

## Decision Notice

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### Decision 23/2024: Bermuda Gaming Commission

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#### **Finance records and meeting minutes**

**Reference no:** 2021019

**Decision date:** 30 July 2024

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Gaming Commission (**Commission**) for its meeting minutes for March 2022 to February 2023 and records related to its finances. In its internal review decision, the Commission administratively refused access to part of the request on the basis that the requested records did not exist or could not be found under section 16(1)(a) of the PATI Act, and granted access, in part, to some of the responsive records. The Commission also denied access to the remaining records or parts of records under sections 23 (personal information), 25 (commercial information), 26 (information received in confidence), 28 (ministerial responsibility), 29 (deliberations of public authorities), 30 (operations of public authorities), 31 (financial and economic interests) and 34 (law enforcement).

The Information Commissioner has found that the Commission did not conduct a reasonable search to locate records responsive to certain items of the PATI request, but justified its reliance on section 16(1)(a) to administratively deny the request for its annual reports, including financial statements, for the five financial years between April 2017 and March 2022. The Information Commissioner has also found that the Commission was justified in relying on sections 29 and 34(1)(a) to refuse access to parts of the meeting minutes, but that it did not justify refusal of access to the remaining parts of the meeting minutes under the relevant exemptions in sections 25, 26, 28, 30 or 31. The Information Commissioner has also found that the Third Party did not justify its reliance on sections 25(1)(c), 25(1)(d) or 26(1)(a) to object to the disclosure of parts of the records that related to its interests. Finally, on her own accord, the Information Commissioner has found that certain personal information was exempt from disclosure under section 23 of the PATI Act and that the Commission has not complied with the disclosure requirement in section 6(5) of the PATI Act.

The Information Commissioner has ordered the Commission to disclose copies of its redacted meeting minutes, as set out in the Confidential Annex, to disclose its quarterly expenditures in accordance with section 6(5) of the PATI Act, to conduct a reasonable search to locate records responsive to items 4, 6 and 7 of the PATI request and to issue a new initial decision on these items.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 16(1)(a) (record does not exist); section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 25(1) (commercial information); section 26(1)(a) (information given in confidence); section 28 (ministerial responsibility); section 29 (deliberations of public

authorities); section 30(1) (operations of public authorities); section 31 (financial and economic interests); section 34(1)(a) (prevention or detection or investigation of breach of law).

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

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

## Background

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1. As background on the finances of the Bermuda Gaming Commission (**Commission**) for the relevant time period, the [2023 Financial Statements of the Consolidated Fund](#) stated on pages 76 and 82:

On January 5, 2019, the Government signed a guarantee on behalf of the [Commission] supporting an overdraft facility with [the Bank of N.T. Butterfield (**BNTB**)] of \$1.2 million, which was increased to \$2.7 million by March 31, 2020. On May 14, 2020, the Minister of Finance consented to a \$700,000 increase in the [Commission's] existing overdraft facility with BNTB to \$3.4 million, with expiry on February 28, 2021. On March 24, 2021, the Minister of Finance consented to a \$3,875,000 increase in the [Commission's] existing overdraft facility with BNTB to \$8,175,000, with expiry on May 31, 2022. In June 2022, the expiry date was further extended to September 30, 2022. On October 31, 2022, the Minister of Finance further consented to an extension of the credit facility to January 31, 2023 under the existing terms and conditions of the facility.

On December 19, 2022, the acting Minister of Finance approved an increase of [the Commission's] overdraft facility from \$8,175,000 to \$9,800,000. Additionally, an Amendment Letter was endorsed by [the Commission], BNTB and the Minister of Finance on March 27, 2023. This letter formally increased the overdraft facility from \$8,175,000 to \$9,800,000 and extended the credit facility until June 30, 2023.

The Ministry of Finance guaranteed to make good any default on the part of [the Commission] until all indebtedness to BNTB has been fully discharged.

At March 31, 2023, \$8,121,894 (2022 - \$6,329,650) had been drawn on the facility. See Note 19 (d).

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## 19. Subsequent Events

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### (d) [The Commission] credit facility

In June 2023, the Ministry of Finance and [the Commission] paid BNTB \$9,675,000 and \$33,138, respectively, in full settlement of [the Commission's] loan balance due to BNTB. This loss on guarantees was recognized in the Statement of Operations and Accumulated Deficit.

2. Government guarantees are governed by section 2AA of the [Government Loans Act 1978](#), which provides that the Minister of Finance (**Minister**) may “provide a guarantee for money borrowed by, or any other obligation of, a third party, on such terms and conditions as may be determined by the Minister”. Any such guarantee is to be provided in the name of the Government and signed by the Minister. Further, the Minister is to inform the Legislature of the guarantee. There is no requirement for the Minister to obtain approval from the Legislature prior to signing a government guarantee. Finally, government guarantees are not charged against Bermuda’s debt until it is considered likely that the Government will be called upon to make a payment.<sup>1</sup>
3. On 1 March 2023, the Applicant made a public access to information (**PATI**) request to the Commission, asking for records about the Commission’s executive positions and salaries, annual reports and financial statements, meeting minutes, and correspondence with the Government about the Commission’s finances and annual reports. Specifically, the PATI request sought:
  - a. An up-to-date list of current employees, including any vacant positions (**item 1**).
  - b. The title and corresponding salary of every senior executive within the Commission, meaning Commissioners, the Chief Executive, and any other person who, under the immediate authority of the Chief Executive Officer (**CEO**), exercises managerial functions or is responsible for maintaining accounts or other records of the Commission (**item 2**).
  - c. The Commission’s annual reports, including financial statements, for the five financial years between April 2017 and March 2022 (**item 3**).

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<sup>1</sup> As stated on page 36 of the Government of Bermuda’s [March 2023 Financial Statements](#) “Costs arising from obligations under guarantees are recognized as expenses when management determines that Government will likely be called upon to make payment.”

- d. Any communications between the Commission and the Ministry of Finance Headquarters (**Ministry Headquarters**) or Minister about the annual reports or lack of them since 1 April 2018 (**item 4**).
  - e. Minutes of the Commission's monthly meetings for the last 12 months (i.e. March 2022 to 28 February 2023) (**item 5**).
  - f. Any communications between the Commission and the Ministry Headquarters or Minister about increasing the government guarantee for the Commission to \$9.8 million (**item 6**).
  - g. Any communications between the Commission and the Ministry Headquarters or Minister about the repayment of loans to the Government by the Commission (**item 7**).
4. On 13 April 2023, the Commission informed the Applicant that it was extending the time under section 15 of the PATI Act for its initial response to the request from 12 April 2023 to 24 May 2023.
5. On 25 May 2023, the Applicant received the Commission's initial decision on the PATI request, which:
- a. granted access to the records responsive to item 1;
  - b. for item 2, provided the salaries within a band of \$50,000 for three of the positions and within a band of \$25,000 for one of the positions, and denied all exact salary figures under section 23 as exempt personal information;
  - c. provided the Applicant with the 2017/2018 and the 2018/2019 Annual Reports and Audited Financial Statements for item 3 and denied access to the 2019/2020, 2020/2021 and 2021/2022 annual reports and financial statements because they did not exist, explaining that the annual reports for these years were only in draft form and the financial statements remained unaudited;
  - d. administratively refused item 4 under section 16(1)(a) because the communications did not exist or could not be found;
  - e. granted access, in part, to 10 monthly meeting minutes dated between 31 March 2022 to 23 February 2023 in response to item 5 that were redacted, but did not specify the relevant exemption in the PATI Act to justify the redactions;
  - f. granted access in full to one record responsive to item 6; and

- g. administratively refused access to item 7 under section 16(1)(a) because the requested records did not exist or could not be found.
6. On 6 June 2023, the Applicant asked for an internal review.
  7. On 18 July 2023, the Commission issued an internal review decision, which explained that the initial decision was upheld in full.
  8. On 20 July 2023, the Applicant asked for an independent review by the Information Commissioner, to challenge the Commission's internal review decision.

## Investigation

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9. The Information Commissioner's Office (ICO) accepted the application as valid on 8 August 2023, on the basis that the Applicant had made a PATI request to a public authority and had asked that public authority for an internal review.
10. Through correspondence on 9 and 16 August and 7 September 2023, the ICO clarified with the Commission the sections of the PATI Act that it was relying on to justify its denial of access to some of the responsive records.
11. Following a 7 September 2023 letter from the ICO, the Applicant confirmed on 12 September that they wished to challenge the Commission's reliance upon section 16(1)(a) to administratively deny the request for items 3, 4, 6 and 7 and the exemptions in sections 23 (personal information), 25(1) (commercial information),<sup>2</sup> 26(1) (information received in confidence),<sup>3</sup> 29 (deliberations of public authorities), 30(1) (prejudice to the effectiveness of an investigation), 31(1) (financial and economic interests), and 34<sup>4</sup> (law enforcement) to refuse access to some of the records or parts of the records.
12. The ICO formally notified the Commission of the valid application on 18 September 2023, which considered the issues set out above in paragraph 11. The Information Commissioner also decided that early resolution under section 46 of the PATI Act was not appropriate for this application, because submissions from the Commission were

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<sup>2</sup> Section 25(1) consists of four different exemptions in subsections (a) to (d).

<sup>3</sup> Section 26(1) consists of two different exemptions in subsections (a) and (b).

<sup>4</sup> Section 34(1) consists of eight different exemptions in subsections (a) to (h).

required on the administrative denial and exemptions it relied on to withhold the redacted parts of the responsive records.

13. On 29 September 2023, the Commission tabled in the House of Assembly its Annual Reports for 2018, 2019 and 2020, as well as its Audited Financial Statements for 2018 and 2019. The request for these records in item 3 is no longer considered in this review.
14. On 14 February 2024, in response to a letter from the ICO seeking to clarify the exemptions relied on by the Commission to withhold the redacted parts of the meeting minutes, the Commission also asserted a reliance on sections 28 (ministerial responsibility) and 30(1)(c) (ongoing negotiations).
15. As required by section 47(4) of the PATI Act, the parties were invited to make representations to the Information Commissioner. When seeking submissions, the ICO further clarified which subsections of sections 25, 26 and 34 the Commission appeared to be relying upon. As a result, on 22 March 2024, the ICO invited the Commission to make submissions. The ICO asked specific questions related to the Commission's reliance on sections 16(1)(a), 23, 25(1)(a)-(d), 26(1)(a), 28, 29, 30(1)(c), 31(1) and 34(1)(a), and did not ask any question for other exemptions, other than inviting the Commission to provide any other information it wished the Information Commissioner to consider.
16. On the same day, the Applicant was invited to make submissions. The Applicant made submissions on 10 April 2024. On 13 May 2024, the ICO also notified the Applicant of exemptions that had been invoked during the review and the issues that would be considered by the Information Commissioner.
17. On 21 and 25 March 2024, the ICO also notified seven relevant Third Parties in this review. The third parties consisted of various local banks as well as companies either regulated by the Commission or seeking licenses for a regulated activity.
18. Three of the third parties consented to disclosure of their information. One other third party informed the ICO that it would not be making submissions objecting to disclosure. Two other third parties did not provide submissions.
19. Only one third party, referred to throughout as 'the Third Party', objected to disclosure of information related to its interests based on sections 25(1)(c), 25(1)(d) and 26(1)(a).
20. In its 17 April 2024 submissions, the Commission abandoned its reliance on section 16(1)(a) to administratively deny the request for items 4, 6 and 7, and agreed to conduct a reasonable search for records responsive to these items. The ICO informed the Commission that this Decision would include an order to conduct a reasonable search to

locate the records responsive to items 4, 6 and 7 and issue a new initial decision on these items.

21. The Commission also abandoned its reliance on section 25(1)(a) to refuse access to part of the meeting minutes. Further, while the Commission had originally relied on section 23 to withhold the names of commercial entities, it accepted during the Information Commissioner's review that this exemption would only apply to the names of individual people. The Commission also accepted that the names of individuals who were providing services to the Commission under a contract would fall within the exception to the definition of personal information in section 24(2)(b).
22. Following its submissions, the Commission made further disclosures to the Applicant. On 17 May 2024, the Commission provided the Applicant with the exact salaries of its executive team members responsive to item 2 of the PATI requests. The ICO had noted for the Commission that section 18A(10) of the [Gaming Act 2014 \(Gaming Act\)](#) required the Commission to specify in its annual report "the title and corresponding salary of every senior executive within the Commission", and therefore, there appeared to be no basis for withholding the information. The Commission's internal review decision on item 2 is no longer considered in this review.
23. On 29 May 2024, the Commission also disclosed its aggregate annual spending for 2020, 2021, and the first quarter of 2022 in response to item 3 of the PATI request. On 18 June 2024, the ICO informed the Commission that aggregate annual disclosures did not satisfy the requirements of section 6(5) of the PATI Act and requested that the Commission disclose to the Applicant its quarterly expenses for 2020, 2021 and the first quarter of 2022. Although the Commission has agreed to provide the Applicant with its quarterly expenditures broken down by business expense categories, as at the date of this Decision, the Commission has not disclosed these records to the Applicant.
24. Following the Commission's various changes in position and disclosures during this review, the final issues considered by the Information Commissioner were revised. Accordingly, this review considers whether the Commission was justified to administratively refuse any additional records responsive to item 3 of the request under section 16(1)(a) because they did not exist. This review also considers the Commission's denial of public access to 10 withheld records, which totalled 38 pages, under the exemptions in sections 23, 25(1)(b), 25(1)(c), 25(1)(d), 26(1)(a), 28, 29, 30(1)(c), 31(1) and 34(1)(a). Each record was a formal minute for the meeting held monthly by the



Commissioners, with the first dated 31 March 2022 and the final dated 23 February 2023:<sup>5</sup>

- a. March 2022 (record 1)
- b. April 2022 (record 2)
- c. May 2022 (record 3)
- d. June 2022 (record 4)
- e. August 2022 (record 5)
- f. September 2022 (record 6)
- g. October 2022 (record 7)
- h. November 2022 (record 8)
- i. January 2023 (record 9)
- j. February 2023 (record 10)

25. Finally, this review considers whether the Third Party justified the application of sections 25(1)(c), 25(1)(d) and 26(1)(a) to withhold information related to its interests in the withheld meeting minutes.

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

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26. 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.
27. The Information Commissioner has considered below the exemptions asserted by the Commission for each specific redaction, as listed in the confidential correspondence submitted by the Commission on 14 February 2024 and the additional exemptions invoked by the Commission for particular topics in their submissions of 17 April 2024. The Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(1) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis below cannot be as detailed

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<sup>5</sup> No board meetings occurred in July or December 2022.

as would otherwise be preferred with respect to the conclusion that further parts of the meeting minutes should be disclosed.

***Provision of other information – section 6(5)***

28. Section 6(5) of the PATI Act provides that public authorities “shall make their quarterly expenditures available to members of the public upon request.” The purpose of section 6 of the PATI Act is to encourage proactive disclosure by public authorities of information that is clearly subject to public disclosure, without a requester needing to submit a PATI request.<sup>6</sup>
29. The term ‘quarterly expenditures’ is not defined in the PATI Act or the [Interpretation Act 1951 \(Interpretation Act\)](#). Having regard to the context and purpose of the PATI Act,<sup>7</sup> which is to grant a right to access information “to the greatest extent possible” and to “eliminate unnecessary secrecy”, ‘quarterly expenditures’ in section 6(5) ought to be interpreted in a way that furthers these purposes.
30. ‘Quarterly expenditures’, therefore, should be a breakdown of the expenditures by the business expense categories used by that public authority. These do not need to be audited to be subject to disclosure under section 6(5). For Government Departments that use the E-1 accounting system, this is a standard document identifying expenses by object codes that can be pulled directly from E-1.<sup>8</sup>
31. As per section 8(2) of the PATI Act, “Where the [Information] Commissioner determines that a public authority has not complied with section 6, the [Information] Commissioner may issue an order to the authority requiring it to comply with section 6 within a period to be specified by the Commissioner”. Section 9 of the PATI Act provides that an order issued by the Information Commissioner under section 8 is binding on the public authority and has the same effect of an order of the Supreme Court and is enforceable in the same manner.

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<sup>6</sup> As was stated in the [Companion Guide to the Consultation Draft of the PATI Act](#) at paragraph 5.4, “the proposed legislation encourages public authorities to be proactive in the disclosure of information. Since PATI legislation will only cover information not publicly available, the more information made available to the public means that fewer requests will need to be made under PATI legislation.”

<sup>7</sup> See *Pickering v Liverpool Daily Post* [1991] 2 AC 370, 422B – 423G.

<sup>8</sup> One example of these reports from E-1 is the ICO’s proactive publication of its [quarterly expenditures](#) on its website.

### *Discussion*

32. In this case, in response to the ICO's directions to disclose its quarterly expenditures to the Applicant, the Commission provided the Applicant with its aggregate spending for the years 2020, 2021 and 2022. This did not satisfy the requirement of section 6(5). First, the amounts provided by the Commission reflected its annual expenditure rather than its quarterly expenditure. Furthermore, the aggregate amount spent per quarter is not sufficient to comply with the requirement in section 6(5). As stated above, in order to comply with section 6(5), the Commission must disclose a breakdown of its expenditures by the business expense categories. Although the Commission does not use the E-1 accounting system, the ICO is aware that the Commission has provided its expenditures by business expense categories in the past and, therefore, is capable of doing so.<sup>9</sup>
33. The Commission was informed of the above and has not provided its quarterly expenditures for the relevant years to the Applicant.
34. The Information Commissioner is not satisfied that the Commission has complied with section 6(5) of the PATI Act.

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

35. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it.
36. Regulation 5 of the PATI Regulations 2014 requires public authorities, through their Information Officers, to make reasonable efforts to locate records responsive to a PATI request. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following:
  - [1] the quality of the public authority's analysis of the PATI request;
  - [2] the scope of the search that it decided to make based on that analysis; and
  - [3] the rigour and efficiency with which the search was then conducted.

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<sup>9</sup> In the ICO's review no. 20190122-02 ([Decision 32/2022](#), [Bermuda Gaming Commission](#)), the Commission disclosed a copy of an unaudited draft of its revenues and expenditures for an 18-month period. The expenditures were broken down by 'Staff & Associated Costs', 'Rent & Utilities', 'Professional Fees', 'Board Member Fees & Associated Costs', 'Other Expenditure', 'Consultants', 'Depreciation', and 'Travel, Professional Development and Associated Costs'.

37. The specific circumstances in each case will inform the Information Commissioner's assessment.
38. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.<sup>10</sup>

*Public authority's submissions*

39. The Commission maintained that it understood item 3 of the PATI request to be seeking only final annual reports, including financial statements, that had been approved at the Board or Ministerial level. Final annual reports and audited financial statements did not exist for the financial years ending in 2020, 2021 and 2022. Both in its initial decision and submissions during this review, the Commission explained that it only had draft annual reports and unaudited financial statements for those time periods.

*Applicant's submissions*

40. In their application for an independent review by the Information Commissioner, the Applicant stated that they were seeking annual reports up to March 2022, regardless of whether the reports were in draft form or whether the financial statements were unaudited.

*Discussion*

41. As noted above, in paragraph 13, the Commission tabled its Annual Reports for 2018, 2019 and 2020, as well as its Audited Financial Statements for 2018 and 2019. Therefore, the Commission's reliance on section 16(1)(a) is considered only for the annual reports for 2021 and 2022 and its financial statements for the three fiscal years from April 2020 to March 2022.

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

42. The plain language of the PATI request sought the annual reports, including financial statements, and made no mention of drafts. The Commission's initial decision explained that only draft documents existed for annual reports and financial statements for the relevant time period, and it does not appear that the Applicant explained to the

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<sup>10</sup> See [Decision 04/2017](#), [Department of Health](#), at paragraphs 37-49, and more recently [Decision 01/2023](#), [Ministry of Legal Affairs and Constitutional Reform Headquarters](#), at paragraphs 30-35.

Commission during the internal review request that item 3 should be understood to include drafts.

43. Under these circumstances, it was reasonable for the Commission to understand the PATI request as seeking only final annual reports, including audited financial statements.

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

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

44. The Commission had accurately located the draft records and no doubt exists as to the adequacy of the scope of its search, or the rigour and efficiency with which the search was conducted.

#### *Conclusion*

45. The Information Commissioner is satisfied that the Commission was justified to rely on section 16(1)(a) of the PATI Act to deny access to the request for its final annual reports for 2021 and 2022, as well as its audited financial statements for the three fiscal years from April 2020 to March 2022. Should the Applicant or any other PATI request seek these drafts, a new PATI request will be required that asks for the draft documents.<sup>11</sup>

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

46. A public authority may rely on section 34(1)(a) to deny access to a public record whose disclosure would, or could reasonably be expected to, prejudice the prevention, detection or investigation of a breach or possible breach of the law.
47. The public authority must clearly identify the breach or possible breach of law and show that the harm to the prevention, detection or investigation of the breach or possible breach of law could reasonably be expected to occur.
48. 'Prejudice' means bringing about a negative or detrimental effect, as the Information Commissioner explained in [Decision 01/2018](#), [Bermuda Tourism Authority](#), paragraphs 81-86.
49. The minimum likelihood of harm is that the prejudicing the prevention, detection or investigation of a possible breach of law 'could reasonably be expected to' occur. This is

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<sup>11</sup> On 28 June 2024, the Commission's Annual Reports from 2021 to 2023 and its financial statements for 2019/20 were tabled in the House of Assembly. The Annual Reports, however, did not include audited financial statements for the Commission for financial years 2020-2022. See [Royal Gazette article](#) dated 1 July 2024.

a lesser likelihood of harm compared to 'would', which is a high probability that the harm will occur. 'Reasonably' refers to what a reasonable person may expect considering all circumstances of the case, and they must be likely, plausible or possible based on real and substantial factual grounds.

50. The exceptions and public interest test that apply to section 34 differ from all other harm-based exemptions in the PATI Act. A public authority must consider the public interest test only when a record falls within a category listed in section 34(2)(a) as an exception. If the record does not fall within a section 34(2)(a) exception, the public interest test does not apply.
51. Where disclosure of a record falling within section 34(2)(a) would be in the public interest, the exemption does not apply, and the record must be disclosed as it properly falls within an exception. If, however, the public authority decides the public interest weighs against disclosing a record falling within section 34(2)(a), the exception no longer applies, and the exemption may be justified to withhold the record.
52. In sum, when applying the exemption in section 34(1)(a), a public authority must ask:
  - [1] What is the breach or possible breach of law?
  - [2] How can disclosure prejudice the prevention, detection or investigation of this breach?
  - [3] Can this reasonably be expected to occur?
  - [4] Does the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?
53. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 34(1)(a) to deny access to the records.

*Public authority's submissions*

54. The Commission has invoked section 34(1)(a) to withhold discrete parts of records 2-4 and 6-8 related to a particular investigation that was ongoing at the time of the internal review decision as well as the Commission's submissions to the ICO.
55. Even though the redacted information did not identify the subject of the investigation, the Commission submitted that disclosure of any information related to the investigation could have been considered as putting the subject on notice. The Commission submitted

that disclosure of this information would have affected their ability to see the matter through to conclusion.

*Applicant's submissions*

56. The Applicant did not make submissions specific to section 34(1)(a). The Applicant's public interest arguments, set out below, are not relevant to the specific public interest test for the law enforcement exemptions found in section 34(2).

*Discussion*

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

57. Having carefully reviewed the relevant parts of the records listed in paragraph 54, the Information Commissioner is satisfied that information involves a possible breach of law.

[2] How could disclosure have prejudiced the prevention, detection or investigation of this breach?

58. The Information Commissioner accepts the Commission's reasoning that disclosure could have prejudiced the investigation of the breach. Given the investigation was still ongoing at the time of the internal review decision, the subject of the investigation would have been alerted to the matter while the Commission, law enforcement or prosecutors were still preparing to move forward. This could have led to the destruction of evidence or other developments that would have undermined the investigation.

[3] Could this reasonably have been expected to occur?

59. Having reviewed the withheld parts of the records, the Information Commissioner is satisfied that this could reasonably have been expected to occur because the investigation was ongoing and not speculative.

[4] Did the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure have been in the public interest?

60. The information related to an investigation of a breach of law that was conducted within the scope of lawful authority, and was not a report related to the success of a law enforcement program, an investigation report, nor the general outline of a law enforcement program. None of the exceptions in section 34(1) were applicable and, therefore, no public interest analysis was required.

## *Conclusion*

61. The Information Commission is satisfied that the Commissioner was justified in relying on section 34(1)(a) to refuse access to discrete part of the meeting minutes referenced in paragraph 54 above.

## ***Deliberations of public authorities – section 29***

62. A public authority may rely on section 29(1) to deny access to a record whose disclosure would, or could reasonably be expected to, undermine the deliberative process of a public authority, including free and frank discussion and provision of advice in the course of that process.
63. As the Information Commissioner explained in [Decision 14/2021, Office of the Governor](#), releasing the records at issue must undermine a public authority's 'deliberative process'. This refers to the consideration or evaluation of competing arguments, information and facts with a view to making a decision<sup>12</sup>. A deliberative process is, at its most basic, the thinking process of an agency<sup>13</sup>. This exemption is in place to safeguard the integrity of this process for public authorities' decision making.
64. A public authority must show that, at a minimum, disclosure 'could reasonably be expected to' undermine a public authority's deliberative process. The plain meaning of 'undermine' is to "lessen the effectiveness, power or ability of, especially gradually or insidiously"<sup>14</sup>. Whether it is reasonable to think that the harm will occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
65. The exemption in section 29(1) does not apply to certain categories of information, such as factual or statistical information (section 29(2)(a)) or information in the nature of the reasons of a public authority for making a particular decision (section 29(2)(d)).
66. 'Factual information' is not defined in the PATI Act or the [Interpretation Act](#). The [Irish Freedom of Information Act 2014](#) has a provision similar to section 29(2)(a) of the PATI Act, and the Irish Information Commissioner's discussion of that provision offers a useful definition of 'factual information' in this context. The Irish Information Commissioner has

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<sup>12</sup> See [Decision 02/2019](#), Office of the Governor, paragraph 168.

<sup>13</sup> See Queensland's Office of the Information Commissioner [Guideline on Deliberative Process](#). See also Western Australia's Office of the Information Commissioner (October 2001), [FOI Guide No. 3, Deliberative Process](#), p. 1.

<sup>14</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).



adopted the following plain meaning of “factual” as: “[s]omething that has really occurred or is actually the case; something certainly known to be of this character; hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it”<sup>15</sup>. Factual information is “distinguishable from information in the form of [a] proposal, opinion or recommendation”.<sup>16</sup>

67. Generally, the release of factual information will not reveal deliberations or otherwise threaten a public authority’s deliberative process. Two contexts arise when this distinction between factual and deliberative materials may not stand<sup>17</sup>. First, in some records, the factual information may be so inextricably connected with the deliberative material that disclosure would reveal and cause harm to the public authority’s deliberation. The second context arises when a record contains selective facts collated from a larger group of facts, and the distilling of facts itself is a deliberative process. It indicates the facts the author found relevant or significant and those deemed irrelevant or insignificant to the matter at hand.
68. The exemption in section 29(1) is subject to the public interest test. If the exemption is engaged, 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.
69. In sum, when applying the exemption in section 29(1), a public authority must ask:
  - [1] What is the relevant deliberative process involved?
  - [2] Does any of the information fall within the exceptions listed in section 29(2)?
  - [3] Can disclosure of the record reasonably be expected to undermine the identified deliberative process of a public authority?

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<sup>15</sup> Ireland’s Office of the Information Commissioner (August 2015), [Guidance Note, Freedom of Information Act 2014 Section 29 – Deliberations of FOI Bodies](#), paragraphs 3.3.1. The decisions cited in the Guidance Note relied on the definition provided by the Oxford English Dictionary.

<sup>16</sup> See [Decision 14/2021, Office of the Governor](#), which referred to Ireland’s Office of the Information Commissioner (August 2015), [Guidance Note, Freedom of Information Act 2014 Section 29 – Deliberations of FOI Bodies](#), paragraphs 3.3.1.

<sup>17</sup> See, for example, Office of the Australian Information Commissioner (December 2016), [FOI Guidelines, Part 6 – Conditional exemptions](#), paragraph 6.70.

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

70. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 29(1) to deny access to the records.

*Public authority's submissions*

71. The Commission maintained that parts of records 1-10 related to one or more of the following deliberative processes:
- a. the review and revision of its 2022/2023 work plan and the development of its 2023/2024 work plan;
  - b. its options and final arrangement for private funding arrangements;
  - c. the identification of correspondent banks;
  - d. the development of revenue streams for the Commission;
  - e. the management of its cash flow;
  - f. decisions concerning casino licensee fees; and
  - g. amendments to its legislative framework.
72. The Commission explained that it was evaluating and considering a number of issues relating to these decisions, the disclosure of which may have undermined a deliberative process. Specifically with respect to the nature of the deliberative processes, the Commission was considering the possibility of securing outside funding from financial institutions due to challenges with its cash flow and was considering the pros and cons of available options. The Commission was also in the process of determining how to handle the banking of gaming proceeds and considering how best to achieve that objective. Finally, the Commission was assessing how to improve its revenue streams, and the disclosure of that information would have affected the Commission's ability to come to an impartial decision and the process by which the Commission made its determination.
73. The Commission submitted that the development of the gaming industry was dependent on the Commission's efforts to secure a US correspondent bank to accept the proceeds of the casino operations. If the Commission was unable to secure a US correspondent bank, the emerging industry would never be realised in Bermuda.

74. The Commission submitted that based on the nature of the information in the meeting minutes, it did not fall under any of the exceptions to the exemption in section 29(2).
75. On the public interest test, the Commission accepted that there was a general public interest in transparency and that disclosure of certain records would allow the public to better understand the development of gaming regulations in Bermuda and the work of the Commission. Further, disclosure could promote the understanding of and accountability for the Commission's decisions. However, the Commission maintained that there was a public interest supporting free and frank discussions during deliberations, and that the balance of public interest favoured maintaining the exemption.

*Applicant's submissions*

76. The Applicant stated that they could not make submissions on whether any of the exemptions applied because they did not have access to the information redacted. The Applicant stated, though, that they suspected that the majority of the records would not have fallen under any exemption. The Applicant relied on the Information Commissioner's [Decision 33/2022, Bermuda Gaming Commission](#) where it was stated that meeting minutes were the type of record that "public authorities routinely and proactively disclose" and that "overall, the public interest in people knowing what matters the Commission is working on at a particular time, as would be documented in meeting minutes, is evident and strong".
77. The Applicant also made general submissions on the public interest test. The Applicant cited the ICO's public interest guidance which provides that "there is a general public interest in promoting transparency, accountability, public understanding, and involvement in the democratic process", which the Applicant submitted were relevant to the redacted information in the meeting minutes.
78. The Applicant further submitted that there is a specific public interest in disclosing the records in question because the Commission is a publicly funded body and the financing of it has, and continues to be, of great interest and concern to taxpayers. The Commission does not yet have a gaming industry to regulate and, to date, about \$16 million of public funds have been spent on the regulator.
79. The Applicant stated that recently, Parliament was told that the Government had taken \$9.7 million from the Sinking Fund to repay the Commission's outstanding credit facility to a local bank, which the Government had guaranteed. The Applicant stated that this information was disclosed to taxpayers many months after the loan was paid off and that at the time it happened, there was nothing said publicly by the Commission or the

Government. The Applicant submitted that it can only be right for the public to understand more about the circumstances surrounding the Government's decision to pay off the loan and what prompted it.

80. The Applicant further submitted that having access to the redacted information in the meeting minutes would also help the public in fully assessing the pros and cons of the annual grant which the Commission has been given in the 2023/24 Government Budget.

*Discussion*

[1] What was the relevant deliberative process involved?

81. Having carefully reviewed the withheld parts of records 1-10 and the Commission's submissions, the Information Commissioner accepts that the relevant parts of the records involve several deliberative processes by the Commission, namely:

- a. the review and revision of its 2022/2023 work plan and the development of its 2023/2024 work plan;
- b. its options and final outcomes for private funding arrangements;
- c. the options and approach for identifying correspondent banks;
- d. its decision on Hotelco's casino license application;
- e. the development of revenue streams for the Commission;
- f. the management of its cash flow;
- g. decisions concerning casino licensee fees; and
- h. amendments to its legislative framework.

82. Some parts of the redacted records relate to more than one of these deliberative processes. As a whole, these are the relevant decision making processes the Commission was engaged in that required consideration of various options and recommendations with the aim of the Commission deciding on a course of action going forward.

[2] Did any of the information fall within the exceptions listed in section 29(2)?

83. Although the Commission did not find that any of the withheld information fell within an exemption in section 29(2), this was incorrect. Two exceptions were applicable: the exception for factual information in section 29(2)(a) and for the nature of the reasons for a decision in section 29(2)(d).

84. Parts of the withheld information in records 1-6 and 8-10 contained purely factual information. This information is distinct from other factual information in the relevant parts of the records that is too intertwined with the details of the options or recommendations under consideration. Disclosure of the intertwined facts would reveal the deliberations of the Commission related to the questions before it.
85. Further, parts of records 1, 2, 4 and 10 consisted of the nature of the reasons for the Commission's decisions concerning its review of its 2022/2023 Work Plan, the decision concerning casino license fees, and its private funding arrangements. This information comes within the exception in 29(2)(d).
86. These parts of the withheld records are not considered further for section 29(1).

[3] Could disclosure of the records reasonably have been expected to undermine the identified deliberative process of a public authority?

87. As an initial matter, the information in some parts of the records did not touch upon the Commission's deliberative process and thus could not reasonably have been expected to undermine any of the substantive deliberative processes listed in paragraph 81. As detailed below, while these records contained information related to the fact that the Commission was exploring various options or recommendations, these parts of the meeting minutes did not contain any details of the deliberations themselves. These parts might, for example, state that discussions or meetings had been held. Some parts might outline the next steps in the deliberative process but did so generally, such that the details of the deliberations are not revealed. As a result, disclosure of this information could not reasonably have been expected to undermine the deliberative processes of the Commission. The Commission's reliance on section 29(1) is not considered further for these parts of the records, as explained more fully below.
88. Whether disclosure could reasonably have been expected to undermine the specific deliberative processes is considered as follows, while again noting that some information is relevant for more than one deliberative process:

Review and revision of the 2022/2023 Work Plan; the management of cash flow; and the options for the private funding arrangements

89. Notably, at the time of its internal review decision on this PATI request, the Commission had already decided to move forward with private funding and had secured lending facilities with a specific bank on agreed terms. This allowed it to resolve its outstanding challenges with managing its cash flow and to pay off its outstanding overdraft with BNTB, which was paid in June 2023 according to the [2023 Financial Statements of the Consolidated Fund](#). Because this deliberative process had concluded, the disclosure of

this deliberative information in the relevant parts of all of the records could not reasonably have been expected to undermine the prior deliberative processes.

90. The reference in part of record 6 concerning the information relied upon for projected cash flow provides further details of the Commission's deliberations. Disclosure of the information about the information, however, could not reasonably have been expected to undermine the Commission's deliberative process, for the same reasons set forth below in paragraph 100.
91. Further, some of these parts of record 8 only referred to the topic or fact of the deliberations—the need to consider private funding or the need to manage cash flow challenges—but did not consist of any deliberative information, such as the evaluation or weighing of options. The disclosure of this information also could not reasonably have been expected to undermine the deliberative process, even if the decision-making had been ongoing at the time of the initial decision. The exemption in section 29(1) is not considered further for either of these parts of the records.

#### Correspondent banking information

92. As explained below, paragraph 204, it had long been public knowledge that the Commission was exploring options with local financial institutions for correspondent banking services. Nothing in most of the withheld parts of the records reveals the Commission's deliberations on this topic. For example, none of the relevant withheld information consists of brainstorming options, questions being raised, or proposals vetted. In the absence of further explanation from the Commission, disclosure of the existence of this known aspect of the Commission's work in parts of records 3, 9 and 10 could not undermine any deliberative process.

#### Development of revenue streams

93. Throughout the 2022/2023 fiscal year, the Commission was considering possibilities for additional revenue streams. In June 2023, the Auditor General published her [Report on the Implementation of Recommendations from Selected Government-related Entities](#), which put into the public domain that the Gaming Commission was exploring particular revenue streams. Given that this information was public at the time of the Commission's internal review decision, the Information Commissioner is not satisfied that its disclosure would undermine the Commission's deliberations. This applies to parts of records 1, 4-6 and 8.
94. Part of record 5, however, contains information about a separate potential revenue stream that had not been decided upon and which had not been placed in the public domain. The Information Commissioner accepts that premature public disclosure of an

option the Commission was considering could reasonably have been expected to undermine its thought process. Premature disclosure of early discussions about options that may not ultimately be adopted by the Commission could have inhibited future brainstorming. If the individuals involved knew the notes of these early discussions would be disclosed, it could reasonably be expected to stifle robust exploration of as many options as possible. Particularly when public authorities are developing new economic sectors or initiatives, officers must have a safe space initially to explore all possible options before the final recommendations or decision are shared for public scrutiny. However, once that information has been placed in the public domain, it is unlikely that disclosure under the PATI Act would undermine the deliberative process.

95. Disclosure of part of record 5, which identifies an option being considered as an additional revenue stream could reasonably be expected to undermine the Commission's deliberations. Disclosure of the remainder of record 5 and parts of records 1, 4, 6 and 8, however, could not reasonably be expected to undermine the Commission's deliberations, given that this information was already in the public domain.

#### Amendments to legislative framework

96. With respect to potential amendments to the legislative framework, the information in certain parts of records 2, 7, 8 and 10 provided reports to the Commission on the legislative changes identified or proposed by various stakeholders and, for some, the status of the proposal. These parts of the records did not contain the deliberations of the Commission on those proposals, such as the Commission's views or its recommendations on the proposals. Because these parts did not touch upon the Commission's deliberations, and in the absence of any further explanation, the exemption in section 29 is not considered further for these parts of the records.

#### Decisions on casino license application fees

97. Part of record 2 addressed the decision on casino license application fees. The information in the record consisted of references to other stakeholders' proposals regarding the license application fees, not the proposals, recommendations or assessments by the Commission. The withheld information updated the Commission on the status of the proposals of others. Parts of records 3, 8, 9 and 10 also could not reasonably have been expected to undermine the Commission's deliberative process because they consisted of status updates of decisions already taken by the Commission.
98. Parts of record 10 related to the Commission's response to Hotelco's outstanding license fee. These parts consisted of factual statements concerning Hotelco's position, and description of how the Commission would make a decision on its response, and a

description of the matter for the Commission to decide. None of these parts of record 10 revealed the Commission's options, the discussion weighing the pros and cons of various approaches or other deliberative process.

99. Disclosure of either of these parts of the records could not reasonably have been expected to undermine a deliberative process of the Commission because the information did not relate to or address the Commission's thought process.

Development of 2023/2024 Work Plan

100. Parts of records 6 and 8 consisted of information relied upon to develop the 2023/2024 budget, which in turn supported the development of the Work Plan for that year. Although this information did consist of recommendations made to the Commissioners, its disclosure was unlikely to undermine the Commission's free and frank discussions and thought process. The nature of the information was such that the Commission and its senior staff would have continued to rely on it even if the information had been disclosed. The Commissioners and the senior staff are expected to conduct themselves in a professional manner and bring forth appropriate information for consideration. The disclosure of limited information used in deliberations could not reasonably be expected to inhibit professional discussions amongst the Commissioner and senior officers.

[4] If the exemption was engaged, did the public interest require disclosure?

101. The balance of the public interest is only considered for part of record 5 described above in paragraph 94.
102. In favour of disclosure on the one hand, the public always had a strong public interest in ensuring that public authorities such as the Commission are accountable for public spending and that its decision making is not cloaked by unnecessary secrecy, as the Applicant maintains. At the time of the internal review decision, the Commission received a substantial amount of public funds, yet had not submitted current annual reports outlining its programs and accomplishments, nor its audited financial statements.
103. On the other hand, strong public interests favoured maintaining the exemption for the limited information in the remaining withheld parts of the record. As stated above, the Commission's consideration of alternative revenue streams was ongoing at the time of the internal review decision and premature public disclosure of the options the Commission was considering could reasonably have been expected to undermine its thought process. Any loss in the quality of decision-making caused by premature public disclosure would have been contrary to good public administration and not in the public interest. It was not in the public interest to hinder the Commission from developing



ideas, debating live issues and reaching decisions away from external interference and distraction.

104. Having carefully weighed these considerations, the balance of the public interest favoured maintaining the exemption for the limited details about possible other revenue streams referred to in part of record 5.

*Conclusion*

105. The Information Commissioner is satisfied that the Commission justified relying on section 29(1) to deny access to part of record 5 but is not satisfied that the reliance section 29(1) was justified for the remaining parts of records discussed above.

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

106. A public authority, or a third party asserting its rights, may rely on section 25(1)(c) to deny access to a public record whose disclosure would, or could reasonably be expected to, have an adverse effect on the commercial interests of any person to whom the information relates. This commercial interest exemption is subject to exceptions in section 25(2), which set out circumstances when the exemption cannot apply.
107. As explained in, ‘commercial interest’ relates to a person’s ability to participate in a commercial activity, such as the sale or exchange of goods or services or the collection of a debt.<sup>18</sup>
108. The PATI Act and Regulations do not define ‘commercial’ or ‘commercial activities’. In [Decision 12/2018, Ministry of Finance Headquarters](#), the Information Commissioner read ‘commercial’ in its ordinary meaning, namely, “concerned with or engaged in commerce”. ‘Commerce’ is defined as “the activity of buying and selling” or “making or intended to make a profit”.<sup>19</sup>
109. Importantly, the exemption in section 25(1) protects the commercial information of private sector businesses as well as public authorities that are engaged in commercial activities, such as a public corporation operating in a competitive environment. A public authority relying on section 25(1) must explain the commercial activity that is involved.

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

<sup>19</sup> See [Decision 12/2018, Ministry of Finance Headquarters](#), at paragraph 66.

110. Commercial activity usually requires a business undertaking carried on to generate income or profit.<sup>20</sup> Under some circumstances, the activity may be indirectly related to a public authority's commercial activity but is still necessary for the public authority to engage in the commercial activity.<sup>21</sup>
111. Unlike some other access to information laws,<sup>22</sup> section 25(1) involves only commercial information. It will not extend to cover information that relates solely to the finances of a public authority, e.g., its money resources and their management.
112. A public authority, or third party, must consider these questions when seeking to justify the exemption for information with commercial value:<sup>23</sup>
- [1] Does any exception in section 25(2) apply?
  - [2] Who is the person to whom the information relates?
  - [3] What are the commercial interests of this person that are of concern?
  - [4] What adverse effect could disclosure cause?
  - [5] How likely is this to occur?
  - [6] If the exemption is engaged, does the balance of the public interest still require disclosure?

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<sup>20</sup> For example, the Queensland Information Commissioner stated that the commercial value harm factor should be read narrowly, in that it is only applicable "to information concerning activities or affairs that are carried on in a business-like fashion for the purpose of generating income or profits"; see [Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd \(Third Party\); The Walt Disney Company \(Australia\) Pty Ltd \(Fourth Party\)](#) [2016] QICmr 30 (18 August 2016), at paragraphs 108-122.

<sup>21</sup> The UK Information Tribunal applies a broader definition of 'commercial' that is not limited to competitive participation in the buying and selling of goods or services. Rather, the UK Tribunal includes activities such as debt collection that, if compromised, could prejudice the public body's commercial interests, although this case was acknowledged as being 'near the borderline' of the definition; see [Student Loan Company Ltd v Information Commissioner](#), EA/2008/0092 (17 July 2009). Similarly, the UK Tribunal has recognised the provision of university course materials as a commercial interest because the course materials are the 'assets' which the university depends upon for its commercial activity of recruiting students in a competitive environment; see [University of Central Lancashire v Information Commissioner](#), EA/2009/0034 (8 December 2009).

<sup>22</sup> See, for example, section 45(c) of the Queensland Freedom of Information Act 1992 (applicable to information concerning business, professional, commercial, or financial affairs whose disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the provision of such information in the future to government).

<sup>23</sup> See [Decision 09/2019, Department of Public Lands and Buildings](#), at paragraphs 170-174.

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

*Public authority's submissions*

114. The Commission invoked section 25(1)(c) to withhold parts of the withheld records that included the names of commercial entities in parts of records 1-10, discussion about the Commission's private funding arrangements in parts of records 1-6 and 10, information about Hotelco's casino license application and approval in parts of records 2, 4 and 8-10, and information about correspondent banking arrangements in parts of records 3 and 8-10.
115. The Commission explained that the relevant commercial interest was the securing of finances for the Commission to remain in existence and, given the small size of the banking industry, it was feared that by disclosing that information, it may have affected the Commission's ability to have similar discussions and seek further funding with other banks. The Commission based this concern on its previous dealings with banking institutions.

*Applicant's submissions*

116. The Applicant made submissions on the public interest test at paragraphs 76-80 above.

*Third Party's submissions*

117. The Third Party submitted that the disclosure of the portions of the meeting minutes that refer to it would have, or could reasonably have been expected to have, an adverse effect on its commercial interests. The Third Party submitted that the disclosure of its relationship and arrangements with the Commission may be detrimental to its ability to do business with any current and potential clients who might have an unfavourable view of gambling, or the Commission itself.
118. The Third Party also submitted that confidentiality is integral to its relationships with its clients and that if a confidential relationship between the Third Party and a client was made public, this would adversely affect the trust that the Third Party's existing and potential clients have that their own relationship with the Third Party will remain confidential.
119. Furthermore, the Third Party submitted that the minutes referred to correspondence between it and the Government and that disclosure of such information, lacking further context, could have led to an inaccurate perception of such communications with the

Government. The Third Party submitted that these communications were part of an overarching confidential commercial relationship between the Third Party and the Commission.

120. The Third Party submitted that the public interest would have not, on balance, been served by the disclosure of any parts of the records relating to it. Such information primarily related to a confidential agreement and would likely not be of relevance to the requester or other members of the general public. When weighed against the expectation that the information shared between the Third Party and the Commission would be held in confidence, the Third Party submitted that public disclosure would have had a significant and detrimental impact on its future commercial arrangements with public bodies.
121. The Third Party further submitted that the redaction of its name in the record would have not provided sufficient protection from the adverse effects identified above. The Third Party submitted there was a significant likelihood that a record redacted in this way could still have revealed their involvement to a discerning reader.

*Discussion*

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

122. Three of the Third Parties notified by the ICO expressly consented to the disclosure of the information relating to them. Therefore, the exception in section 25(2)(b) applied to the information consisting of those commercial entities' names as well as information found in parts of records 2-10. None of the exemptions for commercial interests in section 25 are considered further for these parts of the records, including section 25(1)(c), (b) and (d).
123. Although one of the Third Parties also did not object to the disclosure of their information in parts of records 2, 4, 6 and 8-10, these parts of the records are considered further because they also contained information for which either the Commission or the Third Party object to disclosing.

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

124. The remaining parts of the records related to the Commission's operations and to the Third Party's business, with some overlap between the two.
125. Additional information also related to the other vendors providing services to the Commission as well as entities regulated by the Commission and other entities mentioned in parts of the records.

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

Commission

126. As explained above, at paragraphs 108-111, 'commercial' under section 25 of the PATI Act does not cover information that relates solely to the finances of a public authority, such as its money resources and their management, or its regulatory activity in a non-competitive environment. 'Commercial interest' relates to a person's ability to participate in a commercial activity, such as the sale or exchange of goods or services or the collection of a debt. The Commission submitted that its commercial interest was the securing of finances for the Commission to operate.
127. Although the Commission is intended to be a self-funding public authority in the future, this does not equate to engaging in commercial activity and no competitive environment exists. Securing funding is not a commercial interest, but is an operational activity that does not relate to providing goods or services for profit or value. It is a financial interest rather than a commercial interest.
128. The Information Commissioner is not satisfied that the Commission had a 'commercial interest' for the purposes of section 25(1)(c). The Information Commissioner does not further consider the Commission's reliance on section 25(1)(c) to deny access to the relevant parts of records 1-6 and 8-10 related to its securing of private funding, the identification of a correspondent bank, and Hotelco's license application.

Third Party

129. The Third Party submitted that its commercial interest was its ability to maintain current clients as well as to attract and maintain potential clients for its services provided for profit. The Information Commissioner also accepts that the Third Party operates in a competitive environment. This is a commercial activity. Its ability to maintain clients is a commercial interest related to its ability to provide services and earn a profit.

Vendors

130. Having carefully reviewed the withheld records, the vendors referred to in the relevant parts of the records have a commercial interest in providing their services in a competitive environment and earning a profit for doing so.

Others

131. The other entities had commercial interests that arose either because they had considered obtaining a casino license as part of their commercial operations or were

conducting activities for profit that were regulated or potentially could be regulated by the Commission.

[4] What adverse effect could disclosure have caused?

132. The question is considered for the remaining parts of records 1-10 that related to the commercial interests of the Third Party, vendors and other entities.

Third party

133. As explained above, the Third Party submitted that disclosure of the redacted text related to their commercial interest in parts of records 2-10 could have caused the following adverse effects:

- a. the current and potential clients of the Third Party would not want to do business with them because clients may have an unfavourable view of gambling or the Commission itself;
- b. current and potential clients of the Third Party would not want to do business with them because they would not trust that information held by the Third Party would remain confidential; and
- c. that without proper explanation, disclosure of certain information in part of record 9, would cause an inaccurate perception of the Third Party's communications with the Government.

134. The relevant information in the meeting minutes related to the Third Party's business relationship with the Commission (parts of records 2- 10) and discussions about the services or potential services provided by the Third Party to other entities (parts of records 3, 9 and 10).

135. It is difficult to see how disclosure of this information in paragraph 133 could reasonably have been expected to lead to the adverse effects claimed by the Third Party. The Third Party's business relationship with the Commission was already public information, as well as its potential provision of services to other entities. Additionally, without further information, the Third Party has not explained how an "inaccurate perception" of its communications with the Government in record 9 would amount to an adverse effect on its commercial interests. An inaccurate perception does not, itself, amount to an adverse effect, especially in circumstances where the Third Party is on notice and could provide a clarification at the time of any disclosure.

136. Further, the Third Party's concerns that disclosure could have caused its current and potential private sector clients to fear that their information held by the Third Party will

not remain confidential are misplaced. The relevant information in the meeting minutes is limited to services provided to the Commission, a public authority. Disclosure of information related to services provided to a public authority (involving public money) differs significantly from the confidentiality of the business information of a private individual or private company. The Third Party is concerned that its current or potential private sector clients will not be able to discern this difference—and would therefore be worried that a disclosure by the Commission of information it held as a public authority somehow creates a risk that a private client's information held by a private company may also be placed in the public domain.. This concern, however, is speculative and too implausible to establish an adverse effect.

137. The Third Party's concerns that disclosure of its relationship with the Commission would have negatively impacted the decisions of current and potential clients to do business with the Third Party because of the clients' view on gambling or the Commission itself are equally speculative and implausible. The business relationship between the Third Party and Commission has been publicly acknowledged for many years by the Government, the Commission and others. It is, therefore, unclear, how disclosure of the information in the meeting minutes could have led to the adverse effects proposed by the Third Party.
138. The exemption in section 25(1)(c) is not considered further for the Third Party's information in the records referred to above. Because the Third Party information is not exempt, the Information Commissioner does not consider its arguments concerning the effectiveness of redactions to protect its interests.

#### Vendors

139. The only information about the various vendors in parts of records 1-5, is generally the fact that they were vendors providing services to the Commission. The relevant information was either already publicly known, or innocuous or administrative in nature. Disclosure of this information would have not allowed competitors an advantage, undermine the vendors' work processes, damage their reputation, or so on. The exemption is not considered further for this information.

#### Others

140. The limited information about other entities in the meeting minutes was already in the public domain. Again, the exemption is not considered further for this information in parts of records 3, 6 and 9.

### *Conclusion*

141. The Information Commissioner is not satisfied that the Commission was justified in relying on the exemption in section 25(1)(c) to withhold parts of each of the records. She is also not satisfied that the Third Party justified its reliance on section 25(1)(c) to object to the disclosure of its information in parts of records 2-10.

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

142. 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.

143. When applying section 25(1)(d), a public authority must consider the following questions<sup>24</sup>:

[1] Does any exception 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] Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?

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

144. The exemption in section 25(1)(d) generally applies to ongoing negotiations. If the negotiations are finished, the exemption is inapplicable, unless there is a real and significant risk to identifiable future negotiations.

145. 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.

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<sup>24</sup> [Decision 09/2019](#), [Department of Public Lands and Buildings](#), paragraph 148.



146. 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.

147. 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*

148. The Commission relied on section 25(1)(d) to withhold the same information described above in paragraph 114.

149. The Commission maintained that it was in the process of negotiating with financial institutions to secure funding and feared disclosure of the information above could reasonably have been expected to affect their ability to do so. The Commission did not consider any public interest factors to favour disclosure.

*Applicant's submissions*

150. The Applicant made submissions on the public interest test in paragraphs 76-80, above.

*Third Party's submissions*

151. The Third Party submitted that the same parts of records identified in paragraph 117, above, contained sensitive commercial information which was the product of confidential negotiations between the Third Party and the Commission, including confidential contractual terms. The disclosure of this information would have detrimentally affected the Third Party's ability to negotiate contracts with current and potential clients who may refer to the published information as precedent to be followed.

152. The Third Party also made the same submissions on the public interest test as set out above in paragraph 120, above.

*Discussion*

153. The Information Commissioner considers the Commission's reliance on section 25(1)(d) to withhold parts of the withheld records and the Third Party's reliance on it to withhold parts of records 2-10.

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

154. As noted above, paragraph 122, several of the Third Parties consented in writing to disclosure of the information in the records related to them. These parts of the records come within the exception to the exemption in section 25(2)(b) and the exemption is not considered further for them.

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

155. The information related to the Commission and the Third Party, which were legal “persons” under section 7(1) of the [Interpretation Act](#). The Commission also asserted this exemption for information related to certain vendors and other entities.

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

Commission

156. The Commission’s negotiations were its efforts to secure funding from financial institutions and correspondent banks.
157. Although the Commission also asserted this exemption for parts of records 1-9 that had information about other vendors or entities (rather than the Commission), the Commission has not provided any explanation of the negotiations at issue for these entities and on the face of the records no negotiations are apparent. The exemption in section 25(1)(d) is not considered further for this information.

Third Party

158. The Third Party’s negotiations were related to the terms of its provision of services to its current and potential clients.

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

Commission

159. The Commission stated that disclosure would have negatively affected its ongoing process to negotiate with financial institutions to secure funding arrangements and correspondent banks.

Third Party

160. Similar to its reasoning above, at paragraphs 133-134, the Third Party asserted that disclosure would have prejudiced its future negotiations with current or potential clients

because they may expect to receive similar terms as those discussed with the Commission.

[5] How could disclosure have caused that prejudice, describing the circumstances or events that could lead to the prejudice and ensuring that these were not speculative?

#### Commission

161. The Commission has not shown how disclosure could have prejudiced the conduct or outcome of the negotiations, stating only that it would have affected its ability to secure funding from financial institutions and correspondent banking arrangements. It is clear from the meeting minutes that the specific negotiations with the banks referred to in the minutes concerning private funding had ended by the time of the internal review decision. Further, by the time of the internal review decision, the Government and the Commission had already paid the balance of the overdraft facility as confirmed in the [2023 Financial Statements of the Consolidated Fund](#), referred to in paragraph 1 above. Therefore, it is unclear what negotiations were ongoing at the time of the internal review decision and how the conduct or outcome of the concluded negotiations could reasonably have been expected to be prejudiced by disclosure of the relevant redacted information.
162. Further, some of the withheld information had nothing to do with the Commission's efforts to secure funding from financial institutions and consisted only of factual information, such as details about the amount of the existing overdraft facility.
163. With respect to negotiations to secure a correspondent bank, nothing in the very limited information in the relevant parts of the records would have revealed details that were not already publicly known. Under these circumstances, disclosure could reasonably have not caused prejudice to the conduct or outcome of the negotiations to secure a correspondent bank.
164. The Commission has not shown how disclosure could reasonably have been expected to cause any specific prejudice to the conduct or outcome of a negotiations.

#### Third Party

165. In addition to the reasoning in paragraphs 135-137, above, the Third Party has not explained how disclosure could have reasonably been expected to be prejudicial. It has not, for example, claimed that the terms of the negotiations with the Commission were more favourable than what would otherwise be offered in arms' length negotiations with

other current or potential clients. In the absence of a specific prejudice, the exemption is not considered further for this information in the relevant parts of the records.

*Conclusion*

166. The Information Commissioner is not satisfied that the Commission was justified in relying on section 25(1)(d) to withhold the relevant parts of records 1-10. She is also not satisfied that the Third Party was justified in relying on the exemption to object to disclosure of information related to it in parts of records 2-10.

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

167. 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”.
168. 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 nondisclosure, then the records must still be disclosed.
169. 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 to both how the third party gave the information and how the public authority received or agreed to hold the information.
170. 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.<sup>25</sup>
171. 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.
172. 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.<sup>26</sup>
173. Sections 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.
174. As set out in section 7(1) of the [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”.

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<sup>25</sup> See Information Commissioner’s Guidance, ‘[Information received in confidence exemptions \(section 26\)](#)’, paragraph 41.

<sup>26</sup> Information Commissioner’s Guidance, ‘[Information received in confidence exemptions \(section 26\)](#)’, paragraph 43.

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

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

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

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

[4] Is 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?

176. 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*

177. The Commission relied on section 26(1)(a) to withhold information in the records relating to private funding arrangements in parts of records 1-6 and 10, correspondent banking in records 3 and 8-10, the development of revenue streams in parts of records 1, 4, 6 and 8, amendment to the legislative frameworks in parts of records 2, 7 and 10, suitability funds in parts of records 1, 6 and 7, casino fees information in parts of records 2 and 3, and Hotelco's casino license application and approval in parts of records 2, 4 and 8-10.

178. The Commission cited regulation 11 of the [Gaming \(Casino License Application\) Regulations 2017](#), which provides for the confidentiality of the application process for a casino license. The Commission also cited section 8 of the [Gaming Act](#), setting out the principal objects of the Commission. These include ensuring that the management and operations of a casino is carried out by persons who are suitable and remains free from criminal influence or exploitation.

179. The Commission submitted that public disclosure of the information would have breached the confidentiality of the third parties concerned. In the past, some had expressed concern with the possibility of information being disclosed to the public, based on prior instances of information being illegally shared. The Commission feared that any disclosure of information would have prevented any further discussions taking place.

*Applicant's submissions*

180. The Applicant made submission on the public interest test, as set out in paragraphs 76-80, above.

*Third Party's submissions*

181. The Third Party submitted that the information in parts of records 2-10 included terms of contractual arrangements entered into on the understanding that such terms would remain confidential.
182. The Third Party also submitted that should information in relation to arrangements between the Commission and the Third Party be made public, it is likely that the Third Party and other commercial entities will be less inclined to enter into future arrangements with the Commission (or similarly situated organisations) on comparably favourable terms.

*Discussion*

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

183. Some of the information in the relevant parts of the records were not given by a third party (other than a public authority). Some of this information consisted of internal discussions about information provided by the Commission's staff that related to one of the third parties (who, as explained below, did not object to disclosure of their information). Other parts of the records contained information that relates to the third parties' interests but did not contain information provided to the Commission by that third party. These parts of the records simply mentioned the Commission's relationship with the relevant third party. The exemption is not considered further for these parts of the records.
184. The information in the relevant remaining parts of records 1, 2, 4, 7, 9 and 10 included information given by one of the Third Parties. The exemption is considered further for these parts.

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

185. The Third Party has only made submissions regarding the "terms of contractual arrangements" contained in the records. The Third Party asserted that it entered into these terms on the understanding that the terms would remain confidential. The Third Party, however, has not provided any evidence or support that the information was given confidentially. Further, the majority of the information in the relevant parts of the

records relating to the Third Party's relationship with the Commission had already been made public at the time the PATI request was made and at the time of the internal review decision.

186. A commercial entity engaged in business with a public authority, particularly after the PATI Act went into effect, would reasonably be expected to know that a high-level, general summary of the details of the terms of the engagement would be subject to public disclosure and scrutiny. Objectively, in the absence of supporting evidence, it is not reasonable to conclude that the information in these parts of the meeting minutes was given in confidence and with the understanding that it would be held confidentially.
187. Regarding the redacted information about the other third parties, the Commission did not make submissions that the information was given in confidence and with the understanding that it would be held confidentially. Furthermore, the relevant third parties did not object to disclosure of the information.

*Conclusion*

188. The Information Commissioner is not satisfied that the Commission justified its reliance on section 26(1)(a) to withhold the relevant information in parts of records 1-10. The Third Party was also not justified in relying on the exemption to object to the disclosure of information in parts of records 2-10.

***Ongoing negotiations – section 30(1)(c)***

189. The elements of this exemption are set forth in [Decision 18/2022, Ministry of Health Headquarters](#), paragraphs 148-153.

*Public authority's submissions*

190. The Commission invoked section 30(1)(c) to withhold parts of all the records that included workplan information in parts of records 1, 3, 6 and 8-10, the development of revenue streams in part of record 5, casino fees information in parts of records 2 and 3 and private funding arrangements in parts of records 1-6 and 10, along with other information in parts of records 2, 8 and 10.
191. As explained above, at the time of the initial decision, the Commission maintained that it was conducting negotiations with several stakeholders with a view of securing funding for the Commission's operations. Disclosure of this information prematurely would have affected the ability of the Commission to negotiate to receive funding.



*Applicant's submissions*

192. The Applicant made submissions on the public interest test, set forth in paragraphs 76-80, above.

*Discussion*

[1] What were the ongoing negotiations to which the record relates?

193. As explained above in paragraph 161, the overdraft facility that the Commission was negotiating to extend or cover had been paid at the time of the internal review decision. The Commission has not identified any other ongoing negotiation as the basis for relying upon section 30(1)(c).
194. Given that no ongoing negotiations existed at the time of the internal review decision, this exemption is not considered further.

*Conclusion*

195. The Information Commissioner is not satisfied that the Commission was justified in relying on section 30(1)(c) to withhold parts of records identified in paragraph 190, above.

***Financial and economic interest – section 31(1)***

196. A public authority may rely on section 31(1) to deny access to a public record whose disclosure could reasonably be expected to have a serious, adverse effect on the financial interests of Bermuda or on the Government's ability to manage the national economy.
197. When applying the exemption in section 31(1), a public authority must ask: <sup>27</sup>

[1] What is the relevant financial interest of Bermuda or aspect of the Government's ability to manage the national economy?

[2] What is the relevant serious adverse effect to the financial interest of Bermuda or aspect of the Government's ability to manage the national economy?

[3] How can disclosure cause the identified serious, adverse effect to Bermuda's financial interest or the Government's ability to manage the national economy?

[4] Can the serious, adverse effect reasonably be expected to occur?

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<sup>27</sup> See [Decision 30/2022, Bermuda Gaming Commission](#), paragraphs 49-63 for further explanation of the elements of section 31(1) of the PATI Act.

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

*Public authority's submissions*

198. The Commission has invoked section 31(1) to withhold information in the records consisting of discussion about Hotelco's casino license application and approval in parts of records 2, 4 and 8-10, its 2022/2023 Work Plan review and 2023/2024 Work Plan development in parts of records 1, 3, 5, 6 and 8-10, HPCL's suitability funds in parts of records 1, 6 and 7, development of revenue streams in parts of records 1, 4-6 and 8, and information about the Commission's cash flow in parts of records 1-6 and 8-10.
199. The Commission maintains that the relevant aspect of the Government's ability to manage the national economy is the development and regulation of the new sector of the economy, namely the emerging gaming industry. The development of this sector was one of the Government's stated public policy goals.
200. At the time of the initial decision, the Commission was still trying to secure approval from a correspondent bank and disclosure of the withheld information at the time could reasonably have been expected to lead to the identified adverse effects related to the adoption of a regulatory framework or to the ability to secure a US correspondent bank.

*Applicant's submissions*

201. The Applicant made submissions only on the public interest test, as set forth in paragraphs 76-80 above.

*Discussion*

[1] What was the relevant financial interest of Bermuda or aspect of the Government's ability to manage the national economy?

202. As was accepted by the Information Commissioner in [Decision 33/2022](#), [Bermuda Gaming Commission](#), at paragraph 217, the relevant aspect was the Government's ability to adequately manage the development of a certain sector of the economy, e.g., the emerging gaming industry, which was recognised as important to meeting the Government's stated public policy goals.

[2] What was the relevant serious adverse effect to the aspect of the Government's ability to manage the national economy?

203. As explained in [Decision 33/2022](#), [Bermuda Gaming Commission](#), paragraph 178, the development of the gaming industry has been dependent on the Commission's efforts to secure a US correspondent bank to accept the proceeds of the casino operations. If

the Commission were unable to secure a US correspondent bank, the emerging industry would never be realised in Bermuda. As in [Decision 33/2022](#), the Information Commissioner accepts here that preventing the Commission's ability to secure a US correspondent bank would be a serious adverse effect on the ability of the Government to manage an emerging industry within the national economy.

[3] How could disclosure have caused the identified serious adverse effect to the Government's ability to manage the national economy?

204. The Commission has not explained how disclosure of the withheld information in the relevant parts of the meeting minutes could have negatively impacted the Government's adoption of a regulatory framework or the Commission's ability to secure a US correspondence bank.
205. Further, it has been public knowledge for some time that one of the issues delaying the emergence of the gaming industry was the ability to bank the proceeds of gaming.<sup>28</sup> It also has been known that the Commission was engaged with local banks to secure a US correspondent bank relationship that would accept the proceeds of the casino gaming operations.<sup>29</sup>
206. Based on the publicly available information and the nature of the withheld information, the disclosure of the redacted text could not reasonably have been expected to cause the serious, adverse effect on the Government's ability to manage the national economy claimed by the Commission. This is because the redacted information is not so detailed and is primarily referencing matters already known to the public.

#### *Conclusion*

207. The Information Commissioner is not satisfied that the Commission has justified its reliance on section 31(1) to withhold the redacted information in the relevant parts of records identified in paragraph 198, above.

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

208. Section 25(1)(b) allows a public authority to refuse access to a record if it consists of information with a commercial value and disclosure would, or could reasonably be expected to, destroy or diminish the value of such information. The commercial value

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<sup>28</sup> See the [Premier of Bermuda's statement](#) 'Update on Gaming' dated 17 July 2020.

<sup>29</sup> See the [Minister of Finance's statement](#) 'Update on the Work of the Bermuda Casino Gaming Commission' dated 28 February 2019.

exemption is subject to exceptions in section 25(2) that set out particular circumstances when the exemption cannot apply.

209. The PATI Act does not define 'commercial value'. As the Information Commissioner explained in [Decision 09/2019, Department of Public Lands and Buildings](#), information may have commercial value because it is important to the performance of the owner's commercial activities or because it can be sold for value to an arms-length buyer, i.e., intrinsic commercial value.<sup>30</sup>

210. A public authority, or third party, must consider the following question when seeking to justify reliance on the exemption for information with commercial value:<sup>31</sup>

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

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

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

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

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

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

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

*Public authority's submissions*

212. The Commission asserts section 25(1)(b) to withhold information in part of record 4, as well as information relating to private funding arrangements in parts of records 1, 2, 3, 4, 5, 6, 7 and 10, and correspondent banking in parts of records 3, 8, 9, and 10.

213. The Commission submitted that information and discussions about the details of potential terms of lending facilities was commercially valuable information. The Commission stated that at the time it issues its initial decision, the Commission was in

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<sup>30</sup> See [Decision 09/2019, Department of Public Lands and Buildings](#), at paragraph 170.

<sup>31</sup> See [Decision 09/2019, Department of Public Lands and Buildings](#), at paragraph 174.

discussions with other possible lenders and the release of information regarding internal finances may have affected the Commission's efforts.

214. The Commission also claimed that disclosure of the information at the time of the request may have diminished the Commission's ability to secure funding from a financial institution.
215. Furthermore, the Commission submitted that the issue of securing a correspondent bank is and was a sensitive one. The disclosure of information may have had an adverse effect on the ability to secure banking services for the gaming industry. It was feared that disclosure of certain information may have affected the confidential discussions taking place between the Commission and the banks.
216. The Commission concluded that it could not identify any public interest facts in favour of disclosing the information in these parts of the records.

*Applicant's submissions*

217. The Applicant made submissions only on the public interest test, as set forth in paragraphs 76-80 above.

*Discussion*

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

218. As noted above, paragraph 122, several of the commercial parties consented in writing to disclosure of the information in the records related to them. These parts of records 6 and 9 come within the exception to the exemption in section 25(2)(b) and the exemption in 25(1)(b) is not considered further for them.

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

219. As explained above, 'commercial' under the PATI Act does not include information that relates to the finances of a public authority such as its funding resources and their management. It is possible that the Commission considered the potential details of the lending facilities as having commercial value for relevant third parties that were providing this information. None of the relevant third parties, however, have objected to the disclosure of the information on the basis of section 25(1)(b).
220. With respect to the Commission's efforts to secure corresponding banking arrangements, the Commission did not identify the specific nature of the commercial value of the actual information in the redacted records. Further, it is not evident on the

face of these parts of the records that a commercial value was attached to the information.

221. In the absence of further explanation, the redacted information did not have a commercial value relevant for section 25(1)(b).

*Conclusion*

222. The Information Commissioner is not satisfied that the Commission was justified in relying on section 25(1)(b) to withhold information in parts of records 1-10.

***Ministerial responsibility – section 28***

223. Section 28(1) allows a public authority to deny public access to a record if it consists of information which, if disclosed, would, 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.

224. 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.

225. 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.

226. 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] Can this harm reasonably be expected to occur?

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

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

*Public authority's submissions*

228. The Commission has invoked section 28 to withhold parts of records 2, 4, 6 and 7-10, as well as its 2022/2023 Work Plan review and 2023/2024 Work Plan development in parts of records 1, 3, 5, 6, 8, 9 and 10, information about its cash flow in parts of records 1-6 and 8-10, and the development of revenue streams in part of record 5.

229. The Commission explained that the decisions and actions of the Minister concerned the then-possibility of the Ministry of Headquarters providing funding for the Commission's operations. The Commission concluded that disclosure of this information at that time could have adversely affected the Commission because it was still in discussions with local financial institutions to secure funding. Disclosing this information relative to the Minister's considerations may have affected the same. This is because disclosure would have affected the Commission's negotiations, because financial institutions would not consider financing the Commission if the Minister had declared his intention to possibly do so.

230. The Commission did not identify any public interest factors favouring disclosure.

*Applicant's submissions*

231. The Applicant made submissions only on the public interest test, as set forth in paragraphs 76-80 above.

*Discussion*

[1] What was the information in the record that could reasonably have been expected to undermine individual ministerial responsibility?

232. The Commission pointed to the Minister's actions and decisions regarding the possibility of the Ministry Headquarters providing funding for the Commission's operations as the relevant information that could reasonably be expected to undermine individual ministerial responsibility.

[2] How could disclosure of that information have undermined individual ministerial responsibility?

233. The Commission's submissions did not address how disclosure of the information could reasonably have been expected to undermine the policies, decisions or actions of the Minister's ministry. For example, the Commission did not assert that the information

revealed contrary views or robust debate of various options considered by the Minister before determining the Ministry Headquarters' final course of action.

234. Instead, the Commission maintained that the disclosure could have prejudiced the Commission's discussions with local financial institutions to secure funding. This is not the same as undermining ministerial responsibility or the free and frank discussion between ministers and public officers in the course of their public duties.
235. The information in the relevant parts of the records only refers to decision taken by the Ministry Headquarters. The fact that the Ministry Headquarters took a decision does not undermine ministerial responsibility. The meeting minutes did not reflect dissention during deliberations or frank discussion where a Minister was disagreeing with a course of action, which he was ultimately accountable for. The exemption in section 28(1) does not make communications about a Ministry's work confidential simply because they were communicated to a Minister.
236. Because the Commission has not explained how disclosure could reasonably be expected to undermine individual ministerial responsibility, this exemption is not considered further.

#### *Conclusion*

237. The Information Commissioner is not satisfied that the Commission was justified in relying on section 28(1) to withheld information identified in paragraph 228, above.

#### ***Personal information – section 23***

238. For the same reasons set out in [Decision 33/2022](#), paragraphs 275-297, the Information Commissioner relies on section 23 on her own accord to withhold the name, signatures, and other identifying information of employees of the Commission and the Commissioners, other than the names of the CEO or Acting CEO and the Chair of the Commission.

#### ***Conclusions***

239. The Information Commissioner is satisfied that the Commission:
- a. did not conduct a reasonable search to locate records responsive to items 4, 6 and 7 of the PATI request in accordance with section 12(2)(b) and regulation 5 of the PATI Regulations;
  - b. has not met the disclosure requirement set forth in section 6(5);



- c. justified its decision to administratively deny access to records responsive to item 3 of the PATI request under section 16(1)(a);
  - d. was justified in relying on section 34(1)(a) to deny access to parts of records 2-4 and 6-8;
  - e. was justified in relying on section 29 to deny access to part of record 5;
  - f. was not justified in relying on sections 25(1)(b)-(d), 26(1)(a), 28, 29, 30(1)(c) or 31 to deny access to the remaining parts of records 1-10.
240. The Information Commissioner is also satisfied that the Third Party did not justify its reliance on sections 25(1)(c), 25(1)(d) or 26(1)(a) to object to the disclosure of parts of the records that related to the Third Party's interests.
241. Furthermore, the Information Commissioner has raised section 23 on her own accord, finding that parts of records 1-10 were exempt from disclosure under section 23.
242. Finally, the Information Commissioner notes that this is the second independent review involving the denial of access to all or parts of the Commission's meeting minutes.<sup>32</sup> Section 6(1) of the PATI Act emphasises that public authorities should provide information proactively to the general public "to enable the public to have minimum need to resort to this Act for obtaining information held by a public authority".<sup>33</sup> Section 10 of the PATI Act further charges the Information Commissioner with responsibility to "foster and encourage the publication by public authorities of information of relevance or interest to the general public in relation to the activities and functions of the authority generally, in addition to the information that is required to be published under [Part 2]" of the PATI Act.
243. With this in mind, the Information Commissioner has found that the Commission asserted unnecessary secrecy contrary to the purposes of the PATI Act set forth in section 2.
244. As a public authority funded by taxpayers and working on behalf of the Bermuda public, it is expected that routine business information would be made available to the public in

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<sup>32</sup> [Decision 33/2022](#), [Bermuda Gaming Commission](#), ordered the disclosure of the Commission's meeting minutes from 1 September 2015 to 29 May 2018, with only limited redactions, similar to the outcome in this Decision.

<sup>33</sup> Many access to information frameworks have similar proactive publication schemes. For example, in the United Kingdom (UK), the Freedom of Information Act (FOI Act) 2000 requires every public authority to have a publication scheme setting out their commitment to make certain classes of information routinely available, such as policies and procedures, minutes of meetings, annual reports and financial information. See the UK's Information Commissioner's Office '[Publication schemes: a guide](#)'.

response to a PATI request, without the need for an independent review by this Office.<sup>34</sup> It is even more disappointing that the records in this case have been subject to such a lengthy review in circumstances where nearly all of the information redacted by the Commission was already in the public domain at the time of the internal review decision.<sup>35</sup> The concern about unnecessary secrecy is further heightened where the Commission has been unable to comply with its statutory disclosure requirements to publish timely Annual Reports and Financial Statements and to make available its quarterly expenditures in accordance with section 6(5) of the PATI Act.

245. Ultimately, the Commission's internal review decision was not a matter of determining whether information not yet known to the public should be considered exempt. Instead, the Commission sought to refuse aspects of its work already known to the public and did so by asserting four to six exemptions for each redaction. This resulted in an extraordinary and unnecessary use of resources of the Commission, and this Office, as well as a delay in public access to the Commission's meeting minutes.
246. The Information Commissioner requires the Commission to adopt a more transparent approach to its work consistent with section 2 and Part 2 of the PATI Act. She does not expect to see a future review involving redactions to meeting minutes that should be routinely available to the public, especially in circumstances where the redactions involve information already known to the public.

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<sup>34</sup> The UK Gambling Commission, for example, routinely publishes its Board papers and minutes, business plans, enforcement reports, procurement and tendering, strategy plans, progress and reports, spending reports, among other things, on its website. See the [Gambling Commission's Publication Scheme](#) on its website.

<sup>35</sup> See the [Audited Financial Statements of the Consolidated Fund](#), Royal Gazette articles dated [16 January 2024](#), [1 March 2023](#) and [21 June 2023](#), the [Auditor General's Report](#) dated June 2023, as well as the public sources cited throughout the Decision (see footnotes 27 and 28 above).

## Decision

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The Information Commissioner finds that the Bermuda Gaming Commission (**Commission**) justified its reliance on section 16(1)(a) to administratively deny the request for its annual reports, including financial statements, for the five financial years between April 2017 and March 2022. The Information Commissioner also finds that the Commission was justified in relying on sections 29 and 34(1)(a) to refuse access to parts of the records, but it did not justify refusal of access to the remaining parts of the records under sections 25(1)(b)-(d), 26(1)(a), 28, 29, 30(1)(c) or 31. The Information Commissioner further finds that the Third Party did not justify its reliance on sections 25(1)(c), 25(1)(d) or 26(1)(a) to object to the disclosure of parts of the records that related to its interests. The Commission also did not conduct a reasonable search to locate records responsive to items 4, 6 and 7. On her own accord, the Information Commissioner finds that certain personal information was exempt from disclosure under section 23 of the PATI Act and that the Commission has not complied with the disclosure requirement in section 6(5) of the PATI Act. Finally, the Information Commissioner finds that the Commission has not disclosed its quarterly expenditures for 2020, 2021 and the first quarter of 2022 as required by section 6(5).

In accordance with section 48 of the Public Access to Information (**PATI**) Act 2010, the Information Commissioner:

- annuls the Commission's decision to refuse items 4, 6 and 7 of the PATI request;
- affirms the decision to administratively deny records responsive to item 3 of the PATI request under section 16(1)(a);
- affirms the decision to deny access to parts of records 2-4 and 6-8 under section 34(1)(a);
- affirms the decision to deny access to part of record 5 under section 29;
- varies the decision to deny access to parts of records 1-10 under section 23; and
- reverses the denial of access to the remaining parts of records 1-10, and orders the Commission to disclose the records, as required.

The Information Commissioner requires the Commission to disclose the parts of records 1-10, as directed by this Decision, Confidential Annex and the accompanying Order; disclose its quarterly expenditures for 2020, 2021 and the first quarter of 2022; and conduct a reasonable search to locate records responsive to items 4, 6 and 7 of the PATI request and issue a new initial decision to the Applicant on or before **Tuesday, 10 September 2024**.

## **Judicial Review**

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

## **Enforcement**

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The Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Bermuda Gaming Commission 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  
30 July 2024

## Appendix I: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Provision of other information

- 6 ...  
(5) Public authorities shall make their quarterly expenditures available to members of the public upon request.

#### Refusal of request on administrative grounds

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

#### 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.

#### Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—  
...  
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;  
...  
(e) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;
- (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; or  
...

### **Commercial information**

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

...

(b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;

(c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates; or

(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

...

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

### **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.

### **Deliberations of public authorities**

29 (1) Subject to subsections (2) and (3), a record is exempt from disclosure if it consists of information, the disclosure of which would undermine, or could reasonably be expected to undermine, the deliberative process of a public authority, including free and frank discussion and provision of advice in the course of that process.

(2) Subsection (1) does not apply to information contained in a record that is—

(a) factual or statistical information;

- (b) information resulting from an investigation or analysis of the performance, efficiency or effectiveness of a public authority in relation to its functions;
- (c) information in the nature of a report, study or analysis of a scientific or technical expert; or
- (d) information in the nature of the reasons of a public authority for making a particular decision.

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

### **Operations of public authorities**

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

...

- (c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any ongoing negotiations by or on behalf of the Government or a public authority.

(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.

### **Law enforcement**

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

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

...

## **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.

**Information Commissioner for Bermuda  
Maxwell Roberts Building  
4<sup>th</sup> Floor  
One Church Street  
Hamilton, HM 11  
ico.bm  
441-543-3700**