

Decision Notice

Decision 12/2018: Ministry of Finance Headquarters

Monies owed by Sandys 360

Reference no: 24082016-01

Decision date: 27 December 2018

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Finance Headquarters (**Ministry**) for various records related to financial information about Sandys 360. The Ministry's initial decision granted the request in part and denied it in part in reliance on sections 25, 26 and 37 of the PATI Act. It did not specify an exemption provision for sections 25 or 26. The Ministry's internal review decision provided access to additional records and otherwise upheld the initial decision on the same grounds. This Review addresses the Applicant's challenge to the reasonableness of the Ministry's search and the decision to deny access to records related to money owed by Sandys 360 to the Government of Bermuda and to the Government's efforts to recover that money.

The Information Commissioner has found that the Ministry conducted a reasonable search for records responsive to Item 1 of the PATI request, in accordance with section 12(2) of the PATI Act, and justified its reliance on section 37(1) (disclosure prohibited by other legislation) to deny access to records related to the amount of payroll tax due.

The Information Commissioner has also found that the Ministry did not justify its reliance on section 37(1), section 25(1)(c) (commercial interests) or section 26(1)(b) (breach of confidence) to deny the public access to the records related to the actual amounts of social insurance contributions and land tax owed. Finally, the Information Commissioner has found that the Ministry had not provided a complete and accurate response to the Applicant to the request for records related to the Government's efforts to recovery money owed by Sandys 360.

The Information Commissioner requires the Ministry to disclose one record in whole and one record, in part, related to the amounts of social insurance contributions and land tax owed.

The Information Commissioner also requires the Ministry to issue an accurate and complete response to the PATI request with respect to Government's efforts to recover money owed.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 12(1) (access to records); section 12(2)(b) (complete and accurate response); section 21 (public interest test); section 25(1)(c) (commercial interests); section 26(1)(b) (breach of confidence); and section 37 (disclosure prohibited by other legislation).

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

Background

1. On 23 February 2016, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Finance Headquarters (**Ministry**) for the following records:
 - a. The financial report of Sandys 360 carried out by KPMG at the request of the Government of Bermuda (**Government**) (**KPMG Report**);
 - b. A list of payments from the Ministry to Sandys 360 for fiscal years ending 2011, 2012, 2013, 2014, 2015 and 2016 (**payments made to Sandys 360**); and
 - c. A list of money owed by Sandys 360 to Government and information on how Government has sought to recover it, including a total figure and all correspondence relating to money owed (**money owed by Sandys 360**).
2. On 18 April 2016, the Ministry issued its initial decision. The Ministry granted the request in part and refused the request in part. The Ministry granted in part the request for payments made to Sandys 360 by providing an explanation of two payments initiated by the Ministry (totalling \$807,000) made between April 2011 and August 2011 from the Government Reserves Fund. The Ministry granted in part the request for money owed by Sandys 360 by disclosing that Sandys 360 owed the Government \$807,000 in relation to a duplicate payment made in error to Sandys 360 in August 2011. It also disclosed that Sandys 360 was in debt to the Government in relation to payroll taxes, land taxes and social insurance contributions. The Ministry explained in its decision that the Government has sought to recover these debts by pursuing its customary debt collection procedures. The Ministry also disclosed a number of documents supporting the explanation provided in the initial decision.
3. The Ministry refused the request for the KPMG Report because it was not held by the Ministry.
4. The Ministry also refused additional records for money owed by Sandys 360 related to the total amount of the debt owed by Sandys 360 involving payroll taxes, land taxes, social insurance contributions. It refused these records on the basis that the records were exempt under unspecified provisions in sections 25 (commercial information) and 26 (information received in confidence), as well as section 37 (disclosure prohibited by other legislation) of the PATI Act.
5. On 4 May 2016, the Applicant sought an internal review.

6. On 13 July 2016, the Ministry issued an internal review decision, upholding its initial decision on the same grounds. The internal review decision identified the Taxes Management Act 1976 as the applicable legislation for the exemption in section 37 of the PATI Act. It explained that the Taxes Management Act provided for the confidentiality of certain tax matters. The Ministry further explained that “it has been a longstanding policy of the Ministry not to publicly disclose amounts owed to Government by entities”.
7. The internal review decision also stated that for the payments made to Sandys 360, the Ministry would provide the Applicant with an additional list of payments made by Government to Sandys 360.
8. The Ministry provided the Applicant with the additional list of payments by letter on 15 July 2016. The Ministry’s letter also stated that there were no records, including letters, invoices, or court papers, showing how Government is seeking to recover the funds owed by Sandys 360. The Ministry reiterated that the Government is using its customary debt collection procedures.
9. The Applicant requested an independent review by the Information Commissioner on 24 August 2016.

Investigation

10. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
11. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Ministry to determine whether it had conducted a reasonable search and whether its reliance on the exemptions was justified.
12. The Applicant had related pending reviews involving the Applicant’s requests for the same records made to other public authorities. In light of this, the Information Commissioner’s Office (**ICO**) confirmed with the Applicant that this Review would only address (1) the reasonableness of the Ministry’s search for the KPMG Report and (2) the denial of access to the records related to money owed by Sandys 360 to Government and the Government’s efforts to recover it. The remaining requested records—the KPMG Report and records related to payments made by Government to Sandys 360—would be addressed in the other two related pending Information Commissioner’s reviews.

13. The Ministry provided the withheld records 1 – 5 that are responsive to the request for money owed by Sandys 360. The Ministry also clarified that it was relying on the exemptions in sections 25(1)(c) (adverse effect on commercial interests), 26(1)(b) (breach of confidence), and 37(1) (disclosure prohibited by other legislation) of the PATI Act.
14. Section 47(4) of the PATI Act requires the Information Commissioner to give all concerned parties to the review a reasonable opportunity to make representations. After confirmation with the Applicant of the issues on review, the ICO notified the Ministry of the application on 1 December 2016. The ICO also notified Sandys 360 (company registration no. 43424) (**Company**) on 11 September 2018, and the Sandys 360 Board of Trustees (**Trustees**) of the review on 30 November 2018.
15. The ICO invited the Applicant, the Ministry, the Company, and the Trustees to comment on this application and make submissions to the Information Commissioner for consideration in this review. The Ministry was asked specific questions related to the reasonableness of its search for records and to justify its reliance on sections 25(1)(c), 26(1)(b), and 37(1) of the PATI Act.
16. The Ministry made formal submissions on 16 April 2018. The Applicant also made submissions in December 2016 and February 2018. The ICO did not receive submissions from the Company nor the Trustees.

Information Commissioner’s analysis and findings

17. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Applicant and the Ministry. She is satisfied that no matter of relevance has been overlooked.

Accuracy of the response – section 12(2)(b)

18. A requester has a right under section 14(2)(a) and 43(2)(b)(i) of the PATI Act to know the actual reasons for the public authority’s decision on the PATI request. The requester also has a right under section 12(2)(b) for those reasons to be supported by accurate facts as they are known to the public authority when it makes the decision. Specifically, section 12(2)(b) requires a public authority to “make every reasonable effort to . . . respond to requests completely, accurately and in a timely manner”.
19. The Ministry’s 15 July 2016 letter to the Applicant stated that “there are *no records* showing how government is seeking to recover the funds it is owed by Sandys 360 and who it is seeking repayment from. Hence, there are *no records* of letters, invoices, or court papers

pertaining to repayment. However, Government sought to recover these debts by pursuing its customary debt collection procedures” (emphasis added).

20. The Ministry’s 13 July 2016 internal review decision also invoked exemptions to deny access to records related to efforts to recover monies owed.
21. The Ministry later provided the ICO with withheld records, which the Information Commissioner has reviewed.
22. The Ministry’s decisions have been contradictory and require clarification to inform the Applicant of the accurate reasoning for the Ministry’s decisions, i.e., whether there are no responsive records or whether responsive records have been located (and the number of records) but are withheld under an exemption.
23. The Information Commissioner is not satisfied that the Ministry has provided an accurate response to the Applicant with respect to whether it has found records responsive to Item 3 of the request seeking records related to Government’s efforts to recover money owed by Sandys 360. The Information Commissioner is also not satisfied that the Ministry has complied with the requirements of section 12(2)(b).

Reasonable search – section 12

24. At issue is whether the Ministry failed to conduct a reasonable search for the KPMG Report.
25. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to provide a response to a PATI request that is complete and accurate.
26. Regulation 5(1) further requires that the public authority, through its Information Officer and delegates, make a reasonable effort to locate a record that is responsive to the PATI request. Should the Information Officer not locate responsive records, regulation 5(2) requires the Information Officer to document the efforts taken. This is often referred to as a ‘search log’.
27. Together, these provisions require the public authority to conduct a reasonable search in support of the right to access public records set out in section 12(1).
28. To determine what records it holds, a public authority must conduct a reasonable search under the circumstances, consistent with section 12(2)(b) and regulation 5. As set out in Decision 02/2018 Department of Human Resources, paragraphs 50-51, the Information Commissioner shall consider:
 - the quality of the public authority’s analysis of the request;

- the scope of the search that it decided to make on the basis of that analysis; and
- the rigour and efficiency with which the search was then conducted.

The specific circumstances of each case will inform this assessment and may include, when appropriate, evidence related to discussions with a requester to clarify a request, the public authority's records management practices, the details of any search plan, or any reason offered by the public authority to justify the reasonableness of its search.

29. A public authority bears the burden of demonstrating that, on the balance of probabilities, it has conducted a reasonable search for records.

Public authority's submissions

30. The Ministry submitted that it did not commission the KPMG Report and never held a copy of the report.

31. The Ministry explained that the Ministry of Public Works held the KPMG Report and that the Ministry had transferred the request to the Ministry of Public Works.

32. The Ministry offered to obtain a copy of the KPMG Report during the ICO's investigation.

Applicant's submissions

33. The Applicant noted that in its internal review decision, the Ministry had both stated it did not hold the KPMG Report and asserted that it withheld the report under exemptions in the PATI Act.

34. The Applicant pointed out that exemptions should not be invoked if records are not located.

Discussion

35. The Information Commissioner considers whether the Ministry conducted a reasonable search for the KPMG Report.

[1] The quality and nature of the public authority's initial analysis of the request

36. The Ministry's initial decision, internal review decision, and submissions clearly indicate it correctly understood that the straightforward PATI request sought the KPMG Report.

37. The Information Commissioner is satisfied that the Ministry's understanding of the request was accurate, complete, and adequate.

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

[3] The rigour and efficiency with which the public authority conducted its search

38. The scope, rigour, and efficiency of the search are assessed together. The Ministry offered very limited information concerning these factors.
39. The Information Commissioner accepts that in light of the high-profile nature of the KPMG Report, the Ministry would be aware if it had a copy of it. Further, the Ministry knew that the Ministry of Public Works held the KPMG Report and sent the PATI request there.
40. The Information Commissioner is satisfied that the scope, rigour and efficiency of the search were adequate under these circumstances.
41. Based upon this assessment, the Information Commissioner is satisfied that, on the balance of probabilities, the Ministry conducted a reasonable search for the KPMG Report.

Disclosure prohibited by other legislation – section 37(1)

42. According to the plain language of section 37(1) of the PATI Act, records are exempt from disclosure if their disclosure is prohibited by any statutory provision, other than the PATI Act itself. For existing legislation, section 37(1) preserved the confidentiality and secrecy provisions that were in statutory provisions at the time the PATI Act came into effect on 1 April 2015. For these existing statutory provisions, the PATI Act does not require express reference to the PATI Act for the exemption in section 37(1) to apply. (section 37(5)).
43. For the section 37(1) exemption to be engaged, the statutory prohibition on disclosure must be mandatory, not discretionary. This may be indicated by the use of the word 'shall' and an accompanying provision setting out penalties for unauthorised disclosures.
44. Section 37(1) is also an absolute exemption, which means that it is not subject to the public interest test set out in section 21 of the PATI Act. For this reason, the applicability of section 37(1) is considered first.
45. When applying section 37(1), a public authority must:
 - a. Identify the statutory prohibition creating the mandatory prohibition on disclosure;
 - b. Demonstrate that the record falls within the statutory provision; and
 - c. Ensure that the records do not fall within any exceptions or gateways to public disclosure that may be contained in the statutory provision.

46. The public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying an exemption.

Public authority's submissions

47. The Ministry submitted that the relevant statutory prohibition on disclosure is the secrecy provision of section 4 of the Taxes Management Act 1976 (**Taxes Act**), which is applicable to certain tax matters.

48. Under section 4(1)(b) of the Taxes Act, the Minister has the discretionary power to decide whether a particular matter can be disclosed. The Ministry submitted that the provision is seldom used. When it has been used, it is to assist other government departments in operational matters or investigations, not for public disclosures.

49. The Ministry did not rely on any other statutory provisions.

Applicant's submissions

50. The Applicant did not make specific submissions on the application of section 4 of the Taxes Act. The Applicant stated generally that none of the exemptions are applicable because companies in arrears for payroll tax, land tax, and social insurance are regularly identified to the public through, for example, the Auditor General's report and the media.

Discussion

[1] Identifying the relevant statutory provision – section 4(1) of the Taxes Act

51. The Ministry relies upon the secrecy provision in section 4(1) of the Taxes Act:

Except in the performance of his duties under the Taxes Acts, every person who is or has been employed in carrying out or assisting any person to carry out the Taxes Acts shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the performance of his duties under the Taxes Acts and shall not communicate any such matter to any person otherwise than—

(a) to or with the consent of the person to whom such matters relates, his authorised agents or trustees;

(b) under the authority of the Minister;

(c) for the purposes of any legal proceedings arising out of the Taxes Acts or any criminal proceedings;

(d) to a person entitled to such information by virtue of any provision of law.

52. The Taxes Act does not need to expressly reference the PATI Act because it already existed when the PATI Act came into effect on 1 April 2015. The prohibition on disclosure in section 4(1)(b) is mandatory, as indicated by the use of the word 'shall'. Further, section 4(2) of the Taxes Act creates a criminal offence for unauthorised disclosures.¹

53. The Information Commissioner accepts that section 4(1) of the Taxes Act meets the requirements for a statutory prohibition on disclosure for the purposes of the exemption in section 37(1) of the PATI Act.

[2] Do records 1-5 fall within the statutory provision?

54. Although section 4(1) of the Taxes Act creates a statutory prohibition on disclosure, the Ministry must show that the records in this case fall under this provision. Throughout its submissions, the Ministry asserted generally that all tax information is confidential, without addressing whether records 1-5 fall within section 4(1)(b) of the Taxes Act.

55. Section 4 of the Taxes Act prevents disclosure of "all matters relating to the affairs of any person" that has been learned while performing duties under the 'Taxes Acts'. Section 4(1)(a)-(d) create 'gateways' to disclosure, despite the secrecy provision, under specific circumstances not at issue here. The Information Commissioner accepts the Ministry's explanation that the Minister only exercises the discretionary authority in section 4(1)(b) to share tax affair information with government departments with respect to the taxes at issue in this case.

56. Section 4(1) prohibits the disclosure of the information learned while performing duties under the 'Taxes Acts'. Section 1 of the Taxes Acts states that 'the Taxes Acts' means "this Act and any statutory provision relating to the taxes to which this Act applies". Section 2(1) then explains the application of the Act: "This Act shall apply in relation to the taxes specified in the First Schedule whether liability to tax arose before or after 1 April 1976". The First Schedule contains an exhaustive list of the taxes to which the Taxes Act applies:

¹ Specifically, section 4(2) of the Taxes Act states:

Any person who contravenes subsection (1) commits an offence:

Punishment on summary conviction: imprisonment for three months or a fine of \$1,000 or both such imprisonment and fine.

Employment Tax²
Betting Duty
Contracts Exchange Tax
Hospital Levy
Hotel Occupancy Tax
Timesharing Occupancy Tax
Timesharing Services Tax
Passenger Cabin Tax
Passenger Departure Tax
Payroll Tax

57. This means that to apply the secrecy provision in section 4(1) of the Taxes Act, the Ministry must show that the information in records 1-5 has been learned while performing duties relating to one of the taxes listed in the First Schedule of the Taxes Act.
58. The Information Commissioner is satisfied that the secrecy provision in section 4(1) of the Taxes Act applies to records 3, 4 and 5 and part of record 2 because these records relate to payroll tax. The Ministry learned the information in these records while performing duties related to payroll tax, which is a tax listed in the First Schedule to the Taxes Act. As noted above, none of the gateway provisions in section 4(1)(a)-(d) are applicable.
59. The Information Commissioner is also satisfied that the Ministry was justified in withholding records 3-5 and the part of record 2 related to payroll taxes because section 4(1) of the Taxes Act is a statutory prohibition on disclosure within the meaning of section 37(1) of the PATI Act.
60. Record 1 relates to social insurance contributions owed and part of record 2 relates to land taxes owed. This information does not involve money owed for a tax that falls within the First Schedule of the Taxes Act. Accordingly, the Ministry did not learn this information while performing duties under the Taxes Acts.
61. The Information Commissioner is not satisfied that record 1 and part of record 2 fall within the secrecy provision contained in section 4(1) of the Taxes Act. The Ministry did not rely on any other statutory provision to support the exemption in section 37(1) of the PATI Act.

² The Payroll Tax Act 1995 repealed the law relating to 'employment' tax and created a payroll tax in its place.

The Ministry cannot justify withholding record 1 and part of record 2 under section 37(1) of the PATI Act.

Commercial interests – section 25(1)(c)

62. The Information Commissioner considers whether record 1 and part of record 2 related to land tax may be withheld under section 25(1)(c).
63. Information is exempt from public access under section 25(1)(c) when its disclosure would or could reasonably be expected to, have an adverse effect on the commercial interests of any person to whom the information relates. 'Person' includes "any company or association or body of persons, whether corporate or unincorporate". (Interpretation Act 1951, section 7(1)). This exemption also contains exceptions that are not applicable here. (section 25(2)).
64. If the exemption in section 25(1)(c) is engaged, the public authority must then consider whether the public interest test still requires disclosure. (section 25(3)).
65. The public authority must first identify to whom the information relates because section 25(1)(c) is limited to protecting the commercial interests of persons to whom the information relates.

Commercial interests

66. The PATI Act does not define 'commercial interests' and so it is to be given its normal, ordinary meaning as interests relating to business, trade, or profession. The Oxford Dictionary of English (3rd edition 2010), defines commercial as "concerned with or engaged in commerce" and 'commerce' is defined as "the activity of buying and selling" or "making or intended to make a profit". Thus, a commercial interest relates to a person's ability to participate in commercial activity, such as the sale of goods or collection of a debt.

Adverse effect

67. This exemption requires that disclosure 'would have or could reasonably be expected to have an adverse effect' on the commercial interest of any person to whom it relates. If not, the exemption is not available.
68. The ordinary, plain meaning of 'adverse effect' is bringing about an unfavourable or harmful result. (Oxford Dictionary of English (3rd edition 2010)). The commercial information exemption, however, cannot be used to avoid embarrassment. It may only be applied when a real risk of harm to commercial interests could reasonably be expected to occur.

69. A public authority must be able to explain how disclosure will cause the adverse effect. This requires explaining the circumstances or events arising out of disclosure that could lead to the adverse effect.

Would, or could reasonably be expected to, occur

70. The commercial information exemption requires that the disclosure 'would or could reasonably be expected to' cause the adverse effect. If a public authority cannot show this, the exemption is not available. Simply speculating to justify the exemption is insufficient.

71. '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.

72. 'Could reasonably be expected to' is a lesser likelihood of the adverse effect occurring. It requires a public authority to distinguish between what is merely speculative, irrational or absurd and expectations that are likely, plausible, or possible based on real and substantial facts.

Burden of proof on third party

73. A third party asserting its rights under section 25(1)(c) bears the burden of showing that the exemption is justified to withhold a record from public disclosure.

74. In sum, a public authority (or a third party) must consider five questions when seeking to justify the exemption in section 25(1)(c):

- a. Who is the person to whom the information relates?
- b. What are the commercial interests of this person that are of concern?
- c. What adverse effect could disclosure cause?
- d. How likely is this to occur?
- e. If the exemption is engaged, does the balance of public interest still require disclosure of the records?

75. A public authority or third party has the burden to show that, on the balance of probabilities, disclosure could reasonably be expected to have an adverse effect on identified commercial interests. It should do so by showing objective and reasonable facts to support its assertions.

Public authority's submissions

76. The Ministry submitted that public disclosure of record 1 and the remaining part of record 2 could have an adverse effect on the commercial interests of the Trustees of Sandys 360 even though the facility is not in operation. Specifically, the Ministry argued that disclosure could hinder the Trustees' ability to obtain funding for new ventures in the future.
77. The Ministry further highlighted that Sandys 360 was not the only registered charity that owes funds to the Government. It emphasised that many small businesses and charities struggled to meet their tax obligations in a timely manner due to the extended recession. The Ministry reasoned that it would be unfair to single out one charity in isolation, or without a change in the Ministry's policy to also identify other entities that owed money to the Government.
78. With respect to the public interest test, the Ministry emphasised that it has long considered all tax information to be confidential. In the Ministry's view, it should only disclose this information under the circumstances allowed for by the Taxes Act.
79. The Ministry submitted that the need to keep tax information confidential dominated all other public interest factors. The Ministry views confidentiality as "paramount". It identified no benefit to the public in disclosing information in isolation.

Applicant's submissions

80. The Applicant submitted that the commercial information exemption did not apply because companies are regularly identified as being in tax arrears. The Applicant referred to prior reports by the Auditor General listing companies that are in tax arrears and highlighted that the media has reported on this. The Applicant also cited the Health Insurance Amendment Act 2015, which allows the Government to name employers who have not paid employee health insurance contributions.
81. The Applicant also submitted that the public interest outweighs any need for confidentiality. The Applicant stated that between \$4 million and \$5 million of public money had been given to Sandys 360 between 2011 and 2016. In the Applicant's view, the taxpayers have a right to know how the money was spent and to whom it was given, especially as the Sandys 360 Centre is now defunct. The Applicant urged that when public money is involved, there is no compelling argument for withholding records.

Sandys 360 Company's submissions

82. As noted above, the Information Commissioner afforded the Company a reasonable opportunity to comment. The ICO did not receive any submissions from the Company asserting an adverse effect on its interests.

Sandys 360 Trustee's submissions

83. As noted above, the Information Commissioner afforded the Trustees a reasonable opportunity to comment. The ICO did not receive any submissions from the Trustees asserting an adverse effect on its interests.

Discussion

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

84. The information in record 1 and the relevant part of record 2 refers to the Company and the Sandys 360 Sports Aquatics and Enrichment Centre (**Sports Centre**), which is owned by the Company.

85. The Ministry asserts that the Trustees are the people to whom the information relates. It did not provide any information, however, concerning the relationship between the Sandys 360 Company, the Sports Centre, and the Trustees.

86. According to public records with the Registrar General, the Sandys 360 Company, incorporated by the Trustees, paid rent to the Trustees to occupy the Sports Centre built by the Trustees.

87. The Information Commissioner is satisfied under the specific circumstances here that the information relates to the Company, the Centre, and the Trustees for the purposes of the commercial interests exemption.

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

88. The Ministry identified the Trustees' commercial interest as the Trustees' ability to obtain funding for new ventures in the future. The Ministry did not assert any other commercial interests on behalf of any other person.

89. Coppel on Information Rights Law and Practice states that the phrase 'commercial interests' is apt to cover, among other things 'a proposed venture'.³ The Information

³ Phillip Coppel, Information Rights Law and Practice (4th ed. 2014), at 845.

Commissioner accepts that obtaining funding for a new venture is a commercial interest within the meaning of section 25(1)(c) of the PATI Act.

90. Neither the Company nor the Trustees made any submissions to identify their commercial interests with respect to these records.

[3] What adverse effect could disclosure cause?

91. The Ministry asserted that disclosure of any of the records could lead to the inability of the Trustees to obtain funding for new ventures in the future. The Ministry provided no information regarding any new potential venture contemplated by the Trustees. Nothing demonstrated that, at the time of the request, the Trustees intended to obtain funding for a new venture or were otherwise in the process of starting a new venture.
92. Although given a reasonable opportunity to provide submissions, neither the Company nor the Trustees identified a potential adverse effect that disclosure could cause.

[4] How could disclosure cause this adverse effect?

93. The Ministry did not provide any explanation of how disclosure could cause that adverse effect. The Ministry has not referred to any circumstances or events that might lead to the Trustees not being able to obtain funding for new ventures because of public disclosure of social insurance contributions and land tax amounts owed in record 1 and part of record 2.
94. The Ministry is speculating that public disclosure of the actual social insurance and land tax amounts owed to Government by the Company or Centre will harm the Trustees if they were to seek funding for new ventures. The Ministry has not provided support that the Trustees have expressed any concerns to the Ministry about the disclosure of the actual amount of social insurance contributions and land tax due. When afforded the opportunity to make submissions in this case, the Trustees themselves did not express such concerns.
95. Further, at the time of the PATI request it was already public knowledge that the Trustees owed former employees of the Company salary and potentially other payroll liabilities.⁴ It was also publicly known that the Sandys 360 Sports Centre faced financial difficulties.⁵
96. In light of the public information at the time of the request and the disclosures by the Ministry during the processing of this request, the Ministry has not explained how public disclosure of the actual amounts owed for social insurance contributions and land tax could

⁴ See, e.g., Unpaid and unable to get any answers, *Royal Gazette*, 5 January 2016, [available at www.royalgazette.com/article/20160105/news/160109924](http://www.royalgazette.com/article/20160105/news/160109924).

⁵ See, e.g., Youths affected by community centre cutbacks, *Royal Gazette*, 7 July 2015, [available at www.royalgazette.com/article/20150707/NEWS/150709770/7012699](http://www.royalgazette.com/article/20150707/NEWS/150709770/7012699).

reasonably be expected to have an adverse effect on an actual effort by the Trustees to seek funding for new ventures. It is not the role of the Information Commissioner to assist a public authority in making arguments to justify the denial of public access to information.

97. The Ministry also argued that it would be unfair to single out the Trustees because a number of charities owe monies to the Government following the recent recession. Again, while it might cause embarrassment or lead to public accountability for the use of public funds, it is unclear how this could adversely affect a funder's or lender's decision to finance a possible future venture by the Trustees. If anything, this suggests that the Trustees were in the same position as other entities, which should be a neutral consideration for any actual efforts to secure funding for future ventures.
98. The Information Commissioner is not satisfied that the Ministry provided an explanation of how disclosure of money owed by Sandys 360 to the Government could reasonably be expected to have an adverse effect on the Trustees' ability to secure funding for new ventures.
99. The Company and Trustees have not made any submissions on behalf of their own interests to explain how disclosure could have an adverse effect on their ability to secure funding for new ventures, or any other commercial interest.

[5] How likely is this to occur?

100. The Ministry has not provided any submissions explaining how disclosure could cause the Trustees to be unable to obtain funding in the future.
101. As a result, the Ministry cannot then establish that these circumstances or events "could reasonably be expected to" cause the Trustees to be unable to secure funding for future ventures.
102. The Information Commissioner is not satisfied that disclosure of record 1 and part of record 2 will have an adverse effect on the commercial interests of the Company nor the Trustees. The Information Commissioner is, therefore, not satisfied that the application of the commercial interests exemption is justified for record 1 and the part of record 2 related to land tax.

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

103. Even if the exemption was engaged, the balance of the public interest still requires disclosure.

104. With respect to monies owed to Government under these circumstances, very little public interest factors, if any, support maintaining the confidentiality of the information.
105. In favour of maintaining the confidentiality of social insurance contribution and land tax amounts owed, the Ministry relied on its “long-standing policy” that all tax information should remain confidential. The Ministry asserted that this confidentiality policy dominates the public interest considerations.
106. Unlike payroll taxes, which fall within a statutory prohibition on disclosure, i.e., section 4(1) of the Taxes Act, the other debts owed to government, including social insurance contributions and land tax, are not the subject of a secrecy provision. To the extent that they have been held secret, it has been as a matter of government custom.
107. The Ministry suggests that information that has been previously held secret as a matter of government custom, rather than as a legislative requirement, should remain secret even after the enactment of the PATI Act. The Information Commissioner cannot accept this claim.
108. As part of the good governance reforms in the public service to promote transparency and improve accountability, information previously protected as a matter of policy or practice within government is precisely the type of information to which the PATI Act now provides the public access, unless it properly falls within a listed exemption. One of the PATI Act’s stated purposes in section 2(b) is to “increase transparency, and eliminate unnecessary secrecy, with regard to information held by public authorities”. The PATI Act strikes the important balance between its purposes set out in section 2 that promote transparency and accountability, and the carefully delineated exemptions listed in Part 4 of the Act that allow information to be withheld from public access.
109. With respect to the public interest in disclosure, numerous, weighty public interest considerations in this case favour disclosure of the social insurance contribution and land tax amounts owed.
110. First, public accountability concerning public spending and decision-making is a primary purpose set out in section 2 of the PATI Act. The Information Commissioner agrees with the Applicant’s position that in light of the substantial amount of public funding involved, disclosure would increase the accountability of the Ministry. It would show that public funding was still being given to Sandys 360 when the Government was aware that the Company and the Trustees were in arrears for social insurance contributions and land tax payments. Disclosure of the actual amounts will allow the public to make informed assessments of the spending decisions made with public funds.

111. Second, the Government has emphasised the importance of holding all employers accountable for making social insurance contributions. Contrary to the assertion of a long-standing confidentiality policy concerning social insurance contributions, the Government has encouraged individuals to check with the Department of Social Insurance to determine if their employers have made the required social insurance payments on their behalf.⁶ The Government has and will provide information about an employer's actual social insurance payments on behalf of individual employees. Here, the public is asking for the aggregate amount of these individual figures.
112. Finally, the public has an interest in accountability for timely social insurance contributions from all employers, and particularly employers who receive significant amounts of public funding. The failure to pay social insurance contributions directly affects employees' rights and the availability of pension funds. Current contributions enable payments from the Contributory Pension Fund for old-age pensions, and disability and death benefits for the general public.⁷ In this case, an employer owed social insurance contributions, which placed a strain on the public, while also receiving substantial public funding at the public's expense. This creates a heightened public interest in accountability.
113. The Information Commissioner is satisfied that, even if the commercial interests exemption was engaged, the balance of the public interest favours disclosure of record 1 related to social insurance contributions and the part of record 2 related to land tax.

Conclusion

⁶ See, e.g., Joint Media Statement from the Tax Commissioner, the Director of Department of Social Insurance and the Director of Public Prosecutions, 17 November 2016, available at www.gov.bm/articles/prosecutions-delinquent-employers. The statement quoted the Director of the Department of Social Insurance:

In the case of Social Insurance, there is an estimated \$14 million of unpaid Social Insurance contributions that has not been paid in by employers. As both employers and employees well know, social insurance contributions provide for an employee's pension when they reach the age of 65. The amount of the pension is directly linked to the amount paid in over the years. It is a serious breach of the law to not pay in the social insurance contributions deducted from the employee. It is equally serious for the employer to not pay his statutory obligation. Employees of companies and other businesses can check with the Department of Social insurance to ensure their contributions are paid up by contacting the Department at 295-5151.

⁷ Contributory Pensions Act 1970, available at www.bermulawslaws.bm/laws/Consolidated%20Laws/Contributory%20Pensions%20Act%201970.pdf, and Contributory Pensions Fund Actuarial Report 2014, available at www.gov.bm/sites/default/files/BERMUDA%20CPF%20AR%20Aug%201%202014%20%28Final%29%20Report%20_05102016.pdf.

114. The Information Commissioner is not satisfied that the Ministry has justified its reliance on section 25(1)(c) to justify the denial of access to record 1 and part of record 2 related to land tax.

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

115. Section 26(1)(b) allows a public authority to deny access to a record if its disclosure would constitute a breach of confidence under any provision of law, unless disclosure would be in the public interest.

116. For section 26(1)(b), the public authority and any third party bear the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption. If either does not provide such support, the exemption cannot be relied upon to deny access to the record.

‘Under any provision of law’

117. The phrase “under any provision of law” means that the relevant duty of confidence may be found under any law, including Acts or statutory instruments (rules or regulations), the common law (law created by judicial decisions), and the Constitution.

‘Would’

118. ‘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.

Public authority’s submissions

119. As discussed above, paragraphs 47-49, the Ministry relied on section 4 of the Taxes Management Act 1976 to support its argument that disclosure under the PATI Act in these circumstances would constitute a breach of confidence.

Applicant’s submissions

120. The Applicant made the same submissions as described above in paragraph 50.

Discussion

121. As explained above, section 4 of the Taxes Management Act 1976 does not apply to the information in record 1 and part of record 2 concerning social insurance contributions and land tax.

122. The Ministry has not identified any other provision of law as the basis for asserting the exemption for breach of confidence.

123. The Information Commissioner is not satisfied that disclosure of the information in record 1 and part of record 2 would constitute a breach of confidence under section 4 of the Taxes Act. The Information Commissioner is further not satisfied that the Ministry justified its reliance on section 26(1)(b) of the PATI Act to deny access to record 1 and part of record 2.

Decision

The Information Commissioner finds that the Ministry of Finance Headquarters (**Ministry**) complied in part, and failed to comply in part, with Part 3 of the Public Access to Information (**PATI**) Act in responding to the Applicant's PATI request. Specifically, the Ministry conducted a reasonable search for the records responsive to Item 1 of the PATI request and justified its reliance on section 37(1) to deny access to the amount of payroll tax due. The Ministry failed to justify its reliance on sections 37(1), 25(1)(c), and 26(1)(b) to deny the public access to records related to social insurance contributions and land tax debts.

In accordance with section 48(1)(a) and (b) of the PATI Act, the Information Commissioner varies the Ministry's decision in this case as follows:

- The Information Commissioner annuls the decision to refuse access to record 1 and directs that access to this record be granted in full;
- The Information Commissioner annuls the decision to refuse access to record 2 in whole and directs that access to this record is granted in part with respect to information related to land tax owed, in accordance with section 18 of the PATI Act;
- The Information Commissioner annuls the decision with respect to part of Item 3 of the PATI request related to Government's efforts to recover money owed and directs that a new, accurate and complete initial decision be issued on this part of the request; and
- The Information Commissioner affirms the decision to deny access to records 3-5 in whole on the basis that the records are exempt in accordance with section 37(1) of the PATI Act.

The Information Commissioner requires the Ministry to comply with the requirements of this Decision and accompanying Order **on or before 7 February 2019**.

Judicial Review

Should the Applicant, the Ministry of Finance Headquarters, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez
Information Commissioner
27 December 2018

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

- 12 (1) Subject to this Act, every person who is a Bermudian or a resident of Bermuda has a right to and shall, on request, be given access to any record that is held by a public authority, other than an exempt record.
- (2) Public authorities shall make every reasonable effort to—
- (a) assist persons in connection with requests; and
 - (b) respond to requests completely, accurately and in a timely manner.

Public interest test

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

Commercial information

- 25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—
- (a) [...]
 - (b) [...]
 - (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; [...]
- (2) A record shall be disclosed if it is in the public interest.

Breach of confidence

- 26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—
- (a) [...]
 - (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 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.
- (6) For the avoidance of doubt a record held by the Attorney General or the Director of Public Prosecutions, this is the subject of legal professional privilege, shall be an exempt record and shall not be subject to public disclosure of any kind.

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.

Taxes Management Act 1976

Official secrecy

- 4 (1) Except in the performance of his duties under the Taxes Acts, every person who is or has been employed in carrying out or assisting any person to carry out the Taxes Acts shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the performance of his duties under the Taxes Acts and shall not communicate any such matter to any person otherwise than—
- (a) to or with the consent of the person to whom such matter relates, his authorized agents or trustees;
 - (b) under the authority of the Minister;
 - (c) for the purposes of any legal proceedings arising out of the Taxes Acts or any criminal proceedings;
 - (d) to a person entitled to such information by virtue of any provision of law.

**Information Commissioner for Bermuda
Valerie T. Scott Building
60 Reid Street
Hamilton, HM 12
www.ico.bm
441-294-9181**