

Decision Notice

Decision 09/2019: Department of Public Lands and Buildings

Sandys 360 business review report, government payments and indebtedness

Reference no: 19042016

Decision date: 27 May 2019

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Public Lands and Buildings (**Department**) for a copy of the KPMG business review report of Sandys 360, a list of payments made by the Government to Sandys 360, and records on Sandys 360's indebtedness to the Government. The Department denied access to the report on the grounds that it was exempt under section 26(1)(a) because it was information received in confidence.

The Information Commissioner reviewed the Department's reliance on section 26(1)(a) to deny access to the report. The Information Commissioner also considered the assertions by concerned third parties, KPMG and the Trustees of Sandys Secondary School (**Trustees**), that the report was exempt from public disclosure under sections 26(1)(a), as well as sections section 25(1)(b) (commercial value); section 25(1)(c) (adverse effect on commercial interests); section 25(1)(d) (prejudice to negotiations); and section 26(1)(b) (breach of confidence).

The Information Commissioner has found that the Department did not issue a decision on part of the Applicant's request for an internal review in accordance with section 43(2) of the PATI Act. The Information Commissioner has also found that the Department did not justify its reliance on section 26(1)(a) of the PATI Act. The Information Commissioner has also found that sections 25(1)(b), 25(1)(c), 25(1)(d), and 26(1)(b) of the Act are not applicable to the KPMG report. Finally, the Information Commissioner found that section 23(1) (personal information) is applicable to parts of the report.

The Information Commissioner reverse the Department's internal review decision and requires it to issue an internal review decision on the requested list of payments and indebtedness records, and to grant access to the KPMG report in part, with redactions for personal information in accordance with section 23(1) of the Act and this Decision.

Relevant Statutory provisions

Public Access to Information (**PATI**) Act 2010: section 21 (public interest); section 23(1) (personal information); section 24 (personal information definition); section 25(1)(b) (commercial value); section 25(1)(c) (adverse effect on commercial interests); section 25(1)(d) (prejudice to negotiations); section 26(1)(a) (information received in confidence); section 26(1)(b) (breach of confidence); and section 43(2) (internal review decision).

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

Background

1. This review relates to a business review report carried out on the Sandy 360 Sports, Aquatic and Enrichment Centre (**Sandys 360 Centre**).
2. The Sandys 360 Centre was officially opened in September 2009 but was closed due to financial difficulties in November 2013. The Centre was developed with the intention of providing a community centre in the West End and is located on the site of Sandys Secondary School, the first secondary school for black Bermudians in the West End. Funding for the Centre was assisted through the establishment of a charitable organization, the Sandys Secondary School Foundation (later renamed the Sandys 360 Foundation) (**Foundation**), which received various grants from the Bermuda Government and the members of the public.
3. The Trustees of Sandys Secondary School (**Trustees**) own the freehold of the Sandys 360 Centre, and it is managed by a local limited liability company, Sandys 360 (**Company**). The land and buildings owned by the Trustees continue to provide classroom space and gymnasium facilities for the Sandys Secondary and Middle School, serving as an important community resource.
4. In this Decision, any reference to Sandys 360 refers to the Sandys 360 Centre, the Trustees, the Company, and the Foundation.
5. On 10 December 2015, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Public Works Headquarters (**Ministry Headquarters**) for:
 - The financial report on Sandys 360 carried out by KPMG at the request of government (**KPMG report**);
 - A list of payments government made to Sandys 360 for the fiscal years ending 2011, 2012, 2013, 2014, 2015 and 2016 (**list of payments**); and
 - A list of money owed by Sandys 360 to the government and information on how government has sought to recover it (**indebtedness**).

6. The Ministry Headquarters issued a decision letter dated 16 December 2015 to the Applicant stating that it had transferred the request to the Department of Public Lands and Buildings (**Department**) because the Ministry Headquarters did not hold the records.
7. On 6 January 2016, the Department subsequently informed the Applicant that more than one public authority made payments to Sandys 360 and it was collating the payments made by the Ministry Headquarters for the purpose of disclosure to the Applicant.
8. On 10 February 2016, the Department disclosed the following records to the Applicant:
 - An undated list of payments made to Sandys 360 by government between August 2011 and November 2013;
 - The payment record for Purchase Order No. 21268398;
 - A copy of Purchase Order No. 21186687 (dated 1 November 2012); and
 - An undated letter from the Ministry of Education and Development to the Chairman of Sandy's Secondary School Foundations regarding Grant Approval of \$1 million; and
 - A Memorandum of Understanding between the Ministry of Government Estates and Information Services and the Trustees of Sandys Secondary School with respect to a \$2 million Capital Grant for Fiscal 2012/2013 (signed 1 June 2012).
9. The Department informed the Applicant that the KPMG report is exempt from disclosure under section 26(1) of the PATI Act because it was provided in confidence. The Department also informed the Applicant that the request for the monies owed and efforts to recover it should be directed to the Ministry of Finance Headquarters.
10. Between 12 and 17 February 2016, the Department transferred the portion of the request related to monies owed by Sandys 360 to government to the Ministry of Finance Headquarters for further processing. The Ministry of Finance Headquarters rejected the transfer and sent the request back to the Department. At this point, the Department recommended that the Applicant file a separate PATI request to the Ministry of Finance Headquarters.
11. On 23 February 2016, the Applicant sought an internal review.

12. On 5 April 2016, the Department issued an internal review decision upholding the refusal of access to the KPMG report on the grounds that it fell within the exemption in section 26(1)(a) for information received in confidence. The internal review decision concluded that there were 'material issues' which significantly outweighed the public interest in disclosing the record. The internal review decision did not address the denial of the request for a list of payments made to Sandys 360 by government or a list of the monies owed by Sandys 360 to government and the efforts to recover it.
13. By email on 19 April 2016, the Applicant submitted a request for an independent review by the Information Commissioner, challenging the Department's denial of access to the KPMG report and the reasonableness of the Department's search for payments made to Sandys 360 by government.

Investigation

14. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
15. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Department to determine whether its reliance on the exemption in section 26(1)(a) was justified.
16. On 1 December 2016, the Information Commissioner's Office (ICO) notified the Department that the Applicant had made a valid application.
17. On 16 December 2016, the Department provided the ICO with a copy of the KPMG report. The Department also provided additional information, including a document listing a set of payments made by the government to various bank accounts. The Department stated that parts of this record may not be responsive, i.e., that not all payments may have related to Sandys 360. It did not provide a schedule or otherwise identify the exemption, if any, applicable to the list of payments.
18. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, applicant, and any concerned third party a reasonable opportunity to make representations. The Department, the Applicant, KPMG, the Trustees, the Company, and HSBC were invited to comment on this application and make submissions to the Information Commissioner for consideration during this review.

19. The Department informed the ICO that it was relying on its initial response and did not provide any further submissions during the review apart from correspondence received during its processing of the request.
20. The ICO received submissions from third parties KPMG, HSBC, and the Trustees.
21. The Applicant was notified that the third parties had been given an opportunity to make representations and the ICO provided the Applicant with a summary of their submissions. The Applicant made several written submissions throughout the investigation, both before and after receiving notification of the third parties' views.

Information Commissioner's analysis and findings

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

Preliminary issue – third party submissions

23. This is the Information Commissioner's first decision to consider submissions from concerned third parties. Under the PATI Act, the Information Commissioner will only consider arguments raised on behalf of a third parties' own interests, and only in relation to the three exemptions under the PATI Act that afford third party rights. These exemptions are found in section 23 (personal information), section 25 (commercial information), and section 26 (information received in confidence).
24. The Information Commissioner, therefore, has only considered arguments from the concerned third parties that relate to their own interests.

Failure to address issues in the internal review decision – section 43(2)

25. The Applicant asked the Information Commissioner to determine whether the Department conducted a reasonable search for responsive records. During this review, however, the Information Commissioner determined that the internal review decision did not address the initial decision's denial of the list of payments and the monies owed by Sandys 360 to Government.
26. Section 43(1) of the PATI Act requires a public authority to conduct an internal review. Section 43(2) gives a public authority a maximum of six weeks to notify an applicant of the

internal review decision, the reasons for it, and the right to seek an independent review by the Information Commissioner.

27. The internal review decision issued by the Department on 5 April 2016 refused the Applicant's request for the KPMG report, but did not address the denial of the remaining requests for a list of payments as well as a list of monies owed by Sandys 360 and the efforts to collect it. Public authorities should ensure that internal review decisions address all of the issues challenged by an applicant.
28. It is a matter of fact that the Department did not issue an internal review decision within the statutory timeframe on the PATI request for a list of payments made as well as a list of monies owed and the efforts to collect it.
29. The Information Commissioner is satisfied that the Department failed to meet its obligation to issue an internal review decision on the denial of that part of the PATI request seeking a list of payments made to Sandys 360 as well as a list of monies owed and the efforts to collect it. The Information Commissioner requires the Department to issue an internal review decision on the outstanding parts of the PATI request.

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

30. As set out in Decision 02/2019, Office of the Governor, paragraphs 123-132, to invoke the exemption for information received in confidence in section 26(1)(a), a public authority must ask:

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

31. The exemption in section 26(1)(a) focuses on whether the process or circumstances by which the information was provided indicate that it was given in confidence and with the understanding that it would be treated confidentially. The assessment considers factors related both to how the third party gave the information and how the public authority received or agreed to hold the information.
32. In deciding whether the information was given 'in confidence' by a third party, relevant factors may include:
- a. the expectation of the person or entity giving the information to the public authority;
 - b. any assurances sought regarding the confidentiality of the information;
 - c. the purpose for which the information was provided; and
 - d. any other action that the person or entity giving the information may have taken with respect to the information, e.g., the information was given to other parties and under what circumstances.¹
33. The information must also have been given with the understanding on behalf of the public authority that the public authority would treat the information as confidential. This would include doing so on an ongoing basis. The understanding of confidentiality may be express or implied.
34. When determining how the public authority received the information, the relevant factors are similar to those in paragraph 32, and may include:
- a. any statement or assurances given at the time the information was provided;
 - b. the purpose for which the information was sought or provided;
 - c. the practice, procedure, or policy of the public authority with regard to such information generally;

¹ See Ireland Information Commissioner, Guidance Note on Section 35: Information Obtained in Confidence (Section 35 Guidance Note), para. 2.2.5, available at <https://www.oic.ie/guidance-and-resources/guidance-notes/1-Section-35-Guidance-Note.pdf>. Section 35 of the Ireland Freedom of Information Act 2014 has similar language as section 26(1)(a) of the PATI Act. The Information Commissioner finds the guidance about the Ireland provision to be helpful in interpreting section 26(1)(a) of the PATI Act.

- d. any action which the public authority may be expected to take in relation to the information; and
- e. the nature of the relationship between the provider of the information and the public authority receiving it.²

35. Section 26(1)(a) also requires that disclosure of the information in the record ‘would be likely’ to prevent the authority from receiving further similar information in the future that is required by the public authority to properly fulfil its functions. Speculation is not sufficient to justify the exemption. ‘Would be likely’ means that some significant, real risk must exist that the public authority would be prevented from receiving such information in the future.

36. As set out in the Interpretation Act 1951, the ‘functions’ of a public authority should be understood as ‘powers conferred, or duties imposed, on the authority or officer by or under any provision of law’.

37. If a record falls within the exemption in section 26(1)(a) for information received in confidence, it must still be disclosed if the balance of the public interest favours disclosure. In accordance with section 21 of the PATI Act, the test for whether disclosure 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’.

38. Regulation 2 of the Public Access to Information Regulations (**PAIR**) provides a non-exhaustive list of public interest factors to be considered, including, but not limited to, things that may or would tend to promote greater public understanding of the processes or decisions of public authorities; provide reasons for decisions taken by Government; promote accountability of and within the Government; promote accountability for public expenditures or the more effective use of public funds; and to reveal information relating to measures to protect heritage sites.

39. Finally, a public authority and, if applicable, third parties, bear the burden of satisfying the Information Commissioner that, on the balance of probabilities, they have provided sufficient support to justify applying the exemption.

² See, Ireland Information Commissioner, Section 35 Guidance Note, para. 2.2.6.

Public authority's submissions

40. The Department submitted that the report was prepared for KPMG's client, the Trustees. It further asserted that the commercial information contained in the report is of a confidential and sensitive nature. No further relevant arguments, reasoning, or facts were submitted to justify the application of the exemption.
41. The Department also provided copies of correspondence KPMG sent after KPMG became aware of the PATI request through media reports. In that correspondence, KPMG clarified the Trustees' ownership of the report and asserted restrictions on disclosure of the report.
42. With respect to the balance of the public interest, the Department stated that 'material issues' significantly outweighed the public interest in disclosing the record. It identified these issues as the fact that the report was prepared for KPMG's client and that the commercial information is of a 'confidential' and 'sensitive nature', without further explanation.
43. The Department did not expressly identify any public interest that would be furthered by disclosure of the report.

KPMG's submissions

44. After consulting counsel, KPMG provided its objections to the disclosures. The Information Commissioner has considered those that concern KPMG's own interests. Its submission referred generally to the two exemptions in section 26(1), and KPMG offered broad arguments concerning the 'confidential nature of the report', which it noted contained its analysis, methodologies, and approach.
45. KPMG discussed the confidential provision of the report as part of an active transaction and that its disclosure had the potential to damage KPMG's interests.
46. KPMG also explained that its Engagement Letter with its client—the Trustees—expressly limited KPMG's consent to disclosure to HSBC and the Department. The possibility that the report would be made available to the public was never addressed with KPMG at the time the information was given to the Department. At the ICO's request, KPMG provided copies of its General Terms of Business.
47. KPMG further submitted that the public interest does not require disclosure of the report. KPMG explained that no issue of public transparency was involved. It stated that the public had an interest in ensuring that government is free and able to negotiate the most advantageous contracts with third parties.

48. Further, in its view, the public may have an interest in knowing the price paid for the purchase of Sandys 360 and that the site has been acquired, but this does not necessarily mean that the public has an interest in knowing KPMG's methodologies.

The Trustees' submissions

49. The Trustees asserted that the KPMG report was prepared for the benefit of the Trustees and the Company who each authorised its release to the Government and HSBC only.
50. The Trustees submitted that if the KPMG report was disclosed, the Trustees would be reluctant to provide any further information to the Government regarding Sandys 360 out of concern that the information would also be likely to be disclosed to the public.
51. The Trustees acknowledged that Sandys 360 is of interest to the public and has been the topic of news reports. The Trustees noted that certain information is already in the public domain, including that the Sandys 360 Centre was closed due to financial difficulties and that the Government intends to purchase the Centre and the adjacent property for \$1 million. The Trustees urged that this does not mean that the detailed commercial and private information in the KPMG report about the Trustees' business affairs, and the affairs of Sandys 360, should be disclosed to the public.

HSBC's submissions

52. HSBC did not assert any third party interests on its own behalf. In its view, it was for the Trustees to consent or object to disclosure of the KPMG report.

Applicant's submissions

53. The Applicant submitted that KPMG would have been aware at the time it accepted the commission to produce the KPMG report that the matter concerned public expenditures. KPMG's client was, in reality, the tax paying public of Bermuda. KPMG could not have expected the report to be withheld from the public as that client. The Applicant questioned whether any agreement existed between KPMG and the Government requiring the KPMG report to be kept secret and never to be released to the public.
54. The Applicant also believed that KPMG's work product, such as its analysis, methodology, and approach, is hardly a secret. The Applicant pointed out that many of its former staff members work for KPMG's competitors and many of its reports are in the public domain. Auditing, in the view of the Applicant, is a standard method of financial examination.

55. The Applicant further submitted that the Trustees knowingly accepted public funds for Sandys 360, in the form of grants and other payments from Government. The Trustees would have understood that how public money is spent is a matter for the public. The Applicant argued that the Trustees cannot have shared information with a public authority about the spending of the public's own tax dollars with the belief that the information was shared in confidence or would remain a secret from the public.
56. The Applicant disagreed with the Department and third parties that disclosure is not in the public interest. The Applicant submitted that disclosure of the KPMG report is in the public interest because it concerns millions of dollars of public funding. The money spent on Sandys 360 belongs to taxpayers and when taxpayer money is concerned, the Applicant asserts that transparency should be the default unless there is an overriding reason for nondisclosure, which is not the case here.

Discussion

[1] *Was the KPMG report given by a third party (other than another public authority)?*

57. The Department did not identify what third party provided it with the KPMG report. Both KPMG and the Trustees indicated that KPMG gave the report to the Department, but did so on behalf of the Trustees. This is supported by the Engagement Letter and General Terms of Business.
58. The Information Commissioner is satisfied that the KPMG report was given by a third party, KPMG, to the Department.

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

59. The Information Commissioner was not made aware of any express statements or assurances of confidentiality from the Department that were sought or given to KPMG or the Trustees at the time the report was given.
60. The Department made only a general statement that the KPMG report dealt with sensitive commercial information and that it was prepared for KPMG's client. The Department also provided the ICO with an email from KPMG which stated that the commercial information contained in the report is confidential, but this was sent almost two years after the report was created.

61. KPMG refers to the terms of its Engagement Letter and General Terms of Business to support its assertion that the report was given to the Government in confidence. These documents indicate that no express communication or understanding existed that the report was given in confidence to, and would be kept confidential by, the Department or Government.
62. The Information Commissioner also notes that KPMG's General Terms of Business with the Trustees and the Company acknowledge that the product of its services may be required to be released by law or to a competent regulatory authority. When this occurs, KPMG requires only that it be notified of the disclosure.
63. Nor do the circumstances surrounding the communication establish an implied understanding of confidence. Both KPMG and the Trustees argue that the KPMG report was provided at a time when the Government was actively considering a possible acquisition of Sandys 360. They also pointed to KPMG's methodology, analysis, and approach, as well as the Trustees' business and financial information, in the report as implying that the report was given with an understanding of confidentiality. When viewed in the totality of the circumstances in which the report was provided, these facts alone do not objectively establish that the report was given to the Department in confidence and with the understanding that it would be held confidentially.
64. Both the Trustees and KPMG were aware that the report was prepared for and sought by the Government for the purpose of assessing its options as a stakeholder concerning Sandys 360. In light of the Trustees' financial and other difficulties, the Trustees sought further Government support.
65. With respect to the actions the Government may have taken, KPMG and the Trustees reasonably could have expected any number of circumstances to have arisen which would have led to public disclosure of some or all of the KPMG report. This includes disclosure during public consultation on the options concerning Sandys 360, in connection with the Parliamentary debate on a decision to purchase the land and buildings, and so on. Both KPMG and the Trustees were aware they were negotiating with a public body, and that the processes applicable to a public body's financial commitments of this nature may be subject to future public consideration or inquiry.
66. The Information Commissioner is satisfied that it is arguable whether the Department, Trustees, or KPMG have satisfactorily shown that the KPMG report was given in confidence and with the understanding that the Government would hold it as confidential.

[3] *Whether disclosure would be likely to prevent the public authority from getting such information again in the future?*

67. The Department did not make any submissions on whether disclosure would prevent it from receiving such information in the future.

68. In this instance, an existing grant recipient—the Trustees—is seeking additional funding and other support from Government. The Government of Bermuda’s Financial Instructions require a recipient of government grants and contributions to provide status reports and financial information to confirm the measurable objectives achieved and to provide full access to and disclosure of all accounting records³. A government department is highly likely to continue to receive detailed financial information from grant recipients who, like the Trustees, are seeking additional funding from Government.

69. With respect to the future likelihood of a consultant assisting a government grantee with preparing a business or financial review to support the request for additional support, the PATI Act is now fully in force. The disclosure of the KPMG report is more likely to result in the majority of grant recipients and consultants adapting their business and financial reporting practices to conform to the need for accountability concerning public funds, if they have not done so already. This, in turn, furthers the purposes of the PATI Act set out in section 2 of the Act, including promoting accountability for public spending and for government decision making.

70. The Information Commissioner is not satisfied that disclosure would be likely to prevent the Department, as the public authority, from receiving similar information in the future.

[4] *Whether that information is required for the public authority to fulfil its functions?*

71. In addition, it is unclear how such information is required for the Department (or even the larger Government) to properly fulfil one of its ‘functions’. No specific statutory function has been identified that sets out a duty to provide financial and other assistance to charitable organisations in financial difficulties. Even if such a function existed, it has not been explained how the information is required by the Department to fulfil it.

³ See paragraph 10.7.4 of the Financial Instructions (31 March 2013 ver.). A similar requirement can also be found in paragraph 10.7.4 of the most recent version of Financial Instructions (31 June 2018).

72. The Information Commissioner is not satisfied that disclosure of the KPMG report would be likely to prevent the Department from receiving similar information in the future required to properly fulfil its functions.

73. In sum, the Information Commissioner is not satisfied that the exemption in section 26(1)(a) is engaged.

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

74. In light of the Information Commissioner's conclusion that section 26(1)(a) is not engaged, it is unnecessary to address the issue of the public interest. However, for the sake of completeness, the Information Commissioner addresses the balance of the public interests.

Public interest factors favouring disclosure

75. A number of public interests factors favour disclosure of the KPMG report. These factors are consistent with the purposes set out in section 2 of the PATI Act and the factors discussed in regulation 2 of PAIR, including:

- promoting public accountability for manner in which substantial public funds were spent and managed by both the Government and the Trustees;
- promoting accountability and transparency for Government decision making about the relationship between the Government, Sandys 360, and Sandys Secondary Middle School;
- supporting public participation in decision making by Government by informing the public about the facts concerning Sandys 360 and empowering the public to engage with decision makers on a level playing field;
- improving the quality of public school services provided by the Government and the responsiveness of the Government to the needs of the Sandys Secondary Middle School student and parent community; and
- revealing information relating to efforts to protect a building with strong historical and community value.

Public interest factors favouring maintaining the exemption

76. Two broad public interest considerations favour maintaining the exemption:

- the public's general interest in the preservation of duties of confidentiality concerning commercial or financial information, whether these arise in contract or because of the circumstances in which information was given;
- the public's interest in fair competition for public sector procurement and the Government's ability to negotiate the most advantageous contracts for goods or services as possible;

Balance of the public interest

77. The factors favouring disclosure of the KPMG report further the core purposes of the PATI Act. The need for the public, and the Sandys community in particular, to be informed and empowered to engage with Government decision makers is a weighty factor. The Government's involvement and decision making had a broad impact upon Sandys 360's former employees and vendors; Sandys Secondary Middle School students, parents and teachers; and the public purse as a whole. It also involves an important historical and community resource. In these circumstances the weight of the need for the public to be an informed and engaged partner in a democracy is substantial.

78. Nor has the public received sufficient information about this public investment, as KPMG and the Trustees assert. The Government has provided limited rationale and factual information concerning its decision making around Sandys 360, primarily provided during Parliamentary debate. The public has not received, for example, an executive summary of any assessment, factual information provided in advance of a town meeting or consultation period, and so on. Disclosure of the KPMG report will undoubtedly close the knowledge gap in a number of areas for the public concerning the spending and decision making related to Sandys 360.

79. Consequently, any one of the public interest factors listed above would carry significant weight standing alone. Together, they weigh heavily in favour of disclosing the KPMG report of Sandys 360.

80. Against this, little weight can be given to the public's interest in maintaining the confidentiality of commercial or financial information in circumstances when the Government engages in a significant, voluntary investment of public funds into a charitable organisation. Such a transaction generally requires more, not less, transparency to ensure value for money for the public and the most advantageous transaction for the public.

81. The Information Commissioner is satisfied that the balance of the public interests would require disclosure of the report if the exemption in section 26(1)(a) was engaged.

Conclusion

82. The Information Commissioner is not satisfied that the KPMG report was given to the Department in confidence with the understanding that it would be held as confidential and that its disclosure would be likely to prevent the Department from receiving similar information in the future that is required by the Department to properly fulfil its functions. Consequently, the Information Commissioner is not satisfied that the exemption in section 26(1)(a) is engaged.

83. Further, even if the exemption was engaged, the balance of the public interest favours disclosure of the KPMG report for the reasons discussed above, paragraphs 75-81.

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

84. Section 26(1)(b) allows a public authority to deny access to information if its disclosure would constitute a breach of a duty of confidence provided for by a provision of law.

85. ‘Would’ requires that it is more probable than not that the disclosure will constitute a breach of confidence.

86. ‘Under any provision of law’ means that the relevant duty of confidence may be found in Acts or other statutory instruments, case law (the common law), or the Constitution.

87. When no contractual duty of confidence exists, an equitable breach of confidence claim at common law requires the proponent to establish three elements⁴: (1) that the information has the necessary quality of confidence; (2) that it is given in circumstances that create an obligation or agreement that the information will be kept confidential; and (3) that there is an unauthorised use of that information which, when commercial information is involved, must be to the detriment of the party communicating the information. It is also important to note that even if these three criteria are met, a common law public interest defence still exists.

Necessary confidential or secret nature of the information

88. For the information to have the necessary confidential or secret nature, it must be more than trivial. Information is of a confidential or secret nature if it has, for example, been kept

⁴ See *Coco v A.N. Clark (Engineers) Ltd.*, [1968] F.S.R. 415; see also *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 HL, cited in various Supreme Court of Bermuda judgments.

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 confidential nature.

Given in circumstances that create an obligation or agreement that the information will be kept confidential

89. In the absence of an express or implied contractual obligation term, the confidentiality restrictions are implied from the circumstances of the communications. When it is uncertain whether an implied obligation of confidence exists, courts may apply a 'reasonable person' test: 'If the circumstances are such that any reasonable man [or woman] standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence'.⁵

Unauthorised use of the information

90. 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 nature⁶.
91. The exemption for breach of confidence is a qualified exemption subject to the public interest test.
92. In sum, a public authority or third party seeking to invoke the exemption for breach of confidence concerning commercial information must ask:

[1] Does a duty of confidence arise under the law? If the duty arises in equity under the common law:

[a] Is the necessary confidential or secret nature of the information established?

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

⁵ Coco v A.N. Clark (Engineers) Ltd., at 420.

⁶ Ibid, at 421-422.

[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?

93. Finally, a public authority and any concerned third party has the burden to show, on the balance of probabilities, that the exemption is justified.

KPMG's submissions

94. Only KPMG invoked this exemption on behalf of its interests. KPMG's submissions with respect to section 26(1)(b) include those set forth in paragraphs 44-48, above.

95. KPMG also stated that disclosure of the report could give rise to a cause of action for breach of confidence.

Applicant's submissions

96. The Applicant's submissions related to whether a duty of confidence is owed to KPMG and the balance of the public interest are set forth in paragraphs 53-54 and 56, above.

Discussion

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

97. KPMG has not referred to any Act or statutory instrument imposing a duty of confidence on the Department or broader Government of Bermuda. As noted above, paragraphs 59-61, the Department and Government also do not have a contractual duty of confidence owed to KPMG.

98. The Information Commissioner will, therefore, consider whether the Department owes an equitable duty of confidence to KPMG under the common law. This requires consideration of the first two Coco factors: (1) the necessary confidential or secret nature of the information and (2) whether the information was given in circumstances that create an implied obligation or agreement that the information will be kept confidential.

[a] *Is the necessary confidential or secret nature of the information established?*

99. The Information Commissioner recognises that KPMG executed confidentiality agreements with other entities who received copies of the report other than its client or the

Department. This suggests that some of the information in the report had the necessary confidential or secret nature to require a confidentiality agreement with those other entities. It is unclear whether this is because the information relates to KPMG's analysis, methodology, and approach, or because the information related to the Trustees' financial and business information. In any event, the Information Commissioner accepts that at least some of the information in the report is of a sensitive nature and disclosure of the entire report would reveal new information previously unknown to the public.

100. Based on this, the KPMG report retains the necessary confidential or secret nature for purposes of this breach of confidence analysis⁷.

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

101. As explained above, paragraphs 59-61, the Information Commissioner saw no evidence that KPMG had an express contractual agreement with the Department to hold the report confidentially.

102. The relationship between KPMG and the Department or Government also did not provide the basis for an implied duty of confidence owed to KPMG. The Government remained a stakeholder, not a party to an agreement, who received a copy of the KPMG report as part of its consideration of options for further public funding or other support for Sandys 360.

103. The Information Commissioner is not satisfied that the Department or Government owed KPMG a duty of confidence under any provision of law. It is not necessary to consider this exemption further.

[2] *Would unauthorised disclosure cause detriment to the owner of the information and constitute a breach of the duty of confidence under the common law?*

⁷ To avoid confusion, the Information Commissioner notes that the analyses for the exemptions for breach of confidence and for information received in confidence are different. For purposes of an equitable breach of confidence claim exemption, the Information Commissioner accepts that the information retains the necessary quality of a confidential nature.

In contrast, the analysis for information received in confidence only looks to the objective circumstances surrounding how the information was given. The confidential nature of the information is only one factor that may be considered. As made clear in paragraphs 63-65, above, when the totality of the circumstances surrounding the Department's receipt of the KPMG report are considered, it does not lead to the objective conclusion that KPMG gave the report to the Department in confidence and with the understanding that the Department would hold it confidentiality.

104. For the sake of completeness, however, even if an equitable duty of confidence was owed by the Department to KPMG, disclosure of the report is unlikely to constitute a breach of confidence.
105. KPMG has asserted that disclosure would cause it unwarranted commercial and reputational damage by revealing the analysis, methodology, and approach it used when conducting the business review, all of which are its intellectual property. It also claimed that disclosure to its local competitors would potentially prejudice and undermine KPMG's competitive position.
106. KPMG did not offer support for this proposition, as discussed below at 138-142.
107. Without more, the Information Commissioner is not satisfied that disclosure of the KPMG report would cause detriment to KPMG by revealing its work product to its competitors.
108. In sum, the Information Commissioner is not satisfied that the exemption in section 26(1)(b) is engaged.

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

109. In light of the Information Commissioner's conclusion that section 26(1)(b) is not engaged, it is unnecessary to address the issue of the public interest. However, for the sake of completeness, the Information Commissioner is satisfied that even the exemption was engaged, the balance of the public interest favours disclosure of the KPMG report for the reasons discussed above paragraphs 75-81.

Conclusion

110. The Information Commissioner is not satisfied that the disclosure of the KPMG report would constitute a breach of a duty of confidence provided for by a provision of law. Even if disclosure would constitute this, the Information Commissioner is satisfied that the balance of the public interest would require disclosure of the report.

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

111. Section 25(1)(c) allows a public authority to refuse access to records if they consist of information which, if disclosed, would have or could reasonably be expected to have an adverse effect on the commercial interests of any person to whom the information relates. This exemption is subject to exceptions in section 25(2) that are not applicable in this case.

112. As explained in Decision 12/2018, Ministry of Finance Headquarters, paragraph 74, a public authority or any concerned third party, must consider five questions when seeking to justify the exemption for adverse effects on commercial interests:

- [1] Who is the person to whom the information relates?
- [2] What are the commercial interests of this person that are of concern?
- [3] What adverse effect could disclosure cause?
- [4] How likely is this to occur?
- [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?

113. 'Could reasonably be expected to' requires distinguishing between what is merely speculative, irrational or absurd and identifying expectations that are likely, plausible, or possible based on real and substantial facts.

114. Finally, a public authority or concerned third party has the burden to show that, on the balance of probabilities, the exemption is justified. It should do so by referring to objective and reasonable facts to support its assertions.

115. Only KPMG and the Trustees relied on the exemption in section 25(1)(c).

KPMG's submissions

116. With respect to KPMG's own interests, KPMG stated that none of the exceptions in section 25(2) were applicable. In particular, KPMG stated that the possibility that the report would be made available to the public was never addressed with KPMG and that the report was prepared solely for a paying client or those to whom it had given express consent.

117. KPMG asserted that its analysis, methodology, and approach to the report is the intellectual property of KPMG. It submitted that disclosure of the report's contents will show KPMG's local competitors its work product and this, in turn, will potentially prejudice and undermine KPMG's competitive position.

118. KPMG also stated that when it provided the report to the Department, the Government was negotiating a possible acquisition of the Sandys 360 Centre.

119. Finally, KPMG's arguments concerning the public interest are set out above at paragraphs 47-48.

Trustees' submissions

120. The Trustees were not informed by the Government that the information in the KPMG report belonged to a class of information that would or might be available to the public.
121. The Trustees submitted that the KPMG report was prepared for the Trustees and the Company to provide options for resolving the financial issues arising from the building and operation of the Sandys 360 Centre, including a potential sale of the Centre and lands to the Government.
122. The Trustees asserted that although the Government has announced its plan to purchase the Centre for \$1 million, the sale is yet to be concluded. They stated that disclosure could reasonably be expected to prejudice the conduct of this sale which, in turn, would have an adverse effect on the Trustees' commercial interests. The Trustees explained that disclosure to the public would likely lead to publicity that could jeopardise the sale and would be damaging to the reputation of the Trustees.
123. The Trustees' submissions regarding the public interest are detailed at paragraph 51 above.

Applicant's submissions

124. The Applicant questioned what commercial interests the Trustees have in their role as trustees of a public middle school.
125. Concerning KPMG, the Applicant highlighted the same points set out above in paragraphs 54 and 56, concerning KPMG's work product, and the overriding public interest in disclosure.

Discussion

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

126. The KPMG report relates to the overall status of the Trustees' business interest in Sandys 360. It therefore relates to the Trustees. Because the report is the work product of KPMG, the Information Commissioner accepts that the report also relates to KPMG.
127. The Trustees' and KPMG's commercial interests are considered in turn below.

The Trustees' commercial interests

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

128. The Trustees' reputation, alone, is not a commercial interest involving the sale or trade of goods or other commercial activity.

129. The Trustees also pointed to their interest in a potential successful sale of the Sandys 360 Centre and the adjacent property to Government. The Information Commissioner accepts that this is a commercial interest of the Trustees, regardless of the Trustee's charitable status.

[3] *What adverse effect could disclosure cause?*

130. The Trustees explained that disclosure of the report could lead to publicity that could jeopardise the outcome of the sale of Sandys 360 to the Government.

131. The loss of a sale of real property and other assets is an adverse effect on the Trustees' commercial interests.

[4] *How likely is this to occur?*

132. In light of the substantial amount of public funding involved, the Information Commissioner accepts that disclosure of the report will receive significant public attention. The Information Commissioner notes that on several occasions the Trustees have faced public scrutiny, and criticism, of the management of the Sandys 360 Centre and the financial difficulties that arose with it. This includes public attention on the failure to pay staff and money owed to a construction company, HSBC, and Belco⁸.

133. The Trustees did not, however, explain how this attention could reasonably prevent the sale of the property. When the Legislature considered approval of the sale, public attention again turned to the Trustees' history with Sandys 360. Despite this publicity, both Houses of the Legislature approved the form of Sale and Purchase Agreement between the Ministry Headquarters and the Trustees. The Agreement provides for the purchase of the Sandys 360 Centre and the adjacent property for \$1 million, with only minor amendments to the Agreement that would presumably not include a material change in the sale price.⁹

134. Having carefully reviewed the KPMG report, the Information Commissioner does not agree that its disclosure could reasonably be expected to jeopardise the Government's

⁸ Sam Strangeways, *Sandys 360 centre builder owed more than \$1m*, Royal Gazette, 2 March 2018, [available at http://www.royalgazette.com/news/article/20180302/sandys-360-centre-builder-owed-more-than-1m](http://www.royalgazette.com/news/article/20180302/sandys-360-centre-builder-owed-more-than-1m); Jonathan Bell, *Unpaid and unable to get answers*, Royal Gazette, 5 January 2016, [available at http://www.royalgazette.com/article/20160105/NEWS/160109924](http://www.royalgazette.com/article/20160105/NEWS/160109924).

⁹ See Official Hansard Report dated 5 March 2018, pages 1424-1427, available online at <http://parliament.bm/admin/uploads/hansards/b3b063264490ac79e595ae00abf315d2.pdf>.

purchase of the Sandys 360 Centre. The Trustees' concerns amount to speculation in light of the Legislature's approval of the purchase and the extensive existing publicity surrounding the management of the Sandys 360 Centre and its financial difficulties.

135. The Information Commissioner is not satisfied that disclosure could reasonably be expected to have an adverse effect on the commercial interests of the Trustees.

KPMG's commercial interests

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

136. KPMG's interests in protecting its intellectual property, e.g., its analysis, methodology and approach, is a commercial interest. This involves the ability of KPMG to participate in the sale or exchange of its business review services.

[3] What adverse effect could disclosure cause?

137. KPMG asserted that disclosure of the KPMG report would lead to two related adverse effects on its ability to engage in its business review services. First, KPMG stated that disclosure of the report would reveal its analysis, methodology, and approach to its local competitors. Second, KPMG further concluded that this 'could potentially' undermine its competitive position. No further facts were provided to support these conclusions.

[4] How likely is this to occur?

138. KPMG did not provide any real, concrete facts to support its claim that disclosure would have an adverse effect on its commercial interests.
139. Parts of the KPMG report consist of the collection of relevant, public information or the application of standard accounting practices. Particularly in light of the many public KPMG reports of various types throughout the world, KPMG must identify its commercial interests with specificity.
140. KPMG did not identify specific examples of its propriety analysis, methodology, or approach contained in the KPMG report that is not already public or a standard part of any company's business review services. KPMG did not identify, for example, specific sections where it applied proprietary algorithms or discrete sections or pages that involved its non-standard analysis or methodology. KPMG also did not discuss whether the report could be released in a redacted form.

141. KPMG did not provide any additional information about the competitive market in which it operates, and how disclosure would affect its ability to provide services in that market.

142. Without such factual support, the Information Commissioner cannot accept KPMG's argument. It is not the role of the Information Commissioner to assume such facts for a concerned third party, nor to make arguments for it, to justify a denial of public access to information.

143. The Information Commissioner is not satisfied that disclosure of the KPMG report could reasonably be expected to cause an adverse effect on KPMG's commercial interests.

144. In sum, the Information Commissioner is not satisfied that the exemption in section 25(1)(c) is engaged.

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

145. In light of the Information Commissioner's conclusion that section 25(1)(c) is not engaged, it is unnecessary to address the issue of the public interest. However, for the sake of completeness, the Information Commissioner is satisfied that even if the exemption was engaged, the balance of the public interest favours disclosure of the KPMG report for the reasons discussed above paragraphs 75-81.

Conclusion

146. The Information Commissioner is not satisfied that disclosure of the KPMG report could reasonably be expected to have an adverse effect on the commercial interests of any person to whom the information relates. Even if it did, the Information Commissioner is satisfied that the balance of the public interest would require disclosure of the report.

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

147. Section 25(1)(d) allows a public authority to refuse access to records if the records consist of information which, if disclosed, 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. Section 25(1)(d) also includes exceptions to the exemption, which are not relevant in this case.

148. As set out in Decision 01/2018, Bermuda Tourism Authority, for a public authority or concerned third party to establish that a record is exempt under section 25(1)(d) because

disclosure could reasonably be expected to prejudice negotiations of any person to whom the information relates, it must ask:

- [1] Who is the person to whom the information relates?
- [2] What are the negotiations of this person that are of concern?
- [3] What is the specific prejudice to either the conduct or outcome that is of concern?
- [4] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?
- [5] Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?
- [6] If the exemption is engaged, whether the balance of the public interest requires disclosure?

149. Generally, this exemption will apply to ongoing negotiations involving the person to whom the information relates to ensure that the premature disclosure of information does not harm their position in the negotiation process or outcome. If the negotiations are finished, the requested information must be released unless there is a real and significant risk to identifiable future negotiations, or the information is exempt under another provision of the PATI Act.

150. Factors that may be relevant in deciding whether a negotiation exists include whether the person was trying to reach some compromise or some mutual agreement. It may be helpful to consider whether there is any proposal for settlement or compromise, any indication of a fall back or alternative position, information created for the purpose of negotiation, any negotiating strategy, and an opening position with a view to further negotiations.

151. Prejudice should be understood as an actual, real, and significant harm. It cannot be a speculative or hypothetical harm. It also implies a negative or detrimental effect.

152. Finally, a public authority or concerned third party has the burden to show that, on the balance of probabilities, the exemption is justified. It should do so by showing objective and reasonable facts to support its assertions.

153. Both KPMG and the Trustees submitted that the exemption in section 25(1)(d) of the PATI Act is applicable to the KPMG report.

Trustees' submissions

154. The Trustees explained that the sale of Sandys 360 has yet to be concluded, despite the announcement by the Government. In its view, disclosure would likely result in adverse publicity and could jeopardise the sale.

KPMG's submissions

155. KPMG did not make specific submissions that relates to its own interests on this exemption.

Applicant's submissions

156. The Applicant did not make specific submissions on the applicability of section 25(1)(d), but provided submissions on the public interest test, set out above at paragraph 56.

Discussion

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

157. The KPMG report as a whole relates to the Trustees' interests as the owners of the Sandys 360 Centre.

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

158. The Trustees have clearly identified the negotiations concerning the sale to Government of Sandys 360 Centre and the adjacent property. The Trustees referred to the Government announcement in February 2018 to purchase the Centre for \$1 million. The Trustees explained that, even though an announcement has been made, the purchase of the Centre by the Government has yet to be finalised.
159. Although the Trustees made their submissions in 9 October 2018, they did not address the effect of the Legislature's approval of the form of Sale and Purchase Agreement in March 2018 on their negotiations with Government. It appears that the negotiations have been concluded and agreement reached, even if the Sale and Purchase Agreement has not been signed. For the sake of completion, however, the Information Commissioner will continue to consider this exemption.

[3] *What is the specific prejudice to either the conduct or outcome that is of concern?*

160. The Trustees submitted that disclosure of the KPMG report could jeopardise the Government's plan to purchase the Centre from them. The Information Commissioner accepts that such an effect would constitute prejudice to the conduct or outcome of the negotiations between the Government and Trustees for the sale of the Sandys 360 Centre and the adjacent property.

[4] *How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?*

161. The Trustees explained that the disclosure of the KPMG report would likely result in publicity against them and Sandys 360 which could, in turn, jeopardise the Government's plan to purchase the Centre.

162. The Information Commissioner accepts the Trustees' view that should the KPMG report be disclosed, it will generate widespread publicity, some of which can reasonably be expected to affect the Trustees.

[5] *Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?*

163. As discussed above, paragraphs 132-134, it is unlikely that any publicity associated with the disclosure of the KPMG report would jeopardise the actual sale of the Sandys 360 Centre. Both Houses of the Legislature have approved the form of Sale and Purchase Agreement for \$1 million dollars, subject to minor amendments. Even if the agreement has not been signed and negotiations continue over minor amendments, the final outcome is not reasonably likely to be prejudiced.

164. The Trustees' concerns regarding the potential failure of, or other prejudice to, the sale are too speculative in light of these facts.

165. The Information Commissioner is not satisfied that disclosure of the KPMG report could reasonably be expected to prejudice the conduct or outcome of negotiations, if any, for the sale of the Sandys 360 Centre.

166. In sum, the Information Commissioner is not satisfied that the exemption in section 25(1)(d) is engaged.

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

167. In light of the Information Commissioner's conclusion that section 25(1)(d) is not engaged, it is unnecessary to address the issue of the public interest. However, for the sake of completeness, the Information Commissioner is satisfied that even if the exemption was engaged, the balance of the public interest favours disclosure of the KPMG report for the reasons discussed above paragraphs 75-81.

Conclusion

168. The Information Commissioner is not satisfied that the disclosure of the KPMG report could reasonably be expected to prejudice the conduct or the outcome of the Trustees' negotiations with Government for the sale of the Sandys 360 Centre. Even if disclosure did, the Information Commissioner is satisfied that the balance of the public interest would require disclosure of the report.

Information with commercial value – section 25(1)(b)

169. Section 25(1)(b) allows a public authority to refuse access to a record if it consists of information with a commercial value and disclosure would, or could reasonably be expected to, destroy or diminish the value of such information. Section 25(1)(b) is also subject to exceptions to the exemption which are not relevant in this case.

170. The PATI Act does not define 'commercial value'. Information may have commercial value because it is important to the performance of the owner's commercial activities. It may also have commercial value because it can be sold for value to an arms-length buyer, i.e., intrinsic commercial value. Information with intrinsic value could include technical or artistic works, such as a software program or an original painting.

171. The plain meaning of 'destroy' or 'diminish' refers to the commercial value of the information being lost or lessened.

172. To justify the exemption in section 25(1)(b), the public authority, or third party, must show that the destruction or diminishment of the commercial value would occur, or 'could reasonably be expected to occur', as discussed at paragraph 113 above.

173. A record that falls within the exemption in section 25(1)(b) for information with commercial value must be disclosed if the balance of the public interest favours disclosure.

174. In sum, a public authority or concerned third party must ask the following questions when seeking to apply the exemption for information with commercial value to a record:

- [1] Does the information have commercial value, and can the specific nature of the commercial value be described?
- [2] What is the destruction or diminishment of the commercial value of the information that could occur?
- [3] How could disclosure cause this destruction or diminishment?
- [4] Could it reasonably be expected to occur under the circumstances?
- [5] If the exemption is engaged, does the balance of the public interest still require disclosure?

175. Finally, a public authority or concerned third party invoking section 25(1)(b) has the burden to show that, on the balance of probabilities, the exemption is justified. It should do so by showing objective and reasonable facts to support its assertions.

176. Only KPMG made submissions asserting the exemptions for information with commercial value.

KPMG's submissions

177. KPMG's submissions with respect to section 25(1)(b) are set forth in paragraphs 116-119, above.

Applicant's submissions

178. The Applicant did not make specific submissions on the applicability of the exemption, but emphasised that disclosure of the report is in the public interest, see paragraph 56 above.

Discussion

- [1] *Does the information have commercial value, and can the specific nature of the commercial value be described?*

179. Beyond asserting that the report would reveal its approach, methodologies, and analysis, KPMG did not explain what information in the report has commercial value. In any event, KPMG has not explained what proprietary or non-public approach, methodology, or

analysis is contained in the Sandys 360 report, see above paragraphs 145-47, and has not shown that this is valuable to the sustainability or profitability of its ongoing commercial activity.

180. KPMG's assertion of information with commercial value is too general or vague to satisfy the requirements of section 25(1)(b). The Information Commissioner does not consider the remainder of the questions for the application of this exemption and is not satisfied that the exemption is engaged.

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

181. In light of the Information Commissioner's conclusion that section 25(1)(b) is not engaged, it is unnecessary to address the issue of the public interest. However, for the sake of completeness, the Information Commissioner is satisfied that even if the exemption was engaged, the balance of the public interest favours disclosure of the KPMG report for the reasons discussed above paragraphs 75-81.

Conclusion

182. The Information Commissioner is not satisfied that the KPMG report contains information with commercial value and that disclosure could reasonably be expected to destroy or diminish the value of such information. Even if disclosure did, the Information Commissioner is satisfied that the balance of the public interests would require disclosure of the report.

Personal information – section 23(1)

183. Neither the Department nor a concerned third party invoked the exemption for personal information. The Information Commissioner will consider the application of the personal information exemption on her own initiative¹⁰.
184. Section 23(1) allows public authorities to withhold records containing personal information, subject to exceptions in section 23(2) that are not applicable in this case.
185. Personal information is defined in section 24(1) as 'information recorded in any form about an identifiable individual'. Section 24(2) excludes specific categories of information from the broad definition of personal information.

¹⁰ See Decision 02/2019, Office of the Governor, para. 35; Decision 01/2018, Bermuda Tourism Authority, para. 27.

186. To withhold records, or parts of records, under the personal information exemption, the following must be considered¹¹:

- [1] Does the record, or part of the record, contain information about an identifiable individual?
- [2] Is the information excluded from the definition of personal information because it falls within an exclusion in section 24(2)?
- [3] Do any of the exceptions in section 23(2) prevent the personal information exemption from applying?
- [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?

187. In the context of personal information, the public interest test requires a balancing of the public interest in favour of knowing an individual's personal information, on the one hand, against the privacy rights of the individual and any other public interest in favour of confidentiality on the other.

188. As set out at length in Decision 02/2019, Office of the Governor, the personal work information of public sector employees and of elected and other public officials falls within the definition of personal information. With this category of personal information, the balance of the public interest consideration determines whether personal work information is disclosed under the PATI Act.

Discussion

- [1] *Does the record, or part of the record, contain information about an identifiable individual?*

189. After a careful review of the KPMG report, the Information Commissioner is satisfied that parts of the report contain information about identifiable individuals.

- [2] *Is the information excluded from the definition of personal information because it falls within an exclusion in section 24(2)?*

190. The Information Commissioner is satisfied that none of the information falls within the exclusions to the definition of personal information listed in section 24(2).

¹¹ See Decision 01/2018, Bermuda Tourism Authority, para. 37.

[3] *Do any of the exceptions in section 23(2) prevent the personal information exemption from applying?*

191. The submissions from the Department and the concerned third parties made clear that none of the individuals whose identifying information is in the report have consented in writing to its disclosure, section 23(2)(b), nor were they informed in advance that this information may be made available to the public, section 23(2)(d). The personal information does not relate to the requester, section 23(2)(a), nor does it fall in a class of information generally available to the public, section 23(2)(c). Finally, disclosure is not necessary to avoid danger to the life or health of an individual, section 23(2)(e).

192. The Information Commissioner is satisfied that none of the exceptions in section 23(2) are applicable.

[4] *If the exemption applies, does the balance of the public interest require disclosure?*

193. As discussed above, the Information Commissioner accepts, on the one hand, that strong public interest factors favour disclosure of the KPMG report, as set out in paragraph 75 above.

194. On the other hand, the Information Commissioner acknowledges that there is a strong public interest in the protection of personal information in the report. The public interest in the accountability on the use of public spending may be met by the disclosure of the remainder of the report. The details of specific individuals who may not have the expectation that their information will be made public does not further any of these interests and constitutes an unnecessary invasion of their right to privacy. Bearing this in mind, the Information Commissioner is satisfied that disclosure of most of the personal information is not required by the public interest.

195. The only personal information that should be disclosed is that of the Financial Secretary and the then-Minister of Public Works. Disclosure of their information is in the public interest because the inclusion of their information in the KPMG report relates to their public functions.

196. The Information Commissioner is satisfied that the exemption for personal information in section 23(1) applies to part of the KPMG report.

Decision

The Information Commissioner finds that the Department of Public Lands and Buildings failed to comply with Part 3 of the Public Access to Information (**PATI**) Act 2010 in responding to the request for access to the KPMG report. Specifically, the Department did not issue a decision on part of the Applicant's request for an internal review in accordance with section 43(2) of the PATI Act. The Department also did not justify its reliance on section 26(1)(a) of the Act to deny access to the KPMG report.

The Information Commissioner also found that sections 25(1)(b), 25(1)(c), 25(1)(d), and 26(1)(b) of the Act are not applicable to the KPMG report, but that section 23(1) applies to parts of the report.

In accordance with section 48(1)(a) of the PATI Act, the Information Commissioner reverses the Department's internal review decision in this case and requires that the Department:

- issue an internal review decision on the requested list of payments and indebtedness records; and
- grant access to the record in part with redactions of personal information as outlined in the Confidential Annex to this Decision, which is provided only to the Department,

as directed in this Decision and the accompanying Order **on or before 8 July 2019**.

Judicial Review

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

Enforcement

This decision has been filed with the Supreme Court, according to section 48(3) of the PATI Act. If the Department 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 May 2019

Public Access to Information Act 2010

Public interest test

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

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, including—

...

(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. . . .

Commercial information

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

(a) . . .

(b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;

(c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates; or

(d) information, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates.

(2) . . .

- (3) A record shall be disclosed if disclosure of it is in the public interest.
- (i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and
 - (ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or
- (b) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.
- (2) A record shall be disclosed if disclosure of it is in the public interest.

Information received in confidence

- 26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—
- (a) information—
 - (i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and
 - (ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or
 - (b) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.
- (2) A record shall be disclosed if disclosure of it is in the public interest.

Conduct of review

- 43 (1) An internal review of a decision by a public authority, other than a decision made by the head of a public authority, shall be conducted by the head of the public authority concerned.
- (2) The head of the public authority shall within six weeks after receiving an application for an internal review with respect to a request—
- (a) complete the review and make a decision with regard to the review; and
 - (b) notify the requester and any third party concerned of—
 - (i) the decision and the reasons for the decision; and
 - (ii) the right of the requester or third party, as the case may be, to apply to the Commissioner for a review of the decision under Part 6.

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