

Decision Notice

Decision 33/2024: Information and Digital Technologies Department

Records on BPMS, InnoFund, i3 and Fastpass

Reference no: 2021020

Decision date: 29 November 2024

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Information and Digital Technologies Department (**Department**) for records related to certain technology companies and a specific project. The Department denied access to most of the responsive records on the basis that they were exempt under sections 29 (deliberations of public authorities) and 34(1)(c) (prejudice to fair trial or impartial adjudication) of the PATI Act.

The Information Commissioner has concluded that the Department was justified to refuse access to certain records or parts of records under the exemption in section 29, but that the Department was not justified to refuse access to the remainder of the records or parts of records under section 34(1)(c). On her own accord, the Information Commissioner has also found that certain parts of the records were exempt as personal information in section 23.

The Information Commissioner has ordered the Department to disclose certain records or parts of records in accordance with this Decision, the accompanying Confidential Annex and the Order on or before **Friday, 17 January 2025**.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 29 (deliberations of public authorities); section 34(1)(c) (prejudice to fair trial or impartial adjudication).

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

Background

1. In 2021, the Government of Bermuda (**Government**) initiated a private-public partnership with InnoFund Limited (**InnoFund**) to enable the Government to digitalise its various services as well as attract and support start-ups as they test their products on island. To fund this initiative, on 18 June 2021, the Government provided a letter of comfort to Clarien Bank on behalf of InnoFund supporting a \$2.5 million term loan facility. Sometime in December 2022, the Government paid \$2,418,943 to Clarien Bank in settlement of the balance that was outstanding on the loan facility, as a result of InnoFund's default on the loan. An additional \$3,228 in late payment penalties was paid

to the bank in January 2023, to fully absolve the Government's responsibility as the guarantor on the loan facility.¹

2. On 16 December 2022, the Applicant made a public access to information (**PATI**) request to the Information and Digital Technologies Department (**Department**), asking for the Department's correspondence, from 2019 to that date, that related to InnoFund, InnoFund Innovation Incubator Limited (**i3**), Bermuda Portal Mobile Software Limited (**BPMS**), and a port-of-entry software called Fastpass. The request further stated that the correspondence should include, but not be limited to, emails, faxes, WhatsApp messages, letters, as well as minutes of meetings—in-person or virtual—and of telephone calls. The PATI request also asked for copies of any documents, such as memoranda of understanding (**MoUs**) and agreements, as they related to BPMS, InnoFund, i3 and Fastpass.
3. On 10 March 2023, the Department issued an initial decision, after it extended the statutory timeline to respond to the PATI request. The Department denied access to most of the responsive records under sections 29 (deliberations of public authorities) and 34(1)(c) (prejudice to fair trial or impartial adjudication) of the PATI Act. The Department also disclosed one redacted record, which it believed showed the confidential nature of the advice the Department had provided to the Economic Development Department (**EDD**) in relation to the Fastpass project with BPMS.
4. On 23 March 2023, the Applicant asked for an internal review. On 1 May 2023, the Department issued an internal review decision which, although agreeing that the records formed part of a deliberative process, ultimately denied the request under section 34(1)(c) instead of section 29.
5. On 7 June 2023, the Applicant made a timely application for an independent review by the Information Commissioner, challenging the Department's reliance on section 34(1)(c).

Investigation

6. The Information Commissioner's Office (**ICO**) accepted the application as valid on 14 June 2023, on the basis that the Applicant had made a PATI request to a public authority and

¹ See Government of Bermuda, [Financial Statements of the Consolidated Fund March 31, 2023](#), page 60, as tabled in the House of Assembly on 15 March 2024 ([Official Hansard Report](#), page 1077).

had asked that public authority for an internal review. The ICO also confirmed the issue the Applicant wanted the Information Commissioner to review.

7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application because examining the withheld records was required to evaluate the public authority's reliance on the exemption.
8. The ICO notified the Department of the valid application on 15 June 2023 and asked for the responsive records. On 30 June 2023, the Department submitted 46 records. On 1 March 2024, the Applicant agreed not to pursue parts of this PATI request that asked for MoUs and agreements, because these records were under consideration in a related Information Commissioner's review about a separate PATI request.² Given this, and after duplicates and other non-responsive parts³ were removed, this Decision has considered a total of 39 records, in full or in part, which were numbered as records 1-4, 6, 7, 9-12, 14, 16, 18, 20-30 and 32-46. The Schedule of Records submitted by the Department indicated that it relied on section 34(1)(c) for all the withheld records and section 29 for only some of them. After a query from the ICO, the Department confirmed on 19 April 2024 that this was an oversight, and it would rely on both exemptions before the Information Commissioner's review to withhold all the records from public access.
9. As required by section 47(4) of the PATI Act, the parties were invited to make representations to the Information Commissioner. The Applicant and the Department made formal submissions. BPMS, as one of the Third Parties, confirmed on 16 April 2024 that it had no objection to disclosure of information related to it in records 7, 14, 20, 22, 24, 30, 32, 35, 38-42 and 46. Another Third Party confirmed that it did not wish to make submissions on potential disclosure of information in parts of records 20 and 46 that related to it. Finally, an individual Third Party objected to disclosure of any information referring to them in the records as being exempt personal information.

² For instance, the document attached to record 2 (the signed 2021 service agreement with BPMS) was removed from being considered during this Information Commissioner's review, given that the same record was being considered in a separate, related Information Commissioner's review.

³ Some records contained information that was not responsive to the PATI request and thus was removed from the final copy of records being assessed by the Information Commissioner in this Decision.

Information Commissioner's analysis and findings

10. The Information Commissioner has considered all relevant evidence, being satisfied that no matter of relevance has been overlooked.
11. The Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis below cannot be as detailed as otherwise preferred.

Deliberations of public authorities – section 29

12. A public authority may rely on section 29(1) to deny access to a public 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.
13. 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.⁴ A deliberative process is, at its most basic, the thinking process of an agency⁵. This exemption is in place to safeguard the integrity of this process for public authorities' decision making.
14. 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"⁶. 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.
15. 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)).

⁴ See [Decision 02/2019](#), Office of Governor, at paragraph 168.

⁵ See Queensland's Office of the Information Commissioner (29 August 2023), [Guidelines: Deliberative Process](#). See also Western Australia's Office of the Information Commissioner (October 2001), [FOI Guide No. 3, Deliberative Process](#), page 1.

⁶ See Oxford Dictionary of English (3rd ed. 2010).

16. 'Factual information' is not defined in the PATI Act or the [Interpretation Act 1951 \(Interpretation Act\)](#). 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 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"⁷. Factual information is "distinguishable from information in the form of [a] proposal, opinion or recommendation"⁸.
17. 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 stand⁹. 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.
18. 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.
19. 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)?

⁷ See Ireland's Office of the Information Commissioner (August 2015), [Guidance Note, Freedom of Information Act 2014 Section 29 – Deliberations of FOI Bodies](#), at paragraph 3.3.1. The decisions cited in the Guidance Note relied on the definition provided by the Oxford English Dictionary.

⁸ 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](#), at paragraph 3.3.1.

⁹ See, for example, Office of the Australian Information Commissioner (May 2024), [FOI Guidelines, Part 6 – Conditional exemptions](#), at paragraphs 6.70-71.

[3] Can disclosure of the record reasonably be expected to undermine the identified deliberative process of a public authority?

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

20. 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

21. The Department identified the relevant deliberations as, firstly, its consultations on the best approach for Fastpass's integration with the applications and data of other government departments for purposes of the implementation of Fastpass. The Department noted that the systems involved were not its systems and that it was not privy to any dispute between BPMS, InnoFund or i3 and the Government when this dispute began.
22. The Department maintained that none of the exceptions in section 29 applied because it was helping the EDD understand what must be done to engage the other relevant departments to integrate their systems with that of the EDD.
23. The Department explained that the EDD specifically requested that the discussion on the relevant matter be kept confidential. It further submitted that disclosing its consultations with another public authority, especially when the public authority had requested confidentiality, could undermine its future consultations with client departments.
24. The Department believed that the EDD was in the best position to determine if records of its consultations should be released.
25. The Department argued that disclosure would not have been in the public interest because it could have resulted in a loss of trust between the Department and other public authorities. It could also have led to risk of information leakage and could have inhibited open conversation which, subsequently, could have had a negative impact on decision making.

Applicant's submissions

26. The Applicant was not sure what deliberations the Department was referring to when it relied on section 29 in its initial decision. The Applicant assumed that the Department was referring to the deliberations before the court.

27. The Applicant also submitted that that balance of the public interest required disclosure. They explained that the companies referred to in the PATI request had an agreement with the Government, which included a \$2.5 million guarantee by the Government of a loan on behalf of InnoFund. The Government later had to repay the loan. The Applicant also highlighted that the dispute between BPMS and the Government led to the suspension of operations at i3, an innovation incubator, which was designed to help young businesses flourish. The Applicant believed that this was arguably a welcome boost to Bermuda's offerings and economic activity. The Applicant maintained that, given the guarantee was used to repay the company's loan and the loss of the technology incubator for start-ups, the public interest was balanced in favour of disclosure. The Applicant also referred to a news article with more background information.

Discussion

28. The Information Commissioner considers the Department's reliance on section 29 to withhold records 3, 7, 9, 11, 12, 14, 18, 20-25, 27-30, 32, 34, 35 and 38-46 in full and parts of records 1, 2, 4, 6, 10, 16, 26, 33, 36 and 37.

[1] What was the relevant deliberative process involved?

29. The relevant deliberative process was not the court deliberations, as speculated by the Applicant. Instead, two overlapping deliberations were relevant. First, the Department was involved in consultations with the EDD on how to integrate the applications and data of other government departments with Fastpass.
30. Second, on the face of some records, and as alluded to by the Department, another deliberation was to decide how to respond to the dispute arising between the Government and BPMS, which eventually led to the pending civil matter. The Department explained that, while it was copied on some correspondence, it was not involved in the dispute or participating in this deliberation.
31. While all the records and parts of records related to BPMS and Fastpass, each one did not involve or relate to one of these relevant deliberative processes with the Department and the EDD. Specifically, the following records or parts of records did not relate to the Department or the EDD's evaluation of competing arguments, information or facts with a view to deciding on the technical implementation of Fastpass or how to respond to the emerging dispute:
- a. records 12, 33, 37 and 40, and
 - b. certain parts of records 7, 36 and 43.

32. These records and parts of records are not considered further for section 29(1).

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

33. The remaining records or parts of records consisted of emails, meeting notes, a project handbook and meeting agendas, which contained factual information such as dates, times, subjects, recipients and senders of the emails, as well as dates, times and attendees of the meetings. This specific factual information fell within the exception in section 29(2)(a) and, thus, this information in the records is not considered further.
34. Other factual information in the remaining records was inextricably intertwined with the deliberative processes and, therefore, did not fall within the exception for purely factual information.

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

35. This question is considered for records 3, 9, 11, 14, 18, 20-25, 27-30, 32, 34, 35 and 38, 39, 41, 42, 44-46, parts of records 1, 2, 4, 6, 10, 16 and 26, as well as the remainder of records 7, 36 and 43 only.
36. The Department has raised weighty concerns that disclosure of these records could have undermined its future deliberations with client departments (either the EDD or others) because it must receive confidential and sensitive information from other public authorities to provide its technical IT-related advice and consultation. The Department specifically disclosed record 1 to the Applicant, with redactions, to explain the level of confidentiality expected from it by its clients.
37. The Information Commissioner accepts that disclosing the information sent to the Department from its clients or the Department's consultation and advice to its clients would have inhibited the Department's ability in the future to obtain needed details from clients. These details enable the Department to provide effective and specific technical recommendations and advice.
38. The information that related to the EDD's implementation of Fastpass and the EDD's involvement in discussions on how to respond to the dispute that arose between the Government and BPMS was not trivial. Instead, this information related to issues of significant impact to public services and the public purse. It was reasonably likely that other public authorities would have determined that the Department might disclose this type of information provided for purposes of consultation and, therefore, would have not continued to engage with the same openness when seeking technical advice.

39. Disclosure of the following records could reasonably have been expected to undermine the Department's deliberative consultations, either with the EDD or other public authorities:
- a. records 3, 20, 30, 32, 34, 39 and 44; and,
 - b. parts of records 1, 2, 4, 6, 7, 9-11, 16, 18, 21-23, 25-29, 35, 36, 41, 42, 45 and 46.
40. In contrast, disclosure of the following records could not have been expected to undermine the free and frank discussions between officers in the Department or other public authorities, because they consisted of administrative or routine information that professionals within the Public Service would be expected to share regardless of whether it was disclosed publicly:
- a. records 14, 24 and 38; and,
 - b. the remainder of records 1, 2, 4, 6, 7, 9-11, 18, 21-23, 25-29, 35, 41-43, 45 and 46.
41. None of the information contained in the records or parts of records identified above was so controversial or contentious in nature such that, if disclosed, it would have caused a chilling effect on free and frank discussion. The Department's reliance on section 29 for these specific records or parts of records was not justified and is not considered further.

[3] If the exemption was engaged, did the balance of the public interest require disclosure?

42. The balance of the public interest is considered only for records 3, 20, 30, 32, 34, 39 and 44 and parts of records 1, 2, 4, 6, 7, 9-11, 16, 18, 21-23, 25-29, 35, 36, 41, 42, 45 and 46 identified in paragraph 39.
43. In favour of disclosure, the Information Commissioner considers that the Government has made available to the public limited information on Fastpass, how this project started, how the Government entered into MoUs and agreements related to BPMS, InnoFund and i3, why Fastpass has not been implemented, and why BPMS, InnoFund and i3 were now pursuing legal action against the Government. The Information Commissioner agrees with the Applicant that, given the \$2.5 million guarantee that has been repaid using money from the public purse and given the impact of the discontinuance of the incubator programme, a strong public interest existed in greater transparency.
44. At the same time, countervailing public interests favoured maintaining the exemption. The civil action was pending at the time of the internal review decision and remains pending today. The public has a strong interest in the efficient resolution of disputes with

public authorities that lessens the negative impact on the public. Any disclosure at this time must take into consideration the pending dispute, while noting that this particular public interest concern may not persist once the pending dispute is resolved.

45. In balancing these interests, disclosure of certain information in record 21 should not negatively impact any resolution of the ongoing dispute between the Government and BPMS for a number of reasons, including because it was already known to BPMS or not relevant to the specific points of contention. Disclosure of such information in record 21 would have furthered the public interest in having a greater understanding of the reasons for the relevant public authorities' actions and decisions, and in promoting accountability for them. Accordingly, the balance of the public interest favoured disclosure of certain parts of record 21.
46. In contrast, the balance of the public interest favoured maintaining the exemption for records 3, 20, 30, 32, 34, 39 and 44, relevant parts of records 1, 2, 4, 6, 7, 9-11, 16, 18, 22, 23, 25-29, 35, 36, 41, 42, 45 and 46, as well as other parts of record 21, because they consisted of information that may impact any conclusion of the ongoing dispute in a manner that negatively impacts the public.

Conclusion

47. In sum, the Information Commissioner is satisfied that the Department was justified in relying on section 29 to withhold records 3, 20, 30, 32, 34, 39 and 44 and certain parts of records 1, 2, 4, 6, 7, 9, 10, 11, 16, 18, 21-23, 25-29, 35, 36, 41, 42, 45 and 46. The Information Commissioner is not satisfied, however, that the Department was justified in relying on section 29 for records 12, 14, 24, 33, 37, 38, 40 and 43 as well as certain parts of records 1, 2, 4, 6, 7, 9-11, 18, 21-23, 25-29, 35, 36, 41, 42, 45 and 46.

Prejudice to fair trial or impartial adjudication – section 34(1)(c)

48. A public authority may rely on section 34(1)(c) to deny access to a public record where disclosure would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case. This exemption aims to prevent the release of records that could result in unfairness in the conduct of a trial or adjudication. It safeguards the integrity of the court, or other adjudicating body, and protects a person's right to a fair trial.
49. As explained in [Decision 28/2022, Cabinet Office](#), a public authority applying section 34(1)(c) must first establish that the record relates to the trial of a person or adjudication of a particular case, which is either a current legal proceeding or one

contemplated in future.¹⁰ When identifying the trial or adjudication, the public authority may need to specify the parties to the proceeding, the offence or cause of action as well as the relevance of the record to the proceeding. The public authority also must indicate the proceeding's status at the time of the PATI request (or internal review), e.g., whether the trial or adjudication was ongoing, concluded or anticipated.

50. The PATI Act and the [Interpretation Act](#) do not define 'fair trial' or 'impartial adjudication'. However, the Bermuda Court has accepted that section 6(1) of the Bermuda Constitution derives from Article 6(1) of the European Convention on Human Rights.¹¹ In the context of civil proceedings, fair trial encompasses a wide range of both institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning of judicial decisions.¹²

51. The Bermuda Constitution requires any court prescribed by law to determine the existence or extent of any civil right or obligation, or of any criminal charges, to be independent and impartial. Citing a UK Court judgment, Justice Subair Williams stated:

All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.¹³

52. A public authority relying on section 34(1)(c) must show how disclosure could cause prejudice to a fair trial of a person or impartial adjudication of a case. The likelihood of harm required is that prejudicing the proceeding's fairness or the impartial adjudication 'could reasonably be expected to' occur. This is a lesser likelihood of harm compared to 'would', which means a high probability that the harm will occur. The mere fact that the

¹⁰ See [Decision 28/2022](#), [Cabinet Office](#), at paragraph 55.

¹¹ See [Tafari Wilson v Fiona Miller](#) [2018] SC (Bda) 6 App (23 January 2018), at paragraph 16.

¹² See European Court of Human Rights, [Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#) (31 August 2022).

¹³ See [Locabail \(UK\) Ltd v Bayfield Properties Ltd](#) [1999] EWCA Civ 3004 (17 November 1999), at paragraph 2, as quoted in [Ewart Frederick Winslow Brown v Director of Public Prosecutions, Attorney General, Deputy Governor](#) [2021] SC (Bda) 74 Civ (10 September 2021), at paragraph 69.

records may relate to the proceeding does not, of itself, establish a link between disclosure and prejudice to the fairness or impartiality of the trial or adjudication.

53. 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.
54. Where disclosure of a record falling within section 34(2)(a) would be in the public interest, the exemption does not apply. Unless another exemption applies, the record thus must be disclosed as it properly falls within an exception to section 34. If, however, the public authority decides the public interest weighs against disclosing a record falling within section 34(2)(a), the exception no longer applies, and the exemption may be justified to withhold the record.
55. In sum, when applying the exemption in section 34(1)(c), a public authority must ask:¹⁴
 - [1] What is the relevant trial or adjudication?
 - [2] How can disclosure prejudice the fairness of the trial or impartiality of the adjudication?
 - [3] Can this prejudice reasonably be expected to occur?
 - [4] Does the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?
56. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 34(1)(c) to deny access to the records.

Public authority's submissions

57. The Department submitted that it was not privy to the ongoing legal proceedings. It became aware of the proceedings once informed by the EDD. Nevertheless, the Department believed that its disclosure of the responsive records could have unwittingly prejudiced either party to the matter. It would also have been irresponsible for the

¹⁴ See [Decision 28/2022](#), [Cabinet Office](#), at paragraph 66.

Department to disclose the records, without knowing the consequences to information that it was not privileged to.

Applicant's submissions

58. The Applicant submitted that, because the legal proceedings referenced by the Department were civil proceedings, no 'fair trial of a person' existed for consideration. The Department could therefore only rely on the exemption on the basis that disclosure could have led to the impartial adjudication of a particular case. The Applicant asserted that because the civil proceedings would involve a judge sitting alone (i.e., there was no jury) and judges were considered beyond influence, disclosure could not reasonably have been expected to result in the improper adjudication of the case.
59. The Applicant accepted that they were unable to say what evidence would be presented by the parties at any hearing, though maintained it was fair to assume that the parties could have relied on information at their disposal, which would include correspondence responsive to the PATI request. The Applicant believed that, at a minimum, the parties could have presented information for the judge to decide on whether it may be submitted as evidence. The Applicant submitted the writ relevant to the legal proceedings to the ICO.
60. The Applicant pointed out that section 34(2) states that the exemption would not apply to a record if its disclosure was in the public interest and relied on the same arguments above, in paragraph 27.

Discussion

61. The Information Commissioner considers the Department's reliance on section 34(1)(c) for records 12, 14, 24, 33, 37, 38, 40 and 43 as well as certain parts of records 1, 2, 4, 6, 7, 9-11, 18, 21-23, 25-29, 35, 36, 41, 42, 45 and 46, which were not upheld as being exempt under section 29(1).

[1] What was the relevant trial or adjudication?

62. Based on the writ submitted by the Applicant, the relevant trial or adjudication was Civil Jurisdiction 2022: No. 381, between BPMS, InnoFund and i3 (plaintiffs) and the Government of Bermuda (defendant).

[2] How could disclosure have prejudiced the fairness of the trial or impartiality of the adjudication?

63. Before addressing this question, the Information Commissioner turns to the Applicant's submission that, because the proceedings between the parties were civil proceedings, part of the exemption addressing the "fair trial of a person" was inapplicable. As decided in [Decision 23/2023, Office of the Tax Commissioner](#), a fair trial also applies to civil proceedings, which "encompasses a wide range of both institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning of judicial decisions."¹⁵ Further, in accordance with section 7 of the [Interpretation Act](#), the Government as the Defendant in the identified adjudication was a "person". Thus, the potential prejudice caused by disclosure both to the fairness of the proceedings and the impartiality of the adjudication is considered.
64. The following records or parts of records were created by BPMS, InnoFund or i3, or were already received by or known to one of those entities:
- a. records 14, 24, 35, 38, 40 and 43; and
 - b. certain parts or the remainder of records 7, 37, 41, 42 and 46.
65. In the absence of further explanation from the Department on how public disclosure of information already known to the parties could have prejudiced the fairness or impartiality of the proceedings, section 34(1)(c) is not considered further for these records or parts of records.
66. The remaining records consisted of administrative or innocuous information that related to BPMS and Fastpass but which did not relate to the claims made by BPMS, InnoFund and i3 against the Government. Their disclosure, therefore, could not have had an impact on the fairness or impartiality of the legal proceedings on these issues, even when the information that is available in the public domain is being taken into consideration.¹⁶ Section 34(1)(c) is not considered for the remaining records or parts of records.

¹⁵ See European Court of Human Rights, [Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#) (31 August 2022) as cited in [Decision 23/2023, Office of the Tax Commissioner](#), paragraph 22.

¹⁶ This is known as the 'mosaic theory' in public access to information, which refers to the issue that disclosure of seemingly insignificant information, when combined with information in the public domain or obtained through other PATI requests, will actually cause harm.

Conclusion

67. The Information Commissioner is not satisfied that the Department was justified in relying on section 34(1)(c) to withhold records 12, 14, 24, 33, 37, 38, 40 and 43 or certain parts of records 1, 2, 4, 6, 7, 9-11, 18, 21-23, 25-29, 35, 36, 41, 42, 45 and 46.

Personal information – section 23

68. Under section 23(1) of the PATI Act, public authorities may deny public access to records or parts of records which consist of personal information. Section 24(1) broadly defines ‘personal information’ as information recorded in any form about an identifiable individual.
69. Certain information about identifiable individuals is excluded from the definition of ‘personal information’ in the PATI Act, in accordance with section 24(2). For example, section 24(2) excludes certain information about contractors performing services for a public authority, or information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority.
70. The exemption in section 23(1) also does not apply to the limited circumstances set out in subsection (2). It does not apply, for example, if “the information that was given to the public authority concerned by the individual to whom it relates and the individual was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public” (see subsection (2)(d)).
71. The personal information exemption is subject to the public interest test. Records which are found to be exempt under section 23(1) would still have to be disclosed, if the public interest would, on balance, be better served by disclosure instead of non-disclosure. In considering the public interest test for disclosure of personal information, the following factors have to be taken into consideration¹⁷:
- a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations.
 - b. Whether disclosure would be fair to the individual under all of the circumstances. Evaluating the fairness of any disclosure may include consideration of the following:
 - i. Whether sensitive personal information was involved?

¹⁷ See [Decision 02/2019](#), [Office of the Governor](#), at paragraph 51.

- ii. What would be the consequences upon the individual of disclosure?
 - iii. What are the reasonable expectations of privacy of a person in the individual's position?
 - c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.
72. In sum, as the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), public authorities must consider the following questions before denying public access to records under the personal information exemption¹⁸:
- [1] Whether the records consists of information about an identifiable individual?
 - [2] Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?
 - [3] Whether any of the exceptions to the exemption in section 23(2) applies to the records?
 - [4] If the exemption for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure?
73. Given the importance of the protection of personal information and privacy, particularly in a small jurisdiction such as Bermuda, the Information Commissioner may consider the personal information exemption on her own accord, such as in this case.

Third Party's submissions

74. One individual Third Party objected to the disclosure of any information about them in the records and provided specific reasons to the ICO for their objections.

Discussion

75. The Information Commissioner considers the personal information exemption for certain information in records 1, 2, 4, 6, 7, 9-12, 18, 21-29, 33, 35-38, 40-43, 45 and 46.

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

76. The relevant parts of the records identified above consisted of information about individuals who were officers of public authorities and those associated with private

¹⁸ See [Decision 02/2019, Office of the Governor](#), at paragraph 56.

entities like BPMS and InnoFund. The information included their names, employment history and contact details.

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

77. None of the exclusions in section 24(2) applied. While some of the individuals were officers or employees of public authorities, the relevant information did not relate to their positions or functions but, instead, related to the performance of these positions or functions. The Information Commissioner has consistently found that this type of information does not fall within the exclusion in section 24(2)(a). The exclusion in section 24(2)(b) did not apply to the names of the individuals employed by BPMS or InnoFund in the withheld records, because they had not entered into a contract with the Government as individuals.¹⁹

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

78. None of the exceptions applied to the relevant parts of the records identified above. Specifically, the information did not relate to the Applicant and the individuals to whom the information related had not consented in writing to disclosure of their personal information.

[4] If the exemption for personal information in section 23(1) was engaged, whether the balance of the public interest required disclosure?

79. Given the significant impact of the Government's relationship with BPMS on the public purse and the limited information available in public domain, there was a public interest in the public knowing which individuals were involved in the decision-making process around the Government's contract with BPMS. Disclosure of the personal work information of these individuals would further this public interest and the purposes of the PATI Act to promote accountability and transparency around decision making.
80. With respect to the fairness of disclosure to the individuals, executive public officers with outward facing roles and elected politicians who were involved in the high-level discussion around the project would have known that their names, positions and involvement in matters related to their work could be disclosed to the public.
81. The public interest, however, would not have required disclosure of other personal information in the records, including the contact details of these executive public officers,

¹⁹ See, most recently, [Decision 12/2024](#), [Ministry of Health Headquarters](#), at paragraph 115.

and as well as the personal information of individuals in the private sector or public officers who provided assistance and were not involved in the decision-making process. Disclosure of these details would not have been fair, as these individuals would have objectively had a reasonable expectation that their information would not be released without their consent.

Conclusion

82. The personal information exemption in section 23(1) applied to parts of records 1, 2, 4, 6, 7, 9-12, 18, 21-29, 33, 35-38, 40-43, 45 and 46, and the public interest required disclosure of the names and positions of elected officials and executive public officers, but not of other personal information.

Conclusions

83. The Information Commissioner finds that:
- a. the Department was justified in relying on section 29(1) to refuse public access to records 3, 20, 30, 32, 34, 39 and 44 and certain parts of records 1, 2, 4, 6, 7, 9, 10, 11, 16, 18, 21, 22, 23, 25, 26, 27, 28, 29, 35, 36, 41, 42, 45 and 46;
 - b. the Department was not justified in relying on sections 29(1) and 34(1)(c) to refuse public access to records 12, 14, 24, 32, 33, 37, 38, 40 and 43 as well as certain parts of records 1, 2, 4, 6, 7, 9, 10, 11, 18, 21, 22, 23, 25, 26, 27, 28, 29, 35, 36, 41, 42, 45 and 46; and
 - c. certain other parts of records 1, 2, 4, 6, 7, 9, 10, 11, 12, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 35, 36, 37, 38, 40, 41, 42, 43, 45 and 46 were exempt under section 23(1). Save for the names and positions of elected officials and executive public officers, disclosure of the personal information in these records was not in the public interest.

Decision

The Information Commissioner finds that the Information and Digital Technologies Department (**Department**) was justified in relying on section 29(1) to deny public access to records 3, 20, 30, 32, 34, 39 and 44 and certain parts of records 1, 2, 4, 6, 7, 9, 10, 11, 16, 18, 21-23, 25-29, 35, 36, 41, 42, 45 and 46. But the Department was not justified in relying on sections 29(1) and 34(1)(c) to deny public access to the rest of the records or parts of records. On her own accord, the Information Commissioner finds that parts of records 1, 2, 4, 6, 7, 9-12, 18, 21-29, 33, 35-38, 40-43, 45 and 46 were exempt under section 23(1), though the public interest required disclosure of certain personal information in the records.

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

- upholds the Department's reliance on section 29(1) for records 3, 20, 30, 32, 34, 39 and 44 and for certain parts of records 1, 2, 4, 6, 7, 9, 10, 11, 16, 18, 21, 22, 23, 25, 26, 27, 28, 29, 35, 36, 41, 42, 45 and 46;
- reverses the Department's decision to deny public access by relying on sections 29(1) and 34(1)(c) for records 12, 14, 24, 33, 37, 38, 40 and 43 and for certain parts of records 1, 2, 4, 6, 7, 9, 10, 11, 18, 21, 22, 23, 25, 26, 27, 28, 29, 35, 36, 41, 42, 45 and 46;
- varies the Department's decision to deny public access to parts of records 1, 2, 4, 6, 7, 9, 10, 11, 12, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 35, 36, 37, 38, 40, 41, 42, 43, 45 and 46 by virtue of section 23(1); and
- orders the Department to disclose record 14 in full and parts of records 1, 2, 4, 6, 7, 9, 10, 11, 12, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 35, 36, 37, 38, 40, 41, 42, 43, 45 and 46, with exempt and non-responsive information removed, as directed by this Decision Notice and the accompanying Confidential Annex and Order, which form part of this Decision, on or before **Friday, 17 January 2025**.

Judicial Review

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

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Information and Digital Technologies Department 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
29 November 2024

Appendix I: Relevant statutory provisions

Public Access to Information Act 2010

Public interest test

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

Personal information

- 23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.
- ...
- (6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
- ...

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

Law enforcement

- 34 (1) Subject to subsection (2), a record is exempt if its disclosure would, or could reasonably be expected to—
- ...
- (c) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- ...

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