commercial information. It will not extend to cover information that relates solely to the finances of a public authority, e.g., its money resources and their management.

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<sup>17</sup> See [Decision 09/2019, Department of Public Lands and Buildings](#), at para. 170.

<sup>18</sup> See [Decision 12/2018, Ministry of Finance Headquarters](#), at para. 66.

<sup>19</sup> For example, the Queensland Information Commissioner stated that the commercial value harm factor should be read narrowly, in that it is only applicable "to information concerning activities or affairs that are carried on in a business-like fashion for the purpose of generating income or profits"; see [Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd \(Third Party\); The Walt Disney Company \(Australia\) Pty Ltd \(Fourth Party\)](#) [2016] QICmr 30 (18 August 2016), at paras. 108-122.

<sup>20</sup> The UK Information Tribunal applies a broader definition of 'commercial' that is not limited to competitive participation in the buying and selling of goods or services. Rather, the UK Tribunal includes activities such as debt collection that, if compromised, could prejudice the public body's commercial interests, although this case was acknowledged as being 'near the borderline' of the definition; see [Student Loan Company Ltd v Information Commissioner](#), EA/2008/0092 (17 July 2009). Similarly, the UK Tribunal has recognised the provision of university course materials as a commercial interest because the course materials are the 'assets' which the university depends upon for its commercial activity of recruiting students in a competitive environment; see [University of Central Lancashire v Information Commissioner](#), EA/2009/0034 (8 December 2009).

<sup>21</sup> See, for example, section 45(c) of the Queensland Freedom of Information Act 1992 (applicable to information concerning business, professional, commercial or financial affairs whose disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the provision of such information in the future to government).

93. The plain meaning of 'destroy' or 'diminish' refers to the commercial value of the information being lost or lessened.
94. 'Could reasonably be expected to' requires distinguishing between what is merely speculative, irrational or absurd and identifying expectations that are likely, plausible, or possible based on real and substantial facts. A speculation alone will not be sufficient.
95. If a record falls within the exemption in section 25(1)(b), it must be disclosed if the balance of the public interest favours disclosure.
96. In sum, a public authority, or third party, must consider these questions when seeking to justify the exemption for information with commercial value:<sup>22</sup>

[1] Does any exception in section 25(2) apply?

[2] Does the information have commercial value, and can the specific nature of the commercial value be described?

[3] What is the destruction or diminishment of the commercial value of the information that could occur?

[4] How could disclosure cause this destruction or diminishment?

[5] Could it reasonably be expected to occur under the circumstances?

[6] If the exemption is engaged, does the balance of the public interest still require disclosure?

97. A public authority, or third party asserting its rights under section 25(1)(b), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.

*Third party's submissions*

98. See paragraphs 52-56.

*Applicant's submissions*

99. See paragraphs 58-61.

*Public authority's submissions*

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<sup>22</sup> See [Decision 09/2019](#), Department of Public Lands and Buildings, at para. 174.

100. The OTC was not invited to comment on this exemption, because it was invoked by OARRS during the Information Commissioner's review.

*Discussion*

101. The Acting Information Commissioner considers OARRS's reliance on section 25(1)(b) to object to the disclosure of certain parts of records 2.1 to 2.13 and 4.4. Given the content and nature of records 3.12, 7 and 8, OARRS's arguments were also applied to those parts found not exempt under section 25(1)(c). The Acting Information Commissioner does not consider section 25(1)(b) for the remainder of record 1, because it did not relate to OARRS's commercial interests.

[1] Does any exception in section 25(2) apply?

102. As discussed in paragraph 63 and 64, the exceptions in section 25(2) do not apply to any parts of records 2.1 to 2.13, 3.12, 4.4, 7 and 8.

[2] Does the information have commercial value, and can the specific nature of the commercial value be described?

103. Because OARRS did not submit that the information in the relevant parts of records 2.1 to 2.13, 3.12, 4.4, 7 and 8 could be sold for value to an arms-length buyer, the Acting Information Commissioner does not consider whether the information has any intrinsic commercial value.

104. The Acting Information Commissioner is satisfied that the relevant information related to the performance of OARRS's commercial activities. She is not satisfied, however, that the information was important to the performance of OARRS's commercial activities, in the sense that it was not valuable to the sustainability or profitability of OARRS's commercial activity in debt recovery. As discussed in paragraph 72, the relevant information was too general to have been used by competitors to undermine OARRS's business.

105. Because the Acting Information Commissioner is not satisfied that the relevant parts of records 2.1 to 2.13, 3.12, 4.4, 7 and 8 had commercial value, she does not consider OARRS's reliance on section 25(1)(b) further.

*Conclusion*

106. OARRS has not justified its reliance on section 25(1)(b) of the PATI Act to object to the disclosure of the remainder of records 2.1 to 2.13, 4.4, 7 and 8.

### *Trade secret – section 25(1)(a)*

107. Under section 25(1)(a), a public authority may refuse public access to a record if the record consists of trade secrets of any person. The trade secrets exemption is subject to exceptions in section 25(2), which set out particular circumstances when the exemption cannot apply.
108. Neither the PATI Act nor any other legislation provides a definition of ‘trade secret’. As explained in [Decision 06/2021, Cabinet Office](#), the Information Commissioner has adopted its definition as set out in section 2 of the UK Trade Secrets (Enforcement, etc.) Regulations 2018, as follows:
- a. The information is secret in the sense that it is not, in whole or in part, generally known among or readily accessible to persons within the circles of people that normally deal with this kind of information.
  - b. It has commercial value because it is secret.
  - c. The person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret.<sup>23</sup>
109. This definition incorporates the elements at common law, namely that the information is commercial and would cause harm to its owner if disclosed (i.e., ‘has commercial value because it is secret’) and the owner has made reasonable efforts to keep it secret.
110. The exemption in section 25(1)(a) is class-based. This means that it does not have a harm test within the exemption. For the exemption to be engaged, the public authority or third party needs to show that the requested records fall within a specific class of records, namely trade secrets. However, it requires a showing that the information has commercial value because it is kept secret and, in turn, that it will lose that value if it were disclosed.
111. In sum, a public authority, or third party, must consider these questions when seeking to justify the exemption for information with commercial value:<sup>24</sup>

[1] Does any exception in section 25(2) apply?

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<sup>23</sup> See [Decision 06/2021, Cabinet Office](#), at para. 141.

<sup>24</sup> See [Decision 06/2021, Cabinet Office](#), at para. 146.

[2] Is the information secret because it is not, in whole or in part, generally known among or readily accessible to persons within the circle of people that normally deal with this kind of information?

[3] Does the information have commercial value because it is secret?

[4] Has the person lawfully in control of the information taken reasonable steps under the circumstances to keep it secret?

[5] If the exemption is engaged, does the balance of the public interest still require disclosure?

112. A public authority, or third party asserting its rights under section 25(1)(a), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.

*Third party's submissions*

113. See paragraphs 52-56.

*Applicant's submissions*

114. See paragraphs 58-61.

*Public authority's submissions*

115. The OTC was not invited to comment on this exemption, because it was invoked by OARRS during the Information Commissioner's review.

*Discussion*

116. The Acting Information Commissioner considers OARRS's reliance on section 25(1)(a) to object to the disclosure of certain parts of records 2.1 to 2.13 and 4.4. Given the content and nature of records 3.12, 7 and 8, OARRS's arguments were also applied to those parts found not exempt under sections 25(1)(c) and (b).

[1] Does any exception in section 25(2) apply?

117. The same analysis in paragraphs 63 and 64 applies here. As such, the Acting Information Commissioner considers OARRS's reliance on section 25(1)(a) for those parts of records identified in paragraph 116.

[2] Is the information secret because it is not, in whole or in part, generally known among or readily accessible to persons within the circle of people that normally deal with this kind of information?

118. The relevant parts of records did not reveal OARRS's proprietary work strategies. They only described general information about OARRS, the contract fee, the assigned portfolio, the relevant period, and OARRS's results. A company on a public contract should expect to publicly account for the final outcomes on a service it has been paid to do on government's behalf. Even if OARRS did not plan to publish the information, the Government certainly would have had a duty to update the public on results from engaging consultants to address this longstanding issue of taxpayer indebtedness. The Acting Information Commissioner is thus not satisfied that the relevant information was secret. She does not need consider OARRS's reliance on section 25(1)(a) further.

*Conclusion*

119. OARRS has not justified its reliance on section 25(1)(a) of the PATI Act to object to the disclosure of the remainder of records 2.1 to 2.13, 3.12, 4.4, 7 and 8.

*Conclusion*

120. The Acting Information Commissioner finds that:

- a. records 5 and 6 were responsive to the PATI request,
- b. the OTC did not properly engage the exemption in section 34(1)(c) to deny public access to records 1, 2.1 to 2.13, 3.1 to 3.13, 4.1 to 4.4, 7 and 8,
- c. OARRS was justified in objecting to the disclosure of records 4.1 to 4.3 in full as well as parts of records 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8 under section 25(1)(c), and
- d. OARRS was not justified in objecting to the disclosure of the remaining parts of records under sections 25(1)(a), (b) or (c).



## Decision

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The Acting Information Commissioner finds that the Office of the Tax Commissioner (**OTC**) was not justified in relying on section 34(1)(c) of the Public Access to Information (**PATI**) Act 2010. However, the Third Party was justified in objecting to the disclosure of records containing its commercial information under section 25(1)(c), but not justified for other parts of records under sections 25(1)(a), (b) or (c). The Acting Information Commissioner also finds that two newly identified records were responsive to the PATI request and must be processed.

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

- varies the denial of access by virtue of section 25(1)(c) for records 4.1 to 4.3 in full and parts of records 1, 2.1 to 2.13, 3.1 to 3.13, 4.4, 7 and 8;
- reverses the denial of access to the remainder of records 1, 2.1 to 2.13, 3.12, 4.4, 7 and 8, and orders the OTC to disclose them to the Applicant, as instructed in the Confidential Annex (Appendix II), which forms part of this Decision; and
- orders the OTC to issue an initial decision on records 5 and 6 to the Applicant.

The Acting Information Commissioner requires the OTC's compliance as directed by this Decision and the accompanying Order, on or before **Thursday, 28 September 2023**.

## Judicial Review

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The Applicant, the Office of the Tax Commissioner, the Third Party 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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This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Office of the Tax Commissioner 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 C. Styannes

Acting Information Commissioner

17 August 2023

## Appendix I: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Public interest test

- 21 For the purposes of this Part, the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure.

#### Commercial information

- 25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—
- (a) trade secrets of any person;
  - (b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;
  - (c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates; or
- ...
- (2) Subsection (1) does not apply if—
- ...
  - (c) the information was given to the public authority concerned by the person to whom it relates and the person was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public.
- (3) A record shall be disclosed if disclosure of it is in the public interest.

#### Law enforcement

- 34 (1) Subject to subsection (2), a record is exempt if its disclosure would, or could reasonably be expected to—
- ...
  - (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—
- ...
  - (iii) a report on the degree of success achieved in a program adopted by a public authority for dealing with any contravention or possible contravention of the law;
- ...
- (b) its disclosure would be in the public interest.

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