

Decision Notice

Decision 02/2025 Economic Development Department

Records on BPMS, InnoFund, i3 and Fastpass

Reference no: 2024002

Decision date: 4 February 2025

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Economic Development Department (**Department**) for its correspondence with BPMS Ltd, InnoFund Ltd and the InnoFund Innovation Incubator, as well as the memorandum and agreements the Department entered into with these companies. The Department decided that the records were exempt under section 34(1)(c) (prejudice to fair trial or impartial adjudication). In its internal review decision, the Department also invoked section 16(1)(c) to administratively deny the request on the basis that processing the records would cause a substantial and unreasonable interference with or disruption of the Department's other work. During this review, the Department abandoned its reliance on section 16(1)(c) and invoked section 4(1)(b)(vi) (application) and additional exemptions, including section 25(1)(d) (prejudice to negotiations), to refuse access to the records. Two Third Parties objected to the disclosure of their information in some of the records under sections 23(1) (personal information), 25(1)(c) (adverse effect to commercial interest), 25(1)(d) and 26(1)(b) (breach of confidence).

The Information Commissioner has found that some records at issue did not come within the application of the PATI Act by virtue of section 4(1)(b)(vi). The Information Commissioner has further found that the Department was justified in relying on section 25(1)(d) of the PATI Act to refuse access to the remaining records. The Information Commissioner has varied in part and upheld in part the Department's internal review decision.

The Information Commissioner does not require the Department to take any further action with respect to this Decision.

Relevant statutory provisions

Public Access to Information Act 2010: section 4 (application), section 25(1)(d) (prejudice to negotiations).

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

Background

1. As discussed in more detail in the related [Decision 33/2024](#), [Information and Digital Technologies Department](#), and [Decision 34/2024](#), [Ministry of Health Headquarters](#), the Government of Bermuda (**Government**) initiated a private-public partnership in 2021

with InnoFund Ltd (**InnoFund**) to enable the Government to digitalise some of its services and to attract and support starts-up on island.

2. On 16 December 2022, the Applicant made a public access to information (**PATI**) request to the Department for:
 - a. All correspondence from 2019 to the present to and from individuals involved with the Department, including, but not limited to the Director, that related to BPMS, InnoFund and the i3, along with the Fastpass port of entry system. The request for correspondence included, but was not limited to, emails, faxes, WhatsApp messages, letters, minutes of meetings (in person or virtual) and telephone calls.
 - b. Any documents, such as memoranda of understanding (**MOUs**), agreements, etc., as they related to BPMS, InnoFund and the i3, as well as the Fastpass port of entry system.
3. The Applicant expressly stated that “If this request is too wide or unclear, please don’t hesitate to contact me and we can discuss ways to amend the request appropriately”.
4. On 27 January 2023, the Department extended the deadline to respond to the PATI request to 10 March 2023. The Department also informed the Applicant that the records it had identified so far were exempt under section 34(1)(c) (prejudice to fair trial and impartial adjudication). The Applicant responded by asking for an internal review on 29 January 2023 and stated that they awaited further correspondence from the Department on or before 10 March 2023.
5. On 6 March 2023, the Department informed the Applicant that the search at that time yielded over 5,500 records. The Department and the Applicant appeared to have had a telephone conversation on 10 March 2023 to discuss possibilities on the narrowing of the request. But, based on the Applicant’s submissions to the Information Commissioner’s Office (**ICO**), no agreement was reached on how the request could be narrowed.
6. On 10 March 2023, the Department issued an initial decision, which reiterated that the records that had been identified and reviewed at that point were exempt under section 34(1)(c). The initial decision explained that the reliance on this exemption was due to an ongoing legal proceeding, which BPMS, InnoFund and the i3 had initiated against the Government. The initial decision also informed the Applicant that, because the records retrieved at that point amounted to over 11,000 records, full processing of the PATI request would cause a substantial and unreasonable interference with or

disruption of the Department's other work. The request was thus also administratively denied under section 16(1)(c) of the PATI Act.

7. On 23 March 2023, the Applicant asked for an internal review of the Department's initial decision that was issued on 10 March 2023. The Department's response to the Applicant's internal review request of 29 January 2023 was still outstanding at that point.
8. Shortly after the Applicant's 23 March 2023 internal review request, the Department informed the Applicant that it had issued an internal review decision on 22 March 2023 via regular mail. It also provided the Applicant with a copy of the internal review decision, which upheld the initial decision's reliance on sections 16(1)(c) and 34(1)(c) to deny the PATI request.
9. On 20 April 2023, the Applicant asked for an independent review by the Information Commissioner, challenging the Department's reliance on sections 16(1)(c) and 34(1)(c).

Investigation

10. The ICO accepted the application as valid on 11 May 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. The ICO also confirmed the issue the Applicant wanted the Information Commissioner to review. When confirming the issues on review, the Applicant flagged that the Department had not responded to their request for an internal review made on 23 March 2023.
11. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application because submissions from the public authority were required to justify its reliance on the administrative denial and the exemption.
12. The ICO notified the Department of the valid application on 8 June 2023 but because of the Department's reliance on section 16(1)(c), did not ask for copies of the responsive records. The ICO asked for a schedule of the records instead, if one had been prepared. On 21 July 2023, the Department submitted a schedule of records.
13. On 25 July 2023, the Department clarified that its internal review decision on 22 March 2023 was issued in response to both the Applicant's request of 29 January 2023 and 23 March 2023 for an internal review, as it related to the same PATI request.
14. Because the record schedule submitted by the Department did suggest that the records located were voluminous, the ICO invited the Applicant to narrow the scope of their challenge to the Department's internal review decision. During communications with the

ICO in January 2024, the Applicant confirmed that they would narrow their challenge to the Department's decision to refuse access to:

- a. any MOUs or agreements that related to BPMS, InnoFund, or the i3;
 - b. the Department's correspondence with BPMS, InnoFund or the i3, particularly those which explained the breakdown of relationships between the parties; and
 - c. any records which showed the Premier's support for the project.
15. As a result, the Applicant was no longer challenging the Department's decision to refuse access to (a) any records which explained the Fastpass port of entry system; (b) the Department's internal correspondence or its correspondence with other public authorities on the topic (save for any records identified for paragraph 14(c) above); and (c) any records on BPMS's or InnoFund's financial information (including their financial statements, balance sheets, profit and loss statements, vendor list and account payables).
16. On 24 January 2024, the Department was informed of the narrowed scope of the Applicant's challenge to the internal review decision. As part of the effort to remove the administrative burden of processing the request, on 15 February 2024, the ICO obtained a copy of the emails which the Department had retrieved from the @gov.bm emails of its Director and one of its staff. The search was limited to these two individuals' emails, as they were the main individuals within the Department who had communicated with BPMS, InnoFund and the i3. The narrowed search resulted in the identification of 174 responsive records, which included various MOUs and agreements related to BPMS, InnoFund or the i3 as well as the correspondence between the Department and the three entities. No records showing the Premier's support for the Fastpass port of entry system were identified. The records considered in this review are therefore records 1-72, 74-106, 108-117, 119, 120, 122-135, 137-148, 151-160, 162-169, 173-177, 180, 181 and 183-187.
17. As required by section 47(4) of the PATI Act, the parties were invited to make representations to the Information Commissioner. Both the Applicant and the Department provided formal submissions. In its submissions, the Department invoked a number of new exemptions, including sections 4(1)(b)(vi) (application of the Act) and 25(1)(d) (prejudice to negotiations). Seven Third Parties were also invited to make submissions. Only two Third Parties made submissions to object to disclosure of their information in some of the records. Clarien Bank objected based on the exemptions in sections 25(1)(c) (adverse effect on commercial interests), 25(1)(d) and 26(1)(b) (breach

of confidence). An individual Third Party objected based on the personal information exemption in section 23.

Information Commissioner's analysis and findings

18. 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.
19. 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 public analysis below cannot be as detailed as would otherwise be preferred.

Application – section 4(1)(b)(vi)

20. Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#), paragraph 18, that the “PATI Act excludes from its operation the records of a substantial number of public bodies to which the Legislature has decided that it shall not apply so long as such records do not relate to the general administration of the relevant body”. Among these are records that were obtained or created by the Attorney General's Chambers (**AG's Chambers**) in the course of carrying out its functions, as set out in section 4(1)(b)(vi) of the PATI Act.
21. The provision in section 4(1)(b)(vi) does not mean that the public does not have the right to ask for records obtained or created by the AG's Chambers. The public can make a PATI request for those records, and public authorities must respond to their requests in accordance with the provisions of the PATI Act.¹ A public authority is justified to deny public access to those records if it can show that the records fall under the category prescribed in section 4(1)(b)(vi).
22. Section 4(2) provides that records relating to the general administration of the AG's Chambers continue to fall within the scope of the PATI Act. In interpreting the scope of section 4(2), Justice Subair Williams in [Attorney General v Information Commissioner](#),

¹ Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ, at paragraph 75: “I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act...they cannot be treated as so excluded. Accordingly, [the PATI requester] was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the [Head of Authority] in respect of the records which she sought, and the Commissioner was entitled to commence a review of the matter” under section 47.

paragraph 40, adopted the definition of ‘general administration’ set out by the Irish Information Commissioner, i.e. records relating to personnel, pay matters, recruitment, accounts, information, technology, accommodation, internal organisation, office procedures and the like.²

23. To determine whether a record falls outside the scope of the PATI Act by virtue of section 4(1)(b)(vi), the following must be considered:

[1] Is the record obtained or created by the AG’s Chambers?

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

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

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

Public authority’s submissions

25. The Department explained its understanding that records 11-13, 27, 34, 37, 48, 128, 129, and 176 as well as parts of records 130, 165 and 180, were provided to the AG’s Chambers before the PATI request was made. Further, the records were provided in the course of the AG’s Chambers functions as the Government’s legal advisor.

Applicant’s submissions

26. The Applicant did not make submissions specifically on section 4.

Discussion

27. Section 4(1)(b)(vi) is considered for records 11-13, 27, 34, 37, 38, 48, 128, 129 and 176 as well as parts of records 130, 165 and 180.

² Although the Court of Appeal overturned Justice Subair Williams’s ruling regarding the Information Commissioner’s power to examine records that public authorities claim to fall outside the scope of the PATI Act under section 4(1), the Court of Appeal did not disturb Justice Subair Williams’s findings on the meaning of records relating to general administration and their distinction with records related to the functions of those public authorities, bodies and persons listed in section 4. In [Decision 02/2019, Office of the Governor](#), paragraph 20, the Information Commissioner adopted this definition of ‘general administration’ as applied by the Irish Information Commissioner.

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

28. Having carefully reviewed the withheld records listed above in paragraph 27, along with related records documenting who received them, the Information Commissioner is satisfied that records 11-13, 27, 34, 37, 38, 48, 128, 129 and 176 as well as parts of records 130, 165 and 180 were obtained by the AG's Chambers before the PATI request was made on 16 December 2022.

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

29. The records were obtained by the AG's Chambers in the course of carrying out its functions as the Government's legal advisor. Specifically, these records or parts of records were provided to the AG's Chambers in relation to seeking legal advice on various matters relating to BPMS, InnoFund and the i3.

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

30. None of the relevant records or parts of records related to the AG's Chambers' general administration. They related to the AG's Chambers' performance of its core functions as opposed to, for example, its personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures or the like.

Conclusion

31. The Information Commissioner is satisfied that the PATI Act did not apply to records 11-13, 27, 34, 37, 38, 48, 128, 129 and 176 as well as parts of records 130, 165 and 180 because they were obtained by the AG's Chambers in the course of carrying out its functions as the Government's legal advisor.

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

32. 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. This exemption is subject to exceptions in section 25(2), which set out circumstances when the exemption cannot apply, including where the person to whom the information relates consents in writing to its disclosure.
33. The exemption in section 25(1)(d) generally applies to ongoing negotiations. If the negotiations are finished, the responsive records should be disclosed unless there is a real and significant risk to identifiable future negotiations.

34. 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.
35. 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.
36. In sum, when applying the exemption in section 25(1)(d), a public authority must ask:
- [1] Do any of the exceptions in section 25(2) apply?
 - [2] Who is the person to whom the information relates?
 - [3] What are the negotiations of this person that are of concern?
 - [4] What is the specific prejudice to either the conduct or outcome of the negotiations 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?
37. 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 its reliance on section 25(1)(d) to deny access to the records.

Public authority's submissions

38. The Department provided a detailed explanation of the relevant negotiations, which were ongoing at the time of the internal review request and this review. It also described the specific forms of prejudice to the negotiations that could reasonably be expected to occur if the records were disclosed. The Department argued, and the Information Commissioner accepts, that a more detailed discussion of the Department's submissions is not possible without the risk of causing the very harm the exemption is intended to prevent.

39. With respect to the public interest test, the Department weighed whether the public interest would, on balance, be better served by the disclosure of the requested records than by nondisclosure. The Department also considered the ICO's guidance on the public interest test.
40. The Department accepted that there is a public interest in the promotion of greater public understanding of the Government's processes or decisions related to BPMS, InnoFund and the i3. The Department argued, though, that disclosure of these records was not in the public interest. The Department provided a fulsome explanation of its position. Again, the Information Commissioner accepts that a more detailed discussion of the Department's submissions on the public interest is not possible without the risk of causing the relevant prejudice.

Applicant's submissions

41. The Applicant submitted that disclosure of the records would have been in the public interest. They explained that the organisations referred to in the PATI request had an agreement with the Government to the point that the Government guaranteed a \$2.5 million loan on behalf of InnoFund, which was later repaid by the Government. The Applicant highlighted that the dispute with the Government led to the suspension of operations at the i3, which was designed to help young businesses flourish. The Applicant believed this was arguably a welcome boost to Bermuda's offerings and economic activity. The Applicant submitted that, given the \$2.5 million guarantee being repaid and the loss of an incubator for start-ups, the public interest for disclosure had been met.
42. The Applicant submitted the writ for Civil Jurisdiction 2022: No. 381, the civil proceeding which was brought by BPMS, InnoFund and the i3 against the Government as a result of the dispute and, in a related review, provided a link to an [article](#) in the Royal Gazette.

Clarien Bank's submissions

43. Clarien Bank relied on the exemption in section 25(1)(d) to object to the disclosure of its information in records or parts of records 17, 37, 38, 125, 130, 132, 133, 135, 137, 155, 156 and 165, but did not elaborate further.

Discussion

44. The Department's reliance on section 25(1)(d) is considered for all of the remaining records, which did not fall under section 4(1)(b)(vi) above. Clarien Bank's reliance on the

exemption to object to the disclosure of its information in records 17, 125, 130, 132, 133, 135, 137, 155, 156 and 165 is also considered.³

45. As a preliminary matter, the Department's submissions in this review are, in substance, the same as the Ministry of Finance Headquarters' submissions in Decision 01/2025, Ministry of Finance Headquarters. The specific records at issue in the two reviews are different, though. As explained above, in paragraphs 14-16, as a result of the Applicant's narrowing of the records at issue, the remaining records all related to the breakdown in the relationship between the parties.

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

46. Having carefully reviewed the records and parties' submissions, none of the exceptions in section 25(2) applied.

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

47. The records contained information relating to multiple persons, but mostly to the Government, BPMS, InnoFund and Clarien Bank.

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

48. The Department identified with specificity the relevant negotiations, which were ongoing at the time of the internal review and at the time of the Department's submissions to the ICO in this review.
49. In contrast, Clarien Bank did not identify the relevant negotiations that related to it, nor were any ongoing negotiations clear on the face of the records. In the absence of any explanation from Clarien Bank, its reliance on section 25(1)(d) to object to the disclosure of its information in certain parts of records 17, 125, 130, 132, 133, 135, 137, 155, 156 and 165 that related to it is not considered further.

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

50. The Information Commissioner accepts the Department's detailed explanation of the specific prejudice to the conduct or outcome of the negotiations that would have been prejudiced by the disclosure of the records under review.

³ Clarien Bank also relied on section 25(1)(d) to object to the disclosure of information in records 37 and 38, however, as the Information Commissioner has found that the PATI Act did not apply to these records under section 4(1)(b)(vi) above, they are not considered here.

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

51. Having carefully reviewed the Department's submissions and the withheld records, the remaining records under consideration directly related to the issues in the negotiations and their disclosure could have prejudiced the conduct or outcome of the negotiations between the relevant parties as described in detail by the Department.

[6] Could it be demonstrated that the prejudice could reasonably have been expected to occur under the circumstances?

52. Based on the Department's submissions concerning the nature and circumstances of the negotiations and the prejudice that disclosure could cause, the Information Commissioner is satisfied that the harm could reasonably have been expected to occur and was not speculative.

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

53. The Information Commissioner agrees with the Applicant that there was a strong public interest in greater transparency and accountability for the Government's decision making related to its dealings with BPMS, InnoFund and the i3. Even the Department accepted that disclosure would further the public's understanding of the Government's decision-making process. Despite the significant amount of public funds involved and the impact upon local businesses, the Government has not explained to the public why this situation occurred.
54. Under the circumstances of this PATI request, though, there was also a strong public interest in benefiting from successful negotiations that may mitigate the negative impact of a conflict, and which ultimately may impact the cost to the public. As dissatisfying as the outcome may be, at the time of the PATI request and internal review decision, the balance of the public interest favoured nondisclosure for these reasons.
55. The Information Commissioner notes, however, that this public interest analysis is time-bound. A future PATI request may continue to seek greater transparency about the Government's decision making and the circumstances surrounding the breakdown in the business relationship between the Government on the one hand and BPMS, InnoFund and the i3 on the other. If the Government is not forthcoming about this situation in the future, the balance of the public interest may very well shift in favour of disclosing records that further accountability and transparency, consistent with the purposes in section 2 of the PATI Act.

Conclusion

56. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 25(1)(d) to refuse access to the remaining records.

Conclusion

57. The Information Commissioner finds that the PATI Act did not apply to records 11-13, 27, 34, 37, 38, 48, 128, 129 and 176 as well as parts of records 130, 165 and 180 by virtue of section 4(1)(b)(vi) because they were obtained by the AG's Chambers in the course of carrying out its functions as the Government's legal advisor.
58. The Information Commissioner further finds that the Department was justified in relying on section 25(1)(d) to deny access to the remaining records or parts of records.

Decision

The Information Commissioner finds that some records at issue did not come within the application of the Public Access to Information (**PATI**) Act 2010 by virtue of section 4(1)(b)(vi). The Information Commissioner further finds that the Economic Development Department (**Department**) was justified in relying on section 25(1)(d) of the PATI Act to refuse access to the remaining records.

In accordance with section 48 of the PATI Act, the Information Commissioner has varied the Department's internal review decision to:

- deny public access to records 11-13, 27, 34, 37, 38, 48, 128, 129 and 176 as well as parts of records 130, 165 and 180 because they did not come within the PATI Act by virtue of section 4(1)(b)(vi); and
- deny public access to the remaining records or parts of records under section 25(1)(d).

The Information Commissioner does not require the Department to take any further action in relation to this PATI request.

Judicial Review

The Applicant, the Economic Development Department, 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.

Gitanjali S. Gutierrez
Information Commissioner
4 February 2025

Appendix I: Relevant statutory provisions

Public Access to Information Act 2010

Application

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

Commercial information

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

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