

## Decision Notice

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**Decision 42/2023: Office of the Tax Commissioner**

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**Records about entities liable to pay betting duty**

**Reference no: 2021048**

**Decision date: 30 November 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 licensed betting entities. The OTC provided a table of collated data related to the entities but denied access to the underlying records under section 37(1) of the PATI Act. The OTC also denied the PATI request in part under section 16(1)(a).

The Information Commissioner has affirmed the OTC's decision, finding that the records were exempt by virtue of section 37(1) of the PATI Act because their disclosure was prohibited by other legislation, namely section 4 of the Taxes Management Act 1976, and that the OTC was justified in denying the PATI request in part under section 16(1)(a) because no records existed or could not be found.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 16(1)(a) (record does not exist or cannot be found); section 37 (disclosure prohibited by other legislation).

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

Taxes Management Act 1976: section 2(1) (application of Act), section 4 (official secrecy), and First Schedule.

Miscellaneous Taxes Act 1976: section 38 (responsibility for collection of betting duty).

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

## Background

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1. On 19 May 2023, the Applicant made a PATI request to the Office of the Tax Commissioner (**OTC**), asking for:
  - a. a list of all of the entities liable to pay betting duty to the OTC under section 33 of the Miscellaneous Taxes Act 1976<sup>1</sup> (**item 1**);

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<sup>1</sup> Section 33 of the Miscellaneous Taxes Act provides that there is to be a betting duty charged on "all bets made, received or negotiated by a licensed person wherever made, received or negotiated". Prior to 1 August 2021, persons carrying on the business of bookmaker or pool betting agent had to be licensed under the Betting Act 1975. The Betting Act 1975 has now been repealed by the Betting Act 2021, which provides a comprehensive statutory scheme for the regulation of betting, including the licensing of entities carrying on betting business.

- b. the declared annual betting revenue of each of those entities for the years 2015 to the date of the PATI request (**item 2**);
  - c. an annual breakdown of the betting duty paid to the OTC by those entities for the years 2015 to the date of the PATI request (**item 3**);
  - d. a list of those entities liable to pay betting duty who are in betting duty arrears and the amount and length of time of any such arrears (**item 4**);
  - e. any correspondence or communication between the OTC and the listed entities about a significant decline or increase in declared betting revenue from 2015 to the date of the PATI request (**item 5**).
2. On 7 August 2023, the OTC issued an initial decision. It provided the Applicant with the number of entities registered for betting duty between financial years 2015/16 and 2021/22 and a table of collated data in response to items 2, 3 and 4.<sup>2</sup> The OTC denied access to the names of the entities and a breakdown of betting revenue, duty paid and duty in arrears by individual entity under section 37 of the PATI Act because disclosure was prohibited by section 4 of the Taxes Management Act 1976 (**Taxes Management Act**). Although the OTC acknowledged in response to item 5 of the PATI request that it had queried the betting revenue declared by one of the betting entities, access to the record was denied under section 16(1)(a) of the PATI Act because the record could not be found after all reasonable steps had been taken to locate it.
3. On 15 August 2023, the Applicant asked for an internal review. The OTC acknowledged the request on 16 August 2023 and attached a copy of the updated initial decision (containing the corrected table of collated data).
4. The OTC issued an internal review decision on 11 September 2023 upholding its initial decision.
5. On 12 September 2023, the Applicant made a timely application for an independent review by the Information Commissioner of the OTC'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

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<sup>2</sup> The table of collated data was corrected and resent to the Applicant on 11 August 2023.

the Applicant wanted her to review. The Applicant asked the Information Commissioner to review the OTC's decision to consolidate the information in the underlying records and stated that they were seeking third party information from the OTC.

7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because the OTC's formal submission was required to justify its reliance on the provisions.
8. On 9 October 2023, the Information Commissioner's Office (**ICO**) notified the OTC of this review and asked for the withheld records responsive to items 1-4. The OTC provided the ICO with a copy of the underlying records and explained the way that betting duty was collected prior to the Betting Act 2021 coming into force on 1 August 2021.
9. On 27 October 2023, ICO Investigators met with the OTC to confirm the steps taken by it to search for records responsive to item 5.
10. 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 OTC and the Applicant responded to the invitation to make submissions during this review.

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

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

#### ***Record does not exist or cannot be found – section 16(1)(a)***

12. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it.
13. Regulation 5 of the PATI Regulations 2014 (**PATI Regulations**) requires public authorities, through their Information Officers, to make reasonable efforts to locate records responsive to a PATI request. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate any record.
14. When a public authority denies a PATI request under section 16(1)(a) because a record does not exist or cannot be found, the Information Commissioner's review does not determine to a point of certainty if a record exists or can no longer be located. Rather,

the Information Commissioner is required to assess whether the public authority took all reasonable steps to find a record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration.

15. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following:
  - [1] the quality of the public authority's analysis of the PATI request;
  - [2] the scope of the search that it decided to make on the basis of that analysis; and
  - [3] the rigour and efficiency with which the search was then conducted.
16. The specific circumstances in each case will inform the Information Commissioner's assessment.
17. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.<sup>3</sup>

*Public authority's submissions*

18. The OTC explained that it understood the Applicant to be seeking to know whether the OTC noticed any significant fluctuations in reported betting revenue—specifically whether there had been a significant decline in reported revenue between 2015 and the date of the PATI request, and whether the OTC had communicated these observations with the relevant betting entities and, if so, the content of such communication and any result or action taken.
19. The OTC explained the reason it had queried the revenue of one of the betting entities (as acknowledged in the initial decision) and conducted additional searches in the presence of the ICO Investigators using the relevant search parameters (dates) and key words (names of the individuals from the betting entity that had corresponded with the Assistant Tax Commissioner (**ATC**)). The OTC further explained that no action had been taken against the betting entity as the difference in reporting was not deemed to be significant.
20. The OTC submitted that although there may have been a decline in betting revenue for other entities, the explanation for the decline could be inferred from circumstances that

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<sup>3</sup> See [Decision 04/2017](#), [Department of Health](#), at paras. 37-49, and more recently [Decision 01/2023](#), [Ministry of Legal Affairs and Constitutional Reform Headquarters](#), at paras. 30-35.

they had been notified of and therefore there was no need to query the change in revenue.

21. With regard to the search steps taken, the OTC submitted that it searched the emails of the ATC because they were the person in correspondence with the relevant betting entities.

#### *Applicant's submissions*

22. The Applicant submitted that it seemed odd that no responsive records existed or could not be found. The Applicant noted that according to the information provided by the OTC, in the financial year 2015/16, the betting entities declared \$7.2million in bets and in 2019/20, only \$703,000 in bets was declared – a 90% decrease from four years prior.
23. The Applicant submitted that it seemed unlikely that the OTC would not have enquired about why there had been such a drop in betting tax revenue. The Applicant queried whether the decrease was due to the closure of one of the betting entities or another reason, and whether the OTC noticed the decline and reached out to the betting entities.

#### *Discussion*

24. The Information Commissioner considers the OTC's reliance on section 16(1)(a) to deny item 5 of the PATI request.

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

25. The Information Commissioner is satisfied that the OTC fully understood the Applicant's request for records in item 5 of the PATI request. The OTC's submissions on its analysis of the request were in line with the Applicant's submissions on the information that they expected to exist, i.e., whether the OTC had noticed any significant fluctuations and whether, based on those observations, the OTC had corresponded with any of the listed entities to enquire about the change, and whether further action was taken by the OTC.

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

26. Based on the submissions received from the OTC, the Information Commissioner is satisfied with the OTC's explanation that the ATC's email was the only relevant location to be searched as they were the one that had corresponded directly with the betting entities at the time.
27. The OTC also provided a plausible explanation as to why no records existed with respect to the decrease in revenue in relation to some of the betting entities, and this

explanation was confirmed by the ATC's notes in the underlying records provided to the ICO.

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

28. The Information Commissioner is satisfied that the OTC conducted the search for records responsive to item 5 with adequate rigour and efficiency. The search was conducted by an individual familiar with the subject during the OTC's initial handling of the PATI request and during the Information Commissioner's review. The OTC conducted a search of the ATC's email account in the presence of the ICO's Investigators using relevant parameters and keywords based on the context in which the record was sent (as explained to the ICO) and no responsive records were located.

#### *Conclusion*

29. The Information Commissioner is satisfied that the OTC took all reasonable steps to locate the records responsive to item 5, in accordance with section 12(2) of the PATI Act and regulation 5 of the PATI Regulations, and that no records could be found. The OTC has, therefore, justified its reliance on section 16(1)(a) to administratively deny access to records responsive to item 5 of the PATI request.

#### ***Disclosure prohibited by other legislation – section 37(1)***

30. Section 37(1) of the PATI Act allows a public authority to refuse public access to a record whose disclosure is prohibited by a statutory provision other than the PATI Act.
31. The mandatory nature of a prohibition in a provision may be indicated by the use of the word 'shall' and an accompanying provision setting out penalties for unauthorised disclosures. If the relevant statutory provision only applies when a particular function or duty of a public authority is engaged, the public authority must identify that function or duty and explain how the record falls within the prohibition.
32. The exemption in section 37(1) is not subject to the public interest test.
33. In sum, to rely on section 37(1), a public authority must consider the following<sup>4</sup>:

[1] What is the statutory provision creating the mandatory prohibition on disclosure?

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<sup>4</sup> See the Information Commissioner's updated [Guidance: Disclosure prohibited by other legislation \(section 37\)](#) (January 2023).

[2] Does the record fall within this statutory provision?

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

34. A public authority bears the burden of showing that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

*Public authority's submissions*

35. The OTC submitted that as 'betting duty' is included in the First Schedule of the Taxes Management Act, any request for disclosure of information relating to individual betting entities would be denied on the basis that the records fall within the official secrecy provision in section 4(1) of the Taxes Management Act.
36. The OTC submitted that the affairs of the relevant betting entities that were the subject of the PATI request (duty paid and duty owed) came into the knowledge of the OTC in the performance of its duties under the Taxes Acts, which are defined by the Taxes Management Act to include "this Act and any statutory provision relating to the taxes to which this Act applies". The OTC explained that this would include the Miscellaneous Taxes Act and the Betting Act 1975 (now the Betting Act 2021).
37. The OTC further explained that none of the gateways in section 4(1) of the Taxes Management Act applied, in particular subsection (a) as the OTC had not requested permission from any betting entity to disclose account information and subsection (b) as it is not standard practice to solicit Minister's approval to disclose taxpayer information to a third party.
38. The OTC stated that the secrecy provision is upheld unless there are criminal proceedings or internal governmental compliance investigations and the release of information is managed by the Tax Commissioner under the authority of the Minister of Finance.

*Applicant's submissions*

39. The Applicant submitted that the OTC's reading of section 37(1) of the PATI Act would render the OTC exempt from the PATI Act entirely by virtue of section 4 of the Taxes Management Act. The Applicant submitted this could not be the case as the Tax Commissioner had previously made disclosures and section 4 of the Taxes Management Act was not cited.
40. The Applicant also queried whether section 4(1) of the Taxes Management Act only applies to matters regarding 'individuals' and not 'entities'.



41. The Applicant further submitted that there has not always been official secrecy around delinquent taxpayers in Bermuda, citing the former Auditor General's 'name and shame' policy of publishing the names of companies which had been in arrears for pension and payroll tax. The Applicant stated that many entities owing tax had been made public in a bid to get them to pay, and therefore that it seems to be normal practice to list entities who pay tax and who are in tax arrears.
42. The Applicant acknowledged that the public interest did not apply to section 37(1) but added that it is of great public interest to ensure that the Taxes Management Act was being applied correctly to all tax paying entities – that betting entities were declaring all of their income, that they were paying the taxes due and whether the OTC was fulfilling its duty to ensure this was happening. The Applicant further stated that this information tied back to the lack of regulation of the betting shop industry overall.

*Discussion*

43. The Information Commissioner considers the OTC's reliance on section 37(1) to deny access to the underlying records responsive to items 1-4 of the PATI request.

[1] What is the statutory provision creating the mandatory prohibition on disclosure?

44. The Information Commissioner is satisfied that section 4(1) of the Taxes Management Act is the relevant statutory provision and that it creates a mandatory prohibition on disclosure.<sup>5</sup>

[2] Does the record fall within this statutory provision?

45. As explained in [Decision 12/2018](#), [Ministry of Finance Headquarters](#), paras. 54-57, section 4(1) of the Taxes Management Act prohibits the disclosure of information learned while performing duties under the 'Taxes Acts', defined as "this Act [i.e., the Taxes Management Act], and any statutory provision relating to the taxes to which this Act applies". This would include relevant statutory provisions in the Miscellaneous Taxes Act 1976, the Betting Act 2021 (previously the Betting Act 1975) and the Betting Regulations 2021.
46. Section 2(1) of the Taxes Management Act explains the application of the Act: "This Act shall apply in relation to the taxes specified in the First Schedule whether liability to tax arose before or after 1 April 1976". The First Schedule of the Taxes Management Act

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<sup>5</sup> See discussion in [Decision 12/2018](#), [Ministry of Finance Headquarters](#), paras. 51-53.

contains an exhaustive list of the taxes to which the Taxes Management Act (and hence, section 4(1) prohibiting disclosure) applies: Employment Tax, Betting Duty, Contracts Exchange Tax, Hospital Levy, Hotel Occupancy Tax, Transport Infrastructure Tax, Passenger Departure Tax, Payroll Tax, Timesharing Occupancy Tax and Timesharing Services Tax.

47. With regard to the Applicant's submission that disclosures have been made in the past in relation to taxes owed by entities, the only disclosure of records ordered by the Information Commissioner regarded the tax owed by an entity was in [Decision 12/2018, Ministry of Finance Headquarters](#), in which records regarding social insurance contributions and land tax were ordered to be disclosed. As per the analysis in that Decision, neither social insurance nor land tax are included in the list in the First Schedule of the Taxes Management Act, and therefore are not subject to the official secrecy provision in section 4(1) of that Act. This was the basis for their disclosure in that case.
48. In this case, however, the underlying records being sought relate to betting duty, which is listed in the First Schedule and therefore subject to section 4 of the Taxes Management Act.
49. With regard to the Applicant's further submission that section 4(1) only applies to matters relating to the affairs of any "person" (rather than any 'entity', which is what is being sought), section 1 of the Taxes Management Act, titled 'Interpretation', provides that 'person' shall be defined in the Act to include "any company, partnership, association, or body of persons, whether corporate or unincorporate".
50. The Information Commissioner is therefore satisfied that the underlying records fall within the statutory provision in section 4(1) of the Taxes Management Act.
51. With regard to the Applicant's reference to the former Auditor General's policy to disclose the names of entities who were in arrears for pension and payroll tax, the Information Commissioner notes, first, that pension contributions (like social insurance contributions and land tax) are not included in the First Schedule of the Taxes Management Act. Second, although the information is similar, the context in which the Auditor General may choose to disclose information to the public differs. Information about taxpayers in arrears is provided to the Auditor General pursuant to the Auditor General's oversight powers. The Auditor General then has the authority to make public disclosures of information obtained by her Office under the Auditor General's governing

legislation, which differs from the legislation regulating the disclosure of information obtained by the OTC for its purposes.<sup>6</sup>

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

52. Section 4(1) of the Taxes Management Act contains four potential gateways to disclosure. The Information Commissioner accepts the OTC's submissions that none of the gateways to public disclosure applied and that, in general, the secrecy provision is upheld unless there are criminal proceedings or internal governmental compliance investigations, and the release of information is managed by the Tax Commissioner under the authority of the Minister of Finance.

#### *Conclusion*

53. The Information Commissioner is satisfied that the OTC justified its reliance on the exemption in section 37(1) to deny access to the underlying records responsive to items 1-4 of the PATI request, because section 4 of the Taxes Management Act was a statutory prohibition on disclosure of the requested information.

#### *Conclusions*

54. The Information Commissioner is satisfied that the OTC was justified in relying on sections 16(1)(a) and 37(1) to deny access to the requested records.
55. The Applicant, in their submissions, raised the public interest in ensuring that the Taxes Management Act is being applied correctly to entities liable to pay betting duty by the OTC and in being able to hold the OTC accountable for fulfilling its functions under the various legislation as it relates to the betting industry. The Applicant acknowledged, however, that the public interest test is not applicable where section 37 of the PATI Act is relied on. The Information Commissioner has previously shared concerns about the scope of section 37 and the need for a comprehensive review of existing secrecy provisions<sup>7</sup>, which would address the Applicant's concerns about the limitations to the right of access under the PATI Act.

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<sup>6</sup> For example, compare the confidentiality provision in section 19 of the Audit Act 1990 with section 4 of the Taxes Management Act.

<sup>7</sup> See [Decision 38/2023](#), [Department of Child and Family Services](#), paras. 46-50.

## **Decision**

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The Information Commissioner finds that the Office of the Tax Commissioner (**OTC**) was justified in relying on sections 16(1)(a) and 37(1) of the Public Access to Information (**PATI**) Act 2010 to deny access to the requested records. In accordance with section 48 of the PATI Act, the Information Commissioner affirms the internal review decision by the OTC.

## **Judicial Review**

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The Applicant, the Office of the Tax Commissioner, 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.

Gitanjali S. Gutierrez  
Information Commissioner  
30 November 2023

## Appendix: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Refusal of request on administrative grounds

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

...

#### Disclosure prohibited by other legislation

- 37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.

...

### 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.

### Taxes Management Act 1976

#### Application of Act etc

- 2 (1) This Act shall apply in relation to the taxes specified in the First Schedule whether liability to tax arose before or after 1 April 1976.

...

#### Official secrecy

- 4 (1) Except in the performance of his duties under the Taxes Acts, every person who is or has been employed in carrying out or assisting any person to carry out the Taxes Acts shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the performance of his duties under the Taxes Acts and shall not communicate any such matter to any person otherwise than—

- (a) to or with the consent of the person to whom such matter relates, his authorized agents or trustees;
- (b) under the authority of the Minister;
- (c) for the purposes of any legal proceedings arising out of the Taxes Acts or any criminal proceedings;
- (d) to a person entitled to such information by virtue of any provision of law.

## **Miscellaneous Taxes Act 1976**

### **Responsibility for collection of betting duty**

- 38      The Tax Commissioner shall be responsible for the collection of betting duty.

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