

Decision Notice

Decision 03/2025: Regulatory Authority of Bermuda

Records related to BELCO's North Power Station

Reference no: 2021038

Decision date: 5 February 2025

Summary

The Applicant had made a request under the Public Access to Information (**PATI**) Act 2010 to the Regulatory Authority of Bermuda (**RA**) for records related to the Bermuda Electric Light Company's North Power Station. In its original decision, the RA disclosed some records and refused access to all other records under sections 25 (commercial information), 26 (information received in confidence) and 29 (deliberations of public authorities) of the PATI Act. During this review, the RA asserted a late reliance on sections 30 (operations of public authorities) and 37 (prohibition on disclosure) to withhold some records. Three third parties also objected to public disclosure of certain records related to them, citing sections 25 and 26. The RA further denied other parts of the PATI request under section 16(1)(a) where it found that no responsive records existed.

In this Decision, the Information Commissioner has found that the RA conducted a reasonable search for records responsive to items 4-8 of the PATI request before relying on the administrative denial in section 16(1)(a) because records (or more records) did not exist. During this review, the Information Commissioner was satisfied that the RA had remedied deficiencies with parts of its original search, finding that a reasonable search was conducted for items 2 and 3 of the PATI request. In contrast, the Information Commissioner has found that the RA did not conduct a reasonable search for item 1 of the PATI request.

Further, the Information Commissioner has found that the RA was justified in relying on sections 25(1)(b), 25(1)(c), 29(1) and 37(1) to refuse access to some records in whole or in part, but the RA was not justified in relying on any exemption cited for the remaining records or parts of records. Finally, on her own accord, the Information Commissioner has found that certain personal information was exempt from disclosure under section 23(1) of the PATI Act, except for the names and positions of certain executive public officers where the balance of the public interests required disclosure.

The Information Commissioner has ordered the RA to conduct a reasonable search for item 1 of the PATI request; to issue a new initial decision on item 1 and on certain records that were newly located during this review; and to disclose parts of records 18, 20, 21 and 23-42, with exempt information removed, as directed by this Decision Notice and the accompanying Confidential Annex and Order, which form part of this Decision, on or before **Wednesday, 19 March 2025**.

Relevant statutory provisions

Public Access to Information Act 2010: section 16(1)(a) (record does not exist or cannot be found); section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 25 (commercial information); section 26 (information given in confidence); section 29 (deliberations of public authorities); section 30 (operations of public authorities); section 37 (disclosure prohibited by other legislation).

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

Regulatory Authority Act 2011: section 33 (confidentiality); section 34 (unauthorised disclosure of confidential information); section 106 (disclosure of confidential information by the Regulatory Authority).

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

Background

1. This review arises from the lengthy history leading up to the decision by the Bermuda Electric Light Company Limited (**BELCO**) to optimise the North Power Station (**NPS**) for liquified natural gas (**LNG**),¹ which was completed in April 2020, and the role of the Regulatory Authority of Bermuda (**RA**) in this process.

Regulation of electricity and BELCO

2. The RA was established by the Regulatory Authority Act 2011 (**RAA**) for the purposes of establishing “an independent and accountable regulatory authority...in the public interest to protect the rights of consumers, encourage the deployment of innovative and affordable services, promote sustainable competition, foster investment, promote Bermudian ownership and employment and enhance Bermuda’s position in the global market”.

¹ See the statement of the President of BELCO in the Royal Gazette’s article, ‘[We apologise and will do better](#)’, dated 26 July 2022, which explained that the intention for the NPS was to use natural gas as a fuel and that the NPS engines were being retrofitted to optimise for a different fuel type. See also the Royal Gazette’s article, ‘[Bear with us as we approach optimal NPS efficiency—we are getting there](#)’, on 13 August 2022, where the President of BELCO stated that the NPS “was developed to operate on natural gas as the primary fuel source”.

3. On 28 October 2016, the Electricity Act 2016 (**EA**) came into force and established an electricity sector regulatory framework within the meaning of the RAA.² The EA replaced the Energy Act 2009 and transferred responsibility for electricity regulation from the Energy Commission to the RA. Under the EA and the RAA, the RA's function is to supervise, monitor and regulate the electricity sector in accordance with the purposes of the EA.³ The RA may also be guided by Ministerial declarations, establishing policies for the electricity sector and Ministerial directions, issued to the RA regarding any matter within the Minister's authority with regard to the electricity sector.⁴ The RA's specific powers and functions are set out in the EA and the RAA and include licensing the generation of electricity; licensing the transmission, distribution and retail sale (**TD&R**) of electricity; managing and reviewing the Integrated Resource Plan (**IRP**)⁵ process, including public consultations; setting the electricity retail rates; and setting and monitoring service standards to ensure the adequacy, reliability and quality of electricity services.
4. Prior to 1994, BELCO was Bermuda's sole producer and distributor of electricity, and all the energy produced by BELCO came from the importation and combustion of petroleum products (diesel and fuel oil). Although other smaller producers and distributors of electricity have developed,⁶ BELCO remains the primary producer and distributor of electricity. BELCO holds a [Bulk Generation Licence](#) and a [TD&R Licence](#) in its capacity as owner and operator of the transmission and distribution system in Bermuda.⁷
5. The Clean Air Act 1991 (**CAA**) established the Environmental Authority, a statutory board, responsible for performing the functions assigned to it by the CAA. Under the CAA, the

² The EA put in place the desired structure of the electricity sector set out in '[The National Electricity Sector Policy of Bermuda](#)' published by the Ministry of Economic Development in May 2015.

³ The purposes of the EA, set out in section 6 of the EA, include "to ensure the adequacy, safety, sustainability and reliability of electricity supply in Bermuda so that Bermuda continues to be well positioned to compete in the international business and global tourism markets", "to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources", "to provide sectoral participants and end-users with non-discriminatory interconnection to transmission and distribution systems", "to protect the interests of end-users with respect to prices and affordability, and the adequacy, reliability and quality of electricity service" and "to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity".

⁴ The Minister of Home Affairs is the Minister responsible for electricity.

⁵ The IRP is a strategic blueprint outlining Bermuda's long-term energy future.

⁶ For example, residential and commercial users of solar panels have also produced electricity, with some residential consumers still connected to the BELCO grid.

⁷ These Licences were granted by the RA on 27 October 2017.

operation of a ‘controlled plant’ requires an operating licence granted by the Environmental Authority under the CAA. ‘Controlled plant’ is defined in the First Schedule to the CAA as including “a facility which generates electricity or steam”. BELCO has an Operating Licence (OL-114) under the CAA, which must be renewed annually.⁸

BELCO’s first proposed North Power Station project

6. In 2010, BELCO first put forward plans for its NPS project, which was intended to improve its transmission and distribution, and to replace underwater cables and ageing equipment in several substations. Part of the NPS project included the design and construction of three new diesel generating units to replace engines that were scheduled for retirement in 2013 as well as all ‘E engines’ scheduled for retirement in 2017.
7. A competitive tendering exercise was completed by BELCO between 2011 and 2012. The contract was awarded to Burmeister & Wain Scandinavian Contractor A/S (**BWSC**) and Man Diesel & Turbo SE (**MDT**) (together, **BWSC-MDT**). Planning and environmental approval for the NPS project was granted in 2011/2012.⁹
8. In October 2011, BELCO submitted a base rate tariff¹⁰ filing to the Energy Commission seeking to increase its base rates for the following three years to fund the NPS project.¹¹ In February 2012, the Energy Commission rejected BELCO’s request to raise base electricity rates, and the then-Minister of Environment rejected BELCO’s appeal in May 2012.¹² The project did not move forward at the time.

BELCO’s Replacement Generation Proposal

9. In June 2017, Ricardo Energy and Environment (**Ricardo**) published a [Generation Asset Lifecycle Review Report](#) on BELCO’s generation assets.¹³ At the time, there were 17 operational generation units: four D engines (D3, D8, D10 and D14), operating on light

⁸ As a condition of its Operating Licence, BELCO conducts their own ambient air monitoring programme and is required to submit quarterly reports to the Environmental Authority.

⁹ The original approval was granted under [Plan Number: P0074/11](#) and a revision to that original approval was granted in 2018 under [Plan Number: P0093/18](#).

¹⁰ A tariff is a tax or duty to be paid on goods or services. In this context, the ‘tariff’ refers to the rate customers are charged by BELCO for electricity. Under the current legislative framework, the RA is responsible for setting the rates/tariffs in accordance with the EA and its Retail Tariff Methodology.

¹¹ See [BELCO’s notice and application to the Energy Commission](#) dated 26 October 2011.

¹² See the [Minister’s response to BELCO’s appeal](#) dated 9 May 2012.

¹³ This report was prepared by Ricardo on behalf of the RA as part of a review into the condition of the existing electricity generation assets at BELCO’s power plants at the time.

fuel oil (**LFO**); eight E engines (E1-E8), operating primarily on heavy fuel oil (**HFO**); and five gas turbines, operating on LFO (including GT4). Ricardo noted that seven of the engines were more than 30 years old and a further two units were older than 20 years old and had been unreliable. On 8 November 2017, BELCO notified the RA of its intention to decommission certain of BELCO's generation assets on 31 December 2018 (GT4) and on 31 March 2020 (E1-E4, D3, D8, D10 and D14).

10. To ensure the supply of electricity, on 22 December 2017, BELCO submitted to the RA a proposal for the replacement of these generation facilities pursuant to Condition 20 of its Bulk Generation Licence (**Replacement Generation Proposal**). BELCO requested to replace 80 megawatts (MW) of generating assets with four new dual-fuel engines (the NPS) and a new utility scale battery energy storage system (**BESS**) (NPS and BESS together, the **Replacement Generation**). BELCO requested to include such Replacement Generation in the base rate for recovery through future retail tariffs. The proposed cost for the Replacement Generation was approximately \$120 million.¹⁴
11. Condition 20 of BELCO's Bulk Generation Licence provides that BELCO shall not replace any generation facilities without the RA's prior written consent and that such replacement must be consistent with the governing IRP. The RA also had to approve BELCO's request to include the Replacement Generation costs in the base rate for recovery through future retail tariffs, i.e. to allow BELCO to charge consumers to recoup the costs of the Replacement Generation.
12. At the time that BELCO submitted its Replacement Generation Proposal, the IRP had not been published. The IRP process is mandated by the EA. When the EA came into force, section 40 provided that, within two years of the EA's commencement (i.e. by 28 October 2018), the RA must have issued a notice requesting an IRP proposal from BELCO.¹⁵ Section 40 set out the public consultation process and review process by BELCO. It provided that, following consultation by the RA, the TD&R Licensee shall prepare a final draft IRP that took into consideration public comments and proposals and implemented comments of the RA, if any. The RA might approve the IRP if, acting in accordance with regulatory principles and any administrative determinations, it considered that the final

¹⁴ See Bermuda Stock Exchange Regulatory News Filing, '[Ascendant Group Limited announces nine month results](#)', 2 November 2018, which stated the approximate cost as \$120 million. See also the Royal Gazette's article, '[BELCO signs deal to fund new power station](#)', on 21 June 2018, which stated that BELCO had obtained financing of \$107.5 million for the NPS (excluding the cost for the BESS).

¹⁵ Under the EA, BELCO, as the sole TD&R licensee, was mandated to submit a proposal outlining the expected energy demand and a procurement plan to meet it.

draft IRP was the best approach to meeting the EA's purposes and complying with Ministerial directions (and shall publish the approved IRP on its website).

13. The RA issued a notice requesting an IRP proposal from BELCO on 17 November 2017. BELCO submitted its [2018 IRP Proposal](#) on 15 February 2018.
14. On 19 February 2018, the then-Chief Executive of the RA resigned.¹⁶
15. The RA issued its [BELCO Generation Proposal Approval Order](#) approving the Replacement Generation Proposal on 6 March 2018 (**Approval Order**), while the consultation regarding the IRP was ongoing. The Approval Order stated that "recovery of the costs in connection with the Replacement Generation shall be in accordance with the retail tariff methodology set pursuant to section 35 of the EA." On 23 May 2018, the RA issued its [BELCO Generation Proposal Approval Clarifying Order \(Clarifying Order\)](#), explaining that the RA would continue to monitor the implementation of the Replacement Generation Proposal and require BELCO to maintain its licence obligations and provide information and documentary evidence. The approved IRP was published on 30 June 2019.
16. The BESS project was completed on 20 May 2019¹⁷ and the NPS project was completed on 31 March 2020.¹⁸

Environmental concerns

17. In June 2020, an incident resulted in soot being dispersed in the Berkeley Hill neighbourhood adjacent to the NPS.¹⁹ In response to this incident, BELCO advised that BWSC, the company contracted to build and supply the NPS, had been engaged to carry out testing on emissions from the NPS. "As a result of the incident, BELCO conducted an investigation which revealed that a build-up of residue from the initial commissioning of the engines was emitted through the exhaust stack when one of the engines was restarted following a shut-down for servicing."²⁰ Following this, numerous reports were

¹⁶ See The Royal Gazette, '[Regulatory Authority chief executive steps down](#)', 19 February 2018.

¹⁷ See The Royal Gazette, '[Battery Energy Storage System ribbon cutting](#)', 20 May 2019.

¹⁸ See BELCO's press release, '[BELCO North Power Station officially commissioned at midnight, March 31, 2020](#)', 1 April 2020.

¹⁹ See BELCO's press release, '[BELCO comment on soot emission to RG](#)', 20 June 2020.

²⁰ See BELCO's press release, '[BELCO engages independent advisor to monitor North Power Station emissions](#)', 26 August 2020.

made of soot emissions and other pollution from the NPS, and BELCO engaged in ongoing measures to address and mitigate the issues.

18. In the Environmental Authority’s meeting on 25 May 2021, BELCO explained that “BELCO has been adjusting the cylinder operating pressures to fully optimise the NPS engines for liquid fuels such as heavy fuel oil (HFO), i.e. some engines have been converted from running on natural gas or liquid fuels to liquid fuels only.” BELCO furthered explained that the primary abatement measures would be a change from HFO to LFO, but that this would increase the retail cost of electricity significantly.²¹
19. On 26 July 2022, following another soot emission incident, the President of BELCO issued a statement regarding the “phased approach to increase combustion pressure in order to address the fallout consequences from the NPS”. The statement explained that “Phase 1 involved the installation of shims on the four NPS engines, and this project [was] 100 per cent complete. Phase 2 included the retrofitting of the piston crowns to optimise them for [its] fuel type, with this work completed on all four engines by the end of January.”²² On 18 March 2022, the RA rejected BELCO’s retroactive application to recover \$2.2 million in capital costs from customers for retrofitting piston crowns better suited to burning liquid fuel.²³
20. In August 2022, BELCO’s President—along with BELCO’s Managing Director of Transmission, Distribution and Retail and Managing Director of Bulk Generation—stated on various radio shows that the reason for the emissions was that BELCO had been unable to burn natural gas due to the IRP published in 2019, which did not prefer natural gas as a fuel option. The President added that using HFO instead led to unforeseen challenges at the plant, such as soot fallout and odours reported by nearby residents. The President claimed that, “contrary to the legislative process, the RA published its own version of an IRP that did not select a scenario that included natural gas”.²⁴

²¹ See the [Environmental Authority’s meeting minutes](#) dated 25 May 2021.

²² See the statement of the President of BELCO in the Royal Gazette’s article, ‘[We apologise and will do better](#)’, dated 26 July 2022, which explained that the intention for the NPS was to use natural gas as a fuel and that the NPS engines were being retrofitted to optimise for a different fuel type.

²³ See [Bermuda Electric Light Company Limited v The Regulatory Authority of Bermuda](#) [2024] SC (Bda) 5 Civ (22 February 2024). The Supreme Court dismissed BELCO’s appeal to set aside the RA’s decision regarding the recovery of costs.

²⁴ See The Royal Gazette, ‘[RA accuses Belco of making misleading statements over emissions](#)’, 9 August 2022.

21. On 8 August 2022, the RA accused BELCO of “deliberately misleading the public about emissions from its [NPS]”.²⁵ In its statement, the RA said that, back in 2017, BELCO had said that it had a “dire need” to build the NPS, which would be a dual-fuel plant capable of using oil or LNG. The RA asserted that BELCO had suggested that “oil would be deployed in the first instance and if at some point in the future the country decided to go towards LNG, the plant could then be readily updated to switch to the LNG... Yet, after receiving permission from the RA, BELCO built the NPS to optimise LNG first. It made the decision based on its assumption that the public and the RA would readily accept LNG for energy generation at that time.” The RA explained that, after conducting several public consultations on the IRP proposal, there was little support for LNG.
22. On 16 August 2022, the RA sent a letter encouraging BELCO to retract its allegation that the RA had acted contrary to the legislative process in publishing its own version of the IRP. The RA added that, “as a result, the RA is now considering all legal and regulatory options relating to BELCO’s statements, including, but not limited to, enforcement action, civil proceedings and publishing relevant materials to support its position.”²⁶
23. On 24 August 2022, BELCO made a public clarification stating that it had “submitted a proposal to the Regulatory Authority in 2017 for the construction of the NPS. In the proposal, BELCO said: ‘The NPS will consist of dual-fuel engines that will burn a combination of light fuel oil and heavy fuel oil from the time of first commissioning, as is the case with newer existing engines. The dual-fuel component will enable cost-effective conversion to natural gas should such become available in Bermuda in the future.’ The RA reviewed and approved BELCO’s proposal in its entirety for the approximate \$118 million project to build the NPS and the battery system and no modifications were made to BELCO’s proposal.”²⁷
24. Following this, the RA responded publicly that “The RA has reviewed BELCO’s recent statement concerning the [NPS] approval and [was] satisfied that they have corrected the public record. As a result, the RA consider[ed] the matter closed.”²⁸

²⁵ See the RA’s media release, ‘[RA cautions BELCO about purposely misleading the public](#)’, 8 August 2022.

²⁶ See The Royal Gazette, ‘[Regulator threatens BELCO with legal action as row over emissions intensifies](#)’, 19 August 2022.

²⁷ See Bernews, ‘[BELCO clarifies North Power Station approvals](#)’, 24 August 2022; and The Royal Gazette, ‘[BELCO in climbdown with regulatory over ‘misleading claims’ row](#)’, 25 August 2022.

²⁸ See The Royal Gazette, ‘[BELCO in climbdown with regulatory over ‘misleading claims’ row](#)’, 25 August 2022.

25. On 30 November 2022, the then-Chief Executive of the RA (who had been appointed in January 2019) resigned.

PATI request

26. On 17 January 2023, the Applicant resubmitted²⁹ a public access to information (**PATI**) request to the RA for records related to the RA's approval and oversight of BELCO's NPS as well as records related to the resignation of the former Chief Executive of the RA. The request specifically sought:
- a. All documentation (such as emails, letters, memos, notes, recordings, transcripts and photocopies) about the RA's granting of licence approval for BELCO's NPS, including of any discussions that might have been held in relation to approval being given prior to the official publication of the island's first IRP (**item 1**).
 - b. All documentation about BELCO's decision to optimise its NPS for LNG against the instruction of the IRP, including:
 - i. the date the RA learned of this undertaking,
 - ii. how the RA learned of it and any measures undertaken by the RA in response to the company's actions, such as an investigation, resolution or enforcement,
 - iii. documentation about all measures taken by the RA to ensure such a practice would not be repeated in the future,
 - iv. documentation regarding any entity responsible for conducting inspections of the NPS during its construction, the outcome of those inspections and any actions taken as a result of those outcomes, and
 - v. all information relating to the discovery that the NPS was being optimised for LNG (collectively, **item 2**).

²⁹ The Applicant had made a PATI request to the Regulatory Authority on 29 September 2022, which requested items 1-6. On 7 November 2022, the RA updated the Applicant to inform them that they would have to notify third parties identified in the records as per section 39 of the PATI Act. On 24 November 2022, the RA issued an initial decision granting access to some records and refusing access to the remaining records. On 12 January 2023, the Applicant emailed the RA asking whether they would accept a request for an internal review out of time. The RA replied to the Applicant on 16 January 2023 stating that they were willing to reconsider the PATI request without the need to go through an internal review process under PATI. The RA suggested that they agree the timeline between themselves, and the RA would complete an assessment and disclose further documentation within four weeks, i.e. by 13 February 2023. The Applicant, however, submitted a new PATI request for the same records, plus items 7 and 8, on 17 January 2023. This is the PATI request that has been the subject of this review.

- c. All documents showing how the RA fulfilled its remit to ensure the safety of electricity generation through the NPS by way of any general determinations, orders, directions, decisions, advisory guidelines, investigations or enforcements, including the specification of any breaches by BELCO of its obligations under its licence under the EA since approval of the licence and all actions taken by the RA as a result of any breaches (**item 3**).
 - d. All correspondence related to BELCO's assertion that the RA acted contrary to the legislative process in publishing its own version of an IRP and that the change in fuel source led to "unforeseen challenges" involving pollutants from the plant (**item 4**).
 - e. All documentation related to the RA being accused of providing erroneous information to the public regarding the safety of LNG (**item 5**).
 - f. All documentation related to the resignation of the Chief Executive of the RA in November 2022 (**item 6**).
 - g. All documentation relating to the RA's assertion that BELCO optimised for LNG believing that the public would support it (**item 7**).³⁰
 - h. All relevant material that supported the RA's position that it was "considering all legal and regulatory options relating to BELCO's [misleading] statements, including, but not limited to, enforcement action, civil proceedings and publishing relevant materials to support its position" and documentation related to said enforcement action and civil proceedings (**item 8**).
27. In accordance with section 39 of the PATI Act 2010, on 27 January 2023, the RA notified third parties who had given information that was responsive to the request to the RA. This included BELCO, Ricardo,³¹ Oxera,³² the RA's legal counsel, and the former Chief Executive. As these third parties had already been notified of the Applicant's original PATI request dated 29 September 2022, the RA resent the notification regarding the same records.

³⁰ The Applicant quoted a [Royal Gazette article](#) dated 9 August 2022, which read that "[BELCO] made the decision based on its assumption that the public and the RA would readily accept liquefied natural gas for energy generation at that time."

³¹ Ricardo is an international strategic environmental and engineering consultancy firm, with an expertise that includes the energy sector. See [ricardo.com](https://www.ricardo.com).

³² Oxera is an international economic and finance consultancy firm with expertise in numerous sectors, including energy. See [oxera.com](https://www.oxera.com).

28. On 27 February 2023, the RA issued an initial decision granting the Applicant access to some records responsive to items 1 and 6,³³ denying access to the remainder of the records responsive to item 1 on the basis of sections 25, 26 and 29, and administratively denying items 2-5, 7 and 8 on the basis of section 16(1)(a), stating that responsive records did not exist or could not be found. In its initial decision, the RA referred to objections received from three of the third parties listed above regarding disclosure of their information. The RA stated that they had received “multiple objections to disclosure of various records which were responsive to [the] request. As such, the RA will not be disclosing these documents.”
29. The RA also corrected the Applicant’s understanding of the role of the RA regarding the NPS, as reflected in the wording of item 1 of the PATI request. The RA clarified that there was no licence requirement (and, thus, no licence approval) for the operation of the NPS. The RA’s role was to approve BELCO’s Replacement Generation Proposal and its ability to recover costs through retail tariffs.
30. The RA also referred to its previous initial decision, which had provided access to certain records in full.
31. On 10 April 2023, the Applicant requested an internal review and made thorough submissions to the RA.
32. On 22 May 2023, the RA issued an internal review decision refusing access to the records based on sections 25 and 26 and administratively denying other parts of the PATI request under section 16(1)(a).
33. On 30 June 2023, the Applicant asked for an independent review by the Information Commissioner.

Investigation

34. 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. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review.
35. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application because submissions from the RA were

³³ This disclosure was in addition to the records disclosed in response to the Applicant’s previous PATI request.

required to justify the administrative denial and its reliance on the exemptions to withhold the responsive records.

36. The ICO formally notified the RA of the valid application on 30 August 2023.
37. On 25 September 2023, the RA provided 43 withheld records; however, records 6, 8, 16, 15, 19 and 22 were either non-responsive, duplicates or disclosed to the Applicant previously, and therefore are not considered in this Decision.
38. As required by section 47(4) of the PATI Act, the parties were invited to make representations to the Information Commissioner. On 29 January 2024, the ICO invited the RA to make submissions. On 29 February 2024, the RA made submissions to the ICO and provided the ICO with copies of the objection letters from BELCO, Oxera and Ricardo. In the RA's submissions to the ICO, the RA asserted a late reliance on section 37 of the PATI Act to withhold some of the responsive records, which was accepted by the Information Commissioner. Accordingly, section 37 has been considered in this Decision. The RA also referred to section 30 of the PATI Act in its submissions, although it did not specify the subsection. The Information Commissioner has considered the RA's reliance on section 30 below.
39. On 29 February 2024, the ICO asked the RA for copies of additional records that appeared responsive to the PATI request based on the sample screenshot of searches provided by the RA in their submissions. On 8 March 2024, the RA provided the ICO with a redacted version of record 20, which had been provided by BELCO to the RA in accordance with section 33(5) of the RAA. Following some correspondence with the ICO regarding whether the records were responsive to the PATI request, on 12 March 2024, the RA agreed certain records were responsive and provided copies of additional records 44-49 to the ICO. The RA has not yet issued an initial decision on whether to grant or deny access to these records.
40. On 8 March 2024, the ICO invited submissions from the Applicant and informed the Applicant that the RA had invoked section 37 of the PATI Act during the review. No submissions were received from the Applicant, although the Applicant had made extensive submissions at the time of their internal review request and application to the Information Commissioner, which are considered in this Decision.
41. On 1 April 2024, the ICO invited submissions from BELCO, Oxera and Ricardo (collectively, **the Third Parties**). Submissions were received from Ricardo and BELCO on 15 April 2024. No submissions were received from Oxera, but Oxera had provided submissions to the RA at the time of the initial decision.

42. On 17 April 2024, the ICO requested further background documents from the RA to obtain needed factual information and determine whether a reasonable search had been conducted in support of the RA's reliance on section 16(1)(a). This included asking for the engagement letters between the RA and Oxera and Ricardo, the redacted Replacement Generation Proposal submitted to the RA by BELCO,³⁴ the letter from the RA to BELCO dated 30 March 2017 containing the confidentiality framework, the RA's letter to BELCO dated 2 February 2018, and any of the RA Board's meeting minutes, memorandums and discussions or any other internal records relating to the RA's decision to approve BELCO's Replacement Generation Proposal.
43. On 23 April 2024, the ICO asked BELCO for a copy of the redacted Replacement Generation Proposal submitted to the RA on 22 December 2017 as the RA was having difficulty locating the record. BELCO provided this record, as well as the letter from the RA to BELCO dated 30 March 2017, which set out the confidentiality framework to be used between the RA and BELCO.
44. On 24 April 2024, the RA provided the ICO with a copy of the Framework Agreement between the RA and Ricardo dated 21 September 2017, a letter of engagement between the RA and Oxera dated 5 January 2017, and the RA's letter to BELCO dated 2 February 2018. On 20 June 2024, Oxera provided the ICO with a copy of its terms of engagement with the RA, which were referred to in the letter dated 5 January 2017. The RA did not provide the ICO with any of the RA Board's meeting minutes, memorandums and discussions or any other internal records relating to the RA's decision to approve BELCO's Replacement Generation Proposal.
45. On 30 May 2024, the ICO also asked the RA for copies of the third-party notice letters sent to the Third Parties on 27 January 2023, which the RA provided.
46. On 7 August 2024, the RA and the Applicant were notified that the Information Commissioner's review would consider section 16(1)(a) in relation to any additional records responsive to item 1 of the PATI request.
47. After assessing the submissions and information provided during the investigation, this Decision has considered 37 records numbered 1-5, 7, 9-14, 17-18, 20-21 and 23-43.³⁵

³⁴ As described in paragraph 103 below, BELCO had submitted a redacted copy of its Replacement Generation Proposal pursuant to section 33(3)(b) of the RAA on the basis that the redacted copy may be made available to the public.

³⁵ As noted above, the RA did not process the six newly located records (records 44-49) during this review.

Information Commissioner's analysis and findings

48. 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.
49. 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 with respect to the conclusion that further records should be disclosed.
50. Finally, the RA and the Third Parties invoked multiple exemptions for numerous records. Where appropriate for some of these records, the applicability of only one exemption is discussed when that record is properly withheld in full under the relevant exemption. In these instances, the alternative grounds for withholding are not considered.

Record did not exist or could not be found – section 16(1)(a)

51. 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.
52. 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 considers 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.
53. The specific circumstances in each case will inform the Information Commissioner's assessment.

54. 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.³⁶

Public authority's submissions

55. The RA submitted it had conducted lengthy and thorough searches of two locations it identified as potentially holding records responsive to the PATI request: its shared drive, which is the RA's document and storage software, and the email accounts of the RA's Head of Regulation and the Senior Manager of Electricity.
56. The Information Officer, along with the employees holding the above listed positions, used the PATI request to pull out key words and terms that allowed them to gather and capture the responsive records. Some of the searched terms included 'North Power Station' and 'NPS'. The RA provided a sample of screenshots of the searches conducted to the ICO. It also provided further details of the search for specific items.
57. During this review, the ICO highlighted gaps in the records responsive to item 1, including that the RA had not located any internal records, such as Board meeting minutes, memorandums or discussions (or any other record) relating to the RA's decision to approve BELCO's Replacement Generation Proposal. The RA explained that no minuted Board meetings were held on this matter. With respect to external communications, the RA provided the ICO with correspondence related to item 1 of the PATI request, which the RA had not processed because it viewed the correspondence as non-responsive. Records 47-49 were letters between the RA and BELCO regarding the RA's additional information requests (and the response from BELCO) related to the approval of the Replacement Generation Proposal.
58. For item 2, the RA stated that BELCO had not disclosed any documentation to the RA regarding its intention to optimise the NPS for LNG. The RA explained it learned of the optimisation through the media and did not take any enforcement action in response. No documentation containing mitigation measures existed. The RA further explained that the RA does not regulate construction.
59. For item 3, the RA had pointed the Applicant to its orders dated 6 March 2018 and 23 May 2018 (see paragraph 15) approving the construction of the NPS, which were published on the RA's website. Other than those two orders, the RA explained that it did

³⁶ 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.

not issue any general determinations, orders, directions or decisions regarding the NPS. The RA also did not commence any investigations and did not possess any documentation in relation to breaches by BELCO.

60. Regarding items 4 and 5, the RA stated that it did not hold any responsive records as these were allegations made by BELCO, which the RA disputed. The only record that existed in response to item 4 was the letter from the RA to BELCO encouraging BELCO to retract its allegation (see paragraph 22), which was previously disclosed to the Applicant. The RA pointed the Applicant to the RA's press release dated 8 August 2022, which made the RA's position clear for item 5.
61. For item 6, the RA maintained that the responsive records had already been provided in full to the Applicant which included the former Chief Executive's resignation letter, the letter from the Chairman of the RA accepting the resignation and other correspondence in relation to the Chief Executive's departure dates. The RA also referred to its responses to the Royal Gazette's specific questions about the resignation. In those responses, the RA stated that the former Chief Executive's resignation had nothing to do with the "fall out with BELCO" and that the two issues were "completely unrelated".
62. For item 7, the RA explained that it did not hold any responsive records. The RA maintained that its assertion had been based on a reasonable and proper inference drawn from all the circumstances.
63. Finally, for item 8, the RA explained that no records existed because no enforcement action or civil proceedings were ultimately taken by the RA against BELCO. The RA was of the view that its letter to BELCO encouraging it to correct the public record as well as BELCO's clarification to the Royal Gazette were sufficient to avoid recourse to enforcement action or civil proceedings. As such, no action was taken.

Applicant's submissions

64. In their application for an independent review by the Information Commissioner, the Applicant specifically stated for item 6 that the documents provided by the RA did not reveal the full scope of the reasons for the former Chief Executive's resignation. The Applicant maintained that if the departure was related in any way to the NPS, the public had a strong interest in more records being disclosed.

Discussion

65. The Information Commissioner considers the RA's reliance on section 16(1)(a) to administratively deny items 2, 4, 5, 7 and 8 of the PATI request as well as for the refusal of any further records responsive to items 1, 3 and 6.

Item 1

66. As noted above in paragraph 57, during this review the RA identified records that it initially asserted were non-responsive but which the ICO found responsive. It appears that this occurred based on the RA's overly narrow analysis of the PATI request. The request sought all documentation about the RA's discussion on the granting of 'license approval' for the NPS project. The RA helpfully and appropriately read parts of the request broadly, explaining that the RA did not 'approve' licenses and instead searching for records concerning its actual duties related to replacement generation and tariff approvals. Based on this, however, the RA appears to have omitted certain correspondence that fell within this understanding, e.g. records 47-49.
67. Specifically, the email accounts of the former Chief Executive (who resigned in February 2018), the former Interim Chief Executive (who was appointed in February 2018) and the former Senior Legal Advisor were not searched. The ICO was also unable, during this review, to verify the search of the RA's shared drive for records responsive to item 1.
68. Further, having carefully reviewed the withheld records, it appears that some of the third-party consultants had prepared additional records for the Board. Even if no Board meeting had occurred which produced meeting minutes, it appeared that materials had been prepared for the Board's consideration.³⁷
69. Considering the identification of additional responsive records for item 1 during this review, and the suggestion in the existing withheld records that additional records of internal discussion were likely to exist, the Information Commissioner is not satisfied that the RA's analysis of item 1 of the PATI request was adequate.

Item 2

70. The quality of the RA's analysis of item 2 of the PATI request was not adequate. The RA explained that it understood the PATI request to be limited to records related to the 'license approval'. Item 2 of the PATI request, however, specifically sought "all information relating to the discovery that the NPS was being optimised for LNG". Further,

³⁷ Withheld record 33 made such a reference.

the additional records provided by the RA during this review included records 45 and 46 that related to BELCO's representations to the RA regarding the optimisation of the NPS for LNG.

71. Properly understood, the PATI request specifically sought records related to the RA's knowledge of BELCO's use of LNG. Based on this, the Information Commissioner is not satisfied that the RA's analysis of item 2 of the PATI request was correct or broad enough while conducting its searches when it was processing the PATI request.

Item 3

72. The RA's analysis of item 3 was unduly narrow and inadequate. Item 3 specifically sought "all documents showing how the RA has fulfilled its remit to ensure the safety of electricity generation through the NPS by way of any general determinations, orders, directions, decisions, advisory guidelines, investigations or enforcements and specify any breaches by BELCO of its obligations under its licence under the Electricity Act since approval of the licence and all actions taken by the authority as a result of any breaches."
73. It was clear from the request that the Applicant was not only seeking records that led to the approval of the NPS (covered by item 1) but also records showing how the RA had continued to carry out its statutory functions after the approval of BELCO's Replacement Generation Proposal.
74. The additional searches conducted during this review identified further records that were responsive to item 3. Specifically, records 44, 48 and 49 post-dated the PA's Approval Order of 6 March 2018 and addressed the RA's ongoing scrutiny in relation to BELCO's Replacement Generation Proposal. The RA's activities were in accordance with its statutory responsibilities under the EA to protect the interests of end-users, exercise oversight of BELCO's NPS costing proposal, and regulate retail tariffs. The RA's assessments and inquiries were reasonably understood to be responsive to that part of item 3 seeking records related to the RA's investigation of BELCO's compliance with its obligations following the RA's approval of BELCO's Replacement Generation Proposal.
75. In sum, for items 1, 2 and 3, the RA's analysis of the PATI request was insufficient to justify an administrative denial under section 16(1)(a).

Items 4, 5, 7 and 8

76. In contrast, the RA's analysis of items 4, 5, 7 and 8 was adequate. The RA explained that, for these items, BELCO's statements were not made directly to the RA but played out publicly through the media. The RA had earlier referred to its letter to BELCO dated 18

August 2022 and its press release dated 8 August 2022 that supported this assertion. Further, a careful review of the additional records located during this review indicated that the RA did not take any further action with respect to BELCO's statements.

77. Because the RA did not take any further action, the scope of its search was adequate to identify its correspondence and internal records related to its response to BELCO's public statements. No further locations or topics were omitted.
78. Finally, the RA approached this search with adequate rigour and efficiency. For example, it did not overlook obvious search locations, have difficulty in asking officers to retrieve records, or so on. The RA was aware of the location and nature of records and proceeded to efficiently retrieve them.

Item 6

79. Item 6 was a clear, straightforward request that the RA understood. The RA disclosed several records in response to item 6. The Information Commissioner notes the Applicant's concern that more records should exist if the former Executive Director's resignation was related to the NPS. During the review, the ICO raised this issue with the RA and received further explanation concerning the timing and routine nature of the resignation, which was not controversial or related to the NPS project. While it is not possible to prove the negative, the Information Commissioner accepts the RA's submission that the resignation was unrelated to the NPS project.
80. Considering the records already disclosed by the RA, the locations it searched and the efforts it made to identify records, the scope, rigour and efficiency of the RA's search for item 6 were adequate.

Conclusion

81. The Information Commissioner is satisfied that the RA conducted a reasonable search for records responsive to items 4-8 of the PATI request. The Information Commissioner is not satisfied that the RA conducted a reasonable search for items 1, 2 and 3 before deciding that the records did not exist or could not be found. During this review, however, based on the additional searches conducted, the contents of additional records located and explanations provided by the RA, as well as the nature of the records sought, the Information Commissioner is satisfied that the RA has remedied the deficiencies in its search related to items 2 and 3.
82. The Information Commissioner is not satisfied, on balance, that the RA has remedied its search regarding item 1.

Disclosure prohibited by other legislation – section 37

83. Section 37(1) of the PATI Act allows public authorities to refuse a PATI request if disclosure of the responsive record is prohibited by ‘any statutory provision’ that is not the PATI Act.
84. The exemption in section 37(1) is absolute, which means that it is not subject to the public interest test.
85. As set out by the Information Commissioner in [Decision 05/2017, Bermuda Monetary Authority](#), and [Decision 12/2018, Ministry of Finance Headquarters](#), to rely appropriately on the exemption in section 37(1) of the PATI Act, a public authority must ask:
 - [1] What is the statutory provision creating the mandatory prohibition on disclosure?
 - [2] Does the record fall within this statutory provision?
 - [3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?
86. The mandatory prohibition on disclosure in a provision may be indicated by the use of the word ‘shall’ and an accompanying provision setting out penalties for unauthorised disclosures.
87. If the relevant statutory prohibition only applies when particular functions or duties of a public authority have been engaged, the public authority must identify these functions or duties and explain how the record falls within the prohibition.
88. Finally, the burden is on the public authority to satisfy the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

Public authority’s submissions

89. The RA submitted that the RAA permits sectoral providers to formalise a request for confidential treatment, which BELCO did in this instance. The RA submitted that, once the RA grants confidential treatment under section 33 of the RAA to the information, the disclosure of the information is prohibited by the RA’s governing legislation. Thus, the provisions of the RAA constitute a statutory prohibition on disclosure, and the records identified as falling within a section 33 confidentiality order are exempt under section 37(1) of the PATI Act.

90. Here, the RA explained that it issued a section 33(5) Confidentiality Order to BELCO on 1 February 2018 that was applicable to certain withheld records (**Confidentiality Order**). The RA provided the ICO with an unsigned copy of the Confidentiality Order, which stated that the request for confidential treatment was made “in relation to BELCO’s proposal for the replacement of generation facilities dated and submitted to the [RA] on 22 December 2017 pursuant to Condition 20.3 of BELCO’s Bulk Generation Licence and in response to the [RA]’s section 60 request dated 8 December 2017”.

Applicant’s submissions

91. The Applicant did not make submissions on section 37.

Discussion

92. In assessing the RA’s reliance on section 37, the Information Commissioner also considers relevant facts and information provided by BELCO.³⁸
93. Section 37 is considered for records 1-5, 7, 9-14, 17, 18 and 20-24.

[1] What was the statutory provision creating the mandatory prohibition on disclosure?

94. Pursuant to section 33(1) of the RAA, “any person submitting information to the Authority may request that the Authority treat such information as confidential.” Subsection (2) sets out the standard for confidential treatment that must be met for the RA to grant a request. Subsection (4) requires any person claiming confidentiality to provide the RA with: (a) a full justification for its claim; and (b) a version of such information without the confidential provisions and in a form that may be made available to the public.
95. As per subsection (5), “if the Authority concludes that the justification offered by the submitting party meets the standard for confidential treatment, the Authority shall issue an order granting the request.”
96. Section 33(6) states that, “in any case in which the Authority grants a request for confidential treatment, the information may only be disclosed—(a) to the Minister responsible for the regulated industry sector; (b) to the Commissioners; (c) to the staff; (d) to a court of competent jurisdiction; or (e) where necessary to conduct a public

³⁸ As detailed below, BELCO argued that certain records were exempt under section 26(1)(b) because their disclosure would have been a breach of a statutory duty of confidence arising under section 33 of the RAA.

consultation or adjudication, to specific parties pursuant to a non-disclosure agreement or protective order.”

97. Section 34 of the RAA states that “A Minister, the Commissioners and the members of the staff shall not reveal or in any manner communicate to any other person, except as authorised or required by law, any information for which the Authority has granted confidential treatment.”
98. Section 106 of the RAA states that “Any Commissioner or member of the staff who knowingly contravenes section 34 commits an offence which shall be punishable—(a) on summary conviction by imprisonment for up to one year or a fine of up to \$20,000, or both; or (b) on conviction on indictment by imprisonment for up to two years or a fine of up to \$50,000, or both.”
99. The statutory provision creating the mandatory prohibition on disclosure, therefore, was section 34 of the RAA. The RAA was given royal assent on 18 December 2011 and came into effect on 28 January 2013, i.e. prior to the PATI Act coming into effect on 1 April 2015. Therefore, the RAA does not need to expressly mention that it applies notwithstanding the PATI Act.
100. Given the language of section 34 (“shall not”) and that section 106 of the RAA imposes penalties for unauthorised disclosure, the Information Commissioner is satisfied that section 34 of the RAA constituted a prohibition on disclosure for purposes of section 37 of the PATI Act. Section 33 of the RAA provides the RA with the clear authority to assure its regulated entities that, where appropriate, it will maintain the confidentiality of information it receives.

[2] Did the record fall within this statutory provision?

101. Section 33 of the RAA only applies to “information for which the Authority has granted confidential treatment”. Therefore, for the exemption in section 37(1) of the PATI Act to apply, the record must contain information for which the RA has granted confidential treatment. A careful review of the documents provided by BELCO, the submissions by the RA and the withheld records revealed that the Confidentiality Order issued by the RA under section 33(3) of the RAA applied to specific documents. Further, as explained below, when making other requests for documents from BELCO, the RA indicated to BELCO that the RA had determined that some documents or information should be disclosed in the public interest and would not come within section 33(3) of the RAA.
102. The 1 February 2018 Confidentiality Order only explicitly granted an order for confidentiality of BELCO’s Replacement Generation Proposal dated 22 December 2017

(including its annexes) and BELCO's letter requesting the Confidentiality Order. The Information Commissioner is therefore satisfied that record 1,³⁹ part of record 20⁴⁰ and part of record 24⁴¹ fell squarely within the Confidentiality Order and amounted to "information for which the Authority has granted confidential treatment".

103. The remaining parts of records 20 and 24 did not fall within the Confidentiality Order. The remaining part of record 20 was a redacted copy of BELCO's Replacement Generation Proposal submitted in accordance with section 33(3)(b) of the RAA, i.e. with redactions to the information that should be treated confidentially and the remaining unredacted information considered suitable for public disclosure. The remaining part of record 24 was BELCO's cover letter to the RA enclosing the Replacement Generation Proposal. BELCO did not request that the cover letter be treated confidentially.
104. The other records under consideration for section 37 were not referenced in or did not come within the scope of the Confidentiality Order dated 1 February 2018. Neither the RA nor BELCO have indicated to the ICO that the RA issued any further confidentiality order under section 33 of the RAA in relation to the RA's approval of BELCO's Replacement Generation Proposal. First, the RA had received records 2-5 and 21 prior to issuing its Confidentiality Order but did not include them within its scope. BELCO had marked the documents as 'provisionally confidential' to indicate that BELCO determined the documents met the criteria for a confidentiality order, as the RA had instructed.⁴² BELCO's express request for confidential treatment of records 2-5 and 21, and the precision of the RA's references to specific documents submitted by BELCO, indicated to the Information Commissioner that the Confidentiality Order should not be read to include documents that were not referenced.
105. Second, BELCO provided records 7, 9-14, 17 and 23 to the RA after the RA issued its 1 February 2018 Confidentiality Order. BELCO again marked these records as 'provisionally confidential', but the RA never granted a confidentiality order for them under section 33(5) of the RAA.

³⁹ Record 1 was 'Annex A', which BELCO had requested be redacted in full, including the name of the company that had authored the document.

⁴⁰ This part of record 20 was BELCO's letter requesting confidentiality and providing its submissions on the confidential treatment of the Replacement Generation Proposal.

⁴¹ This part of record 24 was a clean, unredacted copy of BELCO's Replacement Generation Proposal.

⁴² See below at paragraphs 138-142 for an explanation of the RA's request that documents be marked 'provisionally confidential'.

106. Finally, record 18, BELCO's letter to the RA dated 4 March 2018, did not include any reference to the Confidentiality Order or to any justification for confidential treatment.
107. Section 37 is an absolute exemption that is not subject to the public interest test. In accordance with the context and purpose of the PATI Act,⁴³ which is to grant a right to access information "to the greatest extent possible" and to "eliminate unnecessary secrecy", section 37 is strictly applied under the PATI Act. In these circumstances, the RAA sets out a specific process under section 33 for the granting of a statutory confidentiality order by the RA. This process includes a requirement for the requester to provide a version of each document without the confidential provisions and in a form that may be made available to the public. This was not followed with respect to records 2-5, 7, 9-14, 17, 18, 21 or 23 and part of record 24 (the cover letter). Furthermore, the RA did not grant any other order for the confidential treatment of these records under the RAA.
108. Section 37 is not considered further for records 2-5, 7, 9-14, 17, 18, 21 and 23, part of record 20 (the redacted Replacement Generation Proposal) and part of record 24 (cover letter).

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

109. Record 1 and the parts of records 20 and 24 (described in paragraph 102), which fell within the statutory provision in section 33 of the RAA, did not fall within any of the gateways to public disclosure in section 33(6) of the RAA.

Conclusion

110. The Information Commissioner is satisfied that the RA was justified in applying section 37(1) to record 1 and parts of records 20 and 24 because these records came within the statutory prohibition on disclosure in section 33 of the RAA. The Information Commissioner is not satisfied that the RA was justified in relying on section 37 to refuse access to records 2-5, 7, 9-14, 17, 18, 21 and 23 as well as the remaining parts of records 20 and 24 (described in paragraph 108).
111. The Information Commissioner emphasises that a legislative process is in place for the RA to determine that the documents it receives should be treated confidentially. The language in section 33 of the RAA mirrors the language in sections 25 and 26 of the PATI

⁴³ See *Pickering v Liverpool Daily Post* [1991] 2 AC 370, 422B – 423G.

Act. Section 33 of the RAA ensures that the appropriate body, i.e. the RA, can determine whether information should be treated confidentially based on submissions made by BELCO. If the RA seeks to ensure clarity in the future, it is fully empowered under the RAA to order that documents are subject to confidential treatment under section 33 of the RAA, and the documents will be exempt from disclosure under section 37 of the PATI Act.

112. Section 33 of the RAA also recognises the importance of public access to information. It includes a provision requiring an entity seeking confidential treatment of its documents to propose a version with the confidential information redacted, which can be made available to the public. As mentioned above, the redacted version of the Replacement Generation Proposal was provided to the RA but appears was not made available to the public as the legislation intended.

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

113. 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”.
114. If section 26(1)(a) is properly engaged, the public interest test must be applied. Where the public interest would, on balance, be better served by disclosure than by non-disclosure, then the records must still be disclosed.
115. The exemption in section 26(1)(a) focuses on whether the process or circumstances by which the information was provided indicate that it was given in confidence and with the understanding that it would be treated confidentially. The assessment considers factors related both to how the third party gave the information and how the public authority received or agreed to hold the information.
116. 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.⁴⁴
- 117. 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.
- 118. 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.⁴⁵
- 119. Section 26(1)(a) also requires that disclosure of the information in the record ‘would be likely’ to prevent the authority from receiving further similar information in the future that is required by the public authority to properly fulfil its functions. Speculation is not sufficient to justify the exemption. ‘Would be likely’ means that some significant, real risk must exist that the public authority would be prevented from receiving such information in the future.
- 120. As set out in the [Interpretation Act 1951 \(Interpretation Act\)](#), the ‘functions’ of a public authority should be understood as “powers conferred, or duties imposed, on the authority or officer by or under any provision of law”.
- 121. As explained in [Decision 06/2021, Cabinet Office Headquarters](#), at paragraph 106, a public authority, or third party, must consider five questions when seeking to justify the exemption for information received in confidence:

⁴⁴ See [ICO Guidance: Information received in Confidence](#) (March 2023), at paragraph 41.

⁴⁵ See [ICO Guidance: Information received in Confidence](#) (March 2023), at paragraph 43.

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

122. 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

123. The RA submitted that, based on BELCO's request for confidentiality, which was granted by the RA, as well as BELCO's objection to disclosure in response to this PATI request, the records provided by BELCO to the RA had been "received in confidence" within the meaning of section 26(1)(a). The information was shared by BELCO on the understanding that it would be treated as confidential. Disclosing that information would likely have prevented the RA from receiving further similar information which it required to properly fulfil its regulatory functions. Disclosure would have required the RA to resile from its prior reassurance to BELCO that the information would be treated as confidential. The RA submitted that this would have seriously undermined the trust that BELCO, and indeed other regulated entities, could place in the RA. As the RA relied on regulated entities to share information freely and frankly, mutual trust remained critical to that relationship. If the RA could not honour its own assurances on confidentiality, then it would rapidly lose credibility before the entities it regulates.

124. The RA further submitted that a major facet of its overarching duty is to serve the public through the regulation of its sectoral providers. To properly regulate sectoral providers, the RA must routinely request of them delicate information which is not publicly available. This requires a relationship of trust in which the sectoral providers are comfortable remaining open and transparent with the RA, because they are confident that their information will not be treated carelessly or released for public consumption. As such, any disruption to this confidence could greatly affect or reduce the fluidity with

which sectoral providers are willing to share necessary and critical information with the RA, which enables the RA to conduct its legislative objectives.

125. Regarding the public interest test, the RA stated that the disclosure of the withheld records would not have meaningfully advanced the public interest. The RA considered that the advantage of disclosing the records was speculative, whereas the public interest in favour of non-disclosure was clear. It ensured the RA could continue effectively exercising its statutory powers under the RAA, including its power to grant confidentiality, and that it was able to maintain a healthy and trusting relationship with those that it regulates. The public interest in the RA fulfilling its regulatory functions effectively outweighed any public interest in favour of disclosing the records.
126. The RA further stated that transparency is important to the RA as an organisation, but it must also recognise the importance of maintaining a level of discretion when it comes to the confidential treatment of information shared with it while carrying out its legislative duties.
127. Lastly, the RA considered that it was not feasible to grant access to the withheld records in redacted form because the confidential commercial information was closely woven into the documents such that it was impossible to extract it and disclose only some parts. Once redacted, the RA submitted that the records would lose their meaning and, thus, there would be a very limited public interest in disclosing them.
128. The RA's submissions about records received from third parties (other than BELCO) was that the reports produced by such third parties were technical evaluations of the information provided by BELCO. The RA submitted that the technical assessments were inextricably bound up with BELCO's information and one could not realistically be separated from the other. Disclosure of the third-party reports would unavoidably trespass onto BELCO's confidential and sensitive information.

Applicant's submissions

129. The Applicant questioned if information in the records was still confidential considering some of the information already was in the public domain through the RA's processes and through PATI requests to other public authorities.
130. The Applicant also argued that, given the public back and forth between the RA and BELCO regarding the use of LNG, there remained a public interest in accountability of the RA's processes. Furthermore, the RA mentioned publicly that it would publish relevant materials to support its position but never did so. It remained in the public interest to understand why the regulator considered the matter closed.

131. The Applicant emphasised the strong public interest in disclosure given the potential impact on health, wealth, property, the environment and the well-being of the public. The Applicant asserted that disclosure would further the accountability of all parties' adherence to the regulatory process. The Applicant also cited the RA's Work Plan 2020-2021, the RA's website and a statement by the current President of BELCO about the value of transparency, all which they submitted weighed in favour of releasing records.
132. Further, the Applicant submitted that it remained in the public interest to understand how the IRP process was undermined enabling BELCO to procure and commission the NPS and its engines for a fuel that was not yet approved. It was still of national importance for the public to know who signed off on the decision to optimise the NPS the way it was optimised ahead of the publication of the IRP, whether any action was taken against those individuals, what action was taken against them, if no action was taken against them why not, and whether any action could and will be taken against them.
133. The other issue for the Applicant was whether the RA was aware that BELCO had already ordered the engines and knew of the specifications and, if so, what steps, if any, the RA considered to ensure the design was amended.
134. The public also continued to have an interest in the RA's accountability for its decision to reject a ban on the burning of a fossil fuel that is potentially harmful to the population. This was particularly heightened by the statutory mandate of the RA.
135. The Applicant also highlighted that BELCO and its parent company's President was a Government Member of Parliament, and this weighed in favour of greater transparency.
136. A final overarching public interest, in the Applicant's view, was whether disclosure of the records would inform and enable the public to understand what constitutes reasonable costs for BELCO to recover from the public.
137. The Applicant submitted, generally, that it was in the public interest for the RA to disclose documents showing whether the RA had fulfilled its remit and statutory responsibilities in relation to the approval of BELCO's Replacement Generation Proposal.

BELCO's submissions

138. BELCO had marked records 2-5, 7, 9-14, 21, 23 and 24 as “provisionally confidential”.⁴⁶ This marking referred to an informal confidentiality framework the RA established as an alternative to the statutory framework. The RA sought to avoid unnecessarily diverting the resources needed to make a formal confidentiality order under section 33 of the RAA.
139. On 30 March 2017, the RA provided BELCO with a letter explaining how the RA would treat confidential information provided to it by BELCO going forward as part of any informal or formal request for documents pursuant to the RA’s regulatory activity. The letter arose from the RA’s document requests with respect to this and one other ongoing regulatory process and BELCO’s subsequent requests in those matters for section 33 confidentiality orders for all the documents. The RA refused to issue a section 33(3) confidentiality order for either situation. For one of the requests, the RA explained that it determined that disclosure of some of the information would be in the public interest.
140. At that point, the RA stated that, rather than diverting resources at that time to determine which information would and would not come within a statutory section 33(3) confidentiality order, it proposed a preliminary or alternative framework going forward for the treatment of documents and other information provided by BELCO in response to any of the RA’s requests for, or orders to produce, information pursuant to the RAA. Specifically, the RA instructed that BELCO should mark as “non-confidential” any public documents or documents that BELCO determined would meet the criteria of section 33(2) of the RAA, and mark as “provisionally confidential” any documents that BELCO determined contained at least some information that fell within section 33(2) of the RAA.
141. The RA then committed to not disclosing documents marked as “provisionally confidential” until it notified BELCO of its intention to do so and allowed BELCO an opportunity to justify BELCO’s claim of confidentiality under section 33(3) of the RAA. The RA would then notify BELCO of its determination on the application of a confidentiality order after considering BELCO’s justification and afford BELCO an opportunity to comment, including proposing redactions. Finally, the RA would then issue a final decision requiring disclosure, as appropriate.

⁴⁶ To the extent that BELCO sought to rely on the application of the 1 February 2028 Confidentiality Order to these records, the Information Commissioner has concluded above that the Confidentiality Order was not applicable to them.

142. Under these circumstances, BELCO argued that its marking of records 2-5, 7, 9-14, 21, 23 and 24 as “provisionally confidential” showed that it had provided the information in confidence to the RA.
143. BELCO also made submissions on the public interest test, stating that disclosure would further little, if any, public interest. The documents did not relate to any public procurement process, expenditure of public funds, quality of services provided by government, any type of wrong-doing or maladministration, or reveal any public health or safety issues. Although there was a public interest in promoting the public understanding of the process, decisions and actions of public authorities, BELCO argued that disclosure of the records would not assist the public in understanding the RA’s practice, policy or decision-making process, as they solely consisted of information supplied by BELCO regarding its business and its suppliers and did not contain any record of the RA’s deliberative process. There was a strong public interest in protecting confidentiality and honouring the duty of confidentiality. Disclosure of the documents would have run the risk of undermining regulated entities’ trust in the RA and undermining the public’s interest in ensuring that private companies could safeguard their proprietary technical or business information. It would also have undermined the public interest in ensuring fair commercial competition by revealing information that could have been used to gain a competitive advantage.
144. BELCO further submitted that disclosure of the documents would likely have prevented the RA from receiving similar information in the future, as the documents were provided by BELCO on a voluntary basis, and regulated entities would be reluctant to voluntarily share commercially sensitive information if they believed that such information would not remain confidential. Gathering information about regulated entities was required for the RA to fulfil its function to generally monitor and regulate the electricity sector, as set forth in section 14 of the EA. Effective regulation required a level of trust between regulator and regulated entity, where private enterprises could freely share sensitive information about their business or the sector without such information being disclosed to the public.

Oxera’s submissions

145. Oxera submitted that the work it produced for the RA was prepared solely for the RA’s internal benefit and was advice given in relation to a politically sensitive topic. Oxera stated that it was not aware of the extent to which the RA had followed Oxera’s advice and, therefore, objected to disclosure. Oxera did not believe any relevant public interest would have been addressed in the disclosure of the RA’s internal and confidential information.

146. The ICO was provided with the RA's Letter of Engagement and Terms of Engagement with Oxera, which are discussed below.

Ricardo's submissions

147. Ricardo relied on its previous submissions to the RA, in which it had consented to the release of: (1) the final reports sent by Ricardo to the RA; and (2) emails sent by members of Ricardo staff still employed by Ricardo. This would include information related to Ricardo in records 34, 35 and 37-41.
148. Ricardo objected to the release of: (1) emails sent by members of staff no longer working for Ricardo because it had no way of verifying the individuals' consent for release; (2) any training materials issued by Ricardo because they contained valuable intellectual property whose disclosure would harm Ricardo's commercial position; and (3) any informal messages between Ricardo and the RA's staff that were exchanged in confidence and never intended to form part of any formal set of communications or deliverables to the RA. Ricardo's objections to disclosure were relevant for record 42, an email thread between its former employees and the RA. Ricardo also did not provide express consent for record 36, which appeared to be a draft of record 35.
149. With respect to those records for which Ricardo did not consent, the RA provided a copy of its Framework Agreement with Ricardo dated 18 September 2017, which is discussed in detail below.

Discussion

150. The Information Commissioner considers section 26(1)(a) for records 2-5, 7, 9-14, 17, 18, 21, 23 and 25-42 as well as the remaining parts of records 20 and 24.

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

BELCO's information

151. Having carefully reviewed records 2-5, 7, 9-14, 18, 21 and 23 as well as the remaining parts of 20 and 24, they were given by BELCO as a third party, which was not a public authority.
152. Although records 25-29, 32-34 and 38-41 were not given to the RA by BELCO, they contained information that the RA received from BELCO and then provided to its consultants for their analyses.
153. Record 17, however, was not information given by BELCO as a third party. Instead, BELCO referred to record 17, the published contract conditions set by the International

Federation of Consulting Engineers (**FIDIC**) in a letter to the RA and provided a link to the RA for purchasing a copy of the record or offered to allow the RA to view the hard copy record. This exemption is not considered further for record 17.

Oxera's information

154. Records 25-33 were given to the RA by Oxera as a third party, which was not a public authority.

Ricardo's information

155. Similarly, records 34-42 were given to the RA by Ricardo as a third party, which was not a public authority.

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

BELCO's information

156. Although BELCO requested that the information it gave be held in confidence, the RA's non-statutory confidentiality framework expressly informed BELCO that the RA might disclose some of the information in the future if it was not subject to a confidentiality order under section 33 of the RAA. Further, BELCO had provided a redacted copy of the Replacement Generational Proposal (part of record 20) for the purposes of public disclosure of non-confidential information. The Information Commissioner finds that this was not the type of process coming within section 26(1)(a) that would guarantee or require confidentiality throughout, such as a law enforcement agency's confidential and anonymous tip line. Under the non-statutory confidentiality framework, the RA only committed to not disclosing the information at that time. Notably, the RA had disagreed with BELCO in the past and determined that some of its information in other regulatory processes should be disclosed in the public interest. Under the Confidentiality Framework, the RA placed BELCO on notice that its information marked "provisionally confidential" might be subject to public disclosure in the future, and that the RA was reserving a determination on BELCO's request. It is difficult under these circumstances for the Information Commissioner to conclude that the process under the non-statutory confidentiality framework meant that BELCO gave the information in confidence, rather than that BELCO had given it with the hope that it would be considered as given in confidence when the time came for the RA's assessment.
157. In any event, these circumstances did not provide a basis for concluding that BELCO had an understanding that the RA would continue to hold the information confidentially. The

RA expressly stated that it would decide the question of confidentiality at a future time and has also found that, for prior information, some public interest disclosure was required.

158. Accordingly, although BELCO sought to provide records 2-5, 7, 9-14, 21, 23 and 24 in confidence, it could not have been with the understanding that the RA would continue to hold the records confidentially. Similarly, parts of records 25-29, 32-33 and 38-41 (records received from the consultants) contained information from BELCO's records 2-5, 7, 9-14, 21, 23 and 24. BELCO could not have had an understanding that its information in these records would continue to be held confidentially, for the same reasoning.
159. Section 26(1)(a) is not considered further for records 2-5, 7, 9-14, 21 and 23 as well as the remaining parts of records 20 and 24, nor for the parts of records 25-29, 32-33 and 38-41 that contained BELCO's information.

Oxera's information

160. Oxera relied on the confidentiality provisions of its Terms of Engagement with the RA, a public authority, to assert that its information was given in confidence and with the understanding that it would continue to be held confidentially.
161. Clause 9.1 of the Terms of Engagement provided for confidentiality between the parties, stating that "Each party agrees to maintain the Confidential Information of the other party in strict confidence and the Recipient shall restrict disclosure of such Confidential Information to such of its employees, agents or sub-contractors as need to know the same for the purpose of discharging its obligations to the Disclosing Party pursuant to the Contract, and shall ensure that such employees, agents or sub-contractors are subject to obligations of confidentiality corresponding to those which bind it under the Contract."
162. 'Confidential Information' was defined in clause 1.2 of the Terms of Engagement as:
- all technical or commercial information, processes or initiatives that [were] of a confidential nature and have been disclosed by one party ('the Disclosing Party') or its agents to the other party ('the Recipient') or its agents, and any other confidential information concerning the Disclosing Party's business or its products which the Recipient may obtain, save to the extent that such information: (i) has become public knowledge other than through a disclosure in breach of the Contract; (ii) was already known to the Recipient prior to disclosure; (iii) has been received by the Recipient

from a third party who did not acquire it in confidence from the Disclosing Party or from someone owing a duty of confidence to the Disclosing Party.

163. Clause 1.2 of the Terms of Engagement also distinguished between “Confidential Information” and “Deliverables”, defining deliverables as “reports, products or outputs of the Services which [were] provided to [the RA] or which [they] agree[d] in the Proposed Specifications [were] to be provided to [the RA].”
164. Clause 9.2 provided that, with respect to Confidential Information, notwithstanding clause 9.1, “Confidential Information may be disclosed if such information [was] required to be disclosed by law or any legal or regulatory authority or court of competent jurisdiction”. The Terms of Engagement went on at Clause 21 to acknowledge the existence of public access to information laws (the UK’s Freedom of Information Act) and the possibility of disclosures required under the law.
165. As Clause 9.2 expressly stated, the Terms of Engagement did not prohibit a disclosure required by law. Like the UK’s Freedom of Information Act, the PATI Act is a law in Bermuda and, as a public authority, the RA may be required to disclose some information in response to a PATI request. Therefore, the Terms of Engagement did not create a process that required confidentiality. Importantly, the Terms of Engagement did not give rise to an understanding that the confidentiality clauses, standing alone, would ensure confidentiality if a PATI request was made.
166. Section 26(1)(a) is not considered further for records 25-33.

Ricardo’s information

167. As noted above, Ricardo consented to the disclosure of any final reports sent by Ricardo to the RA and, therefore, these reports would not be information provided in confidence and with the understanding that the information would continue to be held confidentially. The Information Commissioner has considered that records 34, 35 and 37-41 were final reports to the RA. Records 36 (a draft PowerPoint presentation) and 42 (an email thread) contained information related to Ricardo’s work product to which its consent for disclosure did not apply. The email thread also contained boilerplate language identifying it as confidential and it arose from the work that came within Ricardo’s confidentiality framework with the RA.
168. Clause 6 of the Framework Agreement contained a confidentiality clause, which provided that:

By virtue of this Agreement, the parties may have access to information that [was] confidential to one another (“confidential information”). Both parties agree[d] to disclose only information that [was] required for performance of obligations under this Agreement. Confidential information shall include the terms and pricing under this Agreement, and all information clearly identified as confidential, or which otherwise can be reasonably considered to be confidential.

A party’s confidential information shall not include information that: (i) is or becomes a part of the public domain through no act or omission of the other party; (ii) was in the other party’s lawful possession prior to the disclosure and had not been obtained by the other party either directly or indirectly from the disclosing party; (iii) is lawfully disclosed to the other party by a third party without restriction on the disclosure; or (iv) is independently developed by the other party; or (v) disclosed as required by any law or regulatory requirement.

Each party agree[d] to hold each other’s confidential information in confidence for a period of seven (7) years from the date of disclosure. Each party agree[d] to disclose confidential information only to those employees or agents who [were] required to protect it against unauthorised disclosure. Nothing shall prevent either party from disclosing the terms or pricing submitted under this Agreement in any legal proceeding in connection with this Agreement or disclosing the information as required by law.

169. Clause 6 acknowledged that disclosure may be made if required by law, which includes the PATI Act. Like the Terms of Engagement for Oxera, the Framework Agreement for Ricardo, in itself, could not have given rise to an understanding by Ricardo that the process required the RA to continue holding Ricardo’s information confidentially.

170. Section 26(1)(a) is not considered further for Ricardo’s information in records 34-42.

Conclusion

171. The Information Commissioner is not satisfied that the RA was justified in relying on section 26(1)(a) to refuse access to records 2-5, 7, 9-14, 17, 21, 23 and 25-42 as well as the remaining parts of records 20 and 24.

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

172. A public authority or, as in this case, a third party may rely on section 26(1)(b) as justification for denying or objecting to access to a public record if the record's disclosure would constitute a breach of a duty of confidence arising under any provision of law.
173. In accordance with the [Interpretation Act](#), 'any provision of law' means "any provision of law which has the effect for the time being in Bermuda, including any statutory provision, any provision of the common law, any provision of the Constitution, and any right or power which may be exercised by virtue of the Royal Prerogative". A duty of confidence may be created by a provision of an agreement or may arise in equity.
174. A party asserting a duty of confidence arising from agreement must show that the records would fall within the scope of the relevant confidentiality or non-disclosure clause.
175. A breach of an equitable duty of confidence requires showing that:⁴⁷
- a. the information has the necessary quality of confidence;
 - b. it was given in circumstances which create an obligation that the information be kept confidential; and
 - c. there must have been an unauthorised use of the information, which in some circumstances must be to the detriment of the confider.
176. Section 26(1)(b) also requires that the disclosure 'would' constitute a breach of confidence. 'Would' means that there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring.
177. The exemption in section 26(1)(b) is subject to the public interest test. The records, or parts of records, must still be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.
178. In sum, a public authority or third party seeking to rely on the exemption under section 26(1)(b) for a breach of a duty of confidence must ask:

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

⁴⁷ See [Coco v AN Clark \(Engineers\) Ltd.](#) [1969] RPC 41, as summarised in [Decision 02/2022](#), [Bermuda Business Development Agency](#), at paragraph 24.

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

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

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

Public authority's submissions

180. See the RA's submissions above at paragraphs 123-128.

Applicant's submissions

181. See the Applicant's submissions on the public interest test above at paragraphs 129-137.

BELCO's submissions

182. BELCO submitted that disclosure of the documents it provided to the RA (and the information contained in them) would have been a breach of the confidence provided for under section 33 of the RAA. The RA issued the Confidentiality Order granting confidential treatment in accordance with section 33(5) of the RAA. Section 33(6) of the RAA prohibited the RA from disclosing information for which such confidentiality treatment has been granted except in limited circumstances, none of which applied to the PATI request. Therefore, disclosure of these documents would have been a breach of a duty of confidence under the RAA. BELCO stated that the same public interest justification set forth above in section 26(1)(a) would apply.

Oxera's and Ricardo's submissions

183. See Oxera's and Ricardo's submissions above at paragraphs 145-149.

Discussion

184. For records provided directly by BELCO to the RA, the RA's and BELCO's submissions on section 26(1)(b) relied on the legislative provision in section 33 of the RAA as creating a statutory duty of confidence. The more appropriate exemption to withhold the records on this basis was section 37, and the Information Commissioner's analysis is at paragraphs 94-108 above. The argument for a statutory duty of confidence is not repeated here for section 26(1)(b). As noted above, only record 1 and parts of records 20 and 24 were found to be exempt under section 37 because their disclosure would have breached a statutory duty of confidence. These records are not discussed here.

185. The Information Commissioner has also not discussed under section 26(1)(b) any records or parts of records that she has found exempt in full or in part under section 25(1) below. This includes records 2-5, 7, 9-14, 17 and 43 in full and parts of records 20, 21, 23, 25, 26, 28, 29, 32-34 and 38-40.⁴⁸
186. The records considered under section 26(1)(b), therefore, are records 18, 27, 30, 31, 35-37, 41 and 42 and the remaining parts of records 20, 21, 23-26, 28, 29, 32-34 and 38-40.

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

187. As noted above, the 1 February 2018 Confidentiality Order issued pursuant to section 33 of the RAA did not apply to record 18 or the remaining parts of records 20 and 24, as concluded above at paragraphs 103-106.
188. Further, the general confidentiality provisions of both the Framework Agreement between Ricardo and the RA and the Terms of Engagement between Oxera and the RA appropriately acknowledged that disclosure was permitted when required by law. This is particularly important for agreements with public authorities, such as the RA, which may not contract out of their obligations under the PATI Act. Neither agreement creates a contractual duty of confidence that prevents a disclosure under the PATI Act.
189. In the absence of a statutory or contractual obligation, though, an equitable duty of confidence may arise under *Coco* where the specific information has the necessary quality of confidence, the information was given in circumstances which created an obligation to keep the information confidential, and the disclosure would cause detriment to the person that provided the information.

BELCO's information

190. Records 18, 21 and 23 and the remaining parts of records 20 and 24 were records provided by BELCO and, therefore, are considered here. Record 27 and the remaining parts of records 25, 26, 28, 29, 32-34 and 38-40 were records provided to the RA by Oxera and Ricardo but referred to information that BELCO had submitted to the RA as part of its Replacement Generation Proposal.⁴⁹ Again, the Information Commissioner has only

⁴⁸ For the section 25(1)(c) analysis, see paragraphs 223-249 below. For the section 25(1)(a) analysis for record 17 only, see paragraph 253 below.

⁴⁹ Records 30, 31, 35-37, 41 and 42 did not refer to information provided to the RA by BELCO and therefore are not considered here.

considered section 26(1)(b) for information which she has found was not exempt under section 25(1) below.

191. The *Coco* analysis begins with consideration of whether the information in the relevant records had the necessary quality of confidence. The Information Commissioner is satisfied that the information had the necessary quality of confidence as the information was not trivial and was not otherwise accessible to the public.
192. The second factor in the *Coco* analysis is whether the information was given in circumstances which created an obligation on behalf of the RA that it be kept confidential. If the circumstances were such that any reasonable person standing in the position of the RA, as the recipient of the information, would have realised that the information was being given to them in confidence, then this should suffice.
193. For record 18, the Information Commissioner notes that, unlike other records provided by BELCO to the RA, BELCO did not mark record 18 'provisionally confidential' or request confidentiality of the information under section 33 of the RAA. Based on the content of the record, there were also no obvious or implicit restrictions on the use of the information from the circumstances. The Information Commissioner is not satisfied, therefore, that record 18 was given in circumstances which created an obligation on behalf of the RA to keep it confidential.
194. For the information contained in record 27 and the remaining parts of records 20, 21, 23-26, 28, 29, 32-34 and 38-40, the Information Commissioner has considered the redacted Replacement Generation Proposal provided by BELCO to the RA under section 33(3)(b) of the RAA. Given that BELCO submitted the redacted proposal on the basis that the unredacted parts could be disclosed to the public, the Information Commissioner considers that this information was not given in circumstances which created an obligation on behalf of the RA to keep it confidential (as BELCO had accepted that the unredacted information could be disclosed to the public). The Information Commissioner is satisfied that the information related to BELCO in record 27 and the remaining parts of records 20, 21, 23-26, 28, 29, 32-34 and 38-40 (apart from what has been found to be exempt under section 25(1) below) was the same information that BELCO had left unredacted when submitting its redacted Replacement Generation Proposal to the RA under section 33(3)(b) of the RAA.

Oxera's information

195. Records 30 and 31 as well as parts of records 27-29, 32 and 33 were emails between the RA and Oxera that only contained factual or administrative information or only contained information that originated from the RA and was provided to Oxera. These records or

parts of records did not have the necessary quality of confidence to give rise to an equitable duty of confidence owed by the RA to Oxera. Section 26(1)(b) is not considered further for these records.

196. Further, records 25 and 26 referred to information that was already public as at the date of the PATI request, 17 January 2023. Because the information was public, this information no longer had the necessary quality of confidence.⁵⁰
197. In contrast, apart from BELCO's information, which is discussed above, the remainder of records 25-29, 32 and 33 consisted of Oxera's detailed technical analysis and recommendations to the RA based on its expertise. Some of the analysis included draft comments seeking the RA's feedback before it was finalised. Because this information was substantive and was kept confidential throughout the RA's consideration of BELCO's Replacement Generation Proposal and subsequent requests for further information, it had the necessary quality of confidence.
198. The second factor in the *Coco* analysis is whether the remainder of records 25-29, 32 and 33, were given in circumstances which created an obligation on behalf of the RA that the information be kept confidential.
199. The remainder of records 25-29, 32 and 33 consisted of deliverables or drafts of deliverables provided to the RA as part of Oxera's consulting services. The information did not consist of Oxera's own technical or commercial information, proprietary processes or initiatives that it had disclosed to the RA, such as proprietary algorithms or trade secrets. The records did not contain information about Oxera's technical methodology or calculations in reaching its conclusions or recommendations, such that they contained Oxera's confidential information as defined in the Terms of Engagement. These records and parts of records were deliverables that generally contained no more detailed analysis than other market reviews and reports prepared by Oxera and published by other clients who are also public authorities.⁵¹
200. Given that the Terms of Engagement expressly acknowledged the applicability of public access to information laws and the absence of information in the records containing Oxera's own confidential information, a reasonable person would not have concluded that these circumstances created an obligation of confidence that the RA owed to Oxera

⁵⁰ See [ICO Guidance: Information received in Confidence](#) (March 2023), at paragraph 76.

⁵¹ See, for example, Oxera, [Review of Ofgem's regulation of the energy supply market](#) (3 May 2022); and [A critical assessment of TCB18 electricity: Prepared for the European electricity TSOs](#) (30 April 2020).

with respect to the relevant records. Accordingly, the *Coco* factors were not met for circumstances giving rise to an equitable duty of confidence.

201. The exemption in section 26(1)(b) is not considered further for records 25-33.

Ricardo's information

202. As noted above, Ricardo consented to the disclosure of final reports sent by Ricardo to the RA. The Information Commissioner is satisfied that Ricardo consented to the disclosure of records 34, 35 and 37-41. Record 42 consisted of an email thread discussing the scope of the RA's query to Ricardo and Ricardo's high-level explanation of its approach to the work, along with other administrative and factual information.

203. With respect to the first *Coco* factor, records 42 lacked the necessary quality of confidence giving rise to the need for protection. The very general description of the scope of the RA's query and Ricardo's high-level explanation of how it approached the work were not sensitive. The brief explanation clarified where Ricardo was in the process of its analysis but did not disclose the nature of its conclusions. Further, the factual and administrative information did not require confidential treatment.

204. Because the information lacked the necessary quality of confidence and could not have given rise to an equitable duty of confidence under *Coco*, section 26(1)(b) is not considered further for record 42.

205. Record 36 appeared to be a draft of record 35 and arguably had the necessary quality of confidence. But, for the same reasoning related to Oxera in paragraphs 199 and 200 above, the nature of the information and Ricardo's Terms of Engagement with the RA, the circumstances did not give rise to an obligation of confidence owed by the RA to Ricardo concerning record 36.

206. Because the circumstances surrounding the records did not give rise to an equitable duty of confidence under *Coco*, no duty of confidence existed under the law. Section 26(1)(b) is not considered further for these records.

Conclusion

207. The Information Commissioner is not satisfied that the RA was justified in relying on section 26(1)(b) to withhold records 18, 27, 30, 31, 35-37, 41 and 42 and the remaining parts of records 20, 21, 23-26, 28-29, 32-34 and 38-40.

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

208. 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, including when the person to whom the information relates consents in writing to its disclosure.
209. A public authority, or third party, must consider these questions when seeking to justify the exemption for information with commercial value:⁵²
- [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?
210. 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

211. The RA made general submissions about the commercial information exemptions in sections 25(1)(a)-(d). In its internal review decision, the RA submitted that the records amounted to “commercial information” under section 25, including BELCO’s technical analysis and strategic plans. The RA stated that these have an intrinsic commercial value and that BELCO requested that the information remain confidential so that it could not be exploited by potential competitors and other third parties.
212. The RA submitted that disclosure of the records would not have advanced the public interest because the RA made the correct decision on the Approval Order for the Replacement Generation, considering all the relevant issues and stakeholders.

⁵² See [Decision 09/2019](#), Department of Public Lands and Buildings, at paragraphs 170-174.

Therefore, the RA submitted that the public interest in disclosing them was speculative. On the other hand, the RA submitted that the public interest in favour of non-disclosure was clear: it ensured that the RA was able to effectively exercise its statutory powers under the RAA, including its power to grant confidentiality orders and that it was able to maintain a healthy and trusting relationship with those that it regulates. The RA did not consider it feasible to disclose the records in redacted form.

213. The RA also made submissions on the reports produced by the third parties stating that the information in the reports was inextricably bound up with BELCO's information and could not realistically have been separated from the other. Disclosing the third-party reports would unavoidably have trespassed onto BELCO's confidential and sensitive commercial information.

Applicant's submissions

214. The Applicant highlighted that, for the commercial information exemptions, it was difficult to see how BELCO's competitive position could have been undermined because it remained the sole generator of energy from fossil fuels in Bermuda.
215. The Applicant also questioned whether harm could have occurred, as in an adverse effect on a commercial interest, given the extent of the information that had already been released to the public on the matter.
216. Further, the Applicant submitted that if the RA was seeking to protect the third-party information of MDT, that company had been open about the fact that its engines were configured for gas, stating that it was not surprised about the challenges at the NPS given that HFO was being used instead of LNG. MDT had also said that the engines it supplied were in perfect working order and that it was not aware of any actions during delivery or commissioning by MDT or its consortium partner BWSC that may have led to or contributed to the challenges. It seemed that this third party was satisfied with what it had delivered and said it was "deeply saddened that the people in Bermuda may not yet experience the reliable operation".⁵³ The Applicant stated that MDT's view should have weighed in favour of the release of any documents from or involving this party, should there be any.
217. Regarding other potential third parties, the Applicant stated that BWSC had refused to answer any questions from the media and that this lack of information strengthened the case for the public interest in disclosure. The Applicant conceded that, if there were

⁵³ See The Royal Gazette, '[Engine manufacturer not surprised Belco is having problems](#)', 10 April 2023.

processes or methods that the manufacturers or contractors did not want in the public domain, these could have been redacted.

BELCO's submissions

218. BELCO submitted that the withheld records contained business, financial and technical information relating to BELCO, its parent company and certain third parties delivering services to BELCO (**BELCO Parties**). The commercial interests that were of concern related to the sale of electricity by BELCO, the ability for BELCO's parent company to receive a return on its investment, and the BELCO Parties' sale of goods and services. Disclosure of the documents could have caused irreversible harm to BELCO's business relationships with the BELCO Parties and other current or potential suppliers, as they would be reluctant to enter business relationships with BELCO if they thought it would result in the disclosure of their confidential information to the public.
219. Although the NPS was fully operational, BELCO submitted that it has ongoing relationships with many of the BELCO Parties, as they continued to supply goods and services for the maintenance of the NPS. It was best practice to have the original equipment manufacturers of the NPS's components continue to provide these services, for both financial and technical reasons, as they remained in the best position to service their own products. Therefore, disruption of these relationships could lead to a significant adverse impact on BELCO's business, as there would be increased financial and transactional costs to find alternate suppliers, leading to reduced profits and potentially impacting the security of electricity supply in Bermuda. BELCO further submitted that any financial harm to BELCO would have an adverse impact on the ability of BELCO's parent company to earn a return on its investment.
220. BELCO submitted that disclosing the identity of the BELCO Parties and proprietary financial and technical information would also give BELCO's competitors insight into BELCO's internal business processes, placing BELCO at a disadvantage in future procurement processes for bulk generation, which were expected to be subject to competitive bidding under the EA. Disclosing the documents would also have had an adverse impact on the BELCO Parties' commercial interests, as the documents contained proprietary information that the BELCO Parties' competitors could use to underbid them in future projects of a similar nature or to gain leverage against the BELCO Parties. The BELCO Parties' customers could also use the information to obtain more favourable pricing or contractual terms. BELCO asserted to the ICO that it has continued to maintain the confidentiality of the information in the records at issue, despite the passage of time, and therefore the information was not publicly known.

221. BELCO relied on the public interest arguments stated above at paragraphs 143 and 144.

Discussion

222. Section 25(1)(c) is considered for records 2-5, 7, 9-14, 18, 21, 23, 25-33, 36, 42 and 43 as well as the parts of records 20, 24, 34, 35 and 37-41 that the RA or BELCO asserted contained BELCO's information.⁵⁴

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

223. Having carefully reviewed the withheld records, none of the exceptions in section 25(2) applied.

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

224. The information related to BELCO and the BELCO Parties. On its face, the information in record 43 also related to the RA's legal counsel.⁵⁵

225. Records 30, 31 and 42 did not contain any information related to the commercial information of BELCO, BELCO's parent company or the BELCO Parties. Section 25(1)(c) is not considered further for records 30, 31 and 42.

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

226. BELCO's commercial interest was in its supply of electricity for profit and its parent company had an interest in receiving a return on its investment. These were both squarely commercial activities.

227. The BELCO Parties had an interest in providing professional and technical services for a profit.

228. For record 43, the RA's legal counsel had an interest in providing expert legal advice for a profit.

229. All these companies were operating in a competitive environment on an international level. While the BELCO Parties might not all have competitors located within Bermuda,

⁵⁴ Section 25(1)(c) is not considered for record 17, as the Information Commissioner has found that record 17 was exempt under section 25(1)(b) below.

⁵⁵ As a reminder, Ricardo did not object to disclosure of records containing its non-proprietary information and Oxera did not respond to the ICO's opportunity to make submissions to assert that its information in the responsive records should be withheld under any commercial information exemption in section 25 of the PATI Act.

they operated within a niche commercial sector that supports the construction and maintenance of national energy suppliers throughout the world. The businesses would compete heavily for limited contracts.

230. The Applicant argued that BELCO was not in a competitive position because it remained the sole generator of energy from fossil fuels in Bermuda. While this is true, it was too narrow a view of BELCO's competitive activity. As explained above in paragraph 4, since 1994, BELCO has been one of several providers of electricity in Bermuda. While undoubtedly it has held a dominant position in the provision of electricity, it has not been the sole provider and has faced smaller competitors.

[4] What adverse effect could disclosure have caused?

231. The relevant records discussed below contain BELCO's extensive list of suppliers for the NPS project, along with details of the suppliers' trade practices and processes; designs, drawings and blueprints; technical data relating to methods of the design or construction of the NPS engines; environmental impact statements; and information relating to sales, prices and customers. The withheld records also contained business, financial and technical information relating to BELCO and its parent company.
232. Specifically, records 9-14 were BELCO's NPS contractual documents with some of the BELCO Parties, consisting in total of over 1,000 pages of detailed business information, as described above. Record 21 was a letter from BELCO to the RA responding to the RA's request under section 60 of the RAA for additional information justifying BELCO's Replacement Generation Proposal⁵⁶ and included four annexes, records 2, 3, 4 and 5, which contained business, risk and financial information. Record 23 was another letter from BELCO to the RA in response to the RA's letter of 2 February 2018, that further explained and justified the Replacement Generation Proposal and included an appendix, record 7, which contained a further risk analysis. The remaining part of record 20 was a redacted copy of BELCO's Replacement Generation Proposal submitted by BELCO under section 33(3)(b) of the RAA. The remaining part of record 24 was BELCO's cover letter submitting its Replacement Generation Proposal to the RA. Finally, record 18 was a letter from BELCO to the RA to provide further clarity concerning its Replacement Generation Proposal and its obligations under the EA and the RAA as the holder of a bulk generation license, and part of record 33 (the second email attachment) was a draft of that letter.

⁵⁶ The RA disclosed to the Applicant its 18 January 2018 letter to BELCO in its initial response to the Applicant on this PATI request.

233. Records 25-29 and 32-41 also contained some of BELCO's and the BELCO Parties' commercial information. These records consisted of Oxera's and Ricardo's expert analysis of the information provided to the RA by BELCO regarding the Replacement Generation Proposal.
234. As discussed above at paragraph 103, BELCO submitted to the RA a redacted copy of the Replacement Generation Proposal that was suitable for public disclosure.⁵⁷ The Information Commissioner has considered the unredacted portions of BELCO's Replacement Generation Proposal, submitted to the RA under section 33(3)(b) of the RAA, as not containing BELCO's commercial information. The redacted version of BELCO's Replacement Generation Proposal, which BELCO submitted to the RA on the basis that it could be made available to the public, was part of record 20. The Information Commissioner is satisfied that the disclosure of this part of record 20 could not have caused an adverse effect to BELCO, its parent company or the BELCO Parties.
235. Furthermore, the Information Commissioner is satisfied that, where Oxera and Ricardo referred to information that BELCO had left unredacted in its Replacement Generation Proposal, the disclosure of this information could not have caused an adverse effect on BELCO, its parent company or the BELCO Parties. This included the information in record 27 and parts of records 21, 23-26, 28, 29, 32, 33, 34 and 38-40.
236. For record 18, as discussed above, BELCO did not mark its letter as 'provisionally confidential' and did not request that it be treated as confidential under section 33 of the RAA on the basis that it contained commercial information. In the circumstances, and based on the content of the record, the Information Commissioner is satisfied that the disclosure of this record would not have caused an adverse effect on BELCO, its parent company or the BELCO Parties. The record only contained high-level general commitments made by BELCO, based on its legal obligations as the holder of a Bulk Generation and a TD&R License.
237. For records 35-37 and 41, the general information in these records was already known publicly at the time of the PATI request. The records pre-dated BELCO's Replacement Generation Proposal and referred to information contained in BELCO's 2016 IRP document. The RA had also publicly referred to Ricardo's report in record 40, quoting it in its IRP Proposal Consultation document dated 2 May 2018.⁵⁸ The Information

⁵⁷ BELCO, therefore, had not relied on any of the provisions in section 33(2) of the RAA (which mirror sections 25 and 26 of the PATI Act) to request that the unredacted information be treated confidentially.

⁵⁸ See the RA's '[Integrated Resource Plan \(IRP\) Proposal Consultation](#)', 2 May 2018, at paragraph 4.7.

Commissioner is not satisfied that disclosure of this information could have caused an adverse effect on the commercial interests of BELCO, its parent company or the BELCO Parties.

238. Section 25(1)(c) is not considered further for records 18, 27, 35-37 and 41 as well as certain parts of records 21, 23-26, 28, 29, 32-34 and 38-40.

239. In contrast, disclosure of other records or parts of records could have caused an adverse effect on the companies' commercial interests.

240. With respect to the commercial interests of BELCO, its parent company and the BELCO Parties, the Information Commissioner accepts that disclosure of records 2-5, 7 and 9-14 as well as the parts of records 21, 23, 25, 26, 28, 29, 32-34 and 38-40 could have caused the following adverse effects identified by the parties:

- a. Disclosure could have harmed BELCO's business relationships with the BELCO Parties and other current or potential suppliers, as they would be reluctant to enter business relationships with BELCO if they thought it would result in the disclosure of their confidential information to the public. This was particularly true because BELCO is a private company contracting with other private companies. Its commercial information was held by a public authority, the RA, due to regulatory oversight, not because BELCO or the BELCO Parties had entered into a public sector contract, for example.
- b. Disclosure resulting in the loss of business relationships with the BELCO Parties could have created increased financial and transactional costs for BELCO to find alternate suppliers, leading to reduced profits and potentially impacting the ability of BELCO to provide electricity.
- c. Any reduced profits for BELCO caused by disclosure would have had an adverse impact on the ability of BELCO's parent company to earn a return on its investment.
- d. Disclosing the documents would also have had an adverse impact on the BELCO Parties' commercial interests, as the records contained proprietary information that the BELCO Parties' competitors could have used to underbid them in future projects of a similar nature or to gain leverage against the BELCO Parties. The BELCO Parties' customers could also have used the information to obtain more favourable pricing or contractual terms.

241. Record 43 consisted of the legal advice prepared by an international law firm that reflected the firm's work product. While law firms providing advice to a public authority may reasonably expect that the nature of their advice may become public, the note or

legal advice itself is generally held confidentially. Here, the law firm's commercial activity could have been impacted if competitive firms could have read the actual note provided to the client, including the depth of analysis, research and advice, and then use it as their own.

[5] How likely was this to occur?

242. Having carefully reviewed the withheld records or parts of records, and considering the competitive environment in which BELCO, the BELCO Parties and the international law firm were operating, the prejudice described in paragraphs 240 and 241 was reasonably likely to have occurred and not speculative.

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

243. Where the exemption was engaged for BELCO's technical, operational and financial analyses or the names of the BELCO Parties that had not been publicly disclosed in records 2-5, 7, 9-14 and 43, as well as parts of records 21, 23, 25, 26, 28, 29, 32-34 and 38-40, the balance of the public interest is considered.
244. The Information Commissioner agrees that there was a general public interest in allowing the public to further understand the RA's decision making with respect to its approval of BELCO's Replacement Generation Proposal. The RA's mandate required a balancing of various public needs and concerns, including the promotion of competition in the energy sector, ensuring the security of Bermuda's electrical supply, and safeguarding the interests of end-users (including their financial and environmental well-being). Furthering public understanding of how the RA balanced these public interests in its decision making would have fulfilled the purposes in section 2 of the PATI Act to promote transparency and accountability.
245. Disclosure of the remaining technical, operational and financial analyses or the names of the BELCO Parties, however, would not have furthered this general public interest in transparency and accountability for the RA's decision making. Some of BELCO's commercial information has already been found by the Information Commissioner to fall outside the exemption for commercial interests because its disclosure could not have caused an adverse effect to BELCO's interests, as explained in paragraphs 234-238. This information about BELCO, a private company, would have provided the public with appropriate information to understand the RA's decision making and regulatory activities. Had the RA disclosed BELCO's non-exempt commercial information, the public interest would have been satisfied.

246. Regarding the more detailed technical, operational and financial analyses and the names of the BELCO Parties, the Information Commissioner also agrees that the public has had an interest in private companies being able to negotiate and enter into private contracts without fear that this type of technical and financial information would be publicly disclosed because the entity was subject to regulatory oversight.
247. Considering these factors, the Information Commissioner is satisfied that the balance of the public interests for BELCO's detailed technical, operational and financial analyses and for the names of the BELCO Parties favoured non-disclosure. Any incremental increase in transparency would have been gained only by a significant level of disclosure of private companies' commercial information.
248. The Information Commissioner also notes the RA's argument regarding the public's interest in the regulatory body being able to obtain the information it has needed from private companies to effectively fulfil its statutory mandate and the effectiveness of the RA's confidentiality orders. Yet, for the records or parts of records at issue, the RA did not issue a statutory confidentiality order for any of them (or BELCO did not request one), and the RA will continue to have the statutory authority to issue an order whenever it determines it is appropriate. Further, the RA continues to have statutory authority to compel companies to provide the required information in response to the RA's request for additional information. In this instance, the relevant factor favouring the exemption in section 25(1)(c) being maintained was the general public benefitting from private companies operating and engaging with regulatory bodies without their confidential commercial information being exposed to competitors.
249. Finally, the Information Commissioner notes the RA's argument that, because its decision to approve the Replacement Generation Proposal was correct, the public did not have a weighty interest in understanding its decision making. This was simply misplaced. The PATI Act requires public authorities to move beyond conducting the public's business behind closed doors and, instead, to be accountable for explaining their decision making in the sunlight of public scrutiny.

Conclusion

250. The Information Commissioner is satisfied that the RA was justified in relying on section 25(1)(c) to deny access to records 2-5, 7, 9-14 and 43 as well as parts of records 21, 23, 25, 26, 28, 29, 32-34 and 38-40, while she is not satisfied that the RA was justified in doing so for records 27, 30-31, 35-37, 41 and 42 as well as the remaining parts of records 20, 21, 23-26, 28, 29, 32-34 and 38-40.

Other commercial information – sections 25(1)(a), (b) and (d)

251. The RA and BELCO also invoked the exemptions in sections 25(1)(a) (trade secrets), 25(1)(b) (information with commercial value) and 25(1)(d) (prejudice to negotiations), although neither party provided arguments or reasonings for the Information Commissioner to assess the application of these exemptions.⁵⁹ Some understanding of BELCO's position, though, could be ascertained on the face of the records.
252. As an initial matter, trade secrets are a specific subset of the information considered above as exempt information under section 25(1)(c). None of the remaining records or parts of records contained information that would have constituted a trade secret as defined in paragraphs 108-9 of [Decision 23/2023](#), Office of the Tax Commissioner.
253. This was also true of the records or parts of records that had commercial value, as defined in paragraph 170 of [Decision 09/2019](#), Department of Public Lands and Buildings, with the exception of record 17. Record 17 was the FIDIC's Conditions of Contract for Plant and Design-Build publication, that was available for sale. This was precisely the type of record whose commercial value would have been diminished if individuals could have obtained a copy through a PATI request for free, and thus not pay the fee to purchase the book from the seller as an arms' length buyer. No public interest existed in allowing such access, and record 17 fell within the exemption in section 25(1)(b).
254. Finally, the RA and BELCO did not identify the relevant negotiations at issue to support their reliance on section 25(1)(d). On their face, the records related to the RA's exercise of its regulatory authority over BELCO to approve BELCO's Replacement Generation Proposal and the RA's requests for additional information to justify BELCO's Replacement Generation Proposal. The nature of this engagement was not a negotiation. In the absence of submissions from the RA or BELCO on this point, the Information Commissioner does not consider section 25(1)(d) further for any remaining record.

Conclusion

255. The Information Commissioner is satisfied that the RA was justified in relying on section 25(1)(b) to withhold record 17, but the RA was not justified in relying on this exemption or sections 25(1)(a) or (d) to withhold the remaining records or parts of records.

⁵⁹ The Information Commissioner has published a [guidance note on the section 25\(1\) exemptions](#) (January 2023).

Operations of public authorities – section 30

256. The RA did not cite section 30 in its initial decision or internal review decision. However, in its submissions to the ICO, the RA stated that “in the substance of its explanations it [was] clearly describing circumstances in which exemption 30 also applies”. The RA did not identify which subsection in section 30 it was relying on.
257. On the face of the records, section 30(1)(a) may have applied to some information in the records, i.e. whose disclosure would have prejudiced the investigations or inquiries conducted by the RA. The RA, however, has not made submissions to explain to the Information Commissioner how disclosure of the records would have prejudiced the effectiveness of such investigation or inquiry conducted by the RA, or the procedures or methods employed for the conduct of those investigations or inquiries.
258. The Information Commissioner is not satisfied that section 30 applied to any of the withheld records and, in particular, to any of the records or parts of records that have not been found to be exempt under any other exemption above.

Deliberations of public authorities – section 29

259. 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.
260. 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.⁶⁰ A deliberative process is, at its most basic, the thinking process of an agency.⁶¹ This exemption is in place to safeguard the integrity of this process for public authorities’ decision making.
261. 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

⁶⁰ See [Decision 02/2019, Office of the Governor](#), at paragraph 168.

⁶¹ See Queensland’s Office of the Information Commissioner (17 September 2019), [Interpreting the legislation – Right to Information Act 2009, Deliberative Process](#), at paragraph 3.1. See also Western Australia’s Office of the Information Commissioner (October 2001), [FOI Guide No. 3, Deliberative Process](#), on page 1.

insidiously”⁶². 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.

262. 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)).
263. ‘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 adopted the following plain meaning of “factual” as: “Something 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”.⁶³ Factual information is “distinguishable from information in the form of [a] proposal, opinion or recommendation”.⁶⁴
264. 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.⁶⁵ 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.

⁶² Oxford Dictionary of English (3rd ed. 2010).

⁶³ 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.

⁶⁴ 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.

⁶⁵ See, for example, Office of the Australian Information Commissioner (December 2016), [FOI Guidelines, Part 6 – Conditional exemptions](#), at paragraph 6.73.

265. 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.
266. 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] Could 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?
267. 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 the exemption to deny access to the records.

Public authority's submissions

268. The RA did not make specific submissions on section 29.

Applicant's submissions

269. On section 29, the Applicant raised each of the exceptions to the exemption in subsection (2), submitting that all information falling within the exceptions should be disclosed.
270. The Applicant submitted that they understood the purpose of section 29 as enabling members of boards and committees to engage in free and frank discussions of issues without fear that their thoughts would be made public, but that, in this case, it was relevant to understand what the RA Board members knew and when they knew it regarding LNG being used at the NPS. This information was factual rather than opinion and therefore met the public interest exception.
271. The Applicant submitted that even information that could be considered at risk of undermining the deliberations of public authorities should have been disclosed if it shed light on any lack of efficiency or effectiveness of the public authority, as there was a strong public interest attached to the RA's deliberations.

272. Further, the Applicant stated that the fact that the RA Board of Commissioners and BELCO's President included former and current Members of Parliament (at the relevant time), the deliberations should have been made transparent.
273. The Applicant's submissions on the public interest test are above at paragraphs 129-137.

Discussion

274. Section 29 is considered for records 18, 27, 30, 31, 35-37, 41 and 42 as well as parts of records 20, 21, 23-26, 28, 29, 32-34 and 38-40.

[1] What was the relevant deliberative process involved?

275. The relevant deliberative process in records 20, 21, 23-29 and 33-42 was the RA's decision on whether to approve BELCO's Replacement Generation Proposal.
276. The relevant deliberative process in records 30-32, although related generally to the decision whether to approve BELCO's Replacement Generation Proposal, was more specifically a deliberation about what the RA needed to obtain via a section 91 information request from the RA to BELCO seeking additional records to support BELCO's Replacement Generation Proposal.
277. Some parts of record 26 also involved the RA's decision on its strategies to promote competition in the electricity generation sector.

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

278. The information in some of the records fell within the exceptions listed in section 29(2).

Factual information

279. Section 29(2)(a) contains an exception for factual information. Record 18 and parts of the email threads in records 27-33 contained factual information that fell within the exception in section 29(2)(a). This would include parts of records 27-29 and 42 where the records contained emails stating facts about meetings and work orders.
280. While parts of some of the other records contained factual information, they were inextricably intertwined with the deliberative process to the extent that they could not have been separated and disclosed.

Technical expert's report, study or analysis

281. Section 29(2)(c) contains an exception for information “in the nature of a report, study or analysis of a scientific or technical expert”. Records 35-37 and 41⁶⁶ were technical reports, studies or analyses provided to the RA prior to the RA’s receipt of BELCO’s Replacement Generation Proposal. The contents of these records also overlapped with information that had already been disclosed by the RA. Therefore, these records fell within the exception in section 29(2)(c) and were not exempt from disclosure under section 29.
282. Similarly, parts of record 34 contained the analysis of BELCO’s Replacement Generation Proposal by Ricardo, the technical expert consulting firm. These parts of the record fell within the exception in section 29(2)(c). Other parts of record 34 consisted of Ricardo’s recommendations on various courses of action. These parts did not come within the exception because they went beyond the technical analysis of the report and, instead, proposed actions the RA could have taken in response to Ricardo’s analysis.
283. Section 29(1) is not considered further for records 35-37 and 41 as well as the parts of records 27-29, 34 and 42 that fell within an exception in section 29(2).

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

284. Disclosure of records 30, 31-33 and 38-40 as well as parts of records 20, 21, 23-29, 34 and 42 could not reasonably have been expected to undermine the deliberative processes of the RA identified above.
285. At the time of the PATI request, the deliberations concerning the RA’s decision whether to approve BELCO’s Replacement Generation Proposal was completed. The RA approved BELCO’s Replacement Generation Proposal by an order dated 6 March 2018. The RA issued another order on 23 May 2018 clarifying BELCO’s ongoing obligation to comply with any information requests the RA issued related to the approved Replacement Generation Proposal.
286. Further, records 30-32 related to the RA’s preparation of its further requests for BELCO to produce information related to the approved Replacement Generation Proposal, pursuant to its 23 May 2018 Clarifying Order. On 31 May 2018, the RA sent the relevant

⁶⁶ Record 41 contained the data supporting the information in the report in record 37.

information request to BELCO, under section 91 of the RAA, concluding its deliberations for what information to seek in this Clarifying Order.

287. Because these deliberations were concluded long before the 17 January 2023 PATI request, and in the absence of submissions by the RA that future deliberations would have been prejudiced, it is unclear to the Information Commissioner how disclosure could have prejudiced the RA's completed deliberation.⁶⁷
288. Section 29(1) is not considered further for the records listed above in paragraph 284.
289. In contrast, record 26 contained information related to the RA's deliberations on strategies for promoting competition within the electricity generation sector. These deliberations were ongoing at the time of the PATI request (and are likely to be ongoing at the time of this Decision). The Information Commissioner is satisfied that premature disclosure of the frank advice of its consultant related to these deliberations could have chilled and inhibited its ongoing considerations.

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

290. The exemption was engaged for part of record 26 concerning the RA's ongoing deliberations. Although the public had an interest in being informed about the factors the RA may have been considering and understanding more about the RA's activities, that interest was met through the various consultation processes that allow the RA to receive public input.
291. The public also had an interest in the effectiveness of the RA's regulatory actions. Disclosure of the relevant part of record 26 would have created a risk that potential electricity providers could have undermined the RA's strategies if they were disclosed prematurely. On balance, the public interest favoured maintaining the exemption for part of record 26.

⁶⁷ See [Decision 14/2021, Office of the Governor](#), at paragraph 19 ("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."); and [Decision 23/2024, Bermuda Gaming Commission](#), at paragraph 89 ("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 process.").

Conclusion

292. The Information Commissioner is not satisfied that the RA justified its reliance on section 29(1) to withhold any of the responsive records except for part of record 26.

Personal information – section 23

293. 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, subject to certain exclusions to the definition in section 24(2) and exceptions to the exemption in section 23(2) that are not applicable in this review.

294. 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 consideration:⁶⁸

- a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations.
- b. Whether disclosure would be fair to the individual under all of the circumstances. Evaluating the fairness of any disclosure may include consideration of the following:
 - i. Whether sensitive personal information was involved?
 - ii. What would be the consequences upon the individual of disclosure?
 - iii. What are the reasonable expectations of privacy of a person in the individual’s position?
- c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.

295. In sum, as the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), public authorities must consider the following questions before denying public access to records under the personal information exemption:⁶⁹

⁶⁸ See [Decision 02/2019, Office of the Governor](#), at paragraph 51.

⁶⁹ See [Decision 02/2019, Office of the Governor](#), at paragraph 56.

- [1] Whether the record 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?

296. The Information Commissioner may consider the personal information exemption on her own accord, as has occurred in this review.
297. Finally, by virtue of section 3 of the [Personal Information Protection \(Transitional\) Regulations 2024](#), this review is decided under the PATI Act in effect as of 31 December 2024. This means that the amendments to the PATI Act and Regulations made by the [Personal Information Protection Amendment Act 2023](#) are not applicable to assessing the records at issue in this Decision.

Discussion

298. Section 23 is considered for parts of records 18, 21 and 23-42, where the Information Commissioner found they were not exempt under the other provisions discussed above.

- [1] Did the record consist of information about an identifiable individual?

299. Relevant identifiable individuals were officers or employees of public authorities, and those associated with private entities including employees of the RA's consultants, BELCO and the BELCO Parties. Their personal information consisted of their names, employment history, signatures and contact details.

- [2] Did the information fall within any exclusion to the definition of personal information (section 24(2))?

300. None of the exclusions applied for the identifying information of individuals throughout the records. While some 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 their 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). Also, the exclusion in section 24(2)(b) did not apply to the names of the

individuals employed by private entities who were identified in the withheld records, because they had not entered into a contract with the Government as individuals.⁷⁰

[3] Did any exception to the exemption in section 23(2) apply to the record?

301. None of the exceptions in section 23(2) applied to information about the individuals in the records.

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

302. Disclosure of the names and positions of the individuals involved in the RA's decision-making process would have promoted the general public interest in transparency and accountability around the RA's regulation of the electricity sector. Concerns were particularly heightened where the RA's decision-making process had a significant impact on the public's economic and environmental interests. With respect to personal information, the public's interest in disclosure for purposes of transparency and accountability must have been balanced against the fairness to the individuals concerned and then the necessity of disclosure to further these public interests.
303. With respect to the fairness of disclosure to the individuals, the executive public officers with outward facing roles who were involved in the high-level discussions and decision-making should have had expectations that their names, positions and involvement in matters related to their work could be publicly disclosed to the public, for transparency and accountability purposes. This included the RA's then-Chief Executive Officer and then-Interim Chief Executive Officer. Disclosure of this category of information would have been fair.
304. In contrast, the public interest would not have required disclosure of other personal information in the records, including the contact details or signatures of these same executive public officers, as well as the personal information of individuals in the private sector or public officers who assisted but were not involved in the decision-making process. These individuals had a reasonable expectation that information relating to the performance of their work would not have been made public, unless a strong public interest factor compelled releasing it. Such strong factors were absent in this case. The personal information exemption was justified for this information.

⁷⁰ See, most recently, [Decision 12/2024](#), [Ministry of Health Headquarters](#), at paragraph 115.

305. For the names and positions of the executive public officers, disclosure would have been necessary to further the identified public interests. Disclosure would have enabled the public to have a better understanding of which individuals made which decisions concerning the approval of BELCO's Replacement Generation Proposal. This, in turn, would have furthered the public's understanding of the RA's activities and promoted accountability for its executive officers.

Conclusion

306. The personal information exemption in section 23(1) applied to parts of records 18, 21, 23, 24 and 27-42, where the public interest required disclosure of the names and positions of the executive public officers in records 18, 23, 24, 27 and 29-33, but not of other personal information.

Conclusions

307. In conclusion, the Information Commissioner finds that:
- a. the RA was justified in relying on section 16(1)(a) to administratively deny access to records responsive to items 4-8 of the PATI request;
 - b. during the review, the RA remedied the deficiencies of its search in relation to items 2 and 3 of the PATI request and, therefore, has conducted a reasonable search for records responsive to these items;
 - c. the RA has not conducted a reasonable search for records responsive to item 1 of the PATI request;
 - d. the RA was justified in relying on section 37(1) to deny public access to record 1 and parts of records 20 and 24;
 - e. the RA was justified in relying on section 25(1)(c) to deny public access to records 2-5, 7, 9-14 and 43 and parts of records 21, 23, 25, 26, 28, 29, 32-34 and 38-40;
 - f. the RA was justified in relying on section 29(1) to deny public access to part of record 26;
 - g. the RA was justified in relying on section 25(1)(b) to deny public access to record 17;
 - h. the RA was not justified in relying on sections 25(1)(a), (b), (c) and (d), 26(1)(a) and (b), 29, 30 and 37 to deny public access to records 18, 27, 30, 31, 35-37, 41 and 42 and the remaining parts of records 20, 21, 23, 25, 26, 28, 29, 32-34 and 38-40; and

- i. certain parts of records 18, 21, 23, 24 and 27-42 were exempt under section 23(1).
Save for the names and positions of the executive public officers, disclosure of the personal information in these records was not in the public interest.

Decision

The Information Commissioner finds that the Regulatory Authority of Bermuda (**RA**) was not justified in relying on section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010 to administratively deny parts of the PATI request, but that its failure to conduct a reasonable search was remedied in part during this review. The Information Commissioner also finds that the RA was justified in relying on sections 37(1) (disclosure prohibited by legislation), 25(1)(c) (adverse effect on commercial interests), 25(1)(b) (adverse effect on commercial value) and 29(1) (deliberations of a public authority) to refuse public access to some records in whole or in part. The Information Commissioner finds that the RA was not justified in relying on any of the other cited exemptions to withhold records. Finally, on her own accord, the Information Commissioner finds that certain personal information was exempt from disclosure under section 23(1) of the PATI Act.

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

- upholds the RA's decision administratively denying items 2-8 of the PATI request under section 16(1)(a);
- upholds the RA's decision denying public access to records 2-5, 7, 9-14 and 43 and parts of records 21, 23, 25, 26, 28, 29, 32-34 and 38-40 under section 25(1)(c), to part of record 26 under section 29(1), and to record 17 under section 25(1)(b);
- varies the RA's decision denying public access to record 1 and parts of records 20 and 24 by virtue of section 37(1), and to parts of records 18, 21, 23, 24 and 27-42 by virtue of section 23(1);
- reverses the RA's reliance on sections 25(1)(a), (b), (c) and (d), 26(1)(a) and (b), 29, 30 and 37 to deny public access for the remaining parts of records; and
- annuls the internal review decision for item 1 of the request.

The Information Commissioner further orders the RA to conduct a reasonable search to locate records responsive to item 1 of the PATI request; to issue a new initial decision to the Applicant on records 44-49 (which were newly located during this review) as well as on any additional records responsive to item 1 located after conducting a reasonable search; and to disclose parts of records 18, 20, 21 and 23-42, with exempt information removed, as directed by this Decision Notice and the accompanying Confidential Annex (Appendix II) and Order, which form part of this Decision, on or before **Wednesday, 19 March 2025**.

Judicial Review

The Applicant, the Regulatory Authority of Bermuda, 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

The Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Regulatory Authority of Bermuda 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
5 February 2025

Appendix I: Relevant statutory provisions

Public Access to Information Act 2010

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—
- ...
- (2) But “personal information” does not include—
- (a) information about an individual, except where the individual is a police officer of the Bermuda Police Service who is or was engaged in a surveillance function during the course of his employment; who is or was an officer or employee of a public authority that relates to the position or functions of the individual;
 - (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—
- (a) trade secrets of any person;
 - (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

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

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

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—

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the public authority concerned or the procedures or methods employed for the conduct of those tests, examinations, investigations, inquiries or audits;

- (b) have a significant, adverse effect on the performance by the public authority of any of its functions relating to management (including industrial relations and management of its staff); or
 - (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.

Disclosure prohibited by other legislation

- 37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.
- ...

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.

Regulatory Authority Act 2011

Confidentiality

- 33 (1) Any person submitting information to the Authority may request that the Authority treat such information as confidential.
- (2) The Authority shall grant a request to treat information as confidential if the Authority concludes that the information is—
- (a) a trade secret of any person;
 - (b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;
 - (c) other 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;
 - (d) information—
 - (i) that is given to the 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
 - (e) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.

(3) A person claiming confidentiality in respect of any information submitted to the Authority must provide—

- (a) a full justification for its claim; and
- (b) a version of such information without the confidential provisions and in a form that may be made available to the public.

(4) Following receipt of any information submitted subject to a request for confidential treatment, the Authority shall issue a decision as to whether the justification offered by the submitting party meets the standard for confidential treatment specified in subsection (2).

(5) If the Authority concludes that the justification offered by the submitting party meets the standard for confidential treatment, the Authority shall issue an order granting the request.

(6) In any case in which the Authority grants a request for confidential treatment, the information may only be disclosed—

- (a) to the Minister responsible for the regulated industry sector;
- (b) to the Commissioners;
- (c) to the staff;
- (d) to a court of competent jurisdiction; or
- (e) where necessary to conduct a public consultation or adjudication, to specific parties pursuant to a non-disclosure agreement or protective order.

(7) If the Authority concludes that the justification offered by the submitting party does not meet the standard for confidential treatment, the Authority shall—

- (a) issue an order denying the request; and
- (b) either—
 - (i) return the information to the submitting party, in which case the Authority shall not consider or rely on the information; or
 - (ii) after providing the submitting party with notice and an opportunity to comment, disclose the information, if doing so would be in the public interest.

Unauthorised disclosure of confidential information

34 A Minister, the Commissioners and the members of the staff shall not reveal or in any manner communicate to any other person, except as authorised or required by law, any information for which the Authority has granted confidential treatment.

Disclosure of confidential information by the Authority

106 Any Commissioner or member of the staff who knowingly contravenes section 34 commits an offence which shall be punishable—

- (a) on summary conviction by imprisonment for up to one year or a fine of up to \$20,000, or both; or
- (b) on conviction on indictment by imprisonment for up to two years or a fine of up to \$50,000, or both.

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