



Information
Commissioner's
Office

ICO Hearing 15 – 00611

Decision

Ministry of Finance, Tourism and Development

Jennifer Dilbert, MBE, JP

Information Commissioner for the Cayman Islands

2 September 2011

Summary:

An Applicant was refused access by the Ministry of Finance, Tourism and Development to “Tender No. CTC MFT&D TSY 10-11 060, the list of all companies that bid, the date their bid was received, the respective bid offers and the final recommendations from the Central Tender Committee.” The responsive records consist of the actual bids submitted by the tendering companies for the provision of long-term financial for Government.

The Information Commissioner noted that some information has already been provided by the Ministry, and upheld the decision of the Ministry of Finance, Tourism and Development to withhold access to the actual bids in Tender No. TSY 10-11 060 under section 17(b)(i) of the *Freedom of Information Law, 2007* as disclosure would constitute an actionable breach of confidence.

Statutes¹ Considered:

Freedom of Information Law, 2007

Freedom of Information (General) Regulations, 2008

Exclusions and Exemptions Considered:

Sections 17(b)(i), 20(1)(d), 21(1)(a)(ii) and 21(1)(b) of the *Freedom of Information Law, 2007*

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¹ In this decision all references to sections are to section under *the Freedom of Information Law, 2007* unless otherwise specified.

A. INTRODUCTION

- [1] On 27 October 2010, the Applicant made an FOI request to the Ministry of Finance, Tourism and Development (the “Ministry”) for records relating to “*Tender No. CTC MFT&D TSY 10-11 060, the list of all companies that bid, the date their bid was received, the respective bid offers and the final recommendations from the Central Tender Committee.*”
- [2] On 26 November 2010, the Ministry responded to the Applicant, deferring access to the responsive records under section 11(2)(c), arguing that it would be contrary to the public interest to release the records since doing so would prejudice “an Offering Memorandum being made” and would undermine the Government's bargaining position, and adding that “once the negotiations have been completed, we will release the requested minutes for your perusal.”
- [3] Following a request from the Applicant, on 20 January 2011 the Chief Officer carried out an Internal Review in which the initial decision to defer access under section 11(2)(c) was upheld.
- [4] On 17 February 2011, the Applicant appealed the request to the Information Commissioner's Office (“ICO”). As a result of the mediation attempt undertaken by the ICO, on 13 April 2011 the Ministry released a spreadsheet which summarized some of the information requested by the Applicant. On 14 April 2011, the Applicant informed the ICO that not all the requested information had been released, and a formal Hearing was scheduled.
- [5] Just before commencement of the formal Hearing, proceedings were stayed in response to a communication in which the Ministry indicated that it was willing to review its position in view of a second request that had been received from the same Applicant. However, on 20 May 2011 the Applicant informed the ICO that all relevant information had still not been disclosed, and the Hearing resumed.
- [6] On 27 May 2011, the Ministry informed the Applicant that it would now be relying on the exemption in section 21(1)(b), and on 1 June 2011 the Ministry once again changed its position to rely on three additional exemptions in sections 17(b)(i), 20(1)(d) and 21(1)(a)(ii). In this latest communication the Ministry also released an additional record to the Applicant relating to the final recommendations of the Central Tenders Committee (“CTC”).

B. BACKGROUND

The Procurement Process

- [7] There is no specific public procurement legislation in the Cayman Islands. Section 35(h) of the *Public Management and Finance Law (2010 Revision)* grants the Governor in Cabinet, upon the advice of the Financial Secretary, the power to make regulations “providing for competitive tendering in connection with contracts to be entered into by or on behalf of the core Government, statutory authorities or Government companies.” Part IX of the *Financial Regulations (2010 Revision)* provides instructions relating to Government procurement, including preference for local suppliers, tendering requirements, the pre-qualifying tendering process, the tendering process itself and the evaluation of tenders. Regulation 41(2) provides

that “tenders submitted for any contract with a value of two hundred and fifty thousand dollars or more shall be evaluated by a Central Tenders Committee”.

- [8] The CTC seeks to ensure that the process of awarding public sector contracts over \$250,000 is carried out in a consistent and fair manner in accordance with the Financial Regulations. CTC has “certain responsibilities that require it to approve certain steps of the tendering process that ensures entities comply with the Financial Regulations”.² In this process, the CTC also “seeks to maximize value for money in public sector procurement, encourage competition through supplier participation in public sector tendering, and maintain public confidence and trust in public sector procurement through accountability and transparency.”³
- [9] In the absence of specific legislation, the CTC has developed two relevant guidelines dealing with the open tender process and the prequalification process, both of which are available on the CTC website.⁴ Government’s procurement process has recently been reviewed in a comprehensive report by the Office of the Auditor General.⁵

The Tender

- [10] In accordance with the relevant procedures, the Treasury Department on 9 and 16 July 2010 publicly invited bid submissions for provision of CI\$155,000,000 or US\$185,074,000 of long term financing for Government. The relevant tender was numbered TSY/10-11/060⁶, and had a deadline of 23 July 2010, which was extended to 28 July 2010. On 3 November 2010, the Premier explained to the Legislative Assembly why this delay was necessary: “After the seven bids were opened, four additional financial institutions expressed an interest...[and] the Department of Treasury sought the CTC’s approval for a further one-week extension to the 28th...[in order to] allow for the possibility of one or more of those four additional institutions submitting a bid that had a lower interest rate than the rates submitted by the seven entities”.⁷
- [11] Subsequently, the tendering process relating to tender TSY/10-11/060 was terminated because, as the Premier stated in the Legislative Assembly, “the Department of Treasury was advised that the only way bids could legitimately be considered from the four additional entities...was to terminate the 28th July tender and to issue a new invitation to tender.”⁸
- [12] The Departmental Tenders Committee (“DTC”) of the Ministry evaluated the bids which had been received as a result of tender TSY/10-11/060, but did not make a recommendation to the CTC as to which of the bidders was successful. In its response to the Evaluation Summary & Tender Award Recommendation (“ESTAR”) Report issued by the DTC, which has been supplied to the Applicant, the CTC raised a number of concerns regarding this approach, but accepted the recommendation of the Ministry not to proceed.
- [13] The present appeal relates to the first of three separate tendering processes, conducted between July 2010 and April 2011, in which the Government sought to secure a long-term loan

² Office of the Auditor General Cayman Islands *Management of Government Procurement* 2 July 2011. I refer to pp 4-6 of this Report for an overview of the tendering process for contract equal to or over \$250,000

³ Intervener Submission 11 July 2011

⁴ http://www.centraltenders.gov.ky/portal/page?_pageid=2122,1&_dad=portal&_schema=PORTAL

⁵ Office of the Auditor General op cit

⁶ erroneously listed as TSY/10-11/06 on the Central Tenders Committee (“CTC”) website

⁷ Legislative Assembly *Hansard* 3 November 2010 p.459

⁸ *Ibid* [Legislative Assembly *Hansard* 3 November 2010 p.459]

agreement. This overall process has since been the subject of a detailed report in which the Auditor General has found weaknesses in the way Government handles public debt.

C. PROCEDURAL MATTERS

- [14] The Ministry has made some of the requested information available to the Applicant in the form of a summary table showing the list of companies that bid, the date their respective bids were received, and information labeled as the “bid amount”. Separately, the Ministry has also provided the Applicant with a copy of the CTC’s response to the Ministry’s ESTAR report, dated 24 August 2010.

Release of “Bid Amounts”

- [15] The summary table includes a column entitled “bid amount” which lists the amount of long term loan of CI\$ 155,000,000 as specified in the tender. For three of the bidders there is a separate amount for the short term bridge loan and the long term debt loan which together make up the same total amount. As well, two of the banks essentially made a combined bid, with each institution proposing to provide half of the full loan amount available. No other information is included in this column.
- [16] Although this disclosure is commendable I find the information provided under the heading “bid amount” not very enlightening, as it simply lists the amount of the long term loan. Most tenders will relate to goods and/or services which Government seeks to purchase from a private sector supplier. Disclosure of the proposed cost of successful and unsuccessful bids adds to the accountability and transparency of the tendering process and increases the likelihood that Government will obtain best value for money. This is obviously consistent with the FOI Law.
- [17] In normal parlance the “bid amount” equals the cost to Government of the respective bid, not the amount of the loan (CI\$155,000,000 or the US\$ equivalent) as indicated by the Ministry. In any event, the loan amount is already public knowledge and does not in any way represent the actual cost to Government.
- [18] In a tender relating to Government financing it is clearly the applicable conditions of repayment, including percentages and fees, which constitute the “bid amount”, i.e. the “cost to Government”. Therefore, I find it unhelpful for the Ministry to represent the loan amount as the “bid amount”. In previous Decisions I have strongly condemned the use of “semantics” by public authorities, and I continue to find it inappropriate here.

The CTC Recommendations and the Duty to Assist the Applicant

- [19] Amongst other things, the request was for the “*the final recommendations from the Central Tender Committee*”. Where there is any question about whether or not a record held by a public authority could be relevant to a request, it is the public authority’s duty to clarify this with the Applicant under section 11(1) and regulation 21(b). If the Ministry needed any clarification as to whether the ESTAR report itself, or the CTC response to the ESTAR report was relevant to the Applicant, it needed only to contact the Applicant and ask. The dividing line between a “recommendation” and a “response” is insignificant when it comes to an Applicant’s right to

access Government records, and the expectation of openness and transparency promulgated in the FOI Law. The Ministry should have understood that the Applicant wanted to know what the CTC's conclusions were in respect of this particular tendering process, and if there was any doubt as to the relevance of any particular record, the Ministry should have contacted the Applicant to make sure.

- [20] In the end, more than seven months after the request was first made, and after commencement of this Hearing, the Ministry has made a commendable effort to release as much information as it considers possible, including the CTC's response to the ESTAR report which was disclosed on 1 June 2011.
- [21] In the spirit of the FOI Law I emphasize that disclosure is mandatory whenever no exception or exemption applies, and I welcome the positive, ongoing engagement of the Ministry with the Applicant, and their willingness to release further records as the Applicant's interest in them became clear, even though the Ministry's initial approach was problematic. Public authorities should note that it is the exemptions that should be interpreted narrowly, not the request.

The ESTAR Report and the Duty to Assist the Applicant

- [22] Although the Ministry did release additional records late in the appeal, it did not disclose the ESTAR report to which the CTC letter responded. I believe this report is essential to fully understand the CTC's return letter, and I do not consider that there is any reason why the report could not be made available by the Ministry.
- [23] In relation to any ancillary documentation (such as the ESTAR report in this case) that an Applicant may require to meaningfully interpret and understand a responsive record (such as the CTC response to the ESTAR report). I believe that a public authority has a duty to determine whether the Applicant is interested in the record, even if the Applicant has not requested access to this exact record. Of course where it is subject to an exception or exemption, access may be withheld and the Applicant informed of his right of appeal.
- [24] Public authorities should bear in mind that applicants, even seemingly sophisticated and experienced applicants, may not fully understand the way events unfold, records are kept, and procedures are followed, in any specific case. That is why, in the present case where events did not unfold according to plan, and the seemingly standard tendering process did not lead to a predictable outcome (the recommendation of a successful bidder by the CTC), I would have expected the Ministry to have offered its assistance to the Applicant in order to explain the events and determine, together with the Applicant, whether or not records such the CTC response letter as well as the ESTAR report were of interest.
- [25] I will not go as far as to include the ESTAR report in the responsive records in the present Hearing and order its release, since the parties have not had a chance to consider whether or not it should be disclosed. However, I would strongly urge the Ministry to consider carefully on what basis it is withholding access to the ESTAR report after having made its content all but public by means of disclosing the CTC's response to the report, and if it does not have a good reason, to release it belatedly in the spirit of openness.

D. ISSUES UNDER REVIEW IN THIS HEARING

[26] The issues to be decided in this Hearing are:

1. **Section 17(b)(i)** - Is the responsive record exempt from disclosure because the disclosure thereof would constitute an actionable breach of confidence?
2. **Section 20(1)(d)** – Is the responsive record exempt from disclosure because its disclosure would prejudice, or be likely to prejudice, the effective conduct of public affairs?
3. **Section 21(1)(a)(ii)** - Is the responsive record exempt from disclosure because its disclosure would reveal 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?
4. **Section 21(1)(b)** - Is the responsive record exempt from disclosure because it contains information...concerning the commercial interests of any person or organization...and the disclosure of that information would prejudice those interests?

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Section 17(b)(i)

[27] The Ministry has denied access to the responsive records on the grounds that they are subject to section 17(b)(i) which states:

17. *An official record is exempt from disclosure if-*
...
(b) the disclosure thereof would-
(i) constitute an actionable breach of confidence;

The meaning of “actionable”

[28] As the UK Information Tribunal found in *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.*⁹ the meaning of “actionable” in the parallel exemption in the UK *Freedom of Information Act 2000* is not unambiguous. Lord Falconer, the sponsor of the Act, in the parliamentary discussions relating to the FOI Bill, clarified that “*the word ‘actionable’ does not mean arguable...*” and that “[it] *means that one can take action and win.*”¹⁰ Guidance from the UK Ministry of Justice supports the same view, namely that the exemption may apply “if

⁹ Information Tribunal *The Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.* EA/2009/0036 13 January 2010

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i360/Final%20Decision%2013.1.10%20without%20signature.pdf>

¹⁰ United Kingdom *Hansard* HL (Series 5) Vol.618, col. 416 and Vol. 619 col 175-6; quoted in Information Tribunal *HEFCE v ICO* op cit para 25 <http://www.justice.gov.uk/downloads/guidance/freedom-and-rights/foi-exemption-s41.pdf>

a person could bring a legal action and be successful.”¹¹ There is no parallel discussion on this point in the Cayman Islands Hansard.

The meaning of “breach of confidence”

[29] In *Coco v. A. N. Clark*, Megarry J established that in order for a case of breach of confidence to succeed, three elements are required. As previously applied in ICO Decision 3-02209, they are:

- (i) the document must have the necessary quality of confidence about it;
- (ii) the information must have been imparted in circumstances importing an obligation of confidence; and
- (iii) there must be an unauthorized use of that information to the detriment of the party communicating it.

[30] It is also important to note, that even if these three criteria are met, a common law public interest defence still exists.

[31] This approach is corroborated by guidance from the UK Information Commissioner on the parallel exemption in the UK’s *Freedom of Information Act 2000*, which also states that:

The duty of confidence is not absolute and the courts have recognised three broad circumstances under which confidential information may be disclosed. These are as follows:

- Disclosures with consent...
- Disclosures which are required by law...
- Disclosures where there is an overriding public interest... Much will depend on the circumstances of each case, but particular weight should be attached to the privacy rights of individuals. The weight of the wider public interest in confidentiality will also depend to some extent on the context. ... Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.¹²

[32] The correctness of this approach is further confirmed in guidance from the UK Ministry of Justice (Department of Constitutional Affairs) on the same exemption, which states:

The courts have recognised that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence. So although the [FOI] Act requires no explicit public interest test, an assessment of the public interest must be still be made.¹³

¹¹ Ministry of Justice *Freedom of Information Guidance. Exemptions guidance. Section 41 – Information provided in confidence* 14 May 2008 p. 2

¹² Information Commissioner’s Office (UK) *Freedom of Information Act. Awareness Guidance 2. Information provided in confidence* Version 4 12 September 2008 pp.3-4

¹³ Ministry of Justice *Freedom of Information Guidance. Exemptions guidance. Section 41 – Information provided in confidence* 14 May 2008 p. 2

[33] Consequently, I hold that the applicability of the exemption in section 17(b)(i) of the Cayman Islands FOI Law will depend on the likelihood that legal action would be successful, and this determination requires a consideration of the common law public interest.¹⁴

(a) The position of the Ministry of Finance, Development & Tourism

Open Tender Guidelines

[34] The Ministry points to part 3 of the “Open Tender Process” Guidelines (the “Guidelines”) dealing with how a bid is received and states that “[i]t is vital that the process for receiving tender bids is controlled, impartial and transparent and ensures that commercially sensitive information is treated confidentially.”

[35] According to the receipt procedures, the Treasury cashier stamps the outside of all bid envelopes with the words “confidential tender”, and all the relevant bids in this case were stamped accordingly. Bid envelopes are passed to the CTC and remain sealed until they are opened at the appropriate time in the process, in accordance with the procedures in part 4 dealing with bid opening. When the CTC Chairman hands the bid documents over to the entity Procurement Officer the procedures require that he confirms the need for confidentiality.

[36] The Ministry submits that the Guidelines state: “Until the guidelines and policy have been developed, all bid information other than the successful bidder’s name and bid amount shall remain confidential.” The Ministry states that “the CTC has yet to develop a guideline or policy regarding the release of information to bidders and the general public.”

Confidentiality Statements by Bidders

[37] The Ministry points out that four of the bid documents contain “express confidentiality clauses”. It does not provide further details on these statements or how they affect the claimed application of the exemption in section 17(b)(i). However I have examined the bids of the tenderers and this is discussed further below.

[38] The Ministry submits that both a contractual and equitable duty of confidence obtains, and sets out their arguments for both as follows.

Contractual Duty of Confidence

[39] The Ministry points out, quoting from *Attorney General v Guardian Newspapers* that “a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others.”¹⁵

[40] The Ministry asserts that both types of duty apply to the information imparted in the bid process, by virtue of the process itself, “as well as [by] the express confidentiality clauses contained in the bids”. The Ministry also points to the Guidelines as a clear indication of the Government’s

¹⁴ See, for instance Information Tribunal *Derry City Council v Information Commissioner* EA/2006/0014 11 December 2006 para 35(a) <http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf>

¹⁵ *Attorney General v Guardian Newspapers Ltd and Others* [1990] 1 A.C.109 at 110

undertaking in regard to confidentiality of all information except the successful bidder's name and bid amount.

Equitable Duty of Confidence

[41] Following the principles stated in Coco v A.N. Clark, as explained above, the Ministry submits that an equitable duty of confidence arises in respect of the responsive record, because:

- The information itself has the necessary quality of confidence about it since it is of commercial interest and has value to the bidders; “the bids contain general confidential company information”; and the terms of the bid offers and the interest rates “would have been specifically composed by each bidder based on its unique position in the financial market”.
- The information was imparted in circumstances importing an obligation of confidence since there is a mutual understanding of confidence between the parties in relation to the responsive records;
- Disclosure of the responsive record would constitute an unauthorized use to the detriment of the party communicating it, since it would constitute disclosure of commercially sensitive information to the competitive disadvantage of the bidders.

[42] The Ministry relies on London Regional Transport v Mayor of London¹⁶ to argue that “confidence should not be overridden without good reasons to support the contention that it is in the public interest to publish.”

[43] The Ministry also quotes from the Attorney General v Guardian Newspapers to argue that the common law of breach of confidence has a built-in assumption of maintaining confidentiality, quoting: “there is an inherent public interest in individual citizens and state having an enforceable right to maintenance of confidence.”¹⁷

[44] Finally, the Ministry relies on the Irish case of Henry and the Office of Public Works,¹⁸ which relates – as does the present case – to the determination of access to information relating to unsuccessful bids under a similarly phrased exemption in the Irish *Freedom of Information Act 1997* as amended in 2003. The Ministry states that the Irish Commissioner “found that an equitable duty of confidence existed in relation to the unsuccessful bids”, and that:

in examining the public interest factors it was noted that as a general rule where the confidential or commercially sensitive information of a tenderer does not involve the expenditure of public money, the public interest lies in protecting that information from disclosure.

[45] The Ministry maintains that the public interest in enhancing the openness and accountability of Government should not overcome “the countervailing public interest in the proper preservation of confidences and the protection of commercially sensitive information.” The Ministry also

¹⁶ *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491

¹⁷ *Attorney General v Guardian Newspapers Ltd and Others* [1990] 1 A.C.109 at 177

¹⁸ *Henry and the Office of Public Works No. 98188* [2001] IEIC 2 25 June 2001

<http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1481,en.htm>

agrees with the Irish Commissioner that unsuccessful bidders should not be subjected to the additional cost of disclosing commercially sensitive information, and that doing so would likely deter their participation in future bids.

Views of the Third Parties

[46] The Ministry granted the bidders an opportunity to express their views on the request for disclosure, and three banks responded. Their correspondence is attached to the Ministry's submission.

[47] One bank argues for the confidentiality of the bidding process based on a letter in which the Premier apparently confirms its confidential nature. However, this letter is dated almost a month after the bidding deadline had passed and two days after the bid was closed by the Ministry. Therefore, it appears that the Premier's letter refers to a subsequent bid, and has no impact on the determination of disclosure of bid TSY/10-11/060 in the present hearing.

[48] A second bank believes that,

the very nature of the tender process expressly required that all [relevant] documentation and information... be treated in confidence... and that specific details of the proposal would be confidential and would not be released to any third party... and that any disclosure of the terms and conditions would constitute a breach of confidence which would be actionable.

[49] The third bank argues that the bidding information should be considered confidential and commercially sensitive as it "may impact our future bidding and/or benefit our competitors". The bank clarifies that "the public disclosure of any tender information other than the bid pricing will affect our future willingness to participate in these processes."

[50] It also makes further statements, but these explicitly refer to the subsequent bid of 23 August 2010, which, according to the bank, should not be disclosed without the information relating to the superseding bid dated 15 March 2011. Since the present case is about the disclosure of responsive records created on or before 28 July 2010, I will not consider these statements further.

(b) The position of the Applicant

[51] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

[52] The Applicant addresses the applicability of the exemption in section 17(b)(i) by submitting a number of relevant public interest factors in favour of disclosure:

- The question of long term Government financing documented in the responsive records, has been in the public spotlight;

- The question of Government financing raises important questions of Government accountability, value for money and due process;
- The Premier himself has drawn attention to the topic in several public statements, and has promised to disclose the information relating to the [now abandoned] contract of Cohen and Company, inter alia saying in the Legislative Assembly “I have stated time and again that when the process is completed the full rates and conditions will be made public”¹⁹;
- The process that is documented by the responsive records was completed in April 2011 when the Government awarded the contract to a local bank, and there is no further reason why this information should remain protected;
- Given that interest rates and conditions on the financial markets are constantly changing, the responsive record would not have a bearing on any future tender bids.

[53] I note that the present appeal relates strictly to the first of three tendering processes for long-term financing between July 2010 and April 2011. According to a recent report by the Audit Office²⁰ Government did not become involved with Cohen and Company until several months after the closing of the current tender by the Ministry. Since the present appeal relates specifically to a bid that ended in August 2010, I do not consider the third point raised by the Applicant above relevant to this Decision, and I will not consider it further.

(c) The views of the Intervener

[54] The Central Tenders Committee was asked to act as Intervener, and its submission briefly addresses the question of confidentiality by pointing out that in general the bidding process often involves the handling by the CTC of confidential information, and that “bidders have a reasonable expectation that commercially sensitive information submitted in their tender documents will not be publicly disseminated unless they are the successful bidder”.

[55] The Intervener further notes that:

Potential bidders are often advised that their submissions will be subject to the freedom of information legislation, and further requested to stamp any information they consider to be commercially sensitive with the word “Confidential”. However, since the Government do not use a standard set of request for proposal (RFP) document[s], some Agencies exclude that disclosure from time to time.

[56] The Intervener does not indicate what advice was actually provided in this regard to the bidders in the present bid TSY/10-11/060.

¹⁹ Legislative Assembly *Hansard* 3 November 2010 p.462

²⁰ Office of the Auditor General Cayman Islands *Management of Government Procurement – Case Studies* August 2011. See p.7 for a time line relating to the three consecutive tenders and the hiring of Cohen and Company.

(d) Discussion

Open Tender Guidelines

- [57] The need for careful procedures and confidentiality in the bidding process is not in question in this Hearing. There is an obvious need for secrecy and confidentiality in order to protect the integrity of the tendering process, while the bidding process is ongoing, that is to say, until a successful bidder has been identified with whom a contract has been signed, or the process has been stopped for another reason. It is obvious that disclosure of bids during the bidding process would undermine the fairness and impartiality with which the selection of a successful bidder must take place, and the Ministry's arguments in this regard are therefore accepted.
- [58] The continuing confidentiality of the bidding information after the bidding process has ceased – in this case, for more than a year - is an entirely different matter. Once the bid selection process has been concluded, there is an important public interest in ensuring that Government, including the CTC and the entity (the Ministry) have acted in an accountable manner in selecting the successful bidder, and that they have secured the best possible value for money on behalf of the Government. In addition, the confidentiality of most information decreases over time, sometimes as the result of a specific event or action, such as the closing of a bidding process.
- [59] The Ministry states that the CTC Guidelines provide that “all bid information other than the successful bidder’s name and bid amount shall remain confidential.” The full quote from the Guidelines reads:
- The release of information to bidders and the general public is being reviewed as part of the Freedom of Information implementation project. Until the guidelines and policy have been developed, all bid information other than the successful bidder’s name and bid amount shall remain confidential.²¹
- [60] Throughout the Guidelines adherence to Cayman Islands Law is explicitly indicated, but the applicability of the FOI Law to the records created under the procurement process is not explicitly stated. For instance, the Guidelines also state that: “Freedom of Information (FOI) requirements will be developed and communicated when available as part of the ongoing FOI implementation project.”
- [61] It is not clear exactly when the Guidelines were published, but the parts that mention FOI were obviously written before the FOI Law came into effect in January 2009, and at a time when it was expected that specific guidelines on access to information relating to the procurement process would be developed. Evidently, more than two and a half years later, access guidelines that take account of the requirements of the FOI Law have still not been developed, and Government's approach to openness and transparency, as embodied in the FOI Law, has still not been incorporated into the Guidelines. The fact that the guidelines in question are essential to Government's procurement process and significantly define and affect the interaction of Government with the private sector, only exacerbates the severity of this situation.
- [62] I find this unacceptable. Whether intentional or not, Government cannot expect to hide behind out-of-date guidelines, which it has had plenty of time to update, in order to avoid its legal obligations under the FOI Law.

²¹ Central Tender Committee Open Tender Process Guidelines n.d. p.29

[63] In any event, guidelines cannot “contract out” of primary legislation, and where there is a contradiction, the Law must supersede the guidelines. It is clear that the provisions of section 3(7) of the FOI Law do not apply to guidelines or procedures, but only to “any other Law that restricts access to records” (my emphasis). Therefore, the provisions of the FOI Law apply to the responsive records, and the Guidelines do not override the Ministry’s duties in this regard.

Confidentiality Statements by Bidders

[64] Upon close examination, the bids of two of the tendering banks contain the same, verbatim confidentiality statement, to the effect that the lender may disclose “any information about this commitment letter that [the] Lender considers appropriate”, to its subsidiaries and affiliates for a number of relevant purposes, and “to the extent that information is required to be disclosed by any applicable law or regulation”. However, the statement does not extend the same standard to disclosure by Government, which it seeks to restrict, stating “the Commitment Letter is delivered to you with the understanding that the substance hereof shall not be disclosed by you to any third party, without the prior written consent of the Lenders”, except insofar as necessary to authorize the offer.

[65] The tender of another bidder includes a confidentiality disclaimer which states, among other things, that “by acknowledgment of your receipt of this confidential material, you agree that the material and its contents are confidential, that you will hold and treat it in the strictest of confidence, and that you will not, directly or indirectly, disclose or permit anyone else to disclose this material or its contents to any other person, firm or entity without written authorization...”.

[66] The tender of one bidder has a comparable confidentiality statement which asserts that “this non-binding indicative proposal is for your confidential use only and neither its existence nor its terms may be disclosed by you to any person other than your officers, or advisors and then only on a ‘need to know’ basis...disclosure to a third party must be with the written consent...or as required by law.”

[67] Apart from this tender, which surprisingly, and presumably erroneously, states that the laws of another named country will govern the legal documentation, the other tenders state that the commitment letter and loan documents are to be governed by the laws of the Cayman Islands, and therefore recognize, at least implicitly, that the bids are subject to the provisions of the FOI Law.

[68] Not included in the Ministry’s submission is the declaration in the proposal of one bidder which states that “this presentation is confidential and proprietary to... and may not be disclosed, reproduced, distributed or used for any other purpose by the recipient without [our] express written consent.”

[69] The tenders from two final bidders do not contain an actual confidentiality statement, but every page of the latter has a header entitled “confidential”. Guidance from the UK Information Commissioner clarifies that the mere marking of a document as “confidential” “does not provide a good indication of whether the information has the necessary quality of confidence”, and that it remains the public authority’s duty to decide whether or not an exemption should apply.²² A duty of confidentiality does not arise merely because the responsive record is stamped as

²² Information Commissioner’s Office (UK) *Freedom of Information Act. Awareness Guidance 2. Information provided in confidence* Version 4 12 September 2008 p.5

“confidential”, nor does it apply to trivial information, or to information which has entered the public domain. As mentioned above, information may also lose its confidential quality over time.

[70] I accept the relevance of the confidentiality statements and markings in examining the expectation of confidentiality relevant to the bids, but I also note that not all of the bidders have included such statements, that the statements which do exist are not always unambiguous (as described above), and that all but one of the bids also acknowledge the applicability of Cayman Islands Law, including the FOI Law. Furthermore, I do not accept that the confidentiality clauses constitute a contractual obligation on the part of Government, or that they can override the application of primary legislation.

Contractual Duty of Confidence

[71] The Ministry's quote from *Attorney General v Guardian* dates from a time (1990) when the FOI Act had yet come into effect in the UK. Even so, the Court of Appeal provided a more nuanced view than the Ministry suggests, as the court also made it clear - relating to quite different circumstances - that “an express contractual duty of confidence will not necessarily be enforceable” and that the duty of confidence is mainly a matter of equity, and not of contract.²³

[72] The global application of the Ministry's argument regarding the contractual duty of confidence is diminished by the fact that the Ministry itself indicates that only four out of the seven bids actually include a confidentiality clause. As explained in the section above, I do not consider that the bids constitute a contract that is binding on Government since Government has not assented to the conditions specified in the clauses.

[73] In any event, a contractual obligation not to disclose certain information will not automatically render that information exempted under the FOI Law. As long as a responsive record is “held” by a public authority, the FOI Law will apply to it, whether or not it has originated within Government. Public authorities should be fully aware of this fact, and have a duty to communicate it plainly to their actual or potential private sector partners and suppliers.

[74] Where a public authority enters into a contract, it should ensure that it does not agree to contractual provisions which, by giving guarantees of confidentiality, may run counter to the FOI Law. If it did, it could find itself having to make difficult choices whether to breach the FOI Law, or violate ill-considered contractual confidentiality provisions.

[75] Government should make every effort to address the lack of up-to-date guidelines and standard contract clauses in this regard, not only in respect of the central tendering process, but in respect of procurement in general, and in relation to all contracts with suppliers and partners that are likely to result in the creation or receipt of recorded information by Government. This approach is consistent with the guidance provided by the UK Information Commissioner on confidential information and contracts.²⁴

[76] For clarity's sake, this does not mean that the record in question would automatically be disclosed, since one or more exceptions or exemptions may apply to it and the public interest in withholding the record may be greater than the public interest in disclosure.

²³ *Attorney General v Guardian Newspapers Ltd and Others* [1990] 1 A.C.109 at 146-148, 176-177, 215-216

²⁴ Information Commissioner's Office (UK) *Freedom of Information Act. Information provided in confidence relating to contracts*. Version 1 24 October 2008 p.2

Equitable duty of confidence

- **Does the information itself have the necessary quality of confidence about it?**

[77] According to guidance from the UK Ministry of Justice the term “necessary quality of confidence” means that “it must be information which is worthy of protection – someone must have an interest in the information being kept confidential.”²⁵ The information cannot already be in the public domain or be trivial in nature.²⁶

[78] The content of the information in the responsive records submitted to Government by the seven bidders varies very little. It comprises tender details, including terms, conditions and fees relating to short term and long term debt financing, as requested in the tender, as well as information establishing the tendering company’s credibility and financial standing. Both of these types of information are considered confidential and sensitive commercial information by the Ministry, the intervener and the three third parties who communicated their views to the Ministry.

- **Was the information imparted in circumstances importing an obligation of confidence?**

[79] The cumulative effect of the explicit wording of the Guidelines (however outdated), the explicit confidentiality statements and the marking of the pages as “confidential” in most of the actual bids, as well as the implicit belief of the bidders that the information would remain confidential are relevant factors in the assessment of the circumstances under which the information was imparted.

[80] Although the Guidelines in their current form are inadequate to the task at hand, in that they do not sufficiently express the application of the FOI Law in respect of tenders submitted to Government, and the mere marking of a page as “confidential” does not make it so, there can be no doubt that all parties acted under the understanding that the responsive records would not be revealed to others, except in relation to the successful bid as specified in the Guidelines.

- **Would disclosure of the responsive record constitute an unauthorized use, to the detriment of the bidders?**

[81] In contrast to recent court decisions relating to the application of the third part of the *Coco* test to individual privacy, the courts still require that detriment be shown in relation to commercial confidences.²⁷

[82] The Ministry, the Intervener, and the third parties have all expressed their views that disclosure of the responsive records would cause actual and/or future harm to Government and the bidders.

[83] However, it is not sufficient merely to make general statements about the likelihood of harmful results, without providing actual detailed arguments as to what, why, how and when such

²⁵ Ministry of Justice *Freedom of Information Guidance op cit* p. 6

²⁶ Information Tribunal *S v Information Commissioner and the General Registry Office* EA/2006/0030 9 May 2007 paras 37 and 42 <http://www.informationtribunal.gov.uk/DBFiles/Decision/i147/S.pdf>;

²⁷ Information Tribunal *The Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.* EA/2009/0036 13 January 2010 paras 40-41

detriment would follow. As the Irish Information Commissioner concluded in relation to pricing information in tenders:

while I accept the possibility that tender prices could be used to derive damaging information about a company's pricing strategy, I would expect any person objecting to price disclosure on this basis to explain exactly how this could occur.²⁸

[84] Quoting from these sources, the Ministry essentially contends that the harm caused would be of a commercial nature, namely that disclosure would provide "insight into a company's competitiveness and financial performance", and give away the company's "basis for arriving at quote prices", so that "commercial loss and damage will arise". Furthermore, disclosure would:

damage the business reputation to confidence that customers, suppliers or investors may have in the bidders; have a detrimental impact on the commercial revenue of the bidders; [and] weaken the position of the bidders in a competitive environment by revealing market-sensitive information or information of potential usefulness to competitors.

[85] One of the third parties objects to the responsive record being disclosed to its competitors, stating that "if the...information were revealed it would be of financial benefit to the Bank's competitors... the disclosure of such commercially sensitive information would probably result in the Bank's operations being prejudicially and adversely affected."

[86] Another third party states that:

the information is confidential and commercially sensitive and may impact our future bidding and/or benefit our competitors... [our] bids include sensitive pricing, technical and commercially sensitive information and intellectual property, which would be of interest and benefit to its competitors... the public disclosure of any tender information other than the bid pricing will affect our future willingness to participate in these processes.

[87] In turn, the Intervener explains that:

the Government often requires products and services which are innovative in their design and approach to a particular problem... [Government] frequently requests bidders to provide information on new technology or financial arrangement[s] which the bidders would have invested considerable time and effort in preparing...often time, those solutions have potential application in other jurisdictions and/or companies. Therefore, whilst a bidder may not be successful in winning a particular contract, one can appreciate that a bidder's future competitive advantage could be prejudiced if their potential solution to a problem was to be divulged to a potential competitor.

[88] In considering these various arguments it is clear to me that the information in the responsive records qualifies as having "the necessary quality of confidence about it"; that the tenders were communicated with an expectation of confidentiality, in circumstances importing an obligation of confidence. From the documents provided I can also see where disclosure would constitute an unauthorized use, to the detriment of the bidders.

²⁸ *Henry and the Office of Public Works No. 98188* [2001] IEIC 2 25 June 2001 para 35

[89] Consequently, I agree with the Ministry that the bidders have a reasonable expectation of confidence, and that the Ministry has a duty of confidence, in relation to the responsive records, and that an action in the courts would have a high likelihood of success.

The Public Interest Test in Respect of Section 17(b)(i)

[90] While section 26(1) of the FOI Law, which requires that access be granted if it is in the public interest does not apply to section 17(b)(i), the common law public interest test must still be applied, as discussed in paragraph [30] above. I agree with the Ministry's assertion that the common law public interest test differs from the public interest test under the FOI Law.

[91] Section 6(5) provides that "where the factors in favour of disclosure and those favouring nondisclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26". This slight bias in favour of disclosure is further enhanced by regulation 2 of the *Freedom of Information (General) Regulations 2008* (the "Regulations"), which lists a number of factors the mere presence of which, in conjunction with s.26(1), could be read as a further emphasis in favour of disclosure. However, the public interest defence to an action for breach of confidence under common law and equity is not so clearly defined in favour of disclosure.

[92] In the parliamentary discussion of the parallel exemption in the UK FOI Act, the Lord Chancellor, Lord Falconer, in comparing the public interest test under FOI with the common law public interest test, stated, "I am sure that lawyers could fine tune the differences between the two tests but they are in substance sufficiently close."²⁹ Nonetheless, while the public interest defence to an action for breach of confidence under common law and equity may not be clearly defined, there is no doubt that there is a strong public interest in maintaining confidentiality, when the duty arises, since "the duty of confidence...[is] not a matter of private but of public interest."³⁰

[93] This approach is corroborated by guidance from the UK's Information Commissioner on the application of the public interest test to the parallel exemption in the UK, as set out in paragraph [31] above:

It is important to note that this is not the public interest test required in the qualified exemptions of the FOIA; it is a consideration required by the development of the common law. There are no hard and fast rules, but the important thing to note is that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong. A duty of confidence should not be overridden lightly.³¹

[94] The Ministry's reliance on the *London Regional Transport* case is somewhat surprising since in it, the Court of Appeal did not agree with the trial judge's "exceptional case" standard for public interest in favour of disclosure, but rather found that

the guiding principle is to preserve legitimate commercial confidentiality while enabling the general public... to be informed of serious criticism, from a responsible source, of the

²⁹ United Kingdom *Hansard* HL (Series 5) Vol.618, col. 416 and Vol. 617 col 928; quoted in Information Tribunal *HEFCE v ICO* op cit para 25 <http://www.justice.gov.uk/downloads/guidance/freedom-and-rights/foi-exemption-s41.pdf>

³⁰ *W v Egdell* [1990] 1 All ER 835

³¹ Information Commissioner's Office (UK) *Freedom of Information Act. Awareness Guidance 2. Information provided in confidence* Version 4 12 September 2008 pp.3-4

value for money evaluation which is a crucial part of the [public private partnership]... that is a very important interest which... must go into the scales on proportionality.³²

[95] I take note of the applicable public interest factors in favour of disclosure presented by the Applicant above:

- The question of long term Government financing documented in the responsive records has been in the public spotlight;
- The question of Government financing raises important questions of Government accountability, value for money and due process;
- The process that is documented by the responsive records was completed in April 2011 when the Government awarded the contract to a local bank, and there is no further reason why this information should remain protected;
- Given that interest rates and conditions on the financial markets are constantly changing, the responsive record would not have a bearing on any future tender bids.

[96] I add the following factors in favour of disclosure:

- Disclosure would document the reasons for the decision to stop the tender process in question, and promote the accountability in relation to the decision taken by the Ministry;
- Disclosure would promote the accountability of Government in relation to the public funds expended in embarking on the tendering process without reaching the intended outcome of identifying a successful bid
- Disclosure would further confirm whether the public statements made in regard to the discontinuation of the tender were incomplete or misleading.

[97] The Ministry acknowledges a number of general public interest factors in favour of disclosure, but also raised a number of factors in favour of withholding the responsive records, and believes the latter weigh heavier than the former. The factors against disclosure have been discussed above, and include:

- The significant public interest in preserving confidences;
- The public interest in ensuring that commercial interests are preserved;
- Following similar circumstances in the Irish *Henry* case, the consideration that the bidding process was stopped and did not lead to the selection of a successful bidder, and therefore did not result in the expenditure of public monies, thereby removing the public interest in financial accountability from the equation;
- The consideration that the disclosure of product and pricing information of unsuccessful bidders would not enhance the public interest in openness and accountability;

³² *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, as quoted in *Information Tribunal Derry City Council v Information Commissioner* EA/2006/0014 11 December 2006 para 35(d)

- The public interest in ensuring that the disclosure would not add to the costs involved in making the offer for unsuccessful bidders, again following the Irish Commissioner in Henry;³³

[98] Having considered all these factors, I have reached the conclusion that the public interest does not require that the bids be disclosed.

[99] I believe that the value of the Applicant's arguments relating to Government accountability and value for money are diminished by the fact that the bidding process was stopped without the identification of a successful bidder. In this regard, if there is any question about the appropriateness of this approach by Government, it is not likely that disclosure of the responsive records will shed any light on this question or increase Government's accountability in this regard (although the ESTAR report, which was not a formal part of the request might). As such, the financial impact on Government of these records and actions is very minor, and does not outweigh the important public interest in maintaining the confidentiality of the commercial information provided by the bidders under a clear and reasonable assumption of confidence.

[100] I wish to make it clear that the great interest shown by the press, the community at large and, indeed, the Auditor General, in relation to the tendering process for Government financing would be a compelling argument in favour of disclosure, were it not that the first tender – i.e. the one under consideration in this Hearing - is quite marginal to the issues of accountability and due process at hand. It should be noted that these events occurred several months after the tender under consideration here was halted and a new tender offering was made. Under these circumstances I do not believe that the public interest in disclosure should override the public interest in withholding the bid documents in this case.

[101] **Having balanced the public interest arguments in favour and against disclosure under section 17(b)(i) I find that the disclosure of the responsive records would constitute an actionable breach of confidence.**

[102] **As I have already found that the exemption in section 17(b)(i) applies to the responsive records, there is no need for me to consider the application of sections 20(1)(d), 21(1)(a)(ii) and 21(1)(b) as set out in *Issues Under Review* above.**

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

Findings:

The responsive records in relation to “*Tender No. CTC MFT&D TSY 10-11 060, the list of all companies that bid, the date their bid was received, the respective bid offers and the final recommendations from the Central Tender Committee*” which have not yet been disclosed to the Applicant, are exempt under section 17(b)(i) of the FOI Law.

³³ *Henry and the Office of Public Works No. 98188* [2001] IEIC 2 25 June 2001 para 56

Decision:

I uphold the decision of the Ministry of Finance, Tourism and Development to withhold access to the remaining responsive records in relation to “*Tender No. CTC MFT&D TSY 10-11 060, the list of all companies that bid, the date their bid was received, the respective bid offers and the final recommendations from the Central Tender Committee*” which have not yet been disclosed, under section 17(b)(i) of the *Freedom of Information Law 2007*. I do not require any further action to be taken by the Ministry of Finance, Tourism and Development in response to this request.

As per section 47 of the *Freedom of Information Law, 2007*, the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.



Jennifer P Dilbert
Information Commissioner

2 September 2011