

Decision Notice

Decision 01/2025 Ministry of Finance Headquarters

Records on BPMS, InnoFund, i3 and Fastpass

Reference no: 2021043

Decision date: 4 February 2025

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Finance Headquarters (**Ministry Headquarters**) for records related to BPMS Ltd, InnoFund Ltd and the InnoFund Innovation Incubator. The Ministry Headquarters decided the records were exempt under sections 34(1)(c) (prejudice to fair trial or impartial adjudication) and 25(1)(d) (prejudice to negotiations). The Ministry Headquarters also administratively denied parts of the PATI request under section 16(1)(f) because the requested information was available in the public domain.

The Information Commissioner has upheld the Ministry Headquarters' denial of public access to most of the records under section 25(1)(d). The Information Commissioner has also varied the denial of access to parts of other records to a refusal under section 25(1)(c) (commercial interests), as raised by a third party, and the denial of some personal information in the remaining records to a refusal under section 23(1). The Information Commissioner accepted a third party's objections under section 23(1) to disclosure of their personal information, in part. Finally, the Information Commissioner has reversed the Ministry Headquarters' decision to deny access to the remaining records under sections 25(1)(d) and 34(1)(c).

The Information Commissioner has ordered that the Ministry Headquarters disclose certain records and parts of records, with exempt and non-responsive information removed, on or before **Tuesday, 18 March 2025**.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test), section 23(1) (personal information), section 25(1)(c) (prejudice to commercial interests), section 25(1)(d) (prejudice to negotiations), section 34(1)(c) (prejudice to fair trial).

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

Background

1. As discussed in more detail in the related [Decision 33/2024, Information and Digital Technologies Department](#), and [Decision 34/2024, Ministry of Health Headquarters](#), the Government of Bermuda (**Government**) initiated a private-public partnership in 2021 with InnoFund Ltd (**InnoFund**) to enable the Government to digitalise some of its services and to attract and support start-ups on island.

2. On 16 December 2022, the Applicant made a public access to information (**PATI**) request to the Ministry Headquarters for:
 - a. All correspondence from 2019 to the present to and from individuals involved with the Ministry Headquarters (including but not limited to the current Minister, David Burt; the former Minister, Curtis Dickinson; the former Acting Financial Secretary (**AFS**); and a specific officer in the policy unit) that related to InnoFund, BPMS Ltd (**BPMS**), the InnoFund Innovation Incubator (**i3**), and the Fastpass port of entry system. The request for correspondence included, but was not limited to, emails, faxes, WhatsApp messages, letters, minutes of meetings (in person or virtual) and telephone calls (**item 1**).
 - b. Any documents, such as memoranda of understanding, agreements, etc., as they related to BPMS, InnoFund and i3, as well as the Fastpass port of entry system (**item 2**).
 - c. Information about the loan guarantee as it related to InnoFund, including when it was made, when it was announced to the Legislature or the public, how much was guaranteed, how much of the loan had been repaid, whether the Government had to step in as guarantor, and if so, the amount the Government had paid towards the loan (**item 3**).
3. The Applicant expressly stated that, “If this request is too wide or unclear, please don’t hesitate to contact me and we can discuss ways to amend the request appropriately”.
4. The Applicant did not receive an initial decision on the PATI request by 27 January 2023, or 6 weeks after the PATI request was made.
5. On 13 February 2023, the Ministry Headquarters attempted to extend the timeline to issue an initial decision out of time. On 3 March 2023, the Ministry Headquarters again attempted to extend the timeline and informed the Applicant that an initial decision would be provided by no later than 10 April 2023.
6. On 20 April 2023, the Applicant asked for an internal review, which was acknowledged by the Ministry Headquarters on the same day.
7. Because the Applicant did not receive an internal review decision within the statutory timeframe, they sought an independent review by the Information Commissioner of the Ministry Headquarters’ failure to issue an internal review decision. This led to the Information Commissioner’s [Decision 21/2023](#), Ministry of Finance Headquarters.

8. In response to [Decision 21/2023](#), Ministry of Finance Headquarters and the accompanying Order, on 22 August 2023, the Ministry Headquarters issued an internal review decision, refusing items 1 and 2 of the PATI request under the exemptions in sections 34(1)(c) (prejudice to a fair trial or impartial adjudication) and 25(1)(d) (prejudice to negotiations). The Ministry Headquarters administratively denied item 3 of the PATI request under section 16(1)(f) because the requested information was already available in the public domain.
9. On 24 August 2023, the Applicant asked for an independent review by the Information Commissioner, challenging the Ministry Headquarters' reliance on sections 16(1)(f), 25(1)(d) and 34(1)(c).

Investigation

10. The ICO accepted the application as valid on 12 September 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.
11. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application because submissions from the public authority were required to justify its reliance on the administrative denial and the exemptions.
12. The ICO notified the Ministry Headquarters of the valid application on 19 September 2023. Because of the Ministry Headquarters' reliance on section 16(1)(f), the ICO only sought copies of the records responsive to items 1 and 2.
13. Shortly thereafter, the Bermuda Government IT system experienced a serious cybersecurity attack.¹
14. Due to the cybersecurity attack and personnel changes, it was not until 23 February 2024 that the Ministry Headquarters was finally able to provide the ICO with access to the then-Acting Financial Secretary's @gov.bm email account. In a meeting on 23 February 2024, the Ministry Headquarters searched the then-Acting Financial Secretary's email from her administrative assistant's computer. No responsive records were found

¹ See '[Bermuda Government Services Update, Remarks from Acting Premier, the Hon Walter Roban, JP, MP](#)', 21 September 2023.

because the administrative assistant's computer contained emails from 2023 and 2024 only.

15. On 29 February 2024, the Ministry Headquarters searched the then-Acting Financial Secretary's @gov.bm email account on her own government computer, in the presence of the ICO Senior Investigator. This resulted in the identification of 617 emails that were likely to be responsive to the PATI request.
16. On 7 March 2024, the Ministry Headquarters searched the records retrieved from former Minister Dickinson's computer in the presence of the ICO Senior Investigator. The search resulted in no responsive records being identified. The ICO later learned that the Ministry Headquarters' attempt to search the former Minister's email was unsuccessful due to a technical challenge, as explained below.
17. In a meeting on 26 April 2024, the Ministry Headquarters again searched the former Minister Dickinson's email account, with the ICO Senior Investigator present and with assistance from the Information and Digital Technologies Department (IDT). No responsive records were located because the former Minister's emails from December 2018 to February 2023, were no longer accessible. The only accessible emails consisted of the former Minister's emails received or sent in November 2018. During the meeting, IDT further confirmed that former Minister Dickinson's email account was not retrievable from the server and that his email account was neither in the regular nor archived system. The reason for this was unknown to IDT.
18. Similarly, in May 2024, IDT explained that it only had access to the policy unit officer's emails from October 2023 to May 2024, and that the officer's email account was not archived. In the Ministry Headquarters' subsequent September 2024 submissions, it also explained that the computer used by the officer had been reconditioned for a new user and therefore no historic records were stored on it. Based on these explanations, the ICO accepted that the Ministry Headquarters no longer had access to former Minister Dickinson's or the policy unit officer's email accounts.
19. On 5 March 2024, the Applicant confirmed that they were not challenging the Ministry Headquarters' decision to withhold the records responsive to item 2, because these records are considered in a related but separate review in Decision 02/2025, Economic Development Department (EDD).
20. On 16 April 2024, the ICO informed the Applicant that it was the position of the Cabinet Office that the emails of the Honourable David Burt, both in his capacity as Premier and as the Minister of Finance, are held by the Cabinet Office and, therefore, access to Premier Burt's email account would not be provided to the Ministry Headquarters for

purposes of PATI requests made to the Ministry Headquarters.² Premier Burt's emails are, therefore, not considered in this review.³

21. On 2 May 2024, after being informed of the volume of the records retrieved from the then-Acting Financial Secretary's email, the Applicant agreed to narrow their request. The Applicant agreed not to challenge the Ministry Headquarters' decision to withhold any records which fell outside the scope of the PATI Act by virtue of section 4(1)(b), any external correspondence, and any emails which did not explain the breakdown in the relationship between the Government and BPMS, InnoFund and i3. The Applicant confirmed that they would still like to obtain the records from the then-Acting Financial Secretary, former Minister Dickinson and the officer in the policy unit. Based on the narrowed terms of the request, and after removing duplicates, there were 93 responsive records identified.
22. The Applicant initially expressed in June 2024 that they still wanted to challenge the Ministry Headquarters' reliance on section 16(1)(f). After learning that the information requested in item 3 was indeed in the public domain, the Applicant confirmed in September 2024 that they no longer wished to challenge the Ministry Headquarters' reliance on the administrative denial in section 16(1)(f).
23. As required by section 47(4) of the PATI Act, the ICO invited the Ministry Headquarters, the Applicant and multiple third parties to make representations. The Ministry Headquarters made formal submissions in September 2024. The Applicant's submissions in [Decision 33/2024, Information and Digital Technologies Department](#) are considered in this review. Of the third parties, only two made submissions. An individual Third Party objected to disclosure of their personal information under section 23(1). Clarien Bank also objected to disclosure of its information in the responsive records under the exemptions in sections 25(1)(c) (adverse effect on commercial interests), 25(1)(d) (prejudice to negotiations) and 26(1)(b) (breach of confidence). The Applicant was subsequently notified of the updated issues under review raised by Clarien Bank and

² As a practical matter, rather than engage in a protracted dispute about whether the Ministry Headquarters 'holds' the Minister of Finance's government emails within the meaning of section 3 of the PATI Act—and considering the ability to transfer parts of any relevant PATI request to the Cabinet Office as well as the fact that the Applicant made a PATI request to the Cabinet Office for the Premier's records—the Information Commissioner has proceeded with requiring the Cabinet Office to process all requests seeking records from the Minister of Finance's email account going forward.

³ At the time, the Applicant was informed that the Premier and Minister of Finance's emails were not captured in any of the Information Commissioner's reviews, and this has since changed. Currently, these emails are subject to a more recent pending Information Commissioner's review no. 2024025 involving the Cabinet Office.

afforded an opportunity to make additional submissions. The Applicant's subsequent submissions as well as their submissions from related reviews are considered here.

24. Considering the parties' final positions in this review, the review considers the Ministry Headquarters' reliance on sections 34(1)(c) and 25(1)(d) to deny access to the 93 remaining responsive records in the then-Acting Financial Secretary's email: records 1, 3-5, 8-17, 19, 21, 23, 24, 27, 28, 31-33, 36, 39-41, 43, 46, 47, 50-52, 56, 57, 59-61, 68, 72, 74, 78, 80-83, 85, 86, 89-92, 97, 98, 100, 101, 108, 110-112, 115, 116, 119, 121 and 124 as well as the responsive and non-duplicated parts of records 6, 7, 26, 29, 37, 45, 62, 65-67, 69, 73, 75, 93-96, 99, 102-107, 109, 113, 114 and 118. This review also considers Clarien Bank's reliance on sections 25(1)(c), 25(1)(d) and 26(1)(b) to object to the disclosure of its information in certain records, as noted below.
25. The ICO could not access an additional 31 records from the then-Acting Financial Secretary's email, likely due to encryption. Further, due to the cybersecurity attack, none of the attachments to the 93 records considered in this review could be retrieved. These records are, unfortunately, not accessible and thus, not considered in this review.

Information Commissioner's analysis and findings

26. 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.
27. 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.

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

28. Section 25(1)(d) allows a public authority to refuse access to a record when disclosure would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates. This exemption is subject to exceptions in section 25(2), which set out circumstances when the exemption cannot apply, including where the person to whom the information relates consents in writing to its disclosure.
29. The exemption in section 25(1)(d) generally applies to ongoing negotiations. If the negotiations are finished, the responsive records should be disclosed unless there is a real and significant risk to identifiable future negotiations.

30. Prejudice in this exemption should be understood as an actual, real and significant harm. It implies a negative or detrimental effect. It cannot be a speculative or hypothetical harm.
31. The prejudice required for this exemption is 'would prejudice' or 'could reasonably be expected to prejudice'. 'Would' prejudice means there is a high probability that the harm anticipated can occur. 'Could reasonably be expected to' prejudice is a lesser likelihood of harm. Reasonable refers to what a reasonable person would expect considering all the circumstances of the case.
32. In sum, when applying the exemption in section 25(1)(d), a public authority must ask:
 - [1] Do any of the exceptions in section 25(2) apply?
 - [2] Who is the person to whom the information relates?
 - [3] What are the negotiations of this person that are of concern?
 - [4] What is the specific prejudice to either the conduct or outcome that is of concern?
 - [5] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?
 - [6] Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?
 - [7] If the exemption is engaged, does the balance of the public interest still require disclosure?
33. Finally, a public authority or third party bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 25(1)(d) to deny access to the records.

Public authority's submissions

34. The Ministry Headquarters confirmed that the records contained information relating to BPMS, InnoFund or i3.
35. The Ministry Headquarters also provided a detailed explanation of the relevant negotiations, which were ongoing at the time of the internal review request and this review. It also described the specific prejudice to the negotiations that could reasonably be expected to occur if the records were disclosed. The Ministry Headquarters argued,

and the Information Commissioner accepts, that a more detailed discussion of the Ministry Headquarters' submissions is not possible without the risk of causing the very harm the exemption is intended to prevent.

36. Regarding the public interest test, the Ministry Headquarters referred to various guidance issued by the Information Commissioner, including guidance relating to the public interest provision in section 21. The Ministry Headquarters accepted that there was a public interest in the promotion of greater public understanding of public authorities' processes or decisions in this case, as well as in the provision of reasons for decisions taken by the Government.
37. The Ministry Headquarters however submitted that disclosure of the records under review was not in the public interest. The Ministry Headquarters provided a fulsome explanation of its position. Again, the Information Commissioner accepts that a more detailed discussion of the Ministry Headquarters' submissions on the public interest is not possible without the risk of causing the relevant prejudice.

Applicant's submissions

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

Clarien Bank's submissions

40. Clarien Bank relied on the exemption in section 25(1)(d) to object to the disclosure of its information in parts of records 3, 4, 36, 46, 65, 78, 91, 100, 112, 115 and 121, but did not elaborate further.

Discussion

41. The Ministry Headquarters' reliance on section 25(1)(d) is considered for records 1, 3-5, 8-17, 19, 21, 23, 24, 27, 28, 31-33, 36, 39-41, 43, 46, 47, 50-52, 56, 57, 59-61, 68, 72, 74, 78, 80-83, 85, 86, 89-92, 97, 98, 100, 101, 108, 110-112, 115, 116, 119, 121 and 124 as well as parts of records 6, 7, 26, 29, 37, 45, 62, 65-67, 69, 73, 75, 93-96, 99, 102-107, 109, 113, 114 and 118. Clarien Bank's reliance on the exemption to object to the disclosure of its information in records 3, 4, 36, 46, 65, 78, 91, 100, 112, 115 and 121 is also considered.

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

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

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

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

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

44. The Ministry Headquarters identified with specificity the relevant negotiations, which were ongoing at the time of the internal review and at the time of the Ministry Headquarters' submissions to the ICO in this review.
45. In contrast, Clarien Bank did not identify the relevant negotiations that related to it, nor were any ongoing negotiations clear on the face of the records. In the absence of any explanation from Clarien Bank, its reliance on section 25(1)(d) to object to the disclosure of its information in certain parts of records 3, 4, 36, 46, 65, 78, 91, 100, 112, 115 and 121 that related to it is not considered further.

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

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

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

47. Having carefully reviewed the Ministry Headquarters' submissions and the withheld records, the Information Commissioner does not accept that public disclosure of records 1, 3-5, 7, 10, 62 and 110 could have caused the prejudice described by the Ministry Headquarters. This is because these records contained information that was not related to the subject of the negotiations or was only administrative or innocuous information. Section 25(1)(d) is not considered further for these records or parts of records.
48. In contrast, the following records or parts of records contained information which directly related to the issues in the negotiations and their disclosure could have prejudiced the conduct or outcome of the negotiations between the relevant parties as described in detail by the Ministry Headquarters: records 6, 8, 9, 11-17, 19, 21, 23, 24, 26-29, 31-33, 36, 37, 39-41, 43, 45-47, 50-52, 56, 57, 59, 60, 61, 65-69, 72-75, 78, 80-83, 85, 86, 89-109, 111-116, 118, 119, 121 and 124.

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

49. Having carefully reviewed the Ministry Headquarters' submissions concerning the nature and circumstances of the negotiations and the prejudice that disclosure could cause, the Information Commissioner is satisfied that the harm could reasonably have been expected to occur and was not speculative.

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

50. The Information Commissioner agrees with the Applicant that the public had a strong interest in greater transparency and accountability for the Government's decision making related to its dealings with BPMS, InnoFund and i3. Even the Ministry Headquarters accepted that disclosure would further the public's understanding of the Government's decision-making process. Despite the significant amount of public funds involved and the impact upon local businesses, the Government has not explained to the public why this situation occurred.
51. Under the circumstances of this PATI request, though, the public also had a strong interest in benefiting from successful negotiations that may mitigate the negative impact of a conflict, and which ultimately may impact the cost to the public. As dissatisfying as

the outcome may be, at the time of the PATI request and internal review decision, the balance of the public interest favoured nondisclosure for these reasons.

52. The Information Commissioner notes, however, that this public interest analysis is time-bound. A future PATI request may continue to seek greater transparency about the Government's decision making and the circumstances surrounding the breakdown in the business relationship between the Government on the one hand and BPMS, InnoFund and i3 on the other. If the Government is not forthcoming about this situation in the future, the balance of the public interest may very well shift in favour of disclosing records that further accountability and transparency, consistent with the purposes in section 2 of the PATI Act.

Conclusion

53. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 25(1)(d) to refuse access to records 6, 8, 9, 11-17, 19, 21, 23, 24, 26-29, 31-33, 36, 37, 39-41, 43, 45-47, 50-52, 56, 57, 59, 60, 61, 65-69, 72-75, 78, 80-83, 85, 86, 89-109, 111-116, 118, 119, 121 and 124, but was not justified in doing so for records 1, 3-5, 7, 10, 62 and 110.

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

54. A public authority may rely on section 34(1)(c) to deny access to a public record where disclosure would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case. This exemption aims to prevent the release of records that could result in unfairness in the conduct of a trial or adjudication. It safeguards the integrity of the court, or other adjudicating body, and protects a person's right to a fair trial.
55. As explained in [Decision 28/2022, Cabinet Office](#) a public authority applying section 34(1)(c) must first establish that the record relates to the trial of a person or adjudication of a particular case, which is either a current legal proceeding or one contemplated in future.⁴ When identifying the trial or adjudication, the public authority may need to specify the parties to the proceeding, the offence or cause of action as well as the relevance of the record to the proceeding. The public authority also must indicate the proceeding's status at the time of the PATI request (or internal review), e.g. whether the trial or adjudication was ongoing, concluded or anticipated.

⁴ See [Decision 28/2022, Cabinet Office](#), at paragraph 55.

56. The PATI Act and the [Interpretation Act 1951](#) do not define ‘fair trial’ or ‘impartial adjudication’. However, the Bermuda Supreme Court has accepted that section 6(1) of the Bermuda Constitution derives from Article 6(1) of the European Convention on Human Rights.⁵ In the context of civil proceedings, fair trial encompasses a wide range of both institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning of judicial decisions.⁶
57. The Bermuda Constitution requires any court prescribed by law to determine the existence or extent of any civil right or obligation, or of any criminal charges, to be independent and impartial. Citing a UK Court judgment, Justice Subair Williams stated:
- All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.⁷
58. A public authority relying on section 34(1)(c) must show how disclosure could cause prejudice to the fair trial of a person or impartial adjudication of a case. The likelihood of harm required is that prejudicing the proceeding’s fairness or the impartial adjudication ‘could reasonably be expected to’ occur. This is a lesser likelihood of harm compared to ‘would’, which means a high probability that the harm will occur. The mere fact that the records may relate to the proceeding does not, of itself, establish a link between disclosure and prejudice to the fairness or impartiality of the trial or adjudication.
59. The exceptions and public interest test that apply to section 34 differ from all other harm-based exemptions in the PATI Act. A public authority must consider the public interest test only when a record falls within a category listed in section 34(2)(a) as an exception. If the record does not fall within a section 34(2)(a) exception, the public interest test does not apply.

⁵ See [Tafari Wilson v Fiona Miller](#) [2018] SC (Bda) 6 App (23 January 2018), at paragraph 16.

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

⁷ See [Locabail \(UK\) Ltd v Bayfield Properties Ltd](#) [1999] EWCA Civ 3004 (17 November 1999), at paragraph 2, as quoted in [Ewart Frederick Winslow Brown v Director of Public Prosecutions, Attorney General, Deputy Governor](#) [2021] SC (Bda) 74 Civ (10 September 2021), at paragraph 69.

60. Where disclosure of a record falling within section 34(2)(a) would be in the public interest, the exemption does not apply. Unless another exemption applies, the record thus must be disclosed as it properly falls within an exception to section 34. If, however, the public authority decides the public interest weighs against disclosing a record falling within section 34(2)(a), the exception no longer applies, and the exemption may be justified to withhold the record.
61. In sum, when applying the exemption in section 34(1)(c), a public authority must ask:⁸
- [1] What is the relevant trial or adjudication?
 - [2] How can disclosure prejudice the fairness of the trial or impartiality of the adjudication?
 - [3] Can this prejudice reasonably be expected to occur?
 - [4] Does the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?
62. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 34(1)(c) to deny access to the records.

Public authority's submissions

63. The Ministry Headquarters explained that the pending litigation between the Government and InnoFund, BPMS and i3 is highly technical and complex. It further explained that the litigation included a number of unresolved disputes. The Ministry Headquarters submitted that premature disclosure of certain records would entirely undermine the ability of the Government to litigate the matter in specified ways and offered detailed submissions to support its position.

Applicant's submissions

64. The Applicant submitted that, because the legal proceedings referred to by the Ministry Headquarters were civil proceedings, there was no "fair trial of a person" to consider. The Ministry Headquarters could only therefore rely on the exemption on the basis that disclosure could have led to "the improper adjudication of a particular case". The Applicant asserted that, because the civil proceedings would involve a judge sitting alone

⁸ See [Decision 28/2022](#), [Cabinet Office](#), at paragraph 66.

(i.e. there was no jury) and judges were considered to be beyond influence, disclosure could not have reasonably been expected to result in the improper adjudication of the case.

65. The Applicant accepted that they were unable to say what evidence would be presented by the parties at any hearing but submitted that it might be fair to assume that the parties could have relied on the information at their disposal, which would include correspondence responsive to the PATI request. The Applicant believed that, at a minimum, the parties could have presented information for the judge to determine whether it may be submitted as evidence.
66. The Applicant relied on their public interest argument in paragraphs 38 and 39 above, because section 34(2) states that the exemption would not apply to a record if “. . . its disclosure would be in the public interest.”

Discussion

67. Section 34(1)(c) is considered for records 1, 3-5, 7, 10, 62 and 110.

[1] What was the relevant trial or adjudication?

68. Based on the writ provided by the Applicant, the relevant trial or adjudication was the Civil Jurisdiction 2022: No. 381, between BPMS, InnoFund and i3 (plaintiffs) and the Government of Bermuda (defendant). According to the writ of summons, the legal proceeding was brought by BPMS, InnoFund and i3, who maintained that the Government was in material breach of their service agreements for specific reasons as detailed in the writ.

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

69. Before discussing this question, the Information Commissioner addresses the Applicant's submission that, because the proceedings between the parties were civil proceedings, there was no 'fair trial of a person' involved. As the Information Commissioner decided in [Decision 23/2023, Office of the Tax Commissioner](#), fair trial also applies to civil proceedings, which “encompasses a wide range of both institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning

of judicial decisions.”⁹ Further, in accordance with section 7 of the [Interpretation Act](#), the Government as the defendant in the identified adjudication was a legal “person”. Thus, the potential prejudice caused by disclosure both to the fairness of the proceedings and the impartiality of the adjudication is considered.

70. The Ministry Headquarters argued that prejudice to the fairness or impartiality of the proceedings could occur in two ways.
71. As an initial matter, the Applicant correctly pointed out that this dispute would be adjudicated by an impartial judge, weighing the evidence in the context of the relevant law. In assessing whether disclosure of the records listed above in paragraph 67 could have prejudiced the fairness or impartiality of the legal proceeding in the manner the Government described, the content of each record must be considered against the nature of and issue or claims involved in the proceeding being adjudicated.
72. Records 1 and 110, as well as parts of records 3 and 5, were created by BPMS, InnoFund or i3, were already received by them, or contained information that was known to one of those entities or publicly available. Further, the information in these records, along with the information in records 4 and 62 as well as the remaining parts of record 3, did not address any of the matters in dispute, but instead related to other aspects of the parties’ dealings that were publicly known. Finally, records 7 and 10 as well as the remaining parts of record 5 were innocuous and administrative information only, e.g. emails confirming meeting times.
73. It is difficult to see how the disclosure of information that was already known to the parties, unrelated to the issues in the litigation, and only administrative or innocuous could have impacted the impartiality or fairness of the judge’s deliberations or adjudication of the disputes. It would not change the judge’s application of the law to the parties’ arguments or introduce information that could impact the judge’s impartiality. This basis for claiming prejudice is not considered further.
74. If the Government’s claim is that any public discussion at all of its relationship with BPMS, InnoFund, and i3 could have prejudiced the fairness or impartiality of the pending litigation, this goes too far. While the Information Commissioner recognises that the litigation itself is *sub judice*, as the Premier announced in Parliament,¹⁰ a fair amount of information is in the public domain. The public is entitled to discuss, question and

⁹ See European Court of Human Rights, ‘[Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#)’ (31 August 2022) as cited in [Decision 23/2023](#), [Office of the Tax Commissioner](#), paragraph 22.

¹⁰ Bermuda House of Assembly, [Official Hansard Report](#), 24 March 2023, at page 1277.

comment on this information. This includes, for example, the details of the Government guarantee and the fact that the guarantee has been paid. The Information Commissioner also notes that the current dispute between the parties was (and is) ongoing, but once it is resolved, the government may need to account to the public for its decision making and activities.

75. With this in mind, it is difficult to see how disclosure of the information in the remaining records would have impacted the Government's position in the litigation. Again, the information in the records does not touch upon the disputed matters or makes only minor references to administrative tasks that could not have had an impact on any substantive matter. This would not prejudice the impartiality of the judge's adjudication of the dispute or render the adjudication unfair.
76. Because the Ministry Headquarters has not shown how disclosure of the records could prejudice the fairness or impartiality of the legal proceeding, its reliance on section 35(1)(c) is not considered further.

Conclusion

77. The Information Commissioner is not satisfied that the Ministry Headquarters was justified in relying on section 34(1)(c) to refuse records 1, 3-5, 7, 10, 62 and 110.

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

78. A public authority, or a third party asserting its rights, may rely on section 25(1)(c) to deny access to a public record where the 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.
79. A 'commercial interest' relates to a person's ability to participate in a commercial activity, such as the sale or exchange of goods or services or the collection of a debt.¹¹
80. The PATI Act and Regulations do not define 'commercial' or 'commercial activities'. In [Decision 12/2018, Ministry of Finance Headquarters](#), the Information Commissioner read 'commercial' in its ordinary meaning, namely, "concerned with or engaged in

¹¹ See [Decision 12/2018, Ministry of Finance Headquarters](#), at paragraph 66.

commerce”. ‘Commerce’ is defined as “the activity of buying and selling” or “making or intended to make a profit”.¹²

81. Importantly, the exemption in section 25(1) protects the commercial information of private sector businesses as well as public authorities that are engaged in commercial activities, such as a public corporation operating in a competitive environment. A public authority relying on section 25(1) must explain the commercial activity that is involved.
82. Commercial activity usually requires a business undertaking carried on to generate income or profit.¹³ Under some circumstances, the activity may be indirectly related to a public authority’s commercial activity but is still necessary for the public authority to engage in the commercial activity.¹⁴
83. Unlike some other access to information laws,¹⁵ section 25(1) involves only commercial information. It will not extend to cover information that relates solely to the finances of a public authority, e.g. its money resources and their management.
84. In sum, a public authority, or third party, must consider these questions when seeking to justify the exemption for commercial interests:

[1] Do any of the exceptions in section 25(2) apply?

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

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

¹² See [Decision 12/2018, Ministry of Finance Headquarters](#), at paragraph 66.

¹³ For example, the Queensland Information Commissioner stated that the commercial value harm factor should be read narrowly, in that it is only applicable “to information concerning activities or affairs that are carried on in a business-like fashion for the purpose of generating income or profits”; see [Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd \(Third Party\); The Walt Disney Company \(Australia\) Pty Ltd \(Fourth Party\)](#) [2016] QICmr 30 (18 August 2016), at paragraphs 108-122.

¹⁴ The UK Information Tribunal applies a broader definition of ‘commercial’ that is not limited to competitive participation in the buying and selling of goods or services. Rather, the UK Tribunal includes activities such as debt collection that, if compromised, could prejudice the public body’s commercial interests, although this case was acknowledged as being ‘near the borderline’ of the definition; see [Student Loan Company Ltd v Information Commissioner](#), EA/2008/0092 (17 July 2009). Similarly, the UK Tribunal has recognised the provision of university course materials as a commercial interest because the course materials are the ‘assets’ which the university depends upon for its commercial activity of recruiting students in a competitive environment; see [University of Central Lancashire v Information Commissioner](#), EA/2009/0034 (8 December 2009).

¹⁵ See, for example, section 45(c) of the Queensland Freedom of Information Act 1992 (applicable to information concerning business, professional, commercial, or financial affairs whose disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the provision of such information in the future to government).

[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?

85. A public authority, or third party asserting its rights 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

86. The Ministry Headquarters did not invoke this exemption.

Applicant's submissions

87. Where the exemption was properly engaged, the Applicant urged the disclosure of redacted records based on the balance of the public interest, as explained above, in paragraphs 38 and 39.

Clarien Bank's submissions

88. Clarien Bank relied on section 25(1)(c) to object to the disclosure of its information in the records, but it did not elaborate further.

Discussion

89. Section 25(1)(c) is considered for Clarien Bank's information in the remaining records 3 and 4.

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

90. Having carefully reviewed the withheld records, none of the exceptions in section 25(2) were applicable to the Clarien Bank's information.

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

91. The information in the relevant records or parts of records related to InnoFund and Clarien Bank.

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

92. Because only Clarien Bank objected to disclosure under section 25(1)(c), only its commercial interests are considered.

93. Although Clarien Bank did not specify its commercial interests, on the face of the records the Information Commissioner is satisfied that the relevant commercial interests were the ability of Clarien Bank to offer its lending services for profit to its current and potential customers within a competitive local market.

[4] What adverse effect could disclosure have caused?

[5] How likely was this to occur?

94. Although it is public that the Government provided a letter of comfort to Clarien Bank for the InnoFund guarantee, the parts of records 3 and 4 containing Clarien Bank's information consisted of specific details of the documentation from Government required by Clarien Bank to secure the guarantee. Disclosure of these details could reasonably be expected to allow its competitor banks to compare whether they are seeking the same documents or to adjust their documentation requests in a manner that, for example, make their financing process more attractive to the Government. Disclosure of these details of its commercial practices could allow its competitors an advantage over Clarien Bank within the competitive banking environment.

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

95. Here, the relevant information involved the details of the documentation requirements of a private bank. On the one hand, the public had a strong interest in transparency and accountability surrounding the financial transactions related to BPMS, InnoFund and i3 that have led to the expenditure of public funds.
96. On the other hand, the public also had a strong interest in ensuring that private businesses can conduct their commercial activities fairly, as well as an interest in maintaining the confidentiality of the banker-client relationship. For this reason, the disclosure of Clarien Bank's commercial information in records 3 and 4 was not in the public interest. Disclosure of this information would not have assisted the public with understanding the circumstances related to the breakdown of the relationship and, further, the details of the Government payment of the guarantee were publicly known. On balance, the public interest favoured maintaining the exemption.

Conclusion

97. The Information Commissioner is satisfied that Clarien Bank justified the application of section 25(1)(c) to refuse access to its information in parts of records 3 and 4.

98. Because Clarien Bank justified withholding the remaining information related to it under section 25(1)(c), its objection to disclosure based on section 26(1)(b) is not considered.

Personal information – section 23

99. 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 24(2) and exceptions to the exemption in section 23(2) that are not applicable in this review.
100. 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:¹⁶
- 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 is 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.
101. 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:¹⁷

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

¹⁶ [Decision 02/2019, Office of the Governor](#), paragraph 51.

¹⁷ [Decision 02/2019, Office of the Governor](#), paragraph 56.

[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) apply 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?

102. The Information Commissioner may consider the personal information exemption on her own accord, as has occurred in this review for some of the records.

103. 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 the PATI Regulations made by the [Personal Information Protection Amendment Act 2023](#) are not applicable to this review.

Third party individual

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

Discussion

105. Section 23 is considered for records 1, 5, 7, 10, 62 and 110 and the remaining parts of records 3 and 4.

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

106. Relevant identifiable individuals were elected officials, officers or employees of public authorities and those associated with private entities, like BPMS and InnoFund. Their personal information consisted of their names, employment history, views and contact details.

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

107. The exclusions in section 24(2) did not apply. While some of the individuals were officers or employees of public authorities, the relevant information did not relate to their positions or functions but, instead, related to the performance of 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 vendors who were identified in the withheld records, because they had not entered into a contract with the Government as individuals.

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

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

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

109. For the same reasons discussed by the Information Commissioner in the related [Decision 34/2024, Ministry of Health Headquarters](#), in paragraphs 75-77, the balance of the public interest favoured disclosure of the personal information of elected officials and executive public officers in records 62 and 110 as well as parts of records 1, 3-5, 7, and 10, along with the name of the individual Third Party identified in record 5. For these individuals, disclosure would have been necessary to further the identified public interests. It would have enabled the public to have a better understanding of which individuals were involved with the decision concerning BPMS, InnoFund and i3. This, in turn, furthers the public's understanding of the Government's activities and promotes accountability for elected officials and executive officers.

Conclusion

110. The personal information exemption in section 23(1) justified denying access to parts of records 1, 3-5, 7 and 10, and the public interest required disclosure of the names and positions of elected officials and executive public officers in these records, as well as in records 62 and 110.

Conclusions

111. In sum, the Information Commissioner is satisfied that the Ministry Headquarters justified its reliance on section 25(1)(d) to withhold records 6, 8, 9, 11-17, 19, 21, 23, 24, 26-29, 31-33, 36, 37, 39-41, 43, 45-47, 50-52, 56, 57, 59, 60, 61, 65-69, 72-75, 78, 80-83, 85, 86, 89-109, 111-116, 118, 119, 121 and 124.
112. The Information Commissioner is not satisfied that the Ministry Headquarters was justified in relying on section 25(1)(d) or 34(1)(c) to refuse access to records 1, 3-5, 7, 10, 62 and 110.

113. The Information Commissioner is satisfied that Clarien Bank justified the application of section 25(1)(c) to refuse access to its information in parts of records 3 and 4.
114. The personal information exemption in section 23(1) justified denying access to parts of records 1, 3-5, 7 and 10, except where the public interest had required disclosure of the names and positions of elected officials, as well as the individual Third Party identified in record 5. The Information Commissioner accepted the individual Third Party's objections under section 23(1) in part.

Decision

The Information Commissioner finds that the Ministry of Finance Headquarters (**Ministry Headquarters**) was justified in relying on section 25(1)(d) of the Public Access to Information (**PATI**) Act 2010 to deny public access to some records. The Information Commissioner also finds that Clarien Bank was justified in refusing access to its commercial information in two of the records. On her own accord, the Information Commissioner finds that parts of certain records were exempt under section 23(1), although the balance of the public interest required disclosure of some personal information of elected officials and executive public officers in these records. Finally, the Information Commissioner finds that the Ministry Headquarters was not justified in relying on sections 25(1)(d) and 34(1)(c) to deny public access to the remaining records.

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

- upholds the Ministry Headquarters' reliance on section 25(1)(d) for records 6, 8, 9, 11-17, 19, 21, 23, 24, 26-29, 31-33, 36, 37, 39-41, 43, 45-47, 50-52, 56, 57, 59, 60, 61, 65-69, 72-75, 78, 80-83, 85, 86, 89-109, 111-116, 118, 119, 121 and 124;
- varies the Ministry Headquarters' decision to deny public access to parts of records 1, 3-5, 7, 10, 62 and 110 by virtue of section 23(1);
- varies the Ministry Headquarters' decision to deny public access to parts of records 3 and 4 by virtue of section 25(1)(c);
- reverses the Ministry Headquarters' decision to deny public access by relying on section 25(1)(d) or 34(1)(c) for the remaining records or parts of records; and
- orders the Ministry Headquarters to disclose records 62 and 110 in full as well as parts of records 1, 3-5, 7 and 10, with exempt and non-responsive information removed, as directed by this Decision Notice and the accompanying Confidential Annex and Order, which form part of this Decision, on or before **Tuesday, 18 March 2025**.

Judicial Review

The Applicant, the Ministry of Finance Headquarters, 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 Ministry of Finance Headquarters 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
4 February 2025

Appendix I: Relevant statutory provisions

Public Access to Information Act 2010

Public interest test

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

Personal information

- 23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.

Commercial information

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

Law enforcement

- 34 (1) Subject to subsection (2), a record is exempt if its disclosure would, or could reasonably be expected to—

(a) prejudice the prevention, detection or investigation of a breach or possible breach of the law;

...

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