

Decision Notice

Decisions 46/2023 and 47/2023: Cabinet Office

Records on Government's relationship with MM&I

Reference nos: 20220106-03 and 20220723

Decision date: 14 December 2023

Summary

These Decisions involve a request submitted under the Public Access to Information (**PATI**) Act 2010 to the Cabinet Office for records about the Government's relationship with MM&I Holdings (**MM&I**). The Cabinet Office issued an initial decision that denied access for parts of records under sections 23 (personal information) and 26(1)(a) (information received in confidence) of the PATI Act. The Cabinet Office also denied access to other records in full, either because they fell outside the scope of the PATI Act by virtue of section 4(1)(b)(vi) or were exempt under section 27(1) (Cabinet documents) of the PATI Act. During its initial response, the Cabinet Office also notified MM&I of the PATI request as required by section 39 and afforded it an opportunity to make submissions as a concerned third party.

The PATI requester (**Requester**) and MM&I (as a third party) each asked for an internal review of the initial decision to deny access to or disclose, respectively, certain records or parts of records. The Cabinet Office issued separate internal review decisions to each party upholding its initial decision.

Both the Requester and MM&I then sought separate independent reviews by the Information Commissioner of the internal review decisions they had received from the Cabinet Office. To simplify an inherently complex proceeding, the Information Commissioner has issued a single decision to address both reviews arising out of the same PATI request and involving overlapping records. Specifically, these Decisions consider the challenges by the Requester to the Cabinet Office's decision to withhold certain records or parts of records, as well as MM&I's challenges to the decision to disclose other records, or parts of records, that relate to it as a third party.

Together, these Decisions review whether sections 4(1)(b) (application), 21 (public interest test), 23 (personal information), 24 (definition of personal information), 25 (adverse effect on commercial interests), 26(1)(a) (information received in confidence), 26(1)(b) (breach of confidence), 27 (Cabinet documents) or 28 (ministerial responsibility) prevent public access to the requested records. These Decisions further consider whether the Cabinet Office met the requirements of section 39 of the PATI Act to provide notice to MM&I as a concerned third party of the Cabinet Office's intention to disclose some of the records considered in this review.

The Information Commissioner has upheld, in part, the Cabinet Office's reliance on sections 4(1)(b)(vi), 23(1), and 27(1)(c) and (d) to deny access to certain records or parts of records. She has found that MM&I was justified, in part, in relying on sections 25(1)(c) and 26(1)(b) to object to the disclosure of certain parts of records. The Information Commissioner has also upheld the Cabinet Office's decision to disclose certain other records or parts of records over MM&I's objection that the exemptions under sections 23(1), 26(1)(a) and 25(1)(c)

applied. She has also found that the Cabinet Office upheld MM&I's rights as a third party under section 39 of the PATI Act.

Relevant statutory provisions

Public Access to Information Act 2010: section 4(1)(b) (application), section 21 (public interest test), section 23 (personal information), section 24 (definition of personal information), section 25 (adverse effect on commercial interests), section 26(1)(a) (information received in confidence), section 26(1)(b) (breach of confidence), section 27 (Cabinet documents), section 28 (ministerial responsibility), section 39 (notice to third parties).

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

Background

1. On 13 September 2017, the Requester filed a public access to information (**PATI**) request to the Ministry of Economic Development and Tourism Headquarters (**Ministry Headquarters**) asking for records regarding the Bermuda Government's relationship with MM&I Holdings (**MM&I**) from 17 December 2012 to date. The PATI request also asked for details of a trip to Florida taken by former Minister Shawn Crockwell around May 2015 with members of the Bermuda Gaming Commission¹ (**BGC**) and MM&I principals.
2. The full history on the handling of the PATI request was described in [Decision 06/2021, Cabinet Office](#). The Requester asked for the Information Commissioner's review of the Ministry Headquarters' handling of their PATI request, which led to the Information Commissioner issuing [Decision 06/2021](#). In that Decision, the Information Commissioner found, among others, that the Ministry Headquarters did not conduct a reasonable search to locate the responsive records. She ordered the Cabinet Office (as the public authority who inherited some of the functions of the now disbanded Ministry Headquarters) to process the newly located records responsive to the PATI request and issue a new initial decision on these records.
3. To comply with [Decision 06/2021](#), the Cabinet Office issued an initial decision on 21 October 2021 which informed the Requester and MM&I (as the third party) that public access is granted in part and denied in part under sections 23(1) (personal information) and 26(1)(a) (information received in confidence) for 22 of the 58 identified records. The initial decision further stated that public access was denied in full for the

¹ Formerly known as the Bermuda Casino Gaming Commission.

other 36 records, either because they fell outside the scope of the PATI Act by virtue of section 4(1)(b)(vi) or were exempt under the Cabinet documents exemptions in section 27(1)(ba), (c), and (d).

4. On 26 October 2021, the Requester sought an internal review by the Cabinet Office of its decision to refuse to disclose records in whole or in part.
5. On 1 November 2021, MM&I, as the third party, also sought an internal review by the Cabinet Office.
6. The Cabinet Office issued its internal review decision to the Requester on 30 December 2021, upholding its initial decision.²
7. The Cabinet Office did not immediately realise that MM&I's correspondence of 1 November 2021 was a request for an internal review. After this was clarified, the Cabinet Office issued a separate internal review decision to MM&I on 27 June 2022, upholding its initial decision.³
8. On 6 January 2022, the Requester applied for an independent review by the Information Commissioner because they were not satisfied with the Cabinet Office's internal review decision dated 30 December 2021 to withhold the records or parts of records. On 23 July 2022, MM&I also applied for an independent review by the Information Commissioner to challenge the Cabinet Office's internal review decision dated 27 June 2022 to disclose the records or parts of records.

Investigation

9. Both applications to the Information Commissioner were accepted as valid. The application made by the Requester was given a reference number 20220106-03, while the one made by MM&I was numbered 20220723. The Information Commissioner confirmed that the Requester and MM&I had made valid requests for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues they each wanted her to review.
10. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because access to the records was required to determine

² Issued in response to the Information Commissioner's [Decision 21/2021](#), [Cabinet Office](#).

³ Issued in response to the Information Commissioner's [Decision 13/2022](#), [Cabinet Office](#).

whether the Cabinet Office's reliance on various provisions in the PATI Act as well as its decision to disclose parts of records were justified.

11. On 18 January 2022 and as part of review 20220106-03, the Information Commissioner's Office (**ICO**) notified the Cabinet Office of the Requester's valid application and asked it to provide the ICO with access to the withheld records.
12. After back-and-forth correspondence with the Cabinet Office, on 28 April 2022, the Information Commissioner issued a summons for certain records which the Cabinet Office had withheld as well as a description of the records claimed to fall outside the scope of the PATI Act. On 6 September 2022, the Cabinet Office provided the ICO with all the records at issue that were withheld in whole or in part. The Cabinet Office also provided a Schedule of Records.
13. On 7 September 2022 and as part of review 20220723, the ICO notified the Cabinet Office of MM&I's valid application. The Cabinet Office was not asked to provide the Information Commissioner with access to the records that were to be disclosed because the relevant records had already been provided in review 20220106-03.
14. During the reviews, the Cabinet Office informed the ICO that it could not locate record 58. The ICO also identified records 18, 42, 47 and 50 as duplicate email strings or as containing non-responsive information. Therefore, these records are not considered in these reviews. Review 20220106-03 involves the Requester's challenges to the decision to withhold in full or in part records 1-17, 19-41, 43-46, 48, 49 and 51-57 (53 records in total). Review 20220723 relates to MM&I's challenges to the decision to disclose, in part, records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49 (19 of the 53 records).
15. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant (ordinarily, the PATI requester) and any third party concerned a reasonable opportunity to make representations. For both reviews, the Cabinet Office, the Requester and MM&I were invited to make submissions on the issues. The Requester was invited to make submissions as the Applicant in review 20220106-03 and as a concerned third party in review 20220723. MM&I was invited to make submissions as the Applicant in review 20220723 and as the concerned third party in review 20220106-03. Both the Cabinet Office and MM&I made submissions in both reviews. The Requester did not make submissions but their submissions in the prior related review, [Decision 06/2021](#), have been considered, where relevant.
16. During the reviews, the Cabinet Office changed and clarified its position on certain records. In particular, it no longer relies on section 26(1)(a) to withhold parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46 and 48 and 49. Instead, the Cabinet Office relies

on the personal information exemption in section 23(1) for these parts of the records. The Cabinet Office further abandoned its decision to withhold records 16, 22, 29 and 51-54, though these records remain withheld and thus are considered in this review.

17. In its submissions for both reviews, MM&I did not expressly refer to any exemptions in the PATI Act. In substance, though, the submissions appear to rely on the exemptions in sections 25(1)(c) (adverse effect on commercial interests), 26(1)(a) (information received in confidence) and 26(1)(b) (breach of confidence). MM&I also challenged whether the Cabinet Office upheld MM&I's rights as a third party to be notified and be given an opportunity to make submissions under section 39. In addition to considering MM&I's submissions in these two reviews, MM&I's submissions in the prior related review, [Decision 06/2021](#), have been considered, where relevant. MM&I also made extensive submissions about the handling of other PATI requests by another public authority and the disclosure of information related to MM&I, and its concerns about what it views as illegal conduct. These broader concerns, set out in paras. 22-24, are beyond the scope of this review, as explained below.
18. Given the parties' submissions in both reviews, the statutory remit of the Information Commissioner, and the Cabinet Office's change of positions, the issues considered in each review are the following:
 - a. review 20220106-03 (prompted by the Requester's application to the ICO):
 - i. the Cabinet Office's reliance on sections 4(1)(b)(vi), 23(1), 26(1)(a), 27(1)(c), 27(1)(d) and 28(1) to withhold records or parts of records 1-17, 19-41, 43-46, 48, 49 and 51-57, and
 - ii. MM&I's reliance on sections 25(1)(c), 26(1)(a) and 26(1)(b) to object to the disclosure of all of the records considered in this review.
 - b. review no. 20220723 (prompted by MM&I's application to the ICO):
 - i. whether the Cabinet Office upheld MM&I's rights under section 39 as a third party;
 - ii. whether the exemptions in sections 25(1)(c), 26(1)(a), 26(1)(b), and 23(1) apply to certain parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49, and these parts of the records should be withheld.

19. As appropriate under the PATI Act to safeguard third party rights, the Cabinet Office has not disclosed to the Requester the parts of records which it intended to disclose, pending the outcome of MM&I's challenge to the intended disclosure.⁴

Information Commissioner's analysis and findings

20. In coming to this Decision, the Information Commissioner has considered all the relevant submissions, or parts of submissions, and other communications from the Cabinet Office, the Requester and MM&I. She is satisfied that no matter of relevance has been overlooked.
21. The Requester and MM&I have only been invited to make submissions on issues related to their interests and rights under the PATI Act.

Preliminary issue – Information Commissioner's mandate and reviews in Parts 6 and 7

22. In conducting this review, MM&I invited the Information Commissioner to consider all relevant historical evidence concerning the relationship between various public authorities, the Royal Gazette and its employees, and MM&I. MM&I also lodged a number of allegations of illegality and wrongful conduct. In correspondence with the ICO in this and other reviews, between 19 August 2020 and 28 September 2023, MM&I has alleged that:
- a. The Requester, the then Executive Director of the BGC, the Royal Gazette and other officers or members of the BGC have colluded to target and significantly damage MM&I, its principals and overseas business partner. MM&I believes that the relevant PATI request, along with a number of other PATI requests filed with various public authorities, were made with that intention.
 - b. The Requester was already in possession of the requested records, which they obtained illegally. The PATI request was filed to create the impression that they obtained these records through the PATI process.
 - c. There is evidence that shows proof of wrongful, illegal, systematic and deceitful acts and abuse of the PATI processes. MM&I submitted a copy of the BGC Supreme Court Writ filed in [Bermuda Casino Gaming Commission v Richard Schuetz](#) [2018] SC (Bda) 24 Civ, as well as an Affidavit by the BGC's then legal counsel to support its assertions.
 - d. The wrongful acts committed to illegally obtain its property (i.e., its records) resulted in the release of MM&I's confidential information, which occurred between August

⁴ See section 14(4)(b) of the PATI Act.

2017 and April 2018. It submitted that its Non-Disclosure Agreement (**NDA**) with the Government was still in effect and valid at the relevant time.

23. In support of the above claims, MM&I submitted the following additional documents, some of which were provided in these reviews:
 - a. NDA with the Government, dated 1 July 2013,
 - b. BGC's correspondence in 2015 and 2016 about the NDA,
 - c. Various Royal Gazette articles and correspondence,
 - d. Handwritten notes of conversation between MM&I's principal and former BGC's staff, dated 7 March 2018, and
 - e. Redacted minutes of the BGC Commissioners' meetings of 25 October 2017 and 6 December 2017, which were disclosed by the BGC in response to the Information Commissioner's [Decision 33/2022](#), Bermuda Gaming Commission.
24. MM&I claimed that the ICO had been made aware of the details of these illegal acts, yet the Information Commissioner has not recognised or even acknowledged the evidence presented and the wrongful acts committed. MM&I also expressed concern that the Information Commissioner has not made any public statement whatsoever on those circumstances, and had not attempted to discipline, deter or try to prevent further abuse of the PATI process by the Requester and the Royal Gazette. Instead, the Information Commissioner appears to continue to support and process the Requester's applications, appeals and objections, and continues to approve the release of further illegally obtained property.
25. Questions concerning illegal or unlawful conduct arising from the broader context of the requested records or the use of the PATI Act is under the jurisdiction of the courts or law enforcement. Both venues have been available to MM&I to pursue its grievances.
26. The Information Commissioner does not have the jurisdiction to decide whether an illegal act has been committed. As the Supreme Court explained in [Furbert v Department of Human Resources and Information Commissioner](#), under section 45(1) of the PATI Act, the Information Commissioner's jurisdiction is limited to reviewing a decision made by the head of a public authority under the PATI Act and, when appropriate, to ordering the production of documents which come within the scope of the PATI Act.
27. MM&I also claims that the Requester has abused the PATI Act. This is a ground a public authority may rely upon to administratively deny a PATI request under section 16(1)(e) as frivolous or vexatious and the Information Commissioner may review that determination if

the ICO receives an application for an independent review. It is worth noting that the Information Commissioner found in her [Decision 33/2022, Bermuda Gaming Commission](#), that a PATI request made by the Royal Gazette (the Requester, who is the Applicant in review 20220106-03⁵) as part of a series of requests made to the BGC between June 2016 and October 2018 was not vexatious or frivolous under section 16(1)(e). The Information Commissioner was unable to assess whether the requests actually emanated from confidential information leaked by the BGC's former Executive Director. But even if it was, it did not necessarily mean that the PATI request was made for its nuisance value, had no reasonable or legitimate grounds, or was filed to accomplish something other than access to records.⁶ While [Decision 33/2022](#) did not speak directly to the disclosures referred to by MM&I, it provided some insight on how the Information Commissioner sees the series of requests made by the Royal Gazette to the BGC during the relevant period.

Notice to third parties – section 39

28. This is the first review in which the Information Commissioner is required to consider a public authority's compliance with section 39 of the PATI Act. As per section 2(a), one of the purposes of the PATI Act is to give the public the right to obtain access to information held by public authorities to the greatest extent possible. The same provision also states, however, that public access is not absolute in that it is subject to exceptions that are, among others, "for the protection of the rights of others". In the PATI Act, the protection of the rights of others in the context of access to information does not only manifest in the form of exemptions, such as the personal information and commercial information exemptions. It also manifests in section 39, which requires public authorities to notify relevant third parties if they intend to disclose a record if it might contain personal information referred to in section 23, commercial information referred to in section 25 and information received in confidence in section 26, and invite the third party to make written representations (**third party notice**).
29. Specifically, a third party notice is required if:

⁵ The Royal Gazette has self-identified themselves as the PATI requester in reviews 20220106-03 and 20220723, which were continuations of the review decided in [Decision 06/2021, Cabinet Office](#). See The Royal Gazette, 'Gambling industry documents can't be kept secret', 13 August 2021.

⁶ [Decision 33/2022, Bermuda Gaming Commission](#), paras. 53 and 54.

- a. the head of authority has reason to believe that the record might be exempt under section 23, 25 or 26, and
 - b. the public authority intends to disclose the record.
30. In relation to a PATI request, section 3 of the PATI Act defines a 'third party' as any person (other than the requester or the public authority) who gave information in the record to a public authority in confidence, or any person to whom information in the record relates.
31. According to the Oxford dictionary, the word 'might' is sometimes "used to express possibility" (e.g., "this might be true").⁷ The standard in section 39 is thus quite low—a head of authority only has to have a reason to believe that it is possible that the record contained information of a type referred to in the personal information, commercial information or information received in confidence exemptions.
32. To comply with the requirements in section 39(1) and (2), the third party notice has to:
 - a. be given by the head of authority,
 - b. state that the public authority intends to disclose a record that might contain information of a type referred to in section 23, 25 or 26 that was given to the authority by the third party or that relates to the third party,
 - c. describe the contents of the records in question, and
 - d. inform the third party that it has fourteen days to consent in writing to the disclosure or make written representations to the authority about the intended disclosure.
33. Under section 39(4), the public authority is required to consider any representations made by a third party before issuing its initial decision on whether access is granted or denied.
34. In sum, to determine whether a public authority has complied with section 39, the Information Commissioner will consider:
 - [1] Whether the head of authority had reason to believe that the record might contain information of a type referred to in section 23, 25 or 26?
 - [2] Whether the public authority intended to disclose the record?
 - [3] If so, whether the public authority provided the third party with a notice informing them of its intention to disclose the record, the description of the

⁷ Oxford Dictionary of English (3rd ed. 2010).

contents of the record, and the statutory timeline to make written representations?

[4] Whether the public authority then considered any representations made by the third party, prior to issuing its decision?

35. The Information Commissioner stresses the importance of reading section 39 together with section 14(3) and (4). Together, these sections require a public authority to notify a third party prior to the disclosure of any records containing information of a type referred to in section 23, 25 or 26. This is accommodated through 'delayed disclosure', in which public authorities are permitted to postpone the intended disclosure of records that might be exempt under the said exemptions until the third parties have been given the opportunity to exercise their rights under sections 41 and 45 to ask for an internal review by the head of authority or an independent review by the Information Commissioner, respectively.⁸ Public authorities thus must take extra precautions when disclosing records that relate to third parties which might be exempt under sections 23, 25 and 26. Records disclosed under the PATI Act are generally disclosed to the world and, once disclosed, they cannot be "undisclosed". The risk to a third party in those circumstances is therefore high. [The Cabinet Office's PATI Administrative Code of Practice for Public Authorities \(Practice Code\)](#), particularly paras. 22.1 to 22.19, set out helpful steps for public authorities when processing records relating to third parties.
36. Similarly, if an internal review is requested (either by the PATI requester or by the third party) and the internal review decision grants access to the records for the first time, the public authority should give the third party an opportunity to ask for an independent review by the Information Commissioner before disclosing the records.
37. Section 39 is a procedural requirement and not a substantive one. Documentation that a public authority has followed sections 22.1 to 22.19 of the Practice Code will suffice to demonstrate that the requirements have been met. The public authority may still decide to disclose the records and that decision will be subject to an independent review by the Information Commissioner.
38. In the event public authorities disclose records without meeting the requirements in sections 39 and 14(3) and (4), one recourse for the third party is to ask for an internal review

⁸ Section 14(3) and (4) of the PATI Act. The provisions do not use the phrase 'delayed disclosure', but the Information Commissioner takes the view that "where it is reasonably practicable to do so" in section 14(3) means to include a scenario where third parties have to be given an opportunity to ask for internal and independent reviews. See also the [ICO Guidance: Timeframes for providing access to records](#) (section 14 and Part 2) (rev. January 2023), paras. 34-38, which was initially published in 2016.

or the Information Commissioner’s review, as appropriate. The third parties must submit their internal review request or apply for an independent review by the Information Commissioner within the timelines prescribed in the PATI Act.

39. It is also open to the third party to seek legal advice and file relevant legal action with the court. Note, however, that section 63 of the PATI Act states that “No proceedings, civil or criminal, shall be brought against any public authority, its employees or agents in respect of the disclosure or non-disclosure by any of them of any record under this Act, or any action taken or omitted to be taken under this Act, unless it is shown that the authority, employee or agent acted in bad faith”. It would then be for the court to determine whether the disclosure was made in bad faith.

Public authority’s submissions

40. The Cabinet Office’s initial decision informed the Requester and MM&I that the relevant parts of the records were related to MM&I.
41. In its internal review decision to MM&I, the Cabinet Office explained that it properly provided MM&I with the notice required under section 39, prior to issuing its 21 October 2021 initial decision. The third party notice is what has given rise to this review.
42. The Cabinet Office submitted that disclosure of the relevant records would provide the Requester and the public with the opportunity to correctly assess the process undertaken by the Government regarding the proposed implementation of gaming in Bermuda.
43. The Cabinet Office submitted that redactions were made to protect the private information of persons. For the most part, the emails provided the meeting details and the effort to provide clarifications and answers to questions posed by the Government and members of the general public about the implementation of gaming in Bermuda.

MM&I’s submissions

44. MM&I did not make specific submissions on the Cabinet Office’s compliance, or lack thereof, with section 39 of the PATI Act.
45. Instead, its submission referred to the disclosure of its records made by the BGC and the Ministry Headquarters⁹ in response to PATI requests made in 2017-2018. MM&I claimed that its rights as a third party were never upheld by those public authorities and that it was only in the Cabinet Office’s internal review decision of 27 June 2022 that their rights were

⁹ The Ministry of Economic Development and Tourism was dissolved between September 2018 and November 2018, according to the Government’s organizational charts.

acknowledged. MM&I highlighted that the Cabinet Office's internal review decision acknowledged that MM&I's third party rights were not honoured during the handling of PATI requests made to those public authorities in or around 2017-2018. MM&I further submitted that it has stated this objection in writing multiple times to relevant parties, including the ICO, and noted that the Information Commissioner has either failed to investigate, or research, or acknowledge or explain this fact.

Requester's submissions

46. The Requester was invited to make submissions but did not provide comment on this point.

Discussion

47. As an initial matter and for clarity, review 20220723, which was prompted by MM&I, only considers the Cabinet Office's compliance with section 39 in relation to parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49, which were discussed in the Cabinet Office's initial decision of 21 October 2021 and, subsequently, its internal review decision of 27 June 2022. The Information Commissioner does not have unbound jurisdiction in this review to consider other public authorities' compliance with section 39 in relation to the disclosure of other records in other PATI requests.
48. The Information Commissioner previously acknowledged in [Decision 06/2021, Cabinet Office](#), that MM&I referred the ICO to the disclosures in response to four PATI requests made to the BGC in 2017 and 2018. MM&I as a third party in the Information Commissioner's review decided in [Decision 06/2021](#) alleged that the records had been disclosed by the ICO, which was inaccurate. Three of those four PATI requests did not result in disclosure of information about MM&I.¹⁰ The disclosures of MM&I-related information was made by the BGC during its initial response to one PATI request dated 28 September 2017 and did not involve the ICO. Neither MM&I nor the PATI requesters in that matter sought an independent review by the Information Commissioner of the BGC's initial decision and disclosures.
49. The Information Commissioner explained in her [Decision 06/2021](#) and correspondence with MM&I on 24 August 2020 that, if a third party believes that a public authority did not meet the requirements set out in section 39, it may challenge the public authority's

¹⁰ These three requests resulted in [Decision 30/2022](#), [31/2022](#) and [33/2022](#), [Bermuda Gaming Commission](#). [Decision 30/2022](#) relates to a PATI request for records of communications with the National Anti-Money Laundering Committee, [Decision 31/2022](#) relates to a PATI request for local betting shop records, and [Decision 33/2022](#) relates to a PATI request for the BGC Commissioners' meeting minutes.

decision to disclose the records by requesting an internal review by the head of authority or an independent review by the Information Commissioner, as appropriate.

50. In accordance with section 45 of the PATI Act, the Information Commissioner only has jurisdiction to conduct an independent review of a public authority's handling of a PATI request if there was a valid application made for such a review. When a third party makes an application to challenge intended disclosure of records relating to them (as MM&I did in this case), the Information Commissioner has the jurisdiction to review whether a public authority properly decided to disclose records relating to that third party and whether it met the requirements for third party notification set out in section 39 (as she does in this case).
51. She cannot, however, assume jurisdiction on her own accord to conduct an independent review of a public authority's internal review decision in the absence of a valid application for such a review. An Information Commissioner's review must be initiated by an applicant who is either the PATI requester or a concerned third party.
52. Turning to the PATI request in this review made to the Ministry Headquarters, MM&I was a party in the Information Commissioner's review decided in [Decision 06/2021](#). While its submissions in [Decision 06/2021](#) referred to the disclosures made by the BGC, MM&I did not raise the Ministry Headquarters' compliance with section 39 in relation to the Ministry Headquarters' initial decision to disclose a limited number of records about the then-Minister's travel with the BGC and MM&I. The Information Commissioner did not consider the Ministry Headquarters' compliance with section 39 in [Decision 06/2021](#) because this was never raised by MM&I at the time.
53. The Information Commissioner now considers whether the Cabinet Office complied with section 39 prior to issuing its initial and internal review decisions to the Requester and MM&I that are under consideration in these Decisions.

[1] Whether the head of authority had reason to believe that the record might contain information of a type referred to in sections 23, 25 or 26?

54. Records 4-8, 13, 15, 20, 37, 44, 48 and 49 contained emails received from or sent to MM&I. The Information Commissioner agrees that the head of the Cabinet Office, the Cabinet Secretary, had reason to believe that they might contain information of a type referred to in section 23, 25 or 26.
55. Although records 2, 24, 31, 33, 43, 45 and 46 were not emails received from or sent to MM&I, they contained information about MM&I. The Information Commissioner thus agrees that the Cabinet Secretary had reason to believe that they contained information of a type referred to under section 23, 25 or 26.

[2] Whether the public authority intended to disclose the record?

56. Based on the letter dated 7 September 2021 sent by the Cabinet Office to MM&I prior to the initial decision being issued, the Information Commissioner is satisfied that the Cabinet Office intended to disclose parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49.

[3] If so, whether the public authority provided the third party with a notice informing them of its intention to disclose the record, the description of the contents of the record, and the statutory timeline to make written representations?

57. The Cabinet Office sent a third party notice to MM&I on 27 August 2021 informing MM&I of its intention to disclose a redacted copy of the relevant records. The Cabinet Office did not provide a description of the contents of the records, but provided MM&I with the actual records themselves, including the parts that it intended to redact.
58. The Cabinet Office's third party notice did not state the timeline for MM&I to make written submissions. The Cabinet Office, instead, informed the Requester that MM&I had until 10 September 2021 to make submissions. Because the Cabinet Office did not issue its initial decision until 21 October 2021, effectively it afforded MM&I more than the required time of 14 days to make written representations. Although the Cabinet Office did not provide express notice to MM&I of the deadline for submissions, the Information Commissioner is satisfied that the Cabinet Office provided MM&I with sufficient time to make representations as required by section 39.

[4] Whether the public authority then considered any representations made by the third party, prior to issuing its decision?

59. Based on the information available to the Information Commissioner, MM&I did not respond to the Cabinet Office's notice of 27 August 2021. It appears from the information before the ICO, that some confusion arose for MM&I and its counsel concerning the procedural posture following the issuance of [Decision 06/2021](#) and the correct manner for MM&I to exercise its rights.¹¹ Accordingly, the Cabinet Office did not have any

¹¹ On 27 July 2021, the Information Commissioner issued [Decision 06/2021](#), with formal notice to MM&I of the Order and its right to seek leave for judicial review. Under the Order, the Cabinet Office was required to do two things in relation to two separate sets of records: (1) to disclose certain records, non-disclosure of which was found by the Information Commissioner to be unjustified; and (2) to decide to disclose or withhold a set of newly identified records. On 18 August 2021, the Cabinet Office provided MM&I with copies of the records it was ordered to disclose

substantive third party submissions to consider prior to issuing its initial decision for this review. The Information Commissioner is satisfied that the Cabinet Office upheld MM&I's rights under section 39 of the PATI Act with respect to its intention to disclose parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49.

Conclusion

60. The Information Commissioner is satisfied that the Cabinet Office upheld MM&I's rights as a third party under section 39 of the PATI Act with respect to the Cabinet Office's intention to disclose parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49.

Applicability of the PATI Act – section 4(1)(b)(vi)

61. Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#), para. 18, that the "PATI Act excludes from its operation the records of a substantial number of public bodies to which the Legislature has decided that it shall not apply so long as such records do not relate to the general administration of the relevant body". Among these are records that were obtained or created by the Attorney-General's Chambers (**AG's Chambers**) in the course of carrying out its functions, as set out in section 4(1)(b)(vi) of the PATI Act.
62. The provision in section 4(1)(b)(vi) does not mean that the public does not have the right to ask for records obtained or created by the AG's Chambers. The public can make a PATI request for those records, and public authorities must respond to their requests in accordance with the provisions of the PATI Act.¹² A public authority is justified to deny

and which related to MM&I, to afford MM&I the opportunity to seek leave for judicial review against the Information Commissioner's Decision and Order requiring disclosure of records. On 27 August 2021, the Cabinet Office notified MM&I as a third party of its intention to disclose newly identified records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49 considered in this review 202207223 and invited its submissions. Instead of responding to the third party notice, MM&I raised objections to the disclosures by prematurely seeking an internal review on 20 September 2021. The Cabinet Office then issued the initial decision to the Requester and MM&I that ultimately led to this Decision.

¹² Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ, at para. 75: "I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act...they cannot be treated as so excluded. Accordingly, [the PATI requester] was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the [Head of Authority] in respect of the records which she sought, and the Commissioner was entitled to commence a review of the matter" under section 47.

public access to those records if it can show that the records fall under the category prescribed in section 4(1)(b)(vi).

63. Section 4(2) provides that records relating to the general administration of the AG's Chambers continue to fall within the scope of the PATI Act. In interpreting the scope of section 4(2), Justice Subair Williams in [Attorney General v Information Commissioner](#), para. 40, adopted the definition of 'general administration' set out by the Irish Information Commissioner, i.e., records relating to personnel, pay matters, recruitment, accounts, information, technology, accommodation, internal organisation, office procedures and the like.¹³
64. To determine whether a record falls outside the scope of the PATI Act by virtue of section 4(1)(b)(vi), the following must be considered:

[1] Was the record obtained or created by the AG's Chambers?

[2] Was the record obtained or created by the AG's Chambers in the course of carrying out its functions?

[3] Does the record relate to the AG's Chambers' general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

65. Because section 4(1) addresses the application of the PATI Act, the Information Commissioner may consider this provision on her own accord when the parties do not raise it.

Public authority's submissions

66. The Cabinet Office invoked section 4(1)(b)(vi) to withhold records 1, 3, 9-12, 14, 17, 21, 23, 25-27, 30, 32, 34 and 39-41 only.
67. In the ICO's letter seeking submissions from the Cabinet Office, the Investigator provided her preliminary view, after carefully reviewing the withheld records, that the Cabinet

¹³ In [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ (24 March 2023), the Court of Appeal overturned Justice Subair Williams's ruling and found that the Information Commissioner has the power to examine records that public authorities claim to fall outside the scope of the PATI Act under section 4(1). The Court of Appeal did not disturb Justice Subair Williams's findings on the meaning of records relating to general administration and their distinction with records related to the functions of those public authorities, bodies and persons listed in section 4. In [Decision 02/2019, Office of the Governor](#), para. 20, the Information Commissioner adopted this definition of 'general administration' as applied by the Irish Information Commissioner. See also [Decision 09/2021, Human Rights Commission](#), at para. 17; [Decision 05/2020, Human Rights Commission](#), at para. 15; [Decision 19/2019, Internal Audit Department](#), at para. 19; and [Decision 21/2022, Office of the Governor](#), at para. 13.

Office had correctly relied on section 4(1)(b)(vi) to deny access to records 1, 3, 9-12, 14, 17, 30 and parts of records 23 and 25. Therefore, the Cabinet Office did not make submissions on section 4(1)(b)(vi) specific to these records.

68. The Cabinet Office submitted that section 4(1)(b)(vi) was applicable to records 21, 26, 27, 32, 34 and 39-41 as well as other parts of records 23 and 25 because the records were email correspondence and one of the individuals included in the correspondence was serving as the Attorney General at the time the records were created.

Requester's submissions

69. The Requester did not make submissions related to the application of section 4(1)(b)(vi) to the relevant records.

Discussion

70. The Information Commissioner considers the Cabinet Office's reliance on section 4(1)(b)(vi) for records 1, 3, 9-12, 14, 17, 21, 23, 25-27, 30, 32, 34 and 39-41. After reviewing the records, the Information Commissioner also considers the application of section 4(1)(b)(vi) to records 16 and 22, on her own accord.

[1] Was the record obtained or created by the AG's Chambers?

71. The Information Commissioner is satisfied that the records identified in para. 70 were created or obtained by the then-Attorney General, who was part of the AG's Chambers.

[2] Was the record obtained or created by the AG's Chambers in the course of carrying out its functions?

72. Under the Constitution, the Attorney General is the principal legal advisor to the Government. It is clear from their content that records 1, 3, 9-12, 14, 16, 17, 21-23, 25-27, 30, 32, 34 and 39-41 were obtained or created by the AG's Chambers in the course of carrying out its functions as the Government's legal advisor. These records contained legal advice and discussion on matters that might have legal implications on the Government.

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

73. The Information Commissioner is satisfied that the records in para. 72 do not relate to the general administration of the AG's Chambers as the content of the records does not relate to personnel, pay matters, recruitment, accounts, information, technology, accommodation, internal organisation, office procedures or the like. The records relate

to the AG's Chambers' core functions as the Government's legal advisor. Therefore, these records do not come within the scope of the PATI Act by virtue of section 4(2)(b).

Conclusion

74. The Information Commissioner is satisfied that the Cabinet Office properly refused access to records 1, 3, 9-12, 14, 17, 21, 23, 25-27, 30, 32, 34 and 39-41 because the PATI Act is inapplicable to these records by virtue of section 4(1)(b)(vi). The Information Commissioner is further satisfied that the PATI Act is inapplicable to records 16 and 22 by virtue of the same provision.

Draft of Cabinet document – section 27(1)(c)

75. Section 27(1)(c) entitles public authorities to deny public access to a record if it is a draft or copy of, or an extract from, a record referred to in subsection (a) or (b). Subsection (a) refers to records submitted for the Cabinet's consideration or those that are proposed by a Minister to be submitted. Subsection (b) refers to an official record of any deliberation or decision of the Cabinet.
76. A 'copy' is a reproduction or duplicate of the document, for example, a photocopy or printed copy. A 'draft' is a preliminary version of the document. It should be the actual document, preferably marked as a draft. An 'extract' usually contains a reproduction of part of the text or material such as a quote, paraphrase or summary. Simply referring to a Cabinet document is not sufficient.¹⁴
77. By virtue of the exceptions set out in section 27(2), the exemptions in section 27(1) do not apply to a record that contains purely statistical, technical or scientific material. The exemptions still apply, however, if its disclosure would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet. This may occur because the information consists of selective material or facts, or because it is so inextricably intertwined with the Cabinet's deliberative thinking that it will reveal deliberations, e.g., what options, advice or recommendations are considered. 'Deliberation' in the PATI Act should be understood as the consideration or evaluation of competing arguments, information and facts with a view to making a decision.¹⁵

¹⁴ [Decision 18/2022](#), [Ministry of Health Headquarters](#), para. 97, citing the Exemption Practice Note 1 of the Victorian Information Commissioner's Office.

¹⁵ [Decision 02/2019](#), [Office of the Governor](#), para. 168.

78. The exemption in section 27(1)(c) is an absolute one, in that it is not subject to the public interest test.

79. In sum, to appropriately rely on the exemption in section 27(1)(c) in denying public access to a record, public authorities must consider and demonstrate:

[1] Whether the record is a draft of, copy of, or extract from a record referred to in section 27(1)(a) or (b)?

[2] Whether the record contains purely statistical, technical or scientific material?

[3] If so, whether the disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

80. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

Public authority's submissions

81. The Cabinet Office relies on section 27(1)(c) to withhold part 2 of record 36 and most of part 1 of record 38. The Cabinet Office did not provide further explanation.

Requester's submissions

82. The Requester did not make submissions on this issue.

Discussion

83. The Information Commissioner considers the Cabinet Office's reliance on section 27(1)(c) to deny public access to part 2 of record 36 and most of part 1 of record 38.¹⁶

[1] Whether the record is a draft of, copy of, or extract from a record referred to in section 27(1)(a) or (b)?

84. Part 2 of record 36 is a draft Cabinet Memorandum to be submitted for the Cabinet's discussion. Part 1 of record 38 mostly consisted of the content of the Discussion Paper

¹⁶ During review 20220106-03, the Cabinet Office abandoned its reliance on section 27(1)(c) for part 1 of record 36 and parts 2-4 as well as limited sections of part 1 of record 38, because they contain administrative information and email details only.

intended for submission to Cabinet. Both parts of the records were created for the sole purpose of the Cabinet's consideration.

85. Therefore, relevant parts of both records are a draft of a record that is exempt under section 27(1)(a).

[2] Whether the record contains purely statistical, technical or scientific material?

86. These parts of records 36 and 38 do not contain statistical, technical or scientific material. Therefore, it is unnecessary to consider whether disclosure of these parts of records 36 and 38 could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision.

Conclusion

87. The Cabinet Office was justified in relying on section 27(1)(c) to withhold parts of records 36 and 38.

Records disclosing Cabinet's deliberation or decision – section 27(1)(d)

88. Section 27(1)(d) allows public authorities to deny public access to a record if its disclosure would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet. What amounts to 'deliberation' of the Cabinet, and disclosure of such deliberation, are discussed above, para. 77.
89. The exemption in section 27(1)(d) does not apply to a record by which a decision of the Cabinet is officially published. The exemption is also not engaged if the exception in section 27(2) applies, as described in para. 77.
90. An officially published deliberation or decision must be written or issued as a function of the person or body responsible for publishing it, and publishing must make the decision or deliberation generally known.¹⁷ This could occur, for example, through the Throne Speech, an official press release, an official speech by the relevant Minister or a Ministerial statement in Parliament. Disclosure of the deliberations or decision to a smaller group, with the expectation of confidentiality, is not considered an official publication.
91. The exemption in section 27(1)(d) is not subject to the public interest test.
92. In sum, when relying on section 27(1)(d), a public authority must consider:

¹⁷ [Decision 18/2022, Ministry of Health Headquarters](#), para. 112.

- [1] What is the deliberation or decision of the Cabinet?
- [2] How could disclosure of the record involve disclosure of the identified deliberation or decision of the Cabinet?
- [3] Could that harm reasonably be expected to occur?
- [4] Is the record one by which a decision of the Cabinet is officially published?
- [5] If the record contains purely statistical, technical or scientific material, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

93. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

Public authority's submissions

- 94. The Cabinet Office relies on section 27(1)(d) to withhold records 19, 28 and 35 only.
- 95. The Cabinet Office submitted that part of record 19 which contains purely statistical, technical or scientific material could be disclosed, though it did not identify the specific part.
- 96. The Cabinet Office submitted that records 19, 28 and 35 speak to deliberations of the Cabinet. It explained that record 19 discloses a "concern" of the Cabinet, while record 28 is a frank exchange between Ministers. It further submitted that the views expressed by the Ministers at the time within the email exchanges were intended to form part of the Cabinet's deliberations, and that the content of the records indicates this.
- 97. The Cabinet Office submitted that the Ministers communicated amongst themselves with the expectation that their views were part of Cabinet's ongoing consideration of these matters and as such are exempted. The likelihood of harm in their release is high as it would defy the Ministers' expectation to have frank exchanges not only in person, but also electronically.
- 98. The Cabinet Office submitted that records 19, 28 and 35 are not those by which a decision of the Cabinet is officially published.

Requester's submissions

- 99. The Requester did not make submissions on this point.

Discussion

100. The Information Commissioner considers the Cabinet Office's reliance on section 27(1)(d) to deny public access to records 19, 28 and 35 only.

[1] What is the deliberation or decision of the Cabinet?

101. Having carefully reviewed the records, the deliberations of the Cabinet included deciding on an appropriate gaming model for Bermuda and negotiating the terms of a Memorandum of Understanding (**MOU**) between the Government and MM&I. Both deliberative processes involved weighing various proposals, considering recommendations and reaching a final decision on action to be taken.

[2] How could disclosure of the record involve disclosure of the identified deliberation or decision of the Cabinet?

102. The Information Commissioner agrees with the Cabinet Office that record 19 relates to the Cabinet's deliberations on the appropriate gaming model for Bermuda. Part 2 of record 19 is a cover email to forward another email and does not contain any information which could disclose the Cabinet's deliberation about MM&I's gaming proposal. The exemption in section 27(1)(d) is not considered further for this part of record 19.
103. Save for the email details, part 1 of record 19 consists of responses to questions posed by the Cabinet. Disclosure of the responses would reveal the areas which the Cabinet queried and the factors it was weighing with respect to its decision on an appropriate gaming model.
104. Record 28 relates to the Ministers' discussions about negotiations surrounding the MOU between the Government and MM&I that the Cabinet was expected to review. Much of this email correspondence, however, would not reveal the Cabinet's deliberations on the MOU. Only disclosure of very limited information in parts 2 and 3 of record 28 could disclose the Cabinet's deliberations on the draft MOU because the information touched upon the nature or content of the draft.
105. Most of record 35 relates to the Cabinet's deliberations about recommendations made by consultants.
106. A small part of record 35 relates to the personal information of former and current Cabinet members, unrelated to their public work. This information is not considered further for the exemption in section 27(1)(d).

[3] Could that harm reasonably be expected to occur?

107. This question is considered for certain parts of records 19, 28 and 35 the disclosure of which could involve the disclosure of the Cabinet's deliberations or decision:
- a. part 1 of record 19;
 - b. certain information in parts 2 and 3 of record 28; and
 - c. most of part 1 of record 35.
108. Because the contents of these parts of records 28 and 35 reflect the Cabinet members' thoughts on the draft MOU and the consultants' recommendations, their disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberations. These views and communications were part of the Cabinet's ongoing dialogue between meetings of the Cabinet. Disclosure could reasonably be expected to reveal the questions, responses and deliberations of the Cabinet prior to reaching decision on the appropriate gaming model and provisions of the MOU.
109. Part 1 of record 19 contains responses to the Cabinet's queries and disclosure could reasonably be expected to disclose the factors which the Cabinet was weighing when deciding on an appropriate gaming model.

[4] Is the record one by which a decision of the Cabinet is officially published?

110. None of the relevant parts of records 19, 28 and 35 were records by which a decision of the Cabinet is published. Rather, the relevant parts of the records consisted of email correspondence involving one or more members of the Cabinet.

[5] If the record contains purely statistical, technical or scientific material, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

111. None of the relevant parts of records 19, 28 and 35 contain purely statistical, technical or scientific material.

Conclusion

112. The Information Commissioner is satisfied that the Cabinet Office was justified in relying on section 27(1)(d) to withhold the relevant parts of records 19, 28 and 35 referred to in para. 107. The Information Commissioner is not satisfied that the Cabinet Office was justified in relying on the exemption to withhold the remaining parts of those records.

Ministerial responsibility – section 28

113. Section 28(1) allows a public authority to deny public access to a record if it consists of information which, if disclosed, would undermine or could reasonably be expected to

undermine individual ministerial responsibility, including free and frank discussion and advice between Ministers, or between Ministers and public officers, in the course of their public duties.

114. A record falling within the exemption in section 28(1) should be disclosed if the public interest would, on balance, be better served by disclosure than non-disclosure.
115. As the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), individual ministerial responsibility is the doctrine by which “ministers are responsible to Parliament for all that happens in their departments, though they will only be regarded as culpable in respect of their own decisions or failures”. The section 28(1) exemption prevents disclosure of records that could reasonably be expected to undermine the policies, decisions and actions of their Ministry.
116. For the exemption in section 28(1) to apply, public authorities must demonstrate that disclosure of the record ‘would’ or ‘could reasonably be expected to’ undermine individual ministerial responsibility. ‘Would’ means there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring. ‘Could reasonably be expected to’ is a lesser likelihood of the adverse effect occurring. It requires a public authority to distinguish between what is merely speculative, irrational or absurd and expectations that are likely, plausible or possible based on real and substantial facts.¹⁸
117. In sum, when relying on section 28, a public authority must consider:
 - [1] What is the information in the record that could reasonably be expected to undermine individual ministerial responsibility?
 - [2] How can disclosure of that information undermine individual ministerial responsibility?
 - [3] Could this harm reasonably be expected to occur?
 - [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?

¹⁸ [Decision 12/2018, Ministry of Finance Headquarters](#), paras. 70-72.

118. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

Public authority's submissions

119. The Cabinet Office relies on section 28 to withhold record 28 only. It claimed that record 28 is a frank exchange between Ministers. The Cabinet Office did not provide any analysis of the public interest test.

Requester's submissions

120. The Requester did not make submissions on this specific exemption. In their submissions in [Decision 06/2021](#), however, the Requester explained why they believed that disclosure of the responsive records, including record 28, is in the public interest. Referring to regulation 2 of the PATI Regulations 2014 (**PATI Regulations**), the Requester submitted that disclosure would promote a greater understanding of the process or decisions of public authorities; provide reasons for decisions taken by the Government; promote accountability of and within the Government; promote accountability for public expenditures or more effective use of public funds; deter or reveal wrong-doing or maladministration; and reveal untrue, incomplete or misleading information or acts of a public authority.
121. The Requester further referred to a special report published by the Royal Gazette to highlight a potential conflict of interest raised when the former Ministers who urged the Government to sign a MOU with MM&I then subsequently became the attorneys for MM&I upon their departure from the Cabinet. The Requester highlighted that these Ministers later pushed for the legalisation of casino gambling in Bermuda.
122. The Requester submitted that the MOU between MM&I and the Government related to a potential contract on cashless gaming system, which was worth millions of dollars. The Requester referred to concerns raised by the BGC on whether the arrangement outlined in the MOU was still under consideration and whether the arrangement could prove problematic due to regulatory issues surrounding the gaming licences of MM&I's partner company, Banyan, in two states in the United States of America. The Requester pointed out that Banyan had made a public presentation on the need for a cashless gaming system in Bermuda at a town hall meeting on responsible gaming, organised by the then opposition (now governing) political party on 3 May 2017.
123. The Requester further explained that, although both MM&I and Banyan have publicly expressed their loss of interest in being involved in Bermuda's casino gaming industry, both

the former Finance Minister and the current Premier have indicated that a cashless gaming system remains the preferred approach in Bermuda.

124. The Requester also noted that following publication of the Royal Gazette's special report on gaming in Bermuda, MM&I claimed publicly that it had planned to give most of its profits to charity, and disclosure of the withheld records may be able to confirm this commitment.
125. The Requester asserted that although the Royal Gazette's special report brought to light major issues of public interest, the taxpayers still do not know what occurred behind closed doors. Bermuda's casino gaming industry remains an issue of major public interest, including who will benefit, how it will be regulated, and what measures will be in place to ensure there is no corruption. The Requester hoped that disclosure of the responsive records could shed light on any conflict of interest, how MM&I came to get the MOU, whether the deal was still under consideration after the 2017 election, and whether the BGC was justified in raising concerns about the MOU with MM&I.
126. The Requester submitted that the public interest would be served by the disclosure of information about the connections the principals of MM&I and Banyan have with elected officials and how those ties may have influenced decision making and plans for the spending of public money.

Discussion

[1] What is the information in the record that could reasonably be expected to undermine individual ministerial responsibility?

127. The Cabinet Office did not identify the relevant parts of record 28 for this exemption. The exemption for ministerial responsibility is therefore considered only for parts of record 28 that were not found to be exempt under section 27(1)(d).
128. The information in the record that would reveal Cabinet deliberations is already exempt under section 27(1)(d). As a result, the remainder of record 28 consists of administrative or informal email communications between Cabinet members.

[2] How can disclosure of that information undermine individual ministerial responsibility?

129. Disclosure of the remaining parts of record 28 could not undermine individual ministerial responsibility. Although the Cabinet Office characterised record 28 as a frank exchange between the Ministers, the remaining email correspondence does not reflect this. Further, even if it did, simply characterising a record as being a 'frank exchange' does not

meet the requirements of the exemption in section 28 for individual ministerial responsibility.

130. As explained above, this exemption is meant to protect the disclosure of any records or parts of records which could undermine the policies, decisions and actions of a Minister's ministry. Because the Cabinet Office has not provided any explanation as to how disclosure of record could lead to this specific harm, the Information Commissioner is not satisfied that the Cabinet Office's reliance on section 28 was justified.

131. The Cabinet Office's reliance on this exemption is not considered further for record 28.

Conclusion

132. The Information Commissioner is not satisfied that the Cabinet Office was justified in relying on section 28 to deny access to the remaining parts of record 28.

Information received in confidence – section 26(1)(a)

133. A public authority may rely on section 26(1)(a) to deny access to information that "is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential" and "the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions".

134. If section 26(1)(a) 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.

135. The exemption in section 26(1)(a) focuses on whether the process or circumstances by which the information was provided indicate that it was given in confidence and with the understanding that it would be treated confidentially. The assessment considers factors related both to how the third party gave the information and how the public authority received or agreed to hold the information.

136. In deciding whether the information was given 'in confidence' by a third party, relevant factors may include:

- a. the expectation of the person or entity giving the information to the public authority;
- b. any assurances sought regarding the confidentiality of the information;
- c. the purpose for which the information was provided; and

- d. any other action that the person or entity giving the information may have taken with respect to the information, e.g., the information was given to other parties and under what circumstances.¹⁹
137. The information must also have been given with the understanding that the public authority would treat the information as confidential. This would include doing so on an ongoing basis. The understanding of confidentiality may be express or implied.
138. When determining how the public authority received the information, the relevant factors may include:
- a. any statement or assurances given at the time the information was provided;
 - b. the purpose for which the information was sought or provided;
 - c. the practice, procedure, or policy of the public authority with regard to such information generally;
 - d. any action which the public authority may be expected to take in relation to the information; and
 - e. the nature of the relationship between the provider of the information and the public authority receiving it.²⁰
139. Section 26(1)(a) also requires that disclosure of the information in the record ‘would be likely’ to prevent the authority from receiving further similar information in the future that is required by the public authority to properly fulfil its functions. Speculation is not sufficient to justify the exemption. ‘Would be likely’ means that some significant, real risk must exist that the public authority would be prevented from receiving such information in the future.
140. As set out in the Interpretation Act 1951 (**Interpretation Act**), the ‘functions’ of a public authority should be understood as “powers conferred, or duties imposed, on the authority or officer by or under any provision of law”.

¹⁹ See Information Commissioner’s Guidance, ‘[Information received in confidence exemptions \(section 26\)](#)’, para. 41.

²⁰ Information Commissioner’s Guidance, ‘[Information received in confidence exemptions \(section 26\)](#)’, para. 43.

141. As explained in [Decision 06/2021](#), [Cabinet Office](#), at para. 106, a public authority, or third party, must consider five questions when seeking to justify the exemption for information received in confidence:

- [1] Was the information given by a third party (other than another public authority)?
- [2] Was the information given in confidence and with the understanding that it would be held confidentially?
- [3] How would disclosure likely prevent the public authority from getting such information again in the future?
- [4] Was that information required for the public authority to fulfil its functions?
- [5] If the exemption is engaged, does the balance of the public interest require disclosure?

142. A public authority, or a third party asserting its rights under section 26(1)(a), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption was justified.

Public authority's submissions

143. The Cabinet Office invoked section 26(1)(a) to withhold records 55-57 only.

144. The Cabinet Office submitted that parts of these records were sent by an individual in their capacity as a private professional, and thus were provided by a third party.

145. The Cabinet Office submitted that parts of records 55 and 56 were provided to the then Minister of Tourism, Transport and Municipalities and record 57 was provided to the then Chairman of the BGC.

146. The Cabinet Office was of the view that the information in records 55-57 was provided 'in confidence' and 'on the understanding that it would be treated as confidential' because each email in these records contained a disclaimer stating that its content might be confidential and privileged.

147. The Cabinet Office submitted that disclosure could prevent the relevant public authorities from receiving further similar information in the future, in that it would erode the confidence in the process of protecting information which has been shared in confidence.

148. The Cabinet Office explained that the Cabinet was required to deliberate and decide which entity would be awarded the gaming contract. Likewise, the BGC was constituted to advise the Cabinet on the process and guidelines for gaming.
149. The Cabinet Office submitted that factors in favour of release of records 55-57 were limited to the fact that the PATI Act grants Bermudians and residents of Bermuda the right to access records held by a public authority. The Cabinet Office identified the following as factors against disclosure:
- a. The disclaimer contained in each email on confidentiality;
 - b. Even though the individual sending the emails was a member of the Cabinet during part of the relevant time period, they were acting in their personal professional capacity when sending the correspondence in records 55-57;
 - c. Despite the lapse of time and the fact that the MOU between the Government and MM&I has been terminated, there is still much to be decided upon regarding the gaming sector/industry in Bermuda. The current climate is still potentially quite explosive.

Requester's submissions

150. See paras. 120-126, above, for the Requester's submissions on the public interest.

MM&I's submissions

151. MM&I vehemently objected to the public disclosure of further records relating to it and its business. MM&I argues that records which the Cabinet Office intended to disclose should be withheld under the exemption in section 26(1)(a). MM&I also agreed with the Cabinet Office that records 55-57 were exempt from public disclosure under section 26(1)(a).
152. MM&I submitted that the contents of some of the records under consideration themselves confirmed that an NDA and confidentiality statements were in place between MM&I and the Government (and the BGC), and from that MM&I has a reasonable expectation that these would be honoured. MM&I referred specifically to records 21, 22 and 48.²¹

²¹ In its submissions, MM&I referred to pages 18-20, 23, 24, 56 of the combined records provided by the Cabinet Office. Pages 18-20 are a part of record 21, pages 23-24 are a part of record 22 and page 56 is a part of record 48.

153. In its submissions considered in [Decision 06/2021, Cabinet Office](#), MM&I made the following arguments that are also considered in this review²²:

- a. Bearing in mind the NDA and MOU, MM&I submitted that it was “unequivocally understood and agreed” that all its business communications, correspondence, presentations, submittals and meeting discussions with the Bermuda Government were confidential and business sensitive in nature. MM&I submitted that this understanding and agreement extended to both the BGC and to what was then called the Ministry of Tourism and Transport.
- b. In support of this assertion, MM&I provided a copy of the NDA and its correspondence with the BGC discussing the applicability of the NDA to the BGC.
- c. MM&I stated that the previous disclosure of records relating to it as part of the initial response to prior PATI requests had resulted in severe personal stress to its principals, significant reputational damage and financial loss of business opportunity.

154. In its submissions dated 19 March 2023, MM&I also stated that the records reveal “extremely confidential business and our gaming solution data”, referring specifically to records 4, 8 and 19.²³

Discussion

155. The Information Commissioner considers the Cabinet’s Office reliance on section 26(1)(a) to withhold records 55-57. MM&I objected to the disclosure of any of the responsive records. But because the Information Commissioner already found that some of the responsive records or parts of records fall outside the scope of the PATI Act or are exempt under other exemptions, she considers MM&I’s reliance on section 26(1)(a) to object to disclosure of records 2, 4-8, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48, 49 and 51-57, as well as parts of records 19, 28, 35, 36 and 38.

[1] Was the information given by a third party (other than a public authority)?

156. Having carefully reviewed the records, the Information Commissioner agrees that records 5-8, 20, 37, 48, 49, 55, and 56, the remainder of record 19, and parts of records 4, 13, 15, 44, 52 and 57 were given by MM&I as a third party.

²² [Decision 06/2021, Cabinet Office](#), paras. 51-54.

²³ In its submissions, MM&I referred to pages 1, 2, 6 and 14 of the combined records provided by the Cabinet Office. Pages 1-2 are a part of record 4, page 6 is a part of record 8 and page 14 is a part of record 19.

157. Even though certain parts of records 51 and 53 consist of emails between officers of public authorities, these parts contain information that was received from MM&I.
158. In contrast, records 2, 24, 29, 31, 33, 43, 45, 46 and 54, the remainder of records 28, 35, 36 and 38 as well as parts of records 4, 13, 15, 44, 51-53 and 57 consist of information given by officers of public authorities and do not contain information received from a third party, as defined in the PATI Act. The Information Commissioner is not satisfied that the Cabinet Office's and MM&I's reliance on section 26(1)(a) was justified for these specific records and parts of records and does not consider them further.

[2] Was the information given in confidence and with the understanding that it would be held confidentially?

159. This question is considered for the records or parts of records identified in paras. 156 and 157.
160. For records 55-57, the Cabinet Office claimed that the information in the records or parts of records was given in confidence and with the understanding that it would be held confidentially because the relevant emails contained a standard disclaimer from the company that the email and its attachments were transmitted only to the recipient and may contain legally privileged or confidential material.
161. It is well settled, however, that such labelling on its own is insufficient to impose an understanding of confidence.²⁴ Instead, consideration is given to the nature of the relationship between the Government and MM&I at around the time of the relevant records, i.e., between 12 August 2016 and 1 December 2016.
162. MM&I's NDA with the Government was terminated in July 2018, so was still in effect at the time of the correspondence in records or parts of records 55-57. However, the existence of the NDA is not the determining factor as to whether this information was given in confidence.
163. The signed NDA contained contradictory indications about whether it created an obligation on the parties as well as the extent of any such obligation. It contained an express statement that the parties were "intending to be legally bound" when they executed it, but the former Tourism Minister's signature was qualified by hand-written initials with a dated statement that his signature and agreement were "conditional on future engagement". Because the Government never entered into an agreement with

²⁴ [Decision 06/2021](#), [Cabinet Office](#), para. 117.

MM&I to provide the services described in the NDA, neither the Cabinet Office nor MM&I have shown that there was an obligation arising from the NDA.

164. A formal agreement is not required to satisfy the requirements of section 26(1)(a). Consideration is also given to clause 7 of the NDA, which stated that Government was expected to hold confidential all information that MM&I provided and to not copy, duplicate, or distribute information relating to the “program” without the express permission of MM&I. The “program” the NDA referred to was “the marketing, design, configuration, implementation, operation and management of gambling” in Bermuda.
165. Having carefully considered clause 7 as well as the content of the relevant parts of records 55-57, however, the information in those records was not given in confidence by MM&I with the understanding that it would be held confidentially. The records are administrative in nature and do not include any information relating to the marketing, design, configuration, implementation, operation, and management of gambling.
166. Similarly, records 5-7, 20, 37, 48 and 49, the remainder of record 19, and parts of records 4, 8, 13, 15, 44, 51 and 53 do not relate to the “program” as described in para. 164, and do not otherwise establish that the information was given in confidence and with the understanding that it would be held confidentially.
167. The exemption in section 26(1)(a) is not considered further for the records or parts of records listed in paras. 165 and 166.
168. In contrast, some information in certain parts of records 4, 8 and 52 contain information which directly relates to the marketing, design, configuration, implementation, operation or management of gambling. Therefore, the information in these specific parts of the records was provided in confidence by MM&I and with the objective understanding that it would be held confidentially by the Government.

[3] How would disclosure likely prevent the public authority from getting such information again in the future?

169. This question is considered only for the parts of the records identified in para. 168.
170. While the information in records 8 and 52 was the kind of information which the Cabinet Office or the relevant public authority at the time could compel a third party to provide, disclosure would be unlikely to prevent these public authorities from receiving similar information in the future. The information in these records was typical of the information a private company would be willing to provide if it was trying to secure a project with the Government.

171. Certain information in the relevant part of record 4, though, was provided by MM&I to the Government as a professional courtesy. Given the voluntary nature of the provision of this information that went beyond what is normally required, the disclosure of the relevant parts of record 4 could prevent the public authority from obtaining similar information in the future.

[4] Was that information required for the public authority to fulfil its functions?

172. This question is considered only for the relevant parts of record 4.

173. The Cabinet Office has, or the relevant public authority at the time had, a remit for casino gaming in Bermuda which would include the development of the industry. Information similar to what was provided by MM&I in these specific parts of record 4 could certainly be helpful for the public authority's performance of its functions. The information is not, however, required by the public authority's performance of its functions.

174. Because the information is not required for the public authority to fulfil its functions, the exemption in section 26(1)(a) is not considered further.

Conclusion

175. The Information Commissioner is not satisfied that the Cabinet Office was justified in relying on section 26(1)(a) to deny access to records 55-57.

176. The Information Commissioner is also not satisfied that MM&I was justified in relying on section 26(1)(a) to object to the disclosure of records 2, 4-8, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48, 49 and 51-57 as well as parts of records 19, 28, 35, 36 and 38.

Breach of confidence – section 26(1)(b)

177. A public authority or, as in this case, a third party may rely on section 26(1)(b) as justification for denying or objecting to access to a public record if the record's disclosure would constitute a breach of a duty of confidence arising under any provision of law.

178. In accordance with the Interpretation Act, 'any provision of law' means "any provision of law which has the effect for the time being in Bermuda, including any statutory provision, any provision of the common law, any provision of the Constitution, and any right or power which may be exercised by virtue of the Royal Prerogative". A duty of confidence may be created by a provision of an agreement or may arise in equity.

179. A party asserting a duty of confidence arising from agreement must show that the records would fall within the scope of the relevant confidentiality or non-disclosure clause.

180. A breach of an equitable duty of confidence requires showing that²⁵:
- a. the information has the necessary quality of confidence;
 - b. it was given in circumstances which create an obligation that the information be kept confidential; and
 - c. there must have been an unauthorised use of the information, which in some circumstances must be to the detriment of the confider.
181. Section 26(1)(b) also requires that the disclosure ‘would’ constitute a breach of confidence. ‘Would’ means that there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring.
182. The exemption in section 26(1)(b) is subject to the public interest test. The records, or parts of records, must still be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.
183. In sum, a public authority or third party seeking to rely on the exemption under section 26(1)(b) for a breach of a duty of confidence must ask:
- [1] Does a duty of confidence arise under the law?
 - [2] Would disclosure constitute a breach of that duty of confidence under the law?
 - [3] If the exemption is engaged, whether the balance of the public interest requires disclosure?
184. A public authority, or a third party asserting its rights under section 26(1)(b), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.
- Public authority’s submissions*
185. The Cabinet Office did not invoke this exemption and thus did not make submissions related to it.

²⁵ [Coco v AN Clark \(Engineers\) Ltd.](#) [1969] RPC 41; see also [Decision 02/2022](#), [Bermuda Business Development Agency](#), para. 24.

Requester's submissions

186. See paras. 120-126, above, for the Requester's submissions on the public interest.

MM&I's submissions

187. See MM&I's submissions in paras. 151-154.

188. MM&I argues that records which the Cabinet Office intended to disclose should be withheld under the exemption in section 26(1)(b).

Discussion

189. MM&I objected to the disclosure of any of the responsive records. But because the Information Commissioner has already found that some of the records or parts of records fall outside the scope of the PATI Act or are exempt under other exemptions, she considers MM&I's reliance on section 26(1)(b) to object to the disclosure of records 2, 4-8, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48, 49 and 51-57, as well as parts of records 19, 28, 35, 36 and 38.

[1] Does a duty of confidence arise under the law?

190. MM&I's reliance on section 26(1)(b) is based on the existence of the NDA and MOU that it had with the Government. The Information Commissioner considers whether a contractual duty of confidence arose from these two documents.

191. Consistent with the Information Commissioner's analysis and conclusion in [Decision 06/2021](#) and above at paras. 163-164, the NDA only created an agreement that the Government would hold information from MM&I confidentially that specifically related to the "marketing, design, configuration, implementation, operation and management of gambling" in Bermuda.²⁶ Although the MOU contains a 'Confidentiality and Solicitation' clause, a duty of confidence did not arise from it because the parties' agreement to keep certain information confidential was expressly conditioned on a condition that did not materialise.²⁷

²⁶ [Decision 06/2021, Cabinet Office](#), para. 70.

²⁷ [Decision 06/2021, Cabinet Office](#), paras. 64-66.

192. The Information Commissioner also found in [Decision 06/2021](#) that the provisions of the NDA could not be extended to MM&I's submissions through the public procurement process that began in May 2015, following the enactment of the PATI Act.²⁸ Given this, the Information Commissioner is satisfied that there was no duty of confidence arising from the NDA and the MOU for records 49 and 51-57 because they were created after the public procurement process had begun. She does not consider MM&I's reliance on section 26(1)(b) for records 49 and 51-57 further.
193. In arguing that it was owed a duty of confidence, MM&I referenced its NDA and MOU with the Government rather than suggesting it was owed an equitable duty of confidence as explained in para. 180. In any event, apart from certain parts of record 8 discussed below, none of the information in the relevant records had the necessary quality of confidence to give rise to an equitable duty of confidence. They do not contain, for example, proprietary or technical information about MM&I cashless gaming solutions. The Information Commissioner does not consider an equitable breach of confidence argument further.

[2] Would disclosure constitute a breach of that duty of confidence under the law?

194. This question is considered for records 2, 4-8, 13, 15, 20, 24, 29, 31, 33, 37, 43-46 and 48 as well as parts of records 19, 28, 35, 36 and 38.
195. The NDA was signed by the Government and MM&I in July 2013 and terminated in July 2018. Clause 7 of the NDA required the Government to "hold confidential all Contractor-provided information" that related to the specific subject matter of the NDA, namely, the "marketing, design, configuration, implementation, operation and management of gambling" in Bermuda (referred in this Decision as the 'program', see para. 164). The clause prohibits the Government from copying, duplicating or distributing information relating to the program, without obtaining MM&I's express permission.
196. To determine whether disclosure would constitute a breach of the duty of confidence, the Information Commissioner is thus required to consider whether the records or parts of records identified in para. 194 were "Contractor-provided information" that related to the program.

²⁸ [Decision 06/2021, Cabinet Office](#), para. 71.

197. Records 2, 24, 29, 31, 33, 43, 45, 46, the remainder of records 28, 35, 36 and 38 as well parts of records 4, 13, 15 and 44 do not fall within the scope of the NDA's confidentiality obligation, because they were not "Contractor-provided information".
198. Records 5-8, 20, 37, 48, the remainder of record 19, and parts of records 4, 13, 15 and 44 contained "Contractor-provided information" which related to the marketing, design, configuration, implementation, operation and management of gambling in Bermuda and therefore fall within the scope of the NDA's confidentiality obligation.
199. Although the information in some of the records or parts of records identified in para. 198 was administrative in nature, the Information Commissioner is satisfied that it related to the program referred to in the NDA.

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

200. The balance of the public interest is considered for records 5-8, 20, 37 and 48, the remainder of record 19, as well as parts of records 4, 13, 15, and 44 identified in para. 198 above.
201. In favour of disclosure, a strong public interest exists in increasing the public understanding of the relationships between the Government and private entities. This transparency allows the public to conduct a more informed and effective scrutiny on, for example, the management of conflict of interests and the procurement process. In this case, as the Requester points out, the former Minister of Tourism Development and Transport as well as the former Attorney General were involved in the introduction of the gaming industry in Bermuda, as well as in the drafting and signing of the NDA and MOU with MM&I. They later became the legal representatives of MM&I in their private capacity. As the Information Commissioner highlighted in her [Decision 06/2021](#), this begged the question of the nature of the relationships between MM&I, the then Minister and the then Attorney General. Disclosure of their correspondence in the relevant records or parts of records will inform the public of the nature of their relationships, as well as the frequency and extent of their contacts before and during the procurement process.
202. The Information Commissioner acknowledges, however, that a strong public interest also favours confidentiality and honouring the duty of confidence in commercial settings. Some of the records or parts of records at issue contained MM&I's proprietary technical or business information which, if disclosed, might be used by others to achieve a commercial advantage, as MM&I points out. Disclosure of the propriety technical or business information is also not in the public interest as it could reasonably be expected to erode

the confidence of the members of the public, including private entities, that the Government or public authorities will protect their sensitive business information.

203. Taking into consideration the public interest factors above, disclosure of records 5-7, 20, 37 and 48, the remainder of record 19 as well as parts of records 4, 8, 13, 15 and 44 is in the public interest. These records or parts of records provide the public with further information on the relationship between the Government and MM&I, without disclosing any proprietary technical or business information of MM&I.
204. In contrast, the balance of the public interest favours non-disclosure of the other parts of record 8 because they relate to MM&I's proprietary technical or business information.

Conclusion

205. MM&I was justified in relying on the exemption in section 26(1)(b) to object to the disclosure of parts of record 8. Their disclosure is not in the public interest.
206. MM&I was not justified in relying on the exemption in section 26(1)(b) to object to the disclosure of records 2, 4-7, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48, 49 and 51-57, the remainder of record 8 and parts of records 19, 28, 35, 36 and 38.

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

207. A public authority or a third party may rely on section 25(1)(c) to deny or object to access to a record if the record's disclosure would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates.
208. The exemption in section 25(1)(c) is subject to the exceptions in section 25(2). A public authority or a third party cannot rely on the exemption, for example, if the information concerned relates to the requester or if the person to whom the information relates gives their written consent to disclosure.
209. A 'commercial interest' relates to a person's ability to participate in a commercial activity, such as the sale of goods or collection of a debt. A commercial activity usually requires a business undertaking done to generate income or profit.
210. The plain meaning of 'adverse effect' is bringing about an unfavourable or harmful result. The commercial information exemption, however, cannot be used to avoid embarrassment. It may only be applied when a real risk of harm to commercial interests could reasonably be expected to occur.

211. Section 25(1)(c) requires that disclosure ‘would or could reasonably be expected to’ cause the adverse effect. The meaning of ‘would’ and ‘could reasonably be expected to’ has been explained in para. 116.
212. If the exemption in section 25(1)(c) is engaged, the public authority or third party must then consider whether the balance of the public interest still requires disclosure of the records.
213. In sum, to rely on section 25(1)(c), public authorities or third parties must consider the following²⁹:

[1] Do any exceptions 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, whether the balance of the public interest requires disclosure?

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

Public authority’s submissions

215. The Cabinet Office did not invoke this exemption and thus did not make submissions.

Requester’s submissions

216. See paras. 120-126, above, for the Requester’s submissions on the public interest.

MM&I’s submissions

217. See paras. 151-154, above, for MM&I’s submissions.

²⁹ [Decision 23/2023](#), [Office of the Tax Commissioner](#), para. 50.

218. MM&I argues that records which the Cabinet Office intended to disclose should be withheld under the exemption in section 25(1)(c).

Discussion

219. MM&I's reliance on section 25(1)(c) to object to the disclosure is considered for records 2, 4-7, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48, 49 and 51-57 as well as parts of records 8, 19, 28, 35, 36 and 38 which the Information Commissioner did not find to be exempt under the provisions already considered.

[1] Do any exceptions in section 25(2) apply?

220. None of the exceptions in section 25(2) apply.

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

221. The information in the records and parts of records identified in para. 219 relates to MM&I.

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

222. MM&I submitted that previous disclosure of its information in response to another PATI request has caused personal stress on MM&I's principals. The personal stress, however, does not amount to commercial interests.

223. MM&I has also identified its business reputation as a commercial interest. While a third party's reputation, on its own, does not qualify as a commercial interest, the Information Commissioner accepts MM&I's submission that its reputation is tied to its ability to receive a return on its investments and to receive potential earnings from the gaming industry. This constitutes a commercial interest. The Information Commissioner also considers MM&I's ability to receive a return on its investments and to receive potential earnings from the gaming industry, on its own, as a separate commercial interests.

[4] What adverse effect could disclosure cause?

224. Records 2, 4-7, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48 and 54-57, the remainder of records 8, 19, 28, 35, 36 and 38 and parts of records 51-53 do not contain MM&I's proprietary business information. They contain general information about MM&I and arrangements for meetings and presentations. MM&I has not shown how disclosure of this information could have any adverse effect on MM&I's commercial interests.

225. While record 49 and certain parts of record 52 contain MM&I's business information, it is of a general nature which did not provide details that, if disclosed, could damage MM&I's reputation and in turn affect its business.

226. MM&I's reliance on section 25(1)(c) to deny public access is not considered further for the records and parts of records identified in paras. 224 and 225.
227. The Information Commissioner accepts that disclosure of certain information in parts of records 51-53 could have an adverse effect on MM&I's commercial business. Records 51 and 53 were internal drafts and feedback of email communications between the Commissioners of the BGC that were sent in final form to MM&I on 13 June 2016. The drafts have not been publicly disclosed. Record 52 included comments and opinions from the BGC's Chairman and Executive Director at the time.
228. The Information Commissioner further accepts that disclosure of the draft email in records 51 and 53 could have an adverse effect on MM&I's reputation which, in turn, will adversely impact its ability to receive a return on its investments and to receive potential earnings from the upcoming gaming industry.

[5] How likely is this to occur?

229. This question is considered for parts of records 51-53 only.
230. Having carefully reviewed the relevant parts of records 51-53, the Information Commissioner is satisfied that disclosure could reasonably be expected to result in the harm previously identified.

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

231. On the one hand, as discussed above, para. 201, the public has a strong interest in understanding the nature and the extent of the relationship between the Government and MM&I. The Information Commissioner notes that prior disclosures by the Cabinet Office, as well as other public authorities, have provided the public with transparency concerning the relationship and business dealings between the Government, the BGC, former Ministers, MM&I and its principals.
232. On the other hand, disclosure of the relevant parts of records 51-53 will not further the public's understanding of that relationship. The substantive information in these records about the relationship with MM&I is already in the public domain. In the relevant parts of records 51-53, though, this information is intertwined with individuals' subjective opinions, comments, and understanding of what happened between the Government and MM&I. Further, the public has an interest in the fair treatment of companies engaged with the government and other public authorities or those seeking to participate in procurement processes.

233. In weighing these factors, the Information Commissioner is of the view that disclosure of the relevant parts of records 51-53 is not in the public interest. Disclosure will contribute little to the public's understanding of the business relationship with MM&I and does not outweigh the public's interest in the fair treatment of companies (and their commercial interests) when seeking to do business with the Government.

Conclusion

234. MM&I was justified in relying on the exemption in section 25(1)(c) to object to the disclosure of parts of records 51-53. Their disclosure is not in the public interest.

235. MM&I was not justified in relying on the exemption in section 25(1)(c) to object to the disclosure of records 2, 4-7, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48, 49 and 54-57 and parts of records 8, 19, 28, 35, 36, 38 and 51-53.

Personal information – section 23(1)

236. Under section 23(1) of the PATI Act, public authorities may deny public access to records or parts of records which consist of personal information. Section 24(1) broadly defines 'personal information' as information recorded in any form about an identifiable individual.

237. Certain information about identifiable individuals is excluded from the definition of 'personal information' in the PATI Act, in accordance with section 24(2). For example, section 24(2) excludes certain information about contractors performing services for a public authority, or information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority.

238. The exemption in section 23(1) also does not apply to the limited circumstances set out in subsection (2). It does not apply, for example, if the information in the requested records relates to the PATI requester (see subsection (2)(a)). It also does not apply to "the information that was given to the public authority concerned by the individual to whom it relates and the individual 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" (see subsection (2)(d)).

239. The personal information exemption is subject to the public interest test. Records which are found to be exempt under section 23(1) would still have to be disclosed, if the public interest would, on balance, be better served by disclosure instead of non-disclosure. In

considering the public interest test for disclosure of personal information, the following factors have to be taken into consideration³⁰:

- 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. Evaluating the fairness of any disclosure may include consideration of the following:
 - i. Whether sensitive personal information was involved?
 - ii. What would be the consequences upon the individual of disclosure?
 - iii. What are the reasonable expectations of privacy of a person in the individual's position?
- c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.

240. In sum, as the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), public authorities must consider the following questions before denying public access to records under the personal information exemption³¹:

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

241. Given the importance of the protection of personal information and privacy, particularly in a small jurisdiction such as Bermuda, the Information Commissioner may consider the

³⁰ [Decision 02/2019, Office of the Governor](#), para. 51.

³¹ [Decision 02/2019, Office of the Governor](#), para. 56.

personal information exemption on her own accord and without the provision being relied upon by any of the parties.

Public authority's submissions

242. The Cabinet Office invoked section 23(1) to withhold parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49.
243. The Cabinet Office explained that most of the redactions under the personal information exemption do not form any material parts of the records, e.g., they indicate either who conducted the search and/or printed the records; the details are those who performed administrative tasks and do not form part of the relevant records.
244. For the remaining part of other records it intended to disclose, the Cabinet Office did not find any other information to be exempt under section 23(1).

Requester's submissions

245. See, at paras. 120-126 above, the Requester's submissions on the public interest test.

MM&I's submissions

246. MM&I objected to further disclosure of any records relating to its employees.
247. MM&I argues that records which the Cabinet Office intended to disclose should be withheld under the exemption in section 23(1).
248. MM&I submitted that previous disclosure made under the PATI Act has resulted in severe personal stress to its principals.

Discussion

249. The Information Commissioner considers Cabinet Office's reliance on section 23(1) for parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49 that the Cabinet Office seeks to withhold. She also considers MM&I's reliance on the exemption to object to the disclosure of information about its employees in the relevant records. On her own accord, the Information Commissioner also considers the exemption for any information about individuals in records 2, 4-7, 13, 15, 20, 24, 29, 31, 33, 37, 43-46, 48, 49 and 54-57 as well as parts of records 8, 19, 28, 35, 36, 38 and 51-53 which she did not find to be exempt under the provisions already considered in this review.

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

250. The records and parts of records identified in para. 249 consist of information about an identifiable individual. Those individuals are either employees or officers of public authorities, Ministers and the members of the Cabinet during the relevant period, and individuals associated with private entities, including MM&I.

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

251. None of the information about individuals in the relevant records or parts of records fell within any of the exclusions in section 24(2). The information about the employees or officers of public authorities contained within the records related to their performance of the positions or functions, rather than to the positions or functions themselves.

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

252. None of the exceptions in section 23(2) are applicable to the personal information in the relevant records.

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

253. As previously discussed in para. 201 above, the public has a strong interest in increasing its understanding of the nature and extent of the relationship between the Government, specific Ministers, and MM&I.

254. Disclosure of the personal information of current or former employees or officers of public authorities who had no senior or decision making role could not further this public interest. Accordingly, disclosure would also be both unfair and unnecessary, given they had no public facing or decision making role related to gaming in Bermuda or the relationship with MM&I. These individuals had reasonable expectations that their work information would not be made public unnecessarily.

255. Similarly, disclosure of personal information of individuals associated with private entities other than MM&I would not further the identified public interests. These individuals might not even be aware that their names were mentioned in the relevant records. Disclosure of their personal information would also be unfair and unnecessary considering their reasonable expectations of privacy.

256. Disclosure of the names and other routine work information (such as their positions and titles) for individuals holding senior and decision making positions in the public authorities, as well as the members of the Cabinet and Ministers, would further the public interests at issue. These individuals held senior, public facing roles and therefore had a lower

expectation of privacy for their public work. These individuals were also involved in the introduction and development of a gaming industry in Bermuda. Disclosure is both fair to the individual and necessary to further the relevant public interests.

257. Disclosure of the names and positions of MM&I's principals would also further the public interest and is necessary for the public to have a clearer understanding of MM&I's dealings with the Government as well as with the relevant Ministers. These individuals' association with the company is well-known to the public, and disclosure of their names in the records is fair considering these circumstances. It would not be fair or necessary, however, to disclose their contact details. These details are not required for the public to better understand their relationship with the Government.

Conclusion

258. The Information Commissioner is satisfied that the Cabinet Office was justified in engaging the exemption in section 23(1) to withhold certain parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49.
259. MM&I's assertion of section 23(1) was only justified for certain information about its employees in parts of records 4, 6, 7, 13, 37, 44, 48 and 49. The Information Commissioner is satisfied that the personal information exemption is engaged for other parts of records 2, 4, 13, 15, 20, 24, 31, 33, 43-46 and 49.
260. The Information Commissioner is also satisfied that the personal information exemption is engaged for parts of records 29 and 54-57 as well as the certain parts of records 19, 28, 35, 36 and 51-53 that she did not find to be exempt under other exemptions previously considered. She is further satisfied that disclosure of the names and titles of senior public officers and elected officials, as well as the names and positions of MM&I's principals, is required by the balance of the public interest. The balance of the public interest requires maintaining the exemption for the remaining personal information in the relevant records.

Conclusions

261. The Information Commissioner finds that:
- a. Records 16 and 22 do not fall within the scope of the PATI Act by virtue of section 4(1)(b)(vi), because they were obtained or create by the AG's Chambers in the course of carrying out its functions.
 - b. Parts of records 2, 4, 13, 15, 19, 20, 24, 28, 29, 31, 33, 35, 36, 43-46 and 51-57 are exempt under section 23(1).
 - c. The Cabinet Office:

- i. upheld MM&I's rights as a third party under section 39 of the PATI Act with respect to the Cabinet Office's intention to disclose parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49;
- ii. properly refused access to records 1, 3, 9-12, 14, 17, 21, 23, 25-27, 30, 32, 34 and 39-41 because the PATI Act is inapplicable to these records by virtue of section 4(1)(b)(vi);
- iii. properly relied upon the exemption section 27(1)(c) to deny public access to parts of records 36 and 38;
- iv. properly relied upon the exemption in section 27(1)(d) to deny public access to parts of records 19, 28 and 35;
- v. properly relied upon the exemption section 23(1) to deny public access to parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49; and
- vi. did not properly rely upon the exemption in section 28 to deny public access to parts of record 28; and
- vii. did not properly rely upon the exemption in section 26(1)(a) to deny public access to records 55-57.

d. MM&I:

- i. properly asserted the exemption in section 26(1)(b) to object to the disclosure of parts of record 8;
- ii. properly asserted the exemption in section 25(1)(c) to object to the disclosure of parts of records 51-53;
- iii. properly asserted the exemption in section 23(1) to object to the disclosure of certain information about its employees in parts of records 4, 6, 7, 13, 37, 44, 48 and 49; and
- iv. did not properly assert the exemptions in sections 23(1), 25(1)(c), 26(1)(a) and 26(1)(b) to object to the disclosure of the rest of the records.

Decision

The Information Commissioner finds that by virtue of section 4(1)(b)(vi) of the Public Access to Information (PATI) Act 2010, the Act does not apply to records 16 and 22. She also finds that certain parts of records 2, 4, 13, 15, 19, 20, 24, 28, 29, 31, 33, 35, 36, 43-46 and 51-57 are exempt under section 23(1).

Further, the Information Commissioner finds that the Cabinet Office properly refused access to records 1, 3, 9-12, 14, 17, 21, 23, 25-27, 30, 32, 34 and 39-41 under section 4(1)(b)(vi).

The Information Commissioner finds that the Cabinet Office properly engaged the following exemptions to deny public access: section 27(1)(c) for parts of records 36 and 38; section 27(1)(d) for parts of records 19, 28 and 35; and section 23(1) for parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49.

The Information Commissioner finds that the Cabinet Office did not properly engage the following exemptions to deny public access: section 28 for parts of record 28 and section 26(1)(a) for records 55-57.

The Information Commissioner finds that MM&I properly asserted the following exemptions to object to disclosure of records: section 26(1)(b) for parts of record 8; section 25(1)(c) for parts of records 51-53; section 23(1) for parts of records 4, 6, 7, 13, 37, 44, 48 and 49.

The Information Commissioner finds that MM&I did not properly assert sections 23(1), 25(1)(c), 26(1)(a) and 26(1)(b) to object to the disclosure of the rest of the records.

Finally, the Information Commissioner finds that the Cabinet Office upheld MM&I's rights as a third party under section 39 of the PATI Act with respect to the Cabinet Office's intention to disclose parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49.

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

- varies the Cabinet Office's decision for:
 - records 16 and 22 by virtue of section 4(1)(b)(vi),
 - certain parts of records 2, 4, 6, 7, 13, 15, 19, 20, 24, 28, 29, 31, 33, 35-37, 43-46, 48, 49 and 51-57 by virtue of section 23(1);
 - certain parts of record 8 by virtue of section 26(1)(b)
 - certain parts of records 51-53 by virtue of section 25(1)(c).

- affirms the Cabinet Office’s decision to deny public access by relying on the following provisions:
 - section 4(1)(b)(vi) for records 1, 3, 9-12, 14, 17, 21, 23, 25-27, 30, 32, 34 and 39-41,
 - section 27(1)(c) for parts of records 36 and 38,
 - section 27(1)(d) for parts of records 19, 28 and 35,
 - section 23(1) for parts of records 2, 4-8, 13, 15, 20, 24, 31, 33, 37, 43-46, 48 and 49
- reverses the denial of access to the remaining parts of records 28 and 55-57; and
- orders the Cabinet Office to disclose records 2, 4-8, 13, 15, 19, 20, 24, 28, 29, 31, 33, 35-38, 43-46, 48, 49 and 51-57 in part, as instructed in the Confidential Annex (Appendix II), which forms part of this Decision.

The Information Commissioner requires the Cabinet Office’s compliance as directed by this Decision and the accompanying Order, on or before **Thursday, 1 February 2024**.

Judicial Review

The Cabinet Office, the PATI requester and MM&I, 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

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.

Gitanjali S. Gutierrez
Information Commissioner
14 December 2023

Appendix I: Relevant statutory provisions

Public Access to Information Act 2010

Application

- 4 (1) Subject to subsection (2), this Act does not apply to—
- ...
 - (b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
 - ...
 - (vi) the Attorney General’s Chambers;
 - ...
- (2) The reference to records in subsection (1) does not include records relating to the general administration of –
- ...
 - (b) any public authority referred to in subsection (1)(b).

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.

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;
 - ...
 - (d) the information was given to the public authority concerned by the individual to whom it relates and the individual 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; or
 - ...
- (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—

...

Commercial information

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

...

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

Information received in confidence

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

(a) information—

(i) that is given to a public authority by a third party (other than another public authority) in confidence and on the understanding that it would be treated as confidential; and

(ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or

(b) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.

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

Cabinet documents

27 (1) Subject to subsections (2) and (3), a record is exempt if it is—

...

(c) a record that is a draft or copy of, or an extract from, a record referred to in paragraph (a) or (b); or

(d) a record, the disclosure of which would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet is officially published.

(2) Subsection (1) does not apply to a record that contains purely statistical, technical or scientific material unless the disclosure of the record would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet.

...

Ministerial responsibility

- 28 (1) Subject to subsection (2), a record is exempt from disclosure if it consists of information, the disclosure of which would undermine, or could reasonably be expected to undermine, individual ministerial responsibility, including free and frank discussion and advice between Ministers, or between Ministers and public officers, in the course of their public duties.
- (2) A record shall be disclosed if disclosure of it is in the public interest.

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