

Decision Notice

Decision 29/2019: Ministry of Finance Headquarters

Correspondence related to letter of entrustment (2)

Reference no: 20190417

Decision date: 28 November 2019

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Finance Headquarters (**Ministry**) for records relating to the redevelopment of the L. F. Wade International Airport, including correspondence between the Ministry and the Government of the United Kingdom (**UK Government**). The Ministry's internal review decision was considered by the Information Commissioner in Decision 13/2018, in which she found, among other things, that there were responsive records that had not been processed by the Ministry (**outstanding records**).

In accordance with Decision 13/2018 and accompanying Order, the Ministry processed the outstanding records and issued an initial decision refusing access to these records under section 32(1)(b) of the PATI Act for information communicated in confidence by a State. The Ministry's internal review decision upheld the initial decision in full.

The Acting Information Commissioner has affirmed the Ministry's decision to deny access to the outstanding records under section 32(1)(b).

Relevant Statutory provisions

Public Access to Information (**PATI**) Act 2010: section 21 (public interest); section 32(1)(b) (national security, defence, and international relations).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

Background

1. On 23 February 2016, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Finance Headquarters (**Ministry**) for various records relating to the redevelopment of the L. F. Wade International Airport (**airport redevelopment project**), including the correspondence between the Government of the United Kingdom (**UK Government**) and the Government of Bermuda (**Bermuda Government**). The Ministry's handling of the PATI request and most of the responsive records were considered by the Information Commissioner in her earlier review, which was the subject of Decision 13/2018.

2. During the earlier review and pursuant to Decision 13/2018, the Ministry released a number of records of correspondence between the UK and Bermuda Governments on this topic. In her Decision, the Information Commissioner also found that the Ministry had not processed three of the responsive records (**outstanding records**) and ordered the Ministry to issue an initial decision on these records.
3. On 11 February 2019, in accordance with the Information Commissioner's Order, the Ministry issued an initial decision refusing access to the outstanding records under the exemption in section 32(1)(b) of the PATI Act.
4. The initial decision referred to "4 additional records" which the Information Commissioner's Office (**ICO**) confirmed were identical to the three outstanding records referred to in Decision 13/2018, but were numbered differently. For consistency and to avoid confusion, this Decision will refer to these records as records 1, 2, and 3 individually and as outstanding records collectively. Records 1, 2, and 3 are correspondence discussing the wording of a draft entrustment letter relating to the airport redevelopment project¹. Record 1 also contains an attachment – a letter dated 6 July 2015 from the UK Secretary of State for Foreign Affairs to the Governor of Bermuda proposing amendments to the entrustment letter dated 10 November 2014.
5. On 6 March 2019, the Applicant sought an internal review.
6. On 17 April 2019, the Ministry issued an internal review decision which fully upheld the initial decision.
7. On the same day, the Applicant filed an application for an independent review by the Information Commissioner.

Investigation

8. 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.
9. 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 its reliance on the exemptions was justified.

¹ The entrustment letters related to the airport redevelopment project, dated 10 November 2014 and 17 July 2015, are publicly available.

10. On 1 May 2019, the Information Commissioner's Office (**ICO**) notified the Ministry of the valid application. The Ministry had already provided the ICO with copies of the outstanding records in the earlier review.
11. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and applicant a reasonable opportunity to make representations. The Ministry and the Applicant were invited to comment on this application and make submissions to the Information Commissioner for consideration during this review. The Ministry was further asked specific questions to justify its reliance on the exemptions and to show the reasonableness of the search it conducted.
12. Both the Ministry and the Applicant provided submissions.

Acting Information Commissioner's analysis and findings

13. In coming to a decision on this matter, the Acting Information Commissioner has 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.
14. The Acting Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

International relations: information communicated in confidence – section 32(1)(b)

15. A record is exempt under section 32(1)(b) if it contains information that has been communicated in confidence by a State or an international organisation of States. According to section 32(2), 'State' includes the United Kingdom and any overseas territory of the United Kingdom.
16. The exemption in section 32(1)(b) is a qualified exemption subject to the public interest test. If the exemption in section 32(1)(b) is engaged, the public interest test must be considered.
17. In Decision 13/2018, the Information Commissioner held that information is communicated in confidence if the terms on which it was obtained require it to be held in confidence, or if the circumstances in which it was obtained make it reasonable for the State or organisation to expect that it will be held in confidence. The exemption in section 32(1)(b) focuses on the

circumstances in which the information was obtained by a public authority, although the content of the information may also be relevant.²

18. The totality of the circumstances under which the information was communicated has to be considered before making a judgment on whether it was communicated in confidence. Factors that may be considered include:

- a. Whether there was a statement by the State or body which supplied the information, indicating that confidentiality is required;
- b. Whether a document may have been marked as 'confidential' by the State or body supplying it, although this will not be conclusive of the matter;
- c. Whether similar information was previously provided in confidence and the same terms of its provision can reasonably be presumed to continue to exist; and
- d. Whether, apart from any formal identification, the information is of a sort considered to be confidential by convention.

19. As summarised in Decision 13/2018, for a public authority to deny access to a record, or part of a record, under section 32(1)(b), it must ask:

- [1] Whether a State or international organisation of States communicated the information?
- [2] Whether, under the totality of the circumstances, the information was communicated in confidence?
- [3] Whether, even if the exemption is engaged, the balance of the public interest requires disclosure?

20. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption. If not, a public authority cannot rely on the exemption to deny access to the record.

² See paragraphs 99 and 100 of Decision 13/2018, Ministry of Finance Headquarters.

Public authority's submissions

21. The Ministry submitted that the outstanding records are records of communication between the Bermuda Government and the UK Government. These records contain confidential, government-to-government communications.
22. The Ministry maintains that the UK Government would expect the correspondence to be held in confidence, given the subject of the correspondence.
23. Furthermore, the Ministry submitted that considerable information has already been released on the airport redevelopment project and disclosure of the records would provide no further insight to the public on the decision making and rationale for the project.

Applicant's submissions

24. The Applicant did not make submissions.

Discussion

[1] Whether a State or international organisation of States communicated the information

25. The attachment to record 1 is a letter dated 6 July 2015 signed by the UK Secretary of State for Foreign Affairs, setting out proposed amendments to the 10 November 2014 entrustment letter. The Investigator is satisfied that the attachment to record 1 was communicated by a 'State' as defined in section 32(2).
26. Records 1, 2, and 3 are correspondence between the UK and Bermuda Governments discussing the wording of a draft entrustment letter which was to set out the powers delegated to the Bermuda Government by the UK Government in relation to the airport redevelopment project. In these records, the Acting Premier provided the Bermuda Government's detailed views on the draft and proposed changes for the consideration of the UK Government.
27. The Investigator is satisfied that records 1, 2, and 3 as well as the attachment to record 1 were records of communication between the Bermuda and UK Governments, both of which fall within the definition of 'State' in section 32(2).

[2] Whether, under the totality of the circumstances, the information was communicated in confidence?

28. The outstanding records were not marked confidential at the time they were sent, nor do they contain any statement that the information was provided in confidence. As explained in Decision 13/2018, however, formal designation of a record as confidential (or the lack thereof) is not definitive of whether the record was communicated in confidence.
29. The Acting Information Commissioner notes that the fact that a record is correspondence between two governments is not enough, standing alone, to show that the records were communicated in confidence. The Acting Information Commissioner has carefully reviewed the outstanding records. She is satisfied that the content and nature of the records, and the circumstances of the communications, indicate that these records are the sort that States consider as communicated in confidence by convention by the parties at the time the correspondence was provided.³ This is also true for the attachment to record 1, which contains proposed amendments to the entrustment letter dated 10 November 2014. The nature and content of these records are in contrast to the records that were released by the Ministry in response to the PATI request.
30. The Acting Information Commissioner is satisfied that the outstanding records were communicated in confidence by a State.

[3] Whether the balance of the public interest requires disclosure?

31. There is a significant interest in furthering the public's understanding of a substantial investment of public money in a project such as the airport redevelopment. The Acting Information Commissioner notes, however, that the Ministry has disclosed the entrustment letters dated 10 November 2014 and 17 July 2015, which were accepted by the Bermuda Government. Furthermore, the Acting Information Commissioner is of the view that there is a strong public interest in maintaining States' expectation of confidence when engaging in free and frank discussion with another jurisdiction to further its interests. In the circumstances, the Acting Information Commissioner is satisfied that the public interest in maintaining this confidence outweighs the public interest in favour of disclosure.

³ See paragraphs 97-100 of Decision 13/2018, Ministry of Finance Headquarters.

Conclusion

32. The Acting Information Commissioner is satisfied that the Ministry was correct to deny access to the outstanding records as they are exempt under section 32(1)(b) of the PATI Act and their disclosure is not required by the public interest test.

Decision

The Acting Information Commissioner finds that the Ministry of Finance Headquarters (**Ministry**) complied with Part 3 of the Public Access to Information (**PATI**) Act 2010 in responding to the Applicant's PATI request. Specifically, the Ministry was justified in denying access to the outstanding records under section 32(1)(b).

In accordance with section 48(1) of the PATI Act, the Acting Information Commissioner affirms the Ministry's internal review decision dated 17 April 2019.

Judicial Review

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

Answer C. Styannes
Acting Information Commissioner
28 November 2019

Public Access to Information Act 2010

Public interest test

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

National security, defence, and international relations

32 (1) Subject to subsection (3), a record is exempt from disclosure if—

(a) . . .

(b) the record contains information communicated in confidence by a State or an international organization of States.

(2) For the purposes of this section “State” includes the United Kingdom and any overseas territory of the United Kingdom.

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

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