



Decision Notice

Decision 49/2023: Cabinet Office

Premier's correspondence related to Gencom and others

Reference no: 20220127-01

Decision date: 20 December 2023

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Cabinet Office for the Premier's correspondence related to Gencom, its subsidiaries, its founder and its representative. The Cabinet Office's internal review decision refused access based on the exemptions in sections 25(1)(c) (adverse effect on commercial interests), 25(1)(d) (prejudice to contractual negotiations) and 31(1) (financial and economic interests). During this review, Gencom, as a Third Party, also asserted the commercial interest exemptions as well as the exemptions in sections 26(1)(a) (information received in confidence) and 26(1)(b) (breach of confidence) to object to the disclosure of records.

In this Decision, the Information Commissioner has found that the Cabinet Office did not conduct a reasonable search in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014. The Information Commissioner has also found that the exemptions in sections 25(1)(d) and 23(1) (personal information) were applicable to withhold the responsive records, in part. Finally, the Information Commissioner has found that the exemptions in sections 25(1)(c), 26(1)(a), 26(1)(b) and 31(1) were not applicable to the remaining parts of the records, which were primarily administrative or innocuous in nature.

The Information Commissioner has varied the internal review decision by the Cabinet Office to deny public access to certain parts of records 1 and 3 under the exemptions in sections 25(1)(d) and 23(1). The Information Commissioner has also reversed the internal review decision, in part, and ordered the Cabinet Office to disclose record 2 and parts of records 1 and 3. Finally, the Information Commissioner has ordered the Cabinet Office to conduct a reasonable search in accordance with the confidential search instructions, to process any newly located records, and to issue an initial decision to the Applicant, as directed by this Decision and the accompanying Order.

Relevant statutory provisions

Public Access to Information Act 2010: section 12(2)(b) (access to records); section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 25(1)(c) (adverse effect on commercial interests); section 25(1)(d) (prejudice to negotiations); section 26(1)(a) (information received in confidence); section 26(1)(b) (breach of confidence); section 31 (financial and economic interests).

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

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

Background

1. On 5 October 2021, the Applicant made a Public Access to Information (**PATI**) request to the Cabinet Office, asking for “all correspondence to and from the Premier, David Burt, as it relates to investment firm Gencom¹, and/or its subsidiaries, and/or its founder Karim Alibhai and/or its representative Chris Maybury since March 1, 2021. With regards to the individuals named, please include any and all correspondence, whether or not it relates to Gencom activities”. The PATI request then gave examples of the format of the records being sought, e.g., emails, letters, minutes of meetings, notes of telephone conversations or video calls, faxes, WhatsApp messages and Zoom or Webex meeting recordings.
2. Because the Cabinet Office did not issue an initial decision within the statutory timeframe, the Applicant asked for an internal review on 19 November 2021.
3. The Cabinet Office issued its internal review decision on 28 January 2022.² The internal review decision addressed two separate, though related, internal review requests. Relevant to this review is para. 9 of the internal review decision, which denied access to the responsive records under the exemptions in sections 25(1)(c) (adverse effect on commercial interests), 25(1)(d) (prejudice to negotiations) and 31(1) (financial and economic interests) of the PATI Act 2010.
4. On 27 January 2022, the Applicant asked for an independent review by the Information Commissioner.

Investigation

5. The Information Commissioner’s Office (**ICO**) accepted the application as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to assess whether its reliance on the exemptions was justified.

¹ Any reference to Gencom in this Decision is a reference to both Gencom and its subsidiaries, such as Westend Properties Limited (**Westend**), unless stated otherwise.

² This was issued in response to the Information Commissioner’s ‘failure to decide’ review that was decided in [Decision 04/2022, Cabinet Office](#).

7. The ICO notified the Cabinet Office of the valid application on 8 March 2022. At the ICO's request, the Cabinet Office provided three withheld records, namely, emails dated 12 April 2021 (**record 1**), 13 April 2021 (**record 2**) and 15 April 2021 (**record 3**).
8. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any concerned third party a reasonable opportunity to make representations. The Cabinet Office and the Applicant were invited to comment on application of the exemptions as well as the reasonableness of the Cabinet Office's search. As a concerned Third Party, Gencom was invited to make submissions. The Cabinet Office, the Applicant and Gencom made submissions.
9. Despite the broad scope of the PATI request, the Cabinet Office identified a limited number of responsive records. As a result, in addition to considering the Cabinet Office's reliance on the exemptions in sections 25(1)(c), 25(1)(d) and 31(1) to withhold the three identified records, the scope of this review was revised to include the reasonableness of the Cabinet Office's search in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014. Further, in light of Gencom's submissions, this review considered Gencom's assertion of sections 26(1)(a) and 26(1)(b) to object to the disclosure of records 1 and 3.
10. On 17 November 2023, the ICO offered the Cabinet Office the option of submitting evidence of its original search or searching the relevant locations in the presence of the ICO Investigator to verify the search. The ICO did not receive a response from the Cabinet Office.

Information Commissioner's analysis and findings

11. The Information Commissioner has considered all relevant submissions, or parts of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.
12. The Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, presents discussion of the withheld records. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

Reasonable search – section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations

13. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to PATI requests completely and accurately. Regulation 5 of the PATI Regulations requires public authorities, through their Information Officers, to make

reasonable efforts to locate records responsive to a PATI request. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate any record. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.

14. In cases where the reasonableness of a public authority's search is in question, the Information Commissioner's task is to assess whether such search was reasonable in accordance with the provisions of the PATI Act and Regulations. It is not her role to assess whether a public authority should or should not hold a record as a matter of good public administration.
15. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following:
 - [1] the quality of the public authority's analysis of the request;
 - [2] the scope of the search that it decided to make on the basis of that analysis;
and
 - [3] the rigour and efficiency with which the search was then conducted.
16. The public authority bears the burden to establish that the search conducted to locate records responsive to a PATI request was reasonable.³

Public authority's submissions

17. The Cabinet Office confirmed that it did not locate any responsive records between 1 March and 12 April 2021 as well as between 15 April and 5 October 2021.
18. When asked about records capturing an exchange of information between the then-Minister of Finance and Gencom that had happened prior to 12 April 2021 (the date of record 1) and included the company's responses referred to in record 1, the Cabinet Office submitted that they were not responsive to the PATI request.
19. The Cabinet Office also maintained that it did not hold any record on a video conference or certain calls referred to within the withheld records.
20. The Cabinet Office accepted that it was reasonable to search Premier Burt's email account to locate the responsive records. It asserted that the Premier's email was

³ See [Decision 04/2017, Department of Health](#), at paras. 37-49, and more recently [Decision 08/2023, Ministry of Finance Headquarters](#), at paras. 28-31.

searched, which generated nil result. The Cabinet Office explained that it could not provide a screenshot showing the nil result.

21. The Cabinet Office did not consider searching other locations for Premier Burt's records (such as a smartphone, laptop and shared drive) to be necessary, given the sole responsibility for the negotiations related to Gencom during the period in question belonged to the Ministry of Finance Headquarters (**Ministry Headquarters**), including the then-Minister of Finance, technical officers and consultant advisors within the Ministry Headquarters.

Applicant's submissions

22. The Applicant emphasised that the PATI request sought "correspondence to and from the Premier, David Burt, as it relates to investment firm Gencom etc". The Applicant maintained that, because of the language "as it relates to" Gencom, its subsidiaries, its founders and its representatives, the responsive records should not be limited to correspondence only between the Premier and the company but include any internal correspondence between the Premier and his advisors, other members of Cabinet, permanent secretaries and others.
23. The Applicant believed that there would be correspondence between the Premier and Gencom's founder or representative that did not relate to Gencom and was responsive to the PATI request. The Applicant gave an example of the £35,000-a-year scholarship to St. Andrew's University that was established in 2018 for four years by Gencom's founder and representative. The Applicant highlighted that the Premier was photographed with the company's representative when the scholarship was first announced in 2018 and that the first recipient received the funding in 2020. The Applicant argued that it was clear that the Premier had engaged with these individuals beyond their resort-specific matters.
24. The Applicant highlighted that there has been a great deal of activity around the hotel redevelopment. The Applicant submitted that, because the Letter of Intent that related to a government guarantee expired on 31 December 2020 and the guarantee was eventually confirmed in May 2022, there would likely be significant discussions before, between and after these dates. The Applicant submitted that, given the Premier's interest and frequent reference to the talks with Gencom, it was fair to assume that the Premier would have been involved or kept abreast of developments.
25. Lastly, the Applicant highlighted that in January 2022 the Premier said that he had spent a significant amount of time during a recent holiday in California "working with the Minister of Finance, working through the challenges with the developer, there's been numerous meetings this week, there'll be meetings over this weekend". In the

Applicant's view, given the Premier had highlighted in January 2022 how much work — including his own — had gone into the project, it would be surprising if there was not a significant amount of responsive correspondence in the preceding months.

Discussion

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

26. The PATI request asked for "all correspondence to and from the Premier, David Burt, as it relates to the investment firm Gencom, and/or its subsidiaries, and/or its founder Karim Alibhai and/or its representative Chris Maybury" from 1 March 2021 to 5 October 2021. The PATI request further clarified that "[w]ith regards to the individuals named, please include any and all correspondence, whether or not it relates to Gencom activities".
27. Based on this language, the PATI request seeks all correspondence between Premier Burt and anyone else from 1 March 2021 to 5 October 2021 that relates to either (1) Gencom, (2) its subsidiaries, (3) its founder, or (4) its representative. For clarity, the correspondence relating to the individuals, i.e., the founder or representative, did not need to relate to Gencom. It could have been, for example, about the scholarship highlighted by the Applicant or any other topic. Further, the responsive records would have included the Premier's correspondence with public officers or Ministers about Gencom, its subsidiaries, its founder or its representative.
28. In confirming this understanding of their PATI request in their submissions to the ICO, the Applicant also emphasised that the phrase "as it relates to" in the PATI request refers the Premier's internal correspondence (such as with public officers or Ministers) and external correspondence (such as with Gencom's founder or others).
29. The Cabinet Office did not explain its understanding of the scope of the PATI request. It stated in its submissions, however, that searches of locations other than Premier Burt's email was unnecessary because the Ministry Headquarters and its officers had responsibility for the negotiation between Gencom and the Government. Further, the three responsive withheld records that the Cabinet Office provided to the ICO only related to Gencom.
30. With respect to the subject matter of the records, the Cabinet Office appears to have limited the responsive records to only the correspondence that related to Gencom. The PATI request expressly stated that with respect to the individuals (the Premier, Gencom's founder and its representative), the Applicant sought all correspondence related to them regardless of whether it relates to Gencom. In their submissions, for example, the

Applicant highlighted other activities between the Premier and Gencom's founder and its representative. The Cabinet Office did not appreciate that the request sought the correspondence related to Gencom's founder and its representative regardless of whether it refers to Gencom.

31. In light of the above, and in the absence of explanation or search documentation from the Cabinet Office, the Information Commissioner is not satisfied that the Cabinet Office's analysis of the PATI request was adequate.

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

32. Because the Cabinet Office's analysis of the PATI request was not adequate, it is unnecessary to consider the scope of the search conducted by the Cabinet Office. The Information Commissioner notes, however, that the PATI request asked for the Premier's correspondence in various forms, such as emails, letters, virtual meeting recordings and WhatsApp messages. The records disclosed by the Cabinet Office were all emails.
33. Further it is unclear to the Information Commissioner whether the Cabinet Office searched both of the official government email accounts used by the Premier. If only one of these email accounts was searched, no explanation was given as to why this was considered reasonable. Based on the information available and in the absence of further explanation from the Cabinet Office, the Information Commissioner is not satisfied that the scope of the Cabinet Office's search was adequate.
34. Given the Cabinet Office's narrow reading of the PATI request, which was never confirmed with the Applicant, and in the absence of sufficient explanation or documentation from the Cabinet Office, the Information Commissioner is not satisfied that the Cabinet Office conducted a reasonable search for responsive records.

Conclusion

35. In sum, the Information Commissioner is not satisfied that the Cabinet Office conducted a reasonable search as required by section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.

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

36. The Cabinet Office and Gencom have referred to a number of exemptions to argue that records 1-3 should be withheld from public access. Of these exemptions, section 25(1)(d) is the most appropriate to consider under the applicable circumstances.

37. Section 25(1)(d) allows a public authority to refuse access to a record when disclosure would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates.
38. The exemption in section 25(1)(d) generally applies to ongoing negotiations. If the negotiations are finished, the responsive records should be disclosed unless there is a real and significant risk to identifiable future negotiations.
39. Prejudice in this exemption should be understood as an actual, real and significant harm. It implies a negative or detrimental effect. It cannot be a speculative or hypothetical harm.
40. The prejudice required for this exemption is 'would prejudice' or 'could reasonably be expected to prejudice'. 'Would' prejudice means there is a high probability that the harm anticipated can occur. 'Could reasonably be expected' to prejudice is a lesser likelihood of harm. Reasonable refers to what a reasonable person would expect considering all the circumstances of the case.
41. In sum, a public authority or third party asserting section 25(1)(d) to deny access to record must consider the following questions⁴:
 - [1] Do any of the exceptions in section 25(2) apply?
 - [2] Who is the person to whom the information relates?
 - [3] What are the negotiations of this person that are of concern?
 - [4] What is the specific prejudice to either the conduct or outcome that is of concern?
 - [5] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?
 - [6] What is the likelihood of this prejudice occurring?
 - [7] If the exemption is engaged, does the balance of the public interest still require disclosure?

⁴ See [Decision 06/2020](#), [Regulatory Authority](#), at para. 38.

42. Finally, a public authority or third party bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

Public authority's submissions

43. The Cabinet Office submitted that the withheld records related to Gencom as an investment firm involved in the redevelopment of the Fairmount Southampton Hotel.
44. The Cabinet Office explained that the relevant negotiation concerned a Government guarantee requested by Gencom for the redevelopment of the Fairmount Southampton Hotel.
45. The Cabinet Office further explained that the negotiations between Gencom and the Government formed one-third of a complex international transaction supported by senior and mezzanine lenders whose combined capital support of the redevelopment came to over \$250 million. Whilst these negotiations may have been of interest to the Applicant, the Cabinet Office submitted that it was unconscionable and untenable to contemplate such negotiations taking place in the public domain when the majority of capital risk was underwritten by international funding and not a public/taxpayer commitment. According to the Cabinet Office, investor confidence generally would plummet in Bermuda if, for example, a request for the release of commercial terms could be ordered in circumstances where the Government's role was subordinated to licensing, administrative approval or some other tenuous means—or none at all.
46. The Cabinet Office also commented on the disposition of the print media towards the Government and the proposed developers, submitting that the potential mischaracterisation of the redevelopment and its commercial terms would impact the willingness of overseas investors to invest in Bermuda.

Applicant's submissions

47. The Applicant explained that the Cabinet Office disclosed records relating to Gencom for their other PATI request⁵, though the Applicant noted that the other request covered records from a different timeline. Based on the records disclosed in response to the other PATI request, the Applicant did not believe that all correspondence to and from the Premier on Gencom would have an adverse effect on commercial interests, if released.

⁵ Considered in [Decision 50/2023](#), [Cabinet Office](#).

48. The Applicant submitted that the public interest test in section 25(3) of the PATI Act applied in this instance. The Applicant believed that, if Gencom was going to make such a significant difference to the island as it said it will and if public money will be used to back a loan to the company, where tax concessions will be provided that affect the public purse, the public interest test was surely met. The Applicant also referred to the Fairmont Southampton Hotel Act 2023 and highlighted that Gencom was covered for \$11 million-worth of redundancy payments between the end of 2020 and early 2021. The Applicant noted that Gencom had also secured more than \$100 million-worth of tax concessions for its redevelopment at the Fairmont Southampton Hotel. Further, the Applicant referred to Gencom being approved for a Special Development Order that will allow up to 250 additional units on an iconic piece of land in Bermuda.
49. The Applicant accepted that not all of these events had taken place during the period covered by this PATI request. But the Applicant viewed these examples to show that Bermuda and its residents were impacted by the decisions taken by the Government on their behalf as they related to Gencom.
50. The Applicant also argued that circumstances have progressed since 2021 and the public interest in Gencom could be said to be even higher as the country waits to see the Fairmont Southampton Hotel reopen and what will happen with its request for a Special Development Order that could mean the landscape at that site being significantly changed. According to the Applicant, it remained within the best interest of the public to have more information about talks and negotiations that occurred between the Premier and the company in the public domain.

Gencom's submissions

51. Gencom explained that the relevant records related to negotiations in 2021 for the financing of the Fairmount Southampton Hotel project and the conditions demanded by the Government for providing a loan guarantee and the amount of the guarantee.
52. Gencom submitted that the information identified in the records was, by its nature, highly confidential and sensitive.
53. Gencom acknowledged that the records dated back to April 2021, but emphasised that the financing for the hotel project had still not been fully secured as of the time of its submissions. Negotiations with lenders to secure debt financing remained fluid and ongoing. The information in the records remained highly confidential in 2023.

54. Further details from Gencom's submissions are included in the Confidential Annex (Appendix II) for the public authority and the Third Party alone, which forms part of this Decision.

Discussion

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

55. None of the exceptions in section 25(2) applied. The information in the responsive records did not relate to the Applicant, and Gencom has not given its written consent to disclosure. Further, there was no evidence that Gencom was informed beforehand that the information in the records belonged to a class of information that would or might be made available to the general public.

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

56. The information in records 1-3 related to Gencom.

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

57. The records related to Gencom's negotiations with its lenders. The records also related to Gencom's negotiation with the Government on the guarantee for the Fairmont Southampton Hotel redevelopment project. The two negotiations are considered separately for the remaining analysis.

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

Gencom's negotiation with lenders

58. Both the Cabinet Office and Gencom submitted that disclosure of records 1 and 3 could have prejudiced the outcome of negotiations between Gencom and its lenders. They explained that disclosure could have impacted the lenders' views and positions with respect to the redevelopment project. The Information Commissioner accepts that this was a relevant prejudice for the purpose of section 25(1)(d).

Gencom's negotiation with the Government

59. Record 1 set out the Government's position and proposed terms in relation to the guarantee, while record 3 set out those of Gencom. Because these records were email exchanges between the Government and Gencom, the positions and proposed terms of each party contained in the records were already known to each other. Disclosure of these records would have not given one of the parties an advantage over the other, so

the conduct or outcome of the negotiations between Gencom and the Government would not have been prejudiced in this sense.

60. Because parties to a negotiation would ordinarily have a reasonable expectation that their respective positions would not be made public at least until negotiations have concluded, the Information Commissioner accepts that disclosure of the parties' positions before the conclusion of a negotiation could have impacted the relationship between the negotiating parties, particularly under circumstances where heightened public attention was on the negotiations. In turn, this could have resulted in one of the parties taking a harder or more inflexible position that could have hindered optimal outcomes from the negotiations. The Information Commissioner accepts that a negative impact on the parties' ability to effectively negotiate further amounted to prejudice for purposes of section 25(1)(d).⁶

[5] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?

61. As set out the Confidential Annex (Appendix II), record 2 and limited parts of record 1 and 3 were innocuous and administrative in nature. Disclosure of record 2 and these parts of records 1 and 3 could not have prejudiced the conduct or outcome of the negotiations.

Gencom's negotiation with lenders

62. Having carefully reviewed records 1 and 3, as well as the detailed arguments of Gencom outlined in the Confidential Annex (Appendix II), the Information Commissioner accepts that Gencom has described circumstances that could have prejudiced the conduct or outcome of its negotiations with potential lenders. This reasoning applied to most of the information, as explained in the Confidential Annex (Appendix II).
63. Some limited information in records 1 and 3 were details that either the Government or Gencom had already shared with the public. Disclosure of this information could not have prejudiced Gencom's negotiations with its lenders.

⁶ See the decision by the Irish Information Commissioner, [Ms X and Dublin City Council](#), OIC-133524-HOS6P3 (21 August 2023), where the Investigator stated: "[I]n my view it is reasonable to accept that parties to a negotiation would expect that their respective positions are not made public at least until negotiations have concluded. Therefore, it seems to me that one party's disclosure of such details, before negotiations have concluded, could impact on its relationship with the other party. In turn, the other party could then take harder positions reflecting their own interests than might otherwise have been the case. Such an outcome could hinder the disclosing party's ability to obtain optimal outcomes."

Gencom's negotiation with the Government

64. Record 3 detailed Gencom's confidential negotiating position with the Government. The guarantee negotiation was ongoing at the time the Cabinet Office was handling the PATI request and the internal review decision. Under these circumstances, disclosure could have impacted the relationship between the negotiating parties and led to a less favourable outcome.

[6] What is the likelihood of this prejudice occurring?

65. The identified prejudice for both sets of negotiations could have reasonably been expected to occur. The circumstances highlighted by the Cabinet Office and Gencom were not speculative.

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

66. The Information Commissioner agrees that the public has had an interest in transparency around Gencom's negotiation with the Government and the hotel redevelopment project. The Government has since agreed to provide a guarantee for the redevelopment up to \$75 million and Gencom will benefit from a tax rebate of potentially \$121 million.⁷ Given this likely significant impact on public finances, the public has had a right to see information that will enable the public to assess whether and how the agreement with Gencom will benefit Bermuda.
67. At the same time, the public has had an interest in making sure that the Government and private businesses were able to conduct ongoing negotiations and ensure that private entities, such as Gencom, were able to secure financing to support its business endeavours. This stands in contrast, for example, to a public procurement project. As the Cabinet Office argued, these negotiations involved a complex transaction for which the majority of capital risk was being underwritten by international funding and not a commitment by the public. The public has had an interest in maintaining investors' confidence in negotiating and doing business in Bermuda.

⁷ See [Official Hansard Report](#), 6 May 2022, at pages 1278 and 1279. The former Ministry of Finance calculated that the total concessions would be approximately \$114 million to \$133 million; see the same Hansard Report, at page 1285. The tax concession was initially structured as tax relief but was later restructured as tax rebates; see [Official Hansard Report](#), 24 March 2023, at page 1244.

68. Records 1 and 3 did not reveal any maladministration and their disclosure would not have shed light for the public on the broader relationship between the Premier and Gencom, its subsidiaries, its founder or its representative.
69. At the time of the Cabinet Office's handling of the PATI request, the amount and form of the Government guarantee had not yet been agreed. The balance of the public interests would have been better served by non-disclosure of the relevant parts of the records rather than by disclosure.
70. In their submissions, the Applicant referred to a previous disclosure made by the Cabinet Office in response to a similar request but for a different set of records. The records disclosed by the Cabinet Office on 21 September 2021 mainly related to the Government and Gencom's negotiation about the redundancy pay of the hotel staff. Not only had this specific negotiation already concluded at the time of the disclosure, by then Gencom had paid back the \$11 million it owed to the Government for the severance pay.⁸

Conclusion

71. The Information Commissioner is satisfied that section 25(1)(d) was applicable to withhold parts of records 1 and 3. The Commissioner is not satisfied that it was applicable to record 2 and other parts of records 1 and 3 that were administrative and innocuous in nature.

Personal information – section 23(1)

72. Under section 23(1) of the PATI Act, public authorities are entitled to deny public access to records which consist of personal information. Section 24(1) broadly defines 'personal information' as information recorded in any form about an identifiable individual.
73. 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, 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.
74. The exemption in section 23(1) 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

⁸ See the Minister of Finance's [statement on 1 February 2021](#).

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)).

75. The personal information exemption is subject to the public interest test. This means 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 consideration:⁹

- 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.

76. 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 exemption:¹⁰

- [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?

⁹ See [Decision 02/2019, Office of the Governor](#), at para. 51.

¹⁰ See [Decision 02/2019, Office of the Governor](#), at para. 56.

[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?

77. Section 23(1) is also the only exemption that the Information Commissioner will consider on her own accord.

Discussion

78. Section 23(1) is considered for record 2 as well as the remaining parts of records 1 and 3 that were not found to be exempt under section 25(1)(d).

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

79. Record 2 and the remainder of records 1 and 3 contained identifying information about the Premier, then-Minister of Finance, Cabinet Secretary, Acting Financial Secretary, a consultant for the Ministry Headquarters, and individuals associated with Gencom. This included their names and contact details.

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

80. The name of the consultant who worked for the Ministry Headquarters shown in records 1 and 3 fell within the exclusion in section 24(2)(b), because they were an individual who was performing services under contract for a public authority. The exemption in section 23(1) does not need to be considered further for this specific information.

81. No other exclusion in section 24(2) applied to record 2 and the remainder of records 1 and 3.

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

82. None of the exceptions in section 23(2) was applicable. The information did not relate to the Applicant, and there has been no written consent to disclosure provided by any of the individuals to whom the information related.

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

83. The public interest factors that would have been furthered by disclosure were the same as those above in para. 66.

84. Except for a specific Gencom staff who objectively had a reasonable expectation that their information would not have been made public, disclosure of the names and positions of individuals mentioned in the records would have been fair. These individuals were either members of the Cabinet who were accountable to the public, senior public officers who were closely involved in the redevelopment project, or individuals who were publicly known as the faces of Gencom.¹¹ Given the significant benefits being provided to Gencom from the public purse through the Government guarantee and tax rebates, the individuals associated with Gencom should objectively have had expectations that some information about their interaction would have been made public. Although these were individuals working for private companies, they have also already identified themselves as associated with the project and negotiations, reducing their expectation of privacy about their involvement. Furthermore, with most parts of records 1 and 3 withheld under section 25(1)(d), disclosure of the individuals' names and position would unlikely have had any negative consequences on them.
85. Disclosure of the names and positions of the individuals, either within the Government or Gencom, would also have been necessary to further the public interest identified in para. 66. It is acknowledged that, due to the ongoing negotiations between Gencom and the Government as well as between Gencom and its lenders at the time of this Decision, most information cannot be disclosed to the public and is exempt under section 25(1)(d). Disclosure of the names of the key decision makers and those who were closely involved in the matter would at least now provide some level of transparency and accountability to the public concerning both the decision makers involved in the project and the timing of their discussions.

Conclusion

86. The Information Commissioner is satisfied that the name of the consultant in records 1 and 3 was not exempt under section 23(1) because it was excluded from the definition of personal information by virtue of section 24(2)(b).
87. The Information Commissioner is further satisfied that section 23(1) was engaged for the names and positions of the Premier, Minister of Finance, Cabinet Secretary, Acting Financial Secretary, Gencom's Founder and Principal and its representative, but that the balance of the public interest required their disclosure. Finally, the Commissioner is

¹¹ See Gencom, '[Gencom-led partnership acquires Fairmont Southampton, Bermuda](#)' (18 December 2019); and The Royal Gazette, '[Chris Maybury: 'I feel so lucky and privileged to be in Bermuda'](#)' (4 May 2023).

satisfied that the remaining personal information, such as contact information or the names of other individuals, was exempt under section 23(1).

Additional exemptions

88. The Cabinet Office and Gencom raised similar arguments¹² laid out in paras. 43-46 and 51-54 above to assert that the substantive information in records 1-3 also fell under a number of other exemptions. This included sections 25(1)(c) (adverse effect on commercial information)¹³, 26(1)(a) (information received in confidence)¹⁴ and 26(1)(b) (breach of confidence)¹⁵ as well as 31(1) (financial and economic interests)¹⁶.
89. As explained above in para. 61, record 2 as well as the remaining parts of records 1 and 3 that have not already been found to be exempt contained innocuous and administrative information. Disclosure of this information will not now cause the harms required under sections 25(1)(c) and 31(1). Further, no circumstances suggested that this type of information had been given in confidence and with the understanding it would have been held confidentially as required under section 26(1)(a), nor did this information have the necessary quality of confidence as required under section 26(1)(b).
90. The application of the exemptions listed in para. 88 is not considered further for the innocuous and administrative information in record 2 or the remaining parts of records 1 and 3.

Conclusion

91. The Information Commissioner is not satisfied that the Cabinet Office conducted a reasonable search as required by section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.
92. The Information Commissioner is satisfied that section 25(1)(d) was applicable to exempt parts of records 1 and 3 from disclosure and that the personal information about certain individuals in records 1 and 3 was exempt from disclosure under section 23(1).

¹² Though the Cabinet Office made distinct arguments to support its reliance on section 31(1), the relevant parts of the records have been found exempt under section 25(1)(d) by the Information Commissioner.

¹³ The test for section 25(1)(c) is set out in [Decision 23/2023, Office of the Tax Commissioner](#), para. 50.

¹⁴ The test for section 26(1)(a) is set out in [Decision 06/2021, Cabinet Office](#), para. 106.

¹⁵ The test for section 26(1)(b) is set out in [Decision 06/2021, Cabinet Office](#), para. 41. See also [Decision 02/2022, Bermuda Business Development Agency](#), para. 24.

¹⁶ The test for section 31(1) is set out in [Decision 30/2022, Bermuda Gaming Commission](#), para. 62.

93. The Information Commissioner is not satisfied that the exemptions in sections 25(1)(d), 25(1)(c), 26(1)(a), 26(1)(b) and 31(1) were applicable to exempt record 2 or the remaining parts of records 1 and 3 from disclosure.

Decision

The Information Commissioner finds that the Cabinet Office did not conduct a reasonable search as required by section 12(2)(b) of the Public Access to Information (**PATI**) Act 2010 and regulation 5 of the PATI Regulations 2014. The Information Commissioner further finds that parts of records 1 and 3, but not record 2, were properly withheld under sections 25(1)(d) and 23(1) of the PATI Act. Finally, the Information Commissioner finds that the exemptions in sections 25(1)(c), 26(1)(a), 26(1)(b) and 31(1)(b) did not apply to record 2 and the remaining parts of records 1 and 3.

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

- varies the internal review decision by the Cabinet Office to deny public access to certain parts of records 1 and 3 under the exemptions in section 25(1)(d) and 23(1);
- reverses the internal review decision with respect to record 2 and parts of records 1 and 3 and orders these records be disclosed as instructed in the Confidential Annex (Appendix III), which forms part of this Decision; and
- orders the Cabinet Office to conduct a reasonable search in accordance with the confidential search instructions attached to the Information Commissioner's cover letter to the Cabinet Office, to process any newly located records, and to issue an initial decision to the Applicant in accordance with the PATI Act and the PATI Regulations.

The Information Commissioner requires the Cabinet Office to disclose the records as instructed, and to conduct a reasonable search and to issue an initial decision, as directed by this Decision and the accompanying Order, on or before **Wednesday, 7 February 2024**.

Judicial Review

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

Enforcement

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

Gitanjali S. Gutierrez
Information Commissioner
20 December 2023

Appendix I: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

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

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

Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
- ...
- (2) But “personal information” does not include—
- ...
- (b) information about an individual who is or was performing services under contract for a public authority that relates to the services performed, including the terms of the contract and the name of the individual;
- ...

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

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

...

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

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 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.

Financial and economic interests

31 (1) Subject to subsection (2), a record is exempt from disclosure if its disclosure, or premature disclosure, could reasonably be expected to have a serious adverse effect on the financial interests of Bermuda or on the ability of the Government to manage the national economy.

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

Public Access to Information Regulations 2014

Reasonable search

5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

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