

## Decision Notice

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**Decision 02/2022: Bermuda Business Development Agency**

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### **Company records**

**Reference no: 20191207**

**Decision date: 27 January 2022**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Business Development Agency (**BDA**) for records on Game Theory, a company who had planned to open a business in Bermuda. BDA disclosed extensive records to the Applicant, with some information redacted. At issue in this Information Commissioner's review is BDA and the third parties' reliance on the exemptions in sections 23(1) (personal information) and 26(1)(b) (breach of confidence) of the PATI Act to refuse further disclosures.

The Information Commissioner has found that BDA was justified, in part, in relying on the exemption for personal information in section 23(1). The Information Commissioner has also found that BDA was justified in denying access to certain records, in full, but has varied the grounds for denial to the exemption in section 26(1)(b) (breach of confidence).

The Information Commissioner has ordered BDA to disclose the remaining parts of records that are not exempt or where the public interest favours their disclosure.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); and section 26(1)(b) (breach of confidence).

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

## Background

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1. On 11 February 2019, the Royal Gazette published an article<sup>1</sup> about an unnamed company recruiting six Bermudians as sports trading operators.
2. During a parliamentary session on 15 February 2019, the Premier claimed that the Royal Gazette had had "a brazen and unprofessional interaction" with "a principal of

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<sup>1</sup> Company Seeks Six 'Sports Trading Operators', *Royal Gazette*, 11 February 2019, available at <https://www.royalgazette.com/other/business/article/20190211/company-seeks-six-sports-trading-operators/>.

a company newly incorporated in Bermuda”, which then chose to not continue setting up a Bermuda office, as triggered by the Royal Gazette’s actions<sup>2</sup>.

3. On 21 February 2019, the Royal Gazette identified “GTL Atlantic Limited” (**Game Theory**) as the company referred to by the Premier and in its 11 February 2019 article<sup>3</sup>.
4. On 2 May 2019, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Business Development Agency (**BDA**), seeking:

. . . all records held by [BDA] on GTL Atlantic Limited . . . [including] communications (such as memos, emails, texts, voicemails, recordings or written records of telephone conversations) about GTL Atlantic Limited between [a specific BDA staff member] and any public servant, including David Burt, Premier of Bermuda.
5. In response to a query from BDA, on 28 May 2019, the Applicant clarified that their request sought “all records the BDA holds on the company, particularly those that relate to its decision not to move forward in setting up an office on the island”.
6. On 25 July 2019, BDA issued a timely initial decision within the 12-week extended period, granting access to a bundle of responsive records, with parts of them redacted. While BDA’s initial decision did not cite specific exemptions in the PATI Act, it stated that some records or parts of records were withheld because they identified information about individuals, were subject to legal professional privilege, contained information imparted in confidence, or amounted to exempt commercial information. BDA expressly acknowledged its duty to third parties under section 39 of the PATI Act and that it was unable to issue the required third party notifications prior to the initial decision’s statutory timeline expiring.
7. The Applicant sought an internal review. During its internal review, BDA identified individuals as third parties and provided them with third party notifications. BDA issued an internal review decision on 14 November 2019. Its internal review decision found that the names of two individuals should be disclosed under the public interest test. It identified the records that are withheld in full and found that they are exempt in accordance with section 26(1)(a) as information received in confidence.

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<sup>2</sup> Official Hansard report, Bermuda House of Assembly, 15 February 2019, page 576.

<sup>3</sup> Silence from Tech Firm on Burt’s Claims, Royal Gazette, 21 February 2019, available at <https://www.royalgazette.com/other/news/article/20190221/silence-from-tech-firm-on-burts-claims/>.

8. The Applicant made a timely application on 7 December 2019 for an independent review by the Information Commissioner.

## Investigation

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9. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
10. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine whether its reliance on the exemptions was justified.
11. The Information Commissioner notified BDA of the Applicant's valid application and requested a copy of the withheld records. On 21 January 2020, the Information Commissioner's Office (**ICO**) received a bundle consisting of a Schedule of Records and 174 records.
12. Records disclosed in full, non-responsive ones and duplicates were removed during the investigation. This Decision considers BDA's decision to withhold the following 99 records, in full or in part: 1-4, 7, 7a, 7b, 8, 12-15, 15a, 15b, 16, 17, 19, 20b, 22, 23, 25-29, 31, 32, 34, 35, 44-47, 48a, 51-53, 54a, 55-61, 65, 67, 71, 74-77, 82, 92, 95a, 97, 99-103, 105-108, 108a, 109, 110, 112, 115-117, 119-121, 123, 124, 127-130, 135-137, 141, 143, 145, 150, 152, 155, 159-162, 166, 167, 170, 173 and 174.
13. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any concerned third party a reasonable opportunity to make representations. Game Theory and a law firm were identified as concerned third parties. These third parties, along with BDA and the Applicant, were invited to comment on the review and make submissions to the Information Commissioner for consideration.
14. The ICO received submissions from the Applicant and both third parties. The third parties referred to sections 23(1) and 26(1)(a) to support their objections to further disclosures. Both parties also cited the exemptions in sections 25(1)(c) (commercial interests) and 26(1)(b) (breach of confidence). Additionally, Game Theory invoked the exemption in section 25(1)(b) (information with commercial value), and the law firm invoked the exemption in section 25(1)(d) (prejudice to negotiations). BDA did not

provide additional submissions and instead relied on its extensive reasoning put forward in its internal review decision.

## **Information Commissioner's analysis and findings**

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15. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the public authority, the third parties and the Applicant. She is satisfied that no matter of relevance has been overlooked.
16. The Information Commissioner strives to provide as full an 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 of various issues cannot be as detailed as would otherwise be preferred.
17. The Information Commissioner expresses appreciation to all the parties for the exceptional quality of their submissions, including BDA's internal review decision. The submissions' analysis and organisation, as well as their careful attention to the provisions of the PATI Act and the PATI Regulations 2014 (**PATI Regulations**), were of assistance during this review.

### ***Preliminary issue – responsiveness of records***

18. As a preliminary matter, the Information Commissioner considers Game Theory's challenge that certain records are not responsive to the PATI request. Game Theory submitted that it is a "common ground" that "the purpose . . . of the PATI request is to assist in helping the public understand why [it] decided not to proceed with opening a Bermuda office". Game Theory stated that records 7b, 12, 15a, 15b, 20b and 108a are not responsive to the PATI request, as they do not explain why it did not proceed with its Bermuda plan.
19. The PATI request, however, asked for "all records". While the Applicant shared in their email of 28 May 2019 that they were "particularly" interested in records about Game Theory's "decision not to move forward in setting up an office on the island", their same email reiterated that they wanted "all records" that BDA held on the company.
20. Again, when discussing the scope of the PATI request during BDA's internal review, the Applicant explained they wanted to understand what led to Game Theory discontinuing its plan to conduct business in Bermuda, along with having access to the

Government correspondence in its “entirety”. The Applicant made clear they “[were] challenging the other redactions in the bundle”.

21. Given this, the Information Commissioner disagrees with Game Theory’s position that records 7b, 12, 15a, 15b, 20b and 108a fall outside the scope of the PATI request. The Information Commissioner finds Game Theory’s reading of the PATI request to be unnecessarily limited. BDA also processed these records as responsive. The Information Commissioner is satisfied that records 7b, 12, 15a, 15b, 20b and 108a are responsive to the PATI request.

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

22. Section 26(1)(b) of the PATI Act allows public authorities to deny access to records if they consist of information whose disclosure “would constitute a breach of duty of confidence provided for by a provision of law”.
23. According to section 2 of the Interpretation Act 1951 (**Interpretation Act**), a “provision of law” is defined as “any provision of law which has effect for the time being in Bermuda, including any statutory provision, any provision of the common law, any provision of the Constitution and any right or power which may be exercised by virtue of the Royal Prerogative”. A duty of confidence referred to in section 26(1)(b) of the PATI Act may be created not only by statutory provisions, but also by a provision of an agreement or may arise in equity.
24. A breach of an equitable duty of confidence requires a showing that<sup>4</sup>:
  - a. the information has the necessary quality of confidence;
  - b. it was given in circumstances which create an obligation that the information be kept confidential; and
  - c. there must have been an unauthorised use of the information, which in some circumstances must be to the detriment of the confider.
25. Information has the necessary quality of confidence if it is more than trivial. Information is of a confidential or secret nature if it has, for example, been kept confidential, is sensitive, or is something worthy of protection, or a combination of these. The passage of time may also have an impact on whether information is of a

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<sup>4</sup> Coco v AN Clark (Engineers) Ltd. [1969] RPC 41; see also Decision 09/2019, Department of Public Lands and Buildings, paras. 87-90.

confidential nature<sup>5</sup>. Information that is already public property and public knowledge cannot be said to have the necessary confidentiality quality<sup>6</sup>.

26. To rely on equitable breach of confidence, public authorities should also demonstrate that the circumstances in which the records or parts of records were provided created an agreement or expectation of confidentiality. In circumstances where it is unclear if an implied obligation of confidence exists, courts may apply a 'reasonable person' test: "[I]f the circumstances are such that any reasonable [person] standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him [or her] in confidence, then this should suffice to impose upon him [or her] the equitable obligation of confidence"<sup>7</sup>. In cases "where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind", the recipient of the information carries "a heavy burden if [they seek] to repel a contention that [they were] bound by" a duty of confidence<sup>8</sup>.
27. Unauthorised use of confidential information may occur when the disclosure is contrary to the express wishes of the person providing the information, or when the person has not provided consent. A detrimental impact on the person providing the information is required if the information is commercial in nature<sup>9</sup>. Detriment is not defined in either the PATI or Interpretation Act. Its plain meaning is "the state of being harmed or damaged" and "a cause of harm or damage"<sup>10</sup>.
28. For section 26(1)(b) to apply, there has to be a high probability that the breach of confidence can occur.
29. The exemption in section 26(1)(b) is subject to the public interest test. A record that falls within this exemption would still have to be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.

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<sup>5</sup> Decision 09/2019, Department of Public Lands and Buildings, para. 88.

<sup>6</sup> Coco v AN Clark (Engineers) Ltd. [1969] RPC 41.

<sup>7</sup> Decision 09/2019, Department of Public Lands and Buildings, para. 89, citing Coco v AN Clark (Engineers) Ltd [1969] RPC 41.

<sup>8</sup> Coco v AN Clark (Engineers) Ltd., p. 48.

<sup>9</sup> Ibid.

<sup>10</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

30. In sum, a public authority or third party seeking to rely on the exemption under section 26(1)(b) for a breach of a duty of confidence must ask<sup>11</sup>:

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

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

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

31. Public authorities have the burden to show that, on the balance of probabilities, their reliance on the exemption is justified.

#### *Public authority's submissions*

32. BDA did not invoke section 26(1)(b) to justify its decision to withhold the responsive records or parts of records.

#### *Game Theory's submissions*

33. Game Theory relied on section 26(1)(b) to support its objection to the disclosure of records 7b, 12, 15a, 15b, 20b and 108a.

##### Records 7b and 20b

34. Game Theory described records 7b and 20b as legal advice that it had submitted to BDA in confidence, in both express and implied terms, to assist BDA and other public authorities to fulfil their functions efficiently and in the most cost effective manner.

35. Game Theory emphasised that the legal privilege attached to these records was never waived. The fact that Game Theory shared the legal advice with BDA does not mean that the privilege was waived, as there has been no public disclosure of the same. No permission to share the legal advice with the public was sought or granted. Game Theory referred to the UK Information Commissioner's Office's guidance on the legal professional privilege exemption to support its argument.

36. Game Theory argued that disclosure would constitute a breach of a duty of confidence under the test set out in Coco v A N Clark (Engineers). Specifically, Game Theory maintained that:

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<sup>11</sup> Decision 06/2021, Cabinet Office, para. 41.

- a. The information in records 7b and 20b has the necessary quality of confidence. It constitutes legal advice which is “patently worthy of protection and signals a genuine interest in the contents remaining confidential”.
  - b. The information was also imparted in confidence. Game Theory was given a verbal assurance of confidentiality and there was an express and/or implied undertaking of confidentiality. Game Theory also expressly stated that any information provided to BDA was done on a confidential basis. It requested BDA not to disclose any information to the public without its express permission.
  - c. Game Theory has not authorised the disclosure of these records. Disclosure would be to its detriment because it would be done without Game Theory’s consent.
37. Game Theory also argued that the disclosure of records 7b and 20b is not in the public interest because it would irreparably damage the essential basis of trust between private entities (such as Game Theory) and public authorities. While disclosure would amount to a breach of confidence, non-disclosure would maintain the rule of law.
  38. Game Theory submitted that records 7b and 20b were never going to be part of BDA’s decision making process and, as such, there is no public interest in their disclosure.

#### Record 12

39. Game Theory submitted that record 12, along with any document which identified a business strategy, is *a fortiori* confidential and has the necessary quality of confidence. Record 12 contains certain proprietary information of Game Theory. Game Theory emphasised the importance of having shared proprietary information, such as record 12, because it is necessary information for a regulator to evaluate which statutory regime applies to a new business venture.
40. Game Theory explained that record 12 was submitted to BDA along with the legal advice, with the same assurance and expectation that it would be held in confidence. It is Game Theory’s expectation that any submissions it made to BDA would be held in confidence indefinitely, particularly because Game Theory is still in business, albeit outside of Bermuda. Disclosure would be detrimental to Game Theory by making its confidential and proprietary information available to its competitors.
41. Finally, Game Theory urged that the balance of the public interest favours confidentiality. Disclosure of record 12 will simply be to satisfy the public’s curiosity but will not achieve any public interest aims, as set out in regulation 2 of the PATI

Regulations. Specifically, disclosure will prejudice BDA's performance and lead to negative impacts on the Bermudian economy if fewer businesses were to open. In contrast, non-disclosure will protect its third party interest as well as the public confidence in the Government when disclosing confidential information or records.

#### Records 15a and 15b

42. Game Theory explained that records 15a and 15b capture information that is not available to the public and are Game Theory's proprietary information.
43. Game Theory asserted that both records show information that will be of interest to its competitors, relying on the same arguments set out in paragraphs 36-41, above.
44. Game Theory argued that disclosure of records 15a and 15b is not in the public interest because it would neither promote transparency and accountability of public authorities, nor promote public understanding and involvement in the democratic process. The records have no relation to Bermuda and will not explain why Game Theory decided not to pursue any plan to conduct business in Bermuda.

#### Record 108a

45. Game Theory explained that record 108a was created following its confidential meeting with BDA. It contains confidential information about its business. All this information is still relevant to Game Theory's business model.
46. Game Theory further submitted that the candid and frank nature of the information it provided while meeting with BDA supported its claim that the information was given in confidence.
47. Game Theory referred to the same arguments set forth in paragraphs 36-41, above.
48. Game Theory asserted that disclosure is not in the public because it would not promote any of the purposes stated in regulation 2 of the PATI Regulations.

#### *Law firm's submissions*

49. The law firm relies on the exemption in section 26(1)(b) to object to disclosure of records 7b and 12.
50. The law firm asserted that records 7b and 12 contain confidential advice it provided to its client. It emphasised that the information in both records is subject to legal professional privilege.

51. The law firm referred to specific language in both records when asserting the confidential nature of the information, as showing the records were given in circumstances which raised the expectation that they would be held in confidence.
52. The law firm also emphasised that it had not waived its right to confidentiality and that disclosure was not in the public interest.

*Applicant's submissions*

53. The Applicant submitted they are unaware of the agreement which Game Theory had with BDA regarding the confidentiality of information submitted by the former. The Applicant does not believe that any such agreement had been in place; but, in any event, Game Theory should have known that BDA is a public authority and that its records would be subject to the PATI Act.
54. The Applicant submitted that disclosure is in the public interest because it would promote a greater understanding of the process or decisions of public authorities; provide reasons for decisions taken by the Government; promote accountability of and within Government; promote accountability for public expenditures or more effective use of public funds; deter or reveal wrong-doing or maladministration; and reveal untrue, incomplete or misleading information or acts of a public authority, as stated in regulations 2(a), (c), (d), (g) and (i) of the PATI Regulations.
55. The Applicant highlighted other public interest factors they found relevant; namely, the need to hold public officials accountable for their comments, the freedom of the press, the 'behind the scenes' discussions with public officials regarding favours, and similar issues.
56. The Applicant submitted that the formation of a fintech industry is of major public interest in Bermuda because it has been touted by the Premier and others on the public payroll as having the potential to significantly boost the economy. At the same time, public scepticism has arisen about how the fintech industry in Bermuda is progressing and the number of actual jobs that have been created.
57. The Applicant further submitted that, because Game Theory describes itself as an "investment house that places bets on investing in sports business", there is great public interest in the prospect of a gaming industry on the island. This would include how it will be safely regulated to ensure it remains corruption-free and avoid any vulnerability to money-laundering.

58. The Applicant explained that the PATI request was prompted by the Premier's remarks during the parliamentary session on 15 February 2019, in which the Premier castigated the Royal Gazette for running the 11 February 2019 article. It is not clear to the public why the Premier made these remarks and claimed that the loss of potential jobs was caused by the Royal Gazette's article.

### *Discussion*

59. The Information Commissioner now considers section 26(1)(b) for records 7b, 12, 15a, 15b, 20b and 108a, based on the third parties' reliance on the exemption.

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

60. Both Game Theory and the law firm based their arguments on a duty of confidence arising from equity.

Is the necessary confidential or secret nature of the information established?

61. Having carefully considered their content and the context in which they were created, the Information Commissioner agrees with the third parties that the information in records 7b, 12, 15a, 15b, 20b and 108a has the necessary confidential or secret nature.
62. Records 7b and 20b consist of advice provided by legal counsel to its client, which on the face of it, is protected by legal professional privilege. It consists of the legal counsel's understanding of various legislation in Bermuda and its analysis of the applicability of these laws. This information is not trivial and would ordinarily be kept confidential.
63. The legal professional privilege exemption in section 35 of the PATI Act was not invoked by BDA in its internal review decision, and third parties are not entitled under the provisions of the PATI Act to assert third party rights relying on section 35. As Game Theory correctly explained, however, a third party may safeguard its information subject to legal professional privilege through the exemption for a breach of an equitable duty of confidence.
64. Records 12 and 108a contain Game Theory's proprietary information. In examining the content and context of these records, the Information Commissioner is satisfied that none of the information is trivial.
65. Similarly, the Information Commissioner is satisfied that the content of records 15a and 15b is not information that would ordinarily be made available to the public.

Was the information given in circumstances that create an obligation or agreement that the information will be kept confidential?

66. The Information Commissioner also accepts the third parties' submissions that the information in records 7b, 12, 15a, 15b, 20b and 108a was given in circumstances which created an agreement between BDA and Game Theory that they would be kept confidential.
67. The Applicant was correct to point out that records held by BDA are subject to the PATI Act because BDA is a public authority, regardless of who created or submitted the records to it. This does not mean, though, that Game Theory could not have a legitimate expectation of confidentiality. The fact that a private entity interacts with a public authority does not, on its own, mean that the private entity waives all expectations of confidentiality. The PATI Act acknowledges various facets to relationships between public authorities and private entities, which are reflected in its provisions, including the exemption in section 26(1)(b) that safeguards the rights of others<sup>12</sup>.
68. The context of the interaction and nature of the relationship between the private entity and the public authority must be considered when deciding whether the circumstances create an obligation or agreement that the information supplied by a private entity would be kept confidential. In this case, Game Theory was a potential private investor using the services offered by BDA. Game Theory provided various information to BDA which it does not ordinarily share with external parties, for the purpose of facilitating setting up a business in Bermuda. Game Theory did not share information with BDA because it was participating in a public procurement process, providing a public service or receiving funds from the Bermuda public purse.
69. This is not to say that private entities interacting with public authorities can always expect confidentiality as long as they are not involved in a public procurement process, providing a public service or receiving public funding. Nonetheless, it is reasonable to assume that private entities who engage in public procurement, provide a public service or receive public funding, and interact with public authorities in the context of these activities, should have a relatively lower expectation of confidentiality than those private companies utilising the business concierge services of BDA to establish a private business in Bermuda.

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<sup>12</sup> Section 2(1)(a) of the PATI Act describes one of its purposes as to "give the public the right to obtain access to information held by public authorities to the greatest extent possible, subject to exceptions that are in the public interest or for the protection of the rights of others".

70. None of the information made available during the Information Commissioner's review suggests that BDA and Game Theory had a formal, written confidentiality agreement. But the absence of such an agreement alone is not a sufficient basis for dismissing Game Theory's assertion of an expectation of confidentiality. Instead, the Information Commissioner needs to consider all the relevant circumstances.
71. At various points when communicating with BDA, Game Theory explicitly asked BDA to keep the information it was providing confidential and emphasised the limited purpose of its sharing the information. These include Game Theory's emails to public authorities receiving the records in question as well as specific language in records 7b and 20b.
72. BDA, in turn, provided assurances of confidentiality to Game Theory on various occasions.
73. Bearing the above in mind, the Information Commissioner is satisfied that the second test in Coco, as described in paragraph 24(b) of this Decision, has been met. Furthermore, because the information captured in the relevant records is that of commercial value and subject to legal professional privilege, any reasonable person would realise that these records had been given in circumstances that created an obligation or agreement that they would be kept confidential.
74. The fact that Game Theory shared these records with public authorities in Bermuda, whose records are subject to public access under the PATI Act, does not negate those circumstances creating an understanding that they would be kept confidential. The sharing of information was for a specific purpose, i.e., to provide background information on Game Theory. It was not in any way equivalent to public disclosure of the information, either in full or in part<sup>13</sup>.

Will there be a detrimental impact on the person providing the information?

75. The Information Commissioner accepts that unauthorised disclosure of records 7b, 12, 15a, 15b, 20b and 108a can reasonably be expected to be detrimental to Game Theory, who has never consented to their disclosure. Given that the records provide Game Theory's proprietary information, disclosure could be used by its competitors to gain leverage against Game Theory.

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<sup>13</sup> Decision 13/2018, Ministry of Finance Headquarters, paras.37-40.

76. Given this analysis, the Information Commissioner is satisfied that BDA owes an equitable duty of confidence to Game Theory concerning records 7b, 12, 15a, 15b, 20b and 108a.

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

77. As BDA owes Game Theory an equitable duty of confidence with regards to the records listed in paragraph 76, disclosure of these records would constitute a breach of that duty of confidence.

[3] *Does the public interest test require disclosure?*

78. The Information Commissioner acknowledges the Applicant's submissions that both fintech and gaming industries are of major public interest in Bermuda. The Information Commissioner agrees that it is in the public interest to understand why the Premier criticised the Royal Gazette during the parliamentary session on 15 February 2019. Having carefully reviewed the records listed in paragraph 76, however, the Information Commissioner is satisfied that their disclosure will not inform the public of the reason why Game Theory decided not to pursue its plan in Bermuda or the reasons behind the Premier's remarks.

79. Game Theory created records 7b, 12, 15a, 15b and 20b for its business purposes. Although BDA created record 108a, it mainly consists of Game Theory's information about its business. The disclosure of these records will not assist the public in understanding BDA's practice, policy or decision making process. Rather, disclosure runs the risk of undermining potential investors' trust in BDA.

80. The balance of the public interest would be better served by maintaining the exemption for records 7b, 12, 15a, 15b, 20b and 108a as properly engaged.

81. Finally, after having reviewed the other withheld records with Game Theory's submissions in mind, the Information Commissioner is satisfied that some of the other responsive records contain the same or similar information concerning Game Theory's business plan or practices. The exemption in section 26(1)(b) is also engaged for this information, and disclosure of it is not in the public interest.

### *Conclusion*

82. The Information Commissioner is satisfied that Game Theory and the law firm have justified the application of section 26(1)(b) to records 7b, 12, 15a, 15b, 20b and 108a because disclosure of these records would constitute a breach of an equitable duty of

confidence and the balance of the public interest favours maintaining the exemption. The Information Commissioner is further satisfied that discrete information concerning Game Theory's business plan or practices that appears in parts of records 2, 7, 13, 15, 16, 26, 31, 32, 35, 44, 47, 67, 71, 75, 77, 92, 95a, 97, 102, 103, 106-108, 120, 127, 128, 130, 135, 136, 141, 143, 166, 170, 173 and 174 has been properly withheld under the same reasoning.

83. Because the Information Commissioner is satisfied that records 7b, 12, 15a, 15b, 20b and 108a are exempt under section 26(1)(b), she does not consider BDA and the third parties' reliance on the exemptions in sections 26(1)(a) and 25(1)(b)-(d), respectively, which were also invoked for these same records.

### *Personal information – section 23(1)*

84. Under section 23(1) of the PATI Act, public authorities may refuse access to a record if it consists of personal information, subject to exceptions in section 23(2) which includes when the information relates to the requester (section 23(2)(a)).
85. 'Personal information' is broadly defined in section 24(1) as 'information recorded in any form about an identified individual'. Section 24(1) also provides a non-exhaustive list of categories of personal information.
86. Certain categories of information about an identifiable individual, however, do not fall within the definition of 'personal information'. Section 24(2) dictates that these categories include, among other things, information about an individual who is or was an officer or employee of a public authority when it relates to the position or functions of the individual (section 24(2)(a)), or the details of a contractor providing services to the Government (section 24(2)(b)). As the Information Commissioner has explained, however, routine personal work information of public sector employees as well as the personal information of elected officials and other public officials still fall within the definition of 'personal information' in section 24(1)<sup>14</sup>.
87. Records consisting of personal information should be disclosed if the public interest would be better served, on balance, by disclosure than non-disclosure. Factors that should be taken into account when balancing the public interest relating to a disclosure of personal information are<sup>15</sup>:

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<sup>14</sup> See Decision 02/2019, Office of the Governor, paras. 43-47.

<sup>15</sup> See Decision 02/2019, Office of the Governor, para. 51.

- a. Whether the disclosure will further any public interest considerations;
  - b. Whether disclosure would be fair to the individual under all of the circumstances; and
  - c. Whether disclosure is necessary to further the public interests that have been identified.
88. Consideration of the fairness of disclosure to the individual requires a public authority to assess whether the information amounts to ‘sensitive personal information’<sup>16</sup>, the potential consequences of disclosure upon the individual, and the individual’s expectation of privacy.
89. In sum, to rely upon the exemption for personal information, a public authority must ask<sup>17</sup>:
- [1] Whether the records consist of information about an identifiable individual?
  - [2] Whether the information falls within any of the exclusions to the definition of personal information in 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, or whether disclosure would benefit the individual?
90. The personal information exemption in section 23(1) is the only exemption the Information Commissioner will consider on her own accord.

*Public authority’s submissions*

91. At the internal review stage, BDA carefully identified individual third party’s personal information within the withheld records.

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<sup>16</sup> Section 7(1) of the Personal Information Protection Act 2016 defines ‘sensitive personal information’ as “any personal information relating to an individual’s place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information”.

<sup>17</sup> See Decision 02/2019, Office of the Governor, para. 56.

92. BDA notified a number of individuals to afford them an opportunity to make submissions on their third party rights during its internal review, including individuals identified as individuals 1-8. Four of individuals 1-8 responded to the third party notifications issued by BDA.
93. With respect to individuals 1-6, BDA explained that their names and contact details should be withheld because they are exempt as personal information and their disclosure is not in the public interest. Disclosing the names and contact details of these individuals will not assist the public in understanding Game Theory's decision not to proceed with its Bermuda plan.
94. BDA acknowledged that some third parties, including individuals 1, 4, 5 and 6, were employees of public authorities. BDA further relied on the Information Commissioner's Decision 02/2019 Office of the Governor, to argue that their 'routine personal work information' is not excluded from the scope of the definition of personal information. BDA concluded that disclosing these individuals' routine personal work information will effectively disclose their names.
95. BDA also concluded that the job titles of the employees of public authorities, including individuals 1, 4 and 5, fall outside the definition of personal information by virtue of section 24(2)(a) because they are attached to the general post or functions, and therefore should be disclosed at the conclusion of the review process.
96. BDA explained its position regarding the names of individuals 7 and 8, who were elected officials. BDA maintained that although their names fell within the personal information exemption, the balance of the public interest requires disclosure because they had a low expectation of privacy in relation to their public duties.
97. For the remaining third parties, BDA found that that the disclosure of their names and contact details is not in the public interest, as it will not assist the public in understanding Game Theory's decision or reasons for the Premier's remarks during the parliamentary session.

#### *Game Theory's submissions*

98. A Game Theory employee made submissions to BDA during the internal review stage. Game Theory now relies on those submissions before the Information Commissioner and provided further arguments on the personal information exemption.
99. Game Theory confirmed that during the course of the Information Commissioner's review, BDA provided it with an unredacted copy of the withheld records relevant to

Game Theory's interests. Game Theory submitted that it has not seen the redacted copy of the records disclosed by BDA to the Applicant at the initial decision stage.

100. Game Theory explained that each record identifies Game Theory's employees in some way, and pointed out specific examples.
101. Game Theory asserted that no further disclosure of information identifying its employees should be made, as this information falls squarely within the definition of personal information. No exception to the exemption in section 23(2) is applicable because the information does not relate to the PATI requester and Game Theory's employees have objected to any disclosure.
102. Game Theory also maintained that public disclosure of its employees' personal information is not in the public interest. It submitted that the purpose of the PATI Act is to provide information about public authorities' decision making process, and not to feed the public's curiosity. Its employees, who are not public employees or officials, were not involved in any decision making process by a public authority in Bermuda and were not residents of Bermuda.
103. Game Theory further submitted that disclosure would be unfair to its employees. Its employees have reasonable expectations of privacy, particularly given the assurances of confidentiality Game Theory received from BDA. Disclosure will also generate adverse consequences for them and subject them to unwarranted and unnecessary public attention. Game Theory compared the disclosure of personal information of one of its employees to 'doxing'<sup>18</sup>.
104. Game Theory emphasised that there is a strong public interest in protecting the right to privacy. Disclosure of personal information of its employees will not meet or further any factor listed in regulation 2 of the PATI Regulations.
105. One of Game Theory's employees expressed concerns about BDA's disclosure at the initial decision stage, because it was made without notifying them and the redactions were ineffective by disclosing content that identified them anyway. They submitted that BDA's disclosure was contrary to the provisions of the PATI Act. Game Theory

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<sup>18</sup> As the UK-based Safeguarding Hub explains:

Doxing is the slang term for hacking and publishing other people's private information online. . . Typically, the information obtained by a 'doxer' will be anything that your online digital footprint has left behind on the web. . . This can include information on your family, friends and associates.

Doxing – what is it?, Safeguarding Hub, available at <https://safeguardinghub.co.uk/doxing-what-is-it/>.

also raised concern that disclosure of its employees' personal information may breach the data protection law in the jurisdiction in which it operates.

#### *Law firm's submissions*

106. The law firm submitted that any information identifying its employees is exempt under the personal information exemption in section 23(1). It specifically referred to the definition of personal information in section 24(1)(f).

#### *Applicant's submissions*

107. The Applicant clarified in their submissions to the Information Commissioner that they are not looking for personal information. The Applicant submitted that the withheld records would not contain personal information. Rather, the names of elected and public officials should be disclosed because these individuals are in publicly-paid roles.

108. The Applicant relies on their submission on the public interest analysis, as set out in paragraphs 54-58 above.

#### *Discussion*

109. The Information Commissioner considers the applicability of the personal information exemption in section 23(1) to the redacted parts of records 1-4, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 25-29, 31, 32, 34, 35, 44-47, 48a, 51-53, 54a, 55-61, 65, 67, 71, 74-77, 82, 92, 95a, 97, 99-103, 105-108, 109, 110, 112, 115-117, 119-121, 123, 124, 127-130, 135-137, 141, 143, 145, 150, 152, 155, 159-162, 166, 167, 170, 173 and 174, which she did not find to be exempt under section 26(1)(b) or has not yet considered.

[1] Whether the records consist of information about an identifiable individual?

110. The Information Commissioner is satisfied that the records identified in paragraph 109 contain information about identifiable individuals, which can be categorised as:

- a. officers or employees of public authorities, including BDA;
- b. elected officials; and
- c. individuals associated with private companies, including Game Theory and the law firm.

111. The Information Commissioner is further satisfied that certain information, claimed to be personal information, is not about an identifiable individual, as found in records

1, 2, 4, 7, 7a, 8, 13, 15, 16, 17, 19, 22, 23, 26, 28, 34, 35, 44, 45, 51, 53, 55, 65, 67, 71, 74, 75-77, 82, 92, 97, 102, 103, 106-108, 115, 117, 120, 127-129, 135, 141, 166, 170, 173 and 174. Therefore, BDA's reliance on section 23(1) to withhold such parts of these records was not justified.

[2] Whether the information falls within any of the exclusions to the definition of personal information?

112. With respect to the public authority employees and elected officials, the Applicant overstates the PATI Act's treatment of information about them. As explained in Decision Notice 02/2019, Office of the Governor, the definition of personal information in section 24(1) is very broad and the exclusion in section 24(2)(a) is very narrow. For the purposes of the PATI Act, therefore, the routine personal work information of public authority employees and elected officials still falls within the definition of personal information. This does not mean that their personal information will always need to be withheld. Rather, the disclosure of their personal information should be based on consideration of the balance of the public interests.
113. The Information Commissioner agrees with BDA that the names and contact details of officers or employees of public authorities as well as those of elected officials are all routine personal work information. The Information Commissioner disagrees, however, with BDA's view that in this case, the job titles of these individuals are excluded from definition of personal information by virtue of section 24(2)(a). This section excludes identifying information about individuals from the personal information definition if the information "relates to the position or functions" of the individuals. While job titles, on their own, would fall squarely under the exclusion in section 24(2)(a), in this case the job titles appear with other information about the individuals, e.g., authorship of a particular record. As a result, none of the information in the withheld records falls within the scope of the exclusion in section 24(2)(a).
114. Some of the records contain information of individuals who are performing services under contracts with a public authority during the relevant time period. The information relating to the provision of their services, such as the information in records 1 or 7a, is excluded from the definition of personal information by virtue of section 24(2)(b). The personal information exemption in section 23(1) does not apply to such information in any withheld record.

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

115. None of the exceptions in section 23(2) are applicable to the redacted personal information. The information does not relate to the Applicant. The individuals whose personal information is captured in the records have not given their written consent to disclosure.

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

116. The public has a general interest in transparency and informing the public of the work of public authorities. When considering the public interest test for records involving personal information, however, this public interest in transparency is balanced against the relevant individuals' right to privacy. Specifically, the Information Commissioner considers whether disclosure would be fair to the individuals and necessary to further the public interests.

117. The Information Commissioner agrees with BDA that disclosure of the information in the records about two elected officials, individuals 7 and 8, is in the public interest. Given their public facing roles and because the information relates to their public roles as members of the then Cabinet, these individuals have or should have expected that such information would be made public. Disclosure of their information will also inform the public of the extent of their interactions with Game Theory.

118. Similarly, the CEO and interim CEO are individuals holding the most senior position at BDA. They, too, should have had an expectation that some of their work information will be made public. The Information Commissioner is satisfied that disclosure of the names of the CEO and interim CEO, as well as their involvement in BDA's work in relation to Game Theory, is in the public interest.

119. In contrast, other individuals whose personal information is captured in the records had a reasonable expectation that their work-related personal information would not be released to the public, either because they were employees of private entities, or because they did not hold senior or public facing roles in a public authority. Some controversy surrounded Game Theory's decision not to pursue its plan to conduct business in Bermuda as well as the Premier's subsequent remarks. Given this, it is reasonable for these individuals to expect their involvement in the matter will not be made public.

120. The Information Commissioner disagrees with the Applicant that because some individuals were employees or officers of public authorities, information about their public work should then be disclosed. While the fact that these individuals' salaries came from the public funds is a relevant factor, it is neither the decisive nor the only factor for consideration. Disclosing the personal information of these individuals will not further public understanding of BDA's work or why Game Theory did not advance its plan in Bermuda. The public interest in understanding BDA's work has been met by the extensive disclosure in responsive to the PATI request at the initial stage, which informed the public of its interactions with Game Theory when the company intended to conduct its business in Bermuda.

### *Conclusion*

121. The Information Commissioner is not satisfied that the personal information exemption in section 23(1) of the PATI Act was justified for certain parts of records 1, 2, 4, 7, 7a, 8, 13, 15, 16, 17, 19, 22, 23, 26, 28, 34, 35, 44, 45, 51, 53, 55, 65, 67, 71, 74, 75-77, 82, 92, 97, 102, 103, 106-108, 115, 117, 120, 127-129, 135, 141, 166, 170, 173 and 174, because the information is not about identifiable individuals. The Information Commissioner is also not satisfied that withholding the names and positions of Government contractors in records 1, 7, 7a, 8, 13, 15, 16, 17, 19, 22, 28, 51, 53 and 141 was justified under this exemption, because they fall outside the scope of the personal information definition by virtue of section 24(2)(b). Therefore, section 23(1) is not properly engaged for these lists of records.

122. The Information Commissioner is satisfied that BDA was justified in concluding that the exemption for personal information was engaged for the names and positions of the elected officials as well as BDA's CEO and interim CEO in records 1, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 27, 31, 32, 34, 35, 47, 48a, 51-53, 67, 71, 74, 76, 77, 82, 95a, 97, 101, 106, 107, 117, 135-137, 141, 143 and 166. However, the Information Commissioner finds that withholding such information was not justified ultimately, because the balance of the public interest requires its disclosure. Therefore, section 23(1) is not properly maintained for those discrete parts of the listed records.

123. Finally, the Information Commissioner is satisfied that BDA's reliance on this exemption was justified to withhold other personal information not referred to in paragraphs 121 and 122 in records 1-4, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 25-29, 31, 32, 34, 35, 44-47, 48a, 51-53, 54a, 55-61, 65, 67, 71, 74-77, 82, 92, 95a, 97, 99-103, 105-108, 109, 110, 112, 115-117, 119-121, 123, 124, 127-130, 135-137, 141, 143, 145, 150, 152, 155, 159-162, 166, 167, 170, 173 and 174, because the public interest does

not require their disclosure. Therefore, section 23(1) is properly maintained for this specific category of personal information.

### ***Conclusion***

124. The Information Commissioner finds that Game Theory and the law firm have justified their reliance on section 26(1)(b) to support their objections to the disclosure of records 7b, 12, 15a, 15b, 20b and 108a. Disclosure of these records would constitute a breach of an equitable duty of confidence, and the balance of the public interest favours maintaining the exemption. The Information Commissioner is further satisfied that discrete information concerning Game Theory's business plan or practices that appear in additional records has been properly redacted under the same reasoning, as listed in paragraph 82.
125. The Information Commissioner also finds that BDA was not justified in relying on section 23(1) to withhold information that is not about an identifiable individual as well as the names and positions of Government contractors, the elected officials and BDA's CEO and interim CEO in records 1, 2, 4, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 26-28, 31, 32, 34, 35, 44, 45, 47, 48a, 51-53, 55, 65, 67, 71, 74-77, 82, 92, 95a, 97, 101-103, 106-108, 115, 117, 120, 127-130, 135-137, 141, 143, 166, 170, 173 and 174. Further disclosure of these records is now required, unless their redactions are varied under section 26(1)(b).
126. Finally, the Information Commissioner finds that BDA was justified in relying on section 23(1) to withhold the remaining information in the redacted records as listed in paragraph 123. Although this Decision requires BDA to disclose certain specific and somewhat limited information amongst the hundreds of pages of records processed for this request, BDA is commended for the thorough and extensive efforts it made when handling this PATI request.

## Decision

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The Information Commissioner finds that the Bermuda Business Development Agency (**BDA**) was justified in denying public access to records 7b, 12, 15a, 15b, 20b and 108a, as well as parts of other records containing the same or similar information, but varies the grounds for denial to the exemption in section 26(1)(b) of the Public Access to Information (**PATI**) Act 2010, based on the third parties' objections, because disclosure could reasonably be expected to breach an equitable duty of confidence, and the public interest favours maintaining the exemption.

The Information Commissioner also finds that BDA was justified in relying on section 23(1) to withhold specified information in records 1-4, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 25-29, 31, 32, 34, 35, 44-47, 48a, 51-53, 54a, 55-61, 65, 67, 71, 74-77, 82, 92, 95a, 97, 99-103, 105-108, 109, 110, 112, 115-117, 119-121, 123, 124, 127-130, 135-137, 141, 143, 145, 150, 152, 155, 159-162, 166, 167, 170, 173 and 174. BDA was not justified, however, in relying on this exemption to refuse public access to parts of records 1, 2, 4, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 26-28, 31, 32, 34, 35, 44, 45, 47, 48a, 51-53, 55, 65, 67, 71, 74-77, 82, 92, 95a, 97, 101-103, 106-108, 115, 117, 120, 127-130, 135-137, 141, 143, 166, 170, 173 and 174.

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

- upholds BDA's decision to deny access to parts of records 1-4, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 25-29, 31, 32, 34, 35, 44-47, 48a, 51-53, 54a, 55-61, 65, 67, 71, 74-77, 82, 92, 95a, 97, 99-103, 105-108, 109, 110, 112, 115-117, 119-121, 123, 124, 127-130, 135-137, 141, 143, 145, 150, 152, 155, 159-162, 166, 167, 170, 173 and 174 as exempt under section 23(1) of the PATI Act;
- varies the decision to deny access to records 7b, 12, 15a, 15b, 20b and 108a as exempt under section 26(1)(b) of the PATI Act, along with discrete information concerning Game Theory's business plan or practices that appears in records 2, 7, 13, 15, 16, 26, 31, 32, 35, 44, 47, 67, 71, 75, 77, 92, 95a, 97, 102, 103, 106-108, 120, 127, 128, 130, 135, 136, 141, 143, 166, 170, 173 and 174; and
- orders BDA to disclose an amended copy of records 1, 2, 4, 7, 7a, 8, 13-15, 16, 17, 19, 22, 23, 26-28, 31, 32, 34, 35, 44, 45, 47, 48a, 51-53, 55, 65, 67, 71, 74-77, 82, 92, 95a, 97, 101-103, 106-108, 115, 117, 120, 127-129, 135-137, 141, 143, 166, 170, 173 and 174, by granting access to the information that is not exempt under section 23(1) of the PATI Act or where the public interest favours its disclosure, as instructed in the Confidential Annex.

The Information Commissioner requires that BDA grant access to the non-exempt parts of the records listed above, as directed by this Decision and the accompanying Order, on or before **Thursday, 10 March 2022**.

## **Judicial Review**

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The Applicant, BDA, Game Theory, the relevant law firm 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**

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This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If BDA 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  
27 January 2022

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Public interest test

21 For the purposes of [Part 4], 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.

...

(6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

#### Definition of personal information

24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual . . .

...

(2) But “personal information” does not include—

(a) information about an individual . . . who is or was an officer or employee of a public authority that relates to the position or functions of the individual;

...

#### Information received in confidence

26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—

...

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

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

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