

Hearing 72-201800330 | 72-201800337

Decision

Ministry of Commerce, Planning and Investment

Sandy Hermiston
Ombudsman

18 October 2019

Summary:

Two applicants made a request under the Freedom of Information Law (2018 Revision) for an agreement between the Ministry of Commerce, Planning and Investment and Tech City, a private company.

The Ministry disclosed most of the agreement, but the redactions of some parts were disputed by the applicants.

The Ombudsman reviewed the matter and found that certain parts of the agreement were properly exempted under section 21 because they contained information with a commercial value, or information concerning the commercial interests of a person, the value of which would be destroyed or diminished if disclosed.

The exemptions in section 17(b)(i) and 20(1)(d) were not engaged, and the Ombudsman required that the Ministry disclose the remainder of the agreement.

Statutes¹ Considered:

Freedom of Information Law (2018 Revision) (FOI Law)

Freedom of Information (General) Regulations 2008 (FOI Regulations)

¹ In this decision all references to “sections” are to sections of *the Freedom of Information Law (2018 Revision)*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

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A. INTRODUCTION

[1] On 10 August 2018 an applicant made a request under the Freedom of Information Law (2018 Revision) (the FOI Law) to the Ministry of Commerce, Planning and Investment (the Ministry) for:

a copy of the MOU/agreement/deal signed yesterday (9 Aug) between the Ministry by Tamara Ebanks and TechCayman as represented by Gene Thompson regarding the development of a local digital economy.

[2] Six days later a different applicant made a request for the same records. That request was for:

the agreement between TechCayman and government, referenced in this article.”

[3] The Ministry responded to both requests in an identical manner, releasing a redacted document, partially withholding access under the exemptions in sections 18(1) (records affecting the national economy) and 21(1)(a) and (b) (commercial interests).

[4] The initial decision was confirmed in the internal review conducted by the Minister responsible, who also added the exemption in section 17(b)(i) (actionable breach of confidence).

B. CONSIDERATION OF ISSUES

[5] The Ministry initially claimed exemptions in sections 17(b)(i) and 21 and added section 20(1)(d) (prejudice to the effective conduct of public affairs) in its written submissions for this appeal.

[6] The Ministry disclosed additional information over the course of this appeal, but the following redactions remain in dispute:

- Redaction #1: paragraph 2(e) on page 7;
- Redaction #2: a heading and one paragraph on page 8;
- Redaction #3: subparagraphs 2(k)(i) and (ii) on page 9;
- Redaction #4: Schedule 1 (title and body) and the first bullet point in Recital F on page 2 of the agreement;

- Redaction #5: Schedule 3 (title and body);
- Redaction #6: Schedule 4 (body only);

a) **Are the redactions exempted under section 20(1)(d), section 21(1)(a)(ii) or 21(1)(b), and, if so, would access to the record nevertheless be in the public interest under section 26(1)?**

[7] Section 20(1)(d) provides the following exemption from the general right to access:

20. (1) A record is exempt from disclosure if –

...

(d) its disclosure would otherwise prejudice, or would be likely to prejudice the conduct of public affairs.

[8] Section 21 provides for the following exemption from the general right to access:

21. (1) ... a record is exempt from disclosure if –

(a) its disclosure would reveal -

...

*(ii) any other information of a **commercial value**, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or*

*(b) it contains information (other than that referred to in paragraph (a)) concerning the **commercial interests** of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.*

[9] The Ministry relied upon a definition of “commercial value” taken from ***Cannon v Australian Quality Egg Farms Ltd (1993 S0094, 30 May 1994), para 54***, a decision notice from the Queensland Office of the Information Commissioner in relation to a similarly worded exemption under the 1992 Queensland *Freedom of Information Act*. Commercial value is defined as:

... information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction.

[10] The Ministry argued that the redacted information constitutes “information... essential to the profitability and/or viability of both the [the Company] and the Government’s continuing business operation.”

- [11] The Ministry also claimed that disclosure of this information would hinder the Government's future bargaining/negotiating position with other companies, leading to the Government's competitive advantage being lost, which would prejudice its commercial interests.
- [12] A submission from Tech Cayman ("the Company") supported this point of view, stating that,
- *The Agreement contains commercial arrangements that would be disadvantageous to the Company if the details are made public.*
 - *The release of the details of the Agreement will disadvantage the Cayman Islands as other countries that have a keen interest in this industry will use the information to compete with Cayman.*
 - *The other business park type business on the island has kept their agreement confidential and will gain an unfair business advantage through the release of the Agreement.*
 - *The Company is a private company and the confidentiality of its trade secrets and business plans should be respected. The release of the Agreement will raise concerns for other private companies that enter into agreements with Government.*
- [13] Applicant A expressed their expectation that details of any agreement signed by the Government should be disclosed, "with the reasonable exception of what could be corporate intelligence that is not related to the deal directly."
- [14] Applicant B did not express any views on the exemption relating to commercial value or interests.
- [15] The UK Information Tribunal clarified that the term "would" in this context means,
- "more probable than not" that there will be prejudice to the specific interest set out in the exemption and the words "would be likely to" have been interpreted to mean that there is a "real and significant risk of prejudice" to the interest in the exemption...²*
- [16] None of the parties made arguments regarding the interpretation of the term "commercial interests" found in section 21(1)(b) which is not defined in the FOI Law.

² UK Information Tribunal *Ian Edward McIntyre v Information Commissioner and Ministry of Defence* 11 February 2008 EA/2007/0068 para 40

[17] Having reviewed the provisions in the agreement identified in redactions 1 – 6, I have reached the following conclusions:

i. Redaction #1:

Paragraph 2(e) on page 7 consists of information which has already been disclosed in other parts of the agreement. **It is therefore not exempt under section 21.**

ii. Redaction #2:

The heading and paragraph 2(g) on page 8 both refer to a third-party private entity which, according to the Ministry, is not aware of the reference in this agreement. The paragraph contains information which, if disclosed, would more probably than not prejudice that entity's commercial interests. **Therefore, both the heading and the paragraph are exempt under section 21(1)(b).**

iii. Redaction #3:

Subparagraph 2(k)(i) on page 9 contains an undertaking from the Government to enact specific legislation, subject to the acknowledgement that any such provision cannot fetter the Government's discretion. When asked what commercial value exists in a non-binding agreement to enact or amend legislation and how the Government's commercial interests would be prejudiced, the Ministry responded by referring to its previous written arguments and adding that another entity could "leverage their public knowledge" and that it would "reduce the Government's ability to manage its public affairs". The Ministry failed to identify any particular "commercial value" involved in the enactment of legislation.

As stated above, the term "commercial interests" is not defined in the FOI Law. Given that there are specific exemptions for "commercial value" and "trade secrets" I must find an interpretation that makes sense of the words "commercial interests" and find a meaning that does not repeat or contradict the other two exemptions listed in section 21. It is my opinion that this provision refers to interests that relate to trading such as the sale or purchase of goods which are undertaken for the purpose of revenue generation and normally take place within a competitive environment. The enactment of legislation is a public activity and while it may impact the government's ability to generate revenue (which is entirely in the Legislature's hands) it is undertaken in a political environment rather than a competitive one. **On this basis, I reject the argument regarding the exemption found in section 21(1).**

The Ministry also argued that the disclosure of the provision in question would "reduce the Government's ability to manage its public affairs". It is unclear how knowledge of

the proposed legislation could be detrimental to the Government, other than the potential public reaction to the proposed legislation which exists with all legislation. I fail to see how the Ministry can, on the one hand, argue that disclosure of a non-binding commitment to enact legislation will reduce the Government's ability to manage its public affairs and, on the other hand, provide three pages of details regarding the Government's legislative agenda for the enactment of modern IP laws as set out in detail in Schedule 2 of the agreement. **Therefore I find that subparagraph 2(k)(i) on page 9 is not exempt under section 20(1)(d).**

Subparagraph 2(k)(ii) on page 9 repeats the information already disclosed in paragraph 2(k). **It is therefore not exempt.**

Redaction #4:

The title of Schedule 1 has already been disclosed on page 7 of the agreement and is therefore not exempt.

I agree that incentives given by the Government could, if disclosed, prejudice the Government's ability to negotiate competitive agreements with future interested parties. The body of Schedule 1 consists of information concerning the commercial interests of the Government which, if disclosed, would more probably than not prejudice the Ministry's future bargaining position in similar negotiations with commercial partners. It could undercut the Cayman Islands' international competitiveness in these types of deals. **Therefore, the exemption in section 21(1)(b) is engaged in relation to the body of Schedule 1.**

I also find that the first bullet point in Recital F on page 2 of the agreement is exempt as it provides details regarding the incentives outlined in Schedule 1.

iv. Redaction #5:

The title and body of text which constitutes Schedule 3 (including the references to the third-party entity's name in the Table of Contents and the reference to the title of Schedule 3 on the second page of the Table of Contents) relates to an agreement between the Government and a third-party private entity, as well as provisions pertaining to the Company itself. This information, if disclosed, would more probably than not prejudice the third-party's commercial interests. **Therefore, both the title and body of Schedule 3 are exempt under section 21(1)(b), as well as the references to the third-party entity in the Table of Contents and Recital F.**

v. Redaction #6:

As the disclosed headings indicate, Schedule 4 lists actions and timelines relating to the information listed in Schedule 1 and given its relationship to information which is already exempt, its disclosure would prejudice the commercial interests of the Government and the Company. **The body of Schedule 4 is therefore exempt under section 21.**

[18] **In conclusion, the following parts of the agreement are exempt from disclosure:**

- **Redaction #2: paragraph 2(g) and its heading on page 8;**
- **Redaction #4: the body of Schedule 1;**
- **Redaction #5: the title (including the title and the third party's name in the Table of Contents) and the body of Schedule 3;**
- **Redaction #6: the body of Schedule 4.**

[19] The exemptions in sections 20(1)(d) and 21 are subject to a public interest test under section 26(1), requiring a determination whether access would nevertheless be in the public interest, notwithstanding that the exemption applies to parts of the responsive record.

[20] The public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining the exemption. The test assumes the form of a balancing exercise between the factors in favour of disclosure and the factors in favour of maintaining the exemption.

[21] In relation to the exemptions in section 21, the Ministry has identified government transparency, accountability and public understanding and participation as factors in favour of disclosure.

[22] The Ministry submits that maintaining the commercial sensitivity of commercial agreements, and protecting the commercial value contained in commercial agreements are two factors in favour of maintaining the exemption. I agree.

[23] I would add that, in accordance with findings of the UK Information Tribunal in relation to the similarly worded exemption, there is also a public interest in protecting the government's commercial interests by safeguarding government's bargaining position in potential future negotiations with commercial partners.

[24] **Therefore, it would not be in the public interest to disclose the information exempted under sections 20(1)(d) or 21, and the exemption is upheld in relation to the redacted parts identified above.**

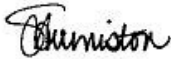
[25] Since I have found that the exemptions in sections 20(1)(d) and 21 apply to the redacted parts of the agreement, there is no need for me to consider whether the exemption in section 17(b)(ii) also applies.

C. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, the following parts of the agreement are exempted:

- **Redaction #3: paragraph 2(g) and its heading on page 8;**
- **Redaction #4: the body of Schedule 1;**
- **Redaction #5: the title (including the title and the third party's name as they appear in the Table of Contents) and the body of Schedule 3;**
- **Redaction #6: the body of Schedule 4.**

I require that the remainder of the agreement between the Ministry and the Company be disclosed with the redaction of the above passages on or before 31 October 2019.



Sandy Hermiston
Ombudsman