



ICO Hearing 29 - 02312
Decision

Ministry of Tourism and Development
(Department of Tourism)

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands

11 April 2013

Summary:

An Applicant was refused full access to documents relating to expenditure on entertainment for Department of Tourism events.

The Information Commissioner overturned the decision of the Chief Officer of the Ministry of Tourism and Development to withhold parts of the responsive records under section 21(1)(b) of *The Freedom of Information Law, 2007* and required that the records be disclosed in full.

Statutes¹ Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
National Archive and Public Records Law, 2010 Revision

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¹ In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

A. INTRODUCTION

- [1] On 8 August 2012 the Applicant made a Freedom of Information (FOI) request to the Department of Tourism for:
- *A list of all events hosted or sponsored by the Department of Tourism from 1 July, 2011, to 8 August, 2012 (or most recent available data). Please include the dates and locations of those events.*
 - *Expenditures associated with those events, broken out by event, and categorised according to purpose and payee.*
 - *A list of all bands, musicians, entertainers or performers hired or paid by the Department to perform at events from 1 July, 2011 to 8 August, 2012 (or most recent available data). Please include the dates and locations of those events.*
 - *Compensation amounts for those bands, musicians, entertainers or performers, per event or contract.*
 - *If not included in the compensation amounts, the amounts and purposes of expenditures by the Department related to those bands, musicians, entertainers or performers. (For example, costs for lodging, travel, meals, entertainment, equipment rentals, subsistence, etc.)*
- [2] On 20 August 2012 the Information Manager (IM) agreed with the Applicant that due to the number of small events and sponsorships with which the Department of Tourism is involved, the response to the FOI request should be narrowed to include only *“functions, sponsored events, conferences etc. - ... any event costing CI\$10K or above to be detailed individually; anything below CI\$10K to be provided as a lump sum”* [DOT’s emphasis].
- [3] On 3 October 2012 the Department of Tourism provided the Applicant with a number of spreadsheets which partially disclosed some information responsive to the request, including detailed costs for some events and services, but withheld information on the specific compensation amounts for performers, under section 21(1)(b), claiming prejudice to commercial interests.
- [4] The Applicant requested an internal review on 4 October, which was completed by the Chief Officer of the then Ministry of Finance, Tourism and Development on 9 November, and which upheld the decision of the IM. The Applicant also requested an internal review to ensure that a lump sum total be provided for all events costing individually under \$10,000.
- [5] The Applicant appealed the decision to redact parts of the records to the Information Commissioner, and the appeal was accepted on 21 November. During the ICO’s pre-hearing investigation, a chart was released providing the lump sum total referred to above. As the other matters could not be resolved in the ICO’s pre-hearing investigation, it was moved to a formal hearing before the Commissioner.
- [6] The records in dispute, and the exemptions claimed, are as follows:
- Document 1** – Caribbean Tourism Organization (CTO) Expenditure Spreadsheet, undated, (redacted). Exemption claimed 21(1)(b).
- Document 2** – Other Costs for events hosted/organized by DOT (redacted). Exemption claimed 21(1)(b).

Document 3 – Sunny Jim Concert Event Budget (redacted)
Exemption claimed 21(1)(b).

- [7] The redactions to the responsive records all relate to fees paid to performers for particular events, and the submissions of both parties refer to the redaction of this information as a whole. In my deliberations I look at each record separately.

B. BACKGROUND²

- [8] The Department of Tourism has responsibility for short and medium term strategic planning and general destination management for the Cayman Islands tourism industry. It implements projects, events and programmes on behalf of the tourism sector, some of which are funded by the Department's budget, and some sponsored in varying amounts. At all times, the Department seeks to advance the heritage, culture and values of the Cayman Islands and promote the advancement of sustainable tourism policies for the benefit of future generations.
- [9] The Department of Tourism's budget for promotional activities for July 2011 – June 2012 was \$6 million.

C. PROCEDURAL MATTERS

- [10] There was a delay in the initial response to the Applicant, with 61 days elapsing between the request and an initial decision, although this is somewhat mitigated by the fact that the IM was in touch with the Applicant to reduce the scope of the request. The internal review then took 36 days. Further delays occurred during the appeal due to the Department of Tourism's tardiness in providing the ICO with source documents from which the records provided to the Applicant were created, and further investigation by the ICO.
- [11] While the IM was attempting to be helpful in creating records responsive to this request, it must be noted that applicants are entitled to gain access to existing records that are responsive to their request. If an applicant agrees to accept a summary or a created record, the public authority is responsible for the accuracy of these created records.
- [12] In this case, very limited, specially-created records were provided to the Applicant, some with redactions. The Applicant has appealed these redactions, which form the basis of this Hearing. However, I must point out that the records provided seem inadequate as a response to the request. While it was agreed that the scope of the request would be narrowed to reflect details of expenditures over \$10,000 with smaller expenditures lumped together, the spreadsheets provided are very limited and it is hard to interpret the information provided. Some of it is undated, expenditures for some events over \$10,000 have full breakdowns and others do not, and some have minute details, while others are much more general. The Department also stated in their submission that some items contained in one of the records were incorrectly categorized and did not relate to expenditures for that event.
- [13] More concerning is that some spreadsheets do not accurately reflect the information in the

² Background information provided by the Ministry of Tourism and Development (Department of Tourism)

source records which my Office requested to verify the spreadsheets. While I have examined only a few records, I found an expenditure of \$75,000 on a sponsorship within the timeframe of the request, which is not accurately reflected on the spreadsheet.

- [14] The Department of Tourism has a budget of \$6 million for promotional activities, and Government has a sophisticated financial system that takes millions of dollars and a score of financial experts to operate. Information relating to major expenditures such as those undertaken by the Tourism Department should be easy to identify, categorize as necessary and provide not only to an FOI applicant, but to the public in general through proactive publication.
- [15] As I have had to do in previous Decisions, I again point to Section 52(1) of the FOI Law which requires that *“every public authority shall maintain its records in a manner which facilitates access to information under this law and in accordance with the [Deputy Governor’s] code of practice³*
- [16] In addition, section 6 of the National Archive and Public Records Law, 2010 Revision provides:

6. (1) Every public agency shall make and maintain full and accurate public records of its business and affairs, and such public records shall be managed and maintained in accordance with this Law.

- [17] In the course of this Hearing, in both its initial submission and its reply submission, the Department of Tourism makes significant references and arguments to support its position that “performance fees and related information are considered personal information under the FOI Law”. However, the application of section 23 was not applied prior to Hearing, and not directly argued in it. I mention these arguments below, and the rebuttal of these by the Applicant, only to provide some clarification. The Law clearly places the burden of proof on the side of the public authority in demonstrating that it has applied the Law correctly. It is not sufficient for a public authority to mention an exemption in general. It must fully claim and argue the exemption for me to consider its application.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [18] The issue to be decided in this Hearing is:

Section 21(1)(b) – Is the information redacted from the responsive records exempt from disclosure because it contains information concerning the commercial interest of any person or organization and the disclosure of that information would prejudice those interests?

³ Chief Secretary’s Code of Practice on Publishing, www.infocomm.ky/document-library

E. CONSIDERATION OF ISSUES UNDER REVIEW

[19] Section 21(1)

This section provides:

21. (1) *Subject to subsection (2), a record is exempt from disclosure if-*
- (a) *its disclosure would reveal-*
 - (i) *trade secrets;*
 - (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;*
 - (b) *it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organization (including a public authority) and the disclosure of that information would prejudice those interests.*

The Position of the Department of Tourism

[20] The Department of Tourism (DOT) submits that it “consistently endeavours to maintain an open relationship with the public and various media houses, by responding to requests outside of FOI and providing information as needed”.

[21] With respect to the redaction of information relating to fees paid to entertainment providers, the DOT maintains that they aggressively negotiate to secure a favourable rate. In addition, when hosting an event, DOT may provide ancillary support and assistance at the event, which has to be taken into account by the entertainment provider when determining the fee to be paid. As well, DOT encourages all performers to charge reduced fees, which can be seen as “the performers’ willingness to act in the national interest for the greater good of Tourism”.

[22] DOT argues that:

public disclosure of the remuneration paid by CIDOT to individual performers could potentially prejudice and negatively impact their future earnings by creating the expectation that any reduction in rate that CIDOT may have secured as a result of a variety of mitigating factors, is a standard performance fee, thus holding the performer to an unrealistic expectation from potential future bookings.

[23] DOT compares the performance fees to other negotiated transactions such as publications, where they are able to negotiate deeply discounted rates because of their “annual purchasing power”. They maintain that these transactions also contain competitively sensitive information which would not ordinarily be divulged.

[24] In addition, non-disclosure of rates is referred to in section 4(c) of the CIDOT Sponsorship Agreement:

c. At all times while this agreement is in force and after its expiration or termination, CIDOT agrees to refrain from using the Sponsor Partner's customer and vendor lists or other confidential material for its own competitive use or disclosing the same to anyone and CIDOT agrees to take reasonable security measures to prevent accidental disclosure and industrial espionage.

- [25] DOT references one of its previous decisions with respect to a similar FOI request where the Department withheld fees paid to entertainers. DOT maintains that it was decided that in that case specific information relating to fees paid to artists was commercially sensitive, and its disclosure could potentially jeopardize any future contractual negotiations with the entertainers. DOT believes that the decision in this current matter is consistent with the decision taken previously.
- [26] In its submissions, DOT argues that remuneration paid to performers can be viewed as the individual's salary for the service provided, and that performance fees and related information are considered personal information under the FOI Law. It goes on to argue that this personal information is unreasonable, and not in the public interest to disclose. These arguments are discussed in paragraphs 57 & 58 below.
- [27] A reply submission was made which in large part sought to refute the Applicant's interpretation of some of the figures provided. Further explanation was also given on the breakdown and categorizing of the information provided in the spreadsheets. DOT also provides further reasons for disclosing some information in detail, such as advertising, catering, air-fare and accommodation costs, asserting that these expenses were based on standard pricing, which is not commercially sensitive.

The Position of the Applicant

- [28] 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.
- [29] The Applicant submits that performers' fees do not qualify as commercially sensitive information, and in any event, even if they did, they should be disclosed in the public interest.
- [30] Neither does the Applicant agree that performers' fees are any more commercially sensitive than the other types of fees and charges routinely disclosed by Government, including other information disclosed in the response to this request. The Applicant maintains that "fees the government pays for services or goods are fundamental components of public records", and believes that even if the performers' fees are found to be commercially sensitive information, it is clearly in the public interest to disclose this information for reasons of accountability.
- [31] Guidelines produced by the FOI Implementation Planning Committee in October 2008 are cited by the Applicant, in which price paid for services rendered is not listed as a type of disclosure that might prejudice commercial interests. Additionally, the Guidelines state that "prejudice" is not defined, but there would need to be "more than a small or trifling negative effect and require a real negative impact on any person or organization" for this exemption to be engaged.
- [32] The Applicant states that:

It is difficult to see how the Department disclosing specific fees for performers could have a real negative impact on the performers' future contractual negotiations – unless the fees paid were far below or far above what is perceived to be a fair rate. Then, disclosure of those government expenses is clearly in the public interest.

[33] In their reply submission, the Applicant objects to DOT's "attempt to stretch the definition of 'salary' to cover fees paid to contractors". They point out that "prior its initial submission for this hearing, the DOT had not attempted to cite a 'personal information' exemption to explain why it is not disclosing performance fees paid to musicians".

[34] The Applicant also refutes the decision to withhold information based on confidentiality clauses within DOT's Sponsorship Agreement, and states:

It is well established that government departments cannot sign away their responsibility to adhere to the FOI Law by way of nondisclosure agreements in contracts. In a September 2011 decision (ICO Hearing 15 – 00611), the Commissioner wrote: "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"... A contractual obligation not to disclose certain information will not automatically render that information exempted under the Freedom of Information Law."

[35] The various arguments put forward by the DOT to support withholding information on performance fees are all addressed by the Applicant, including the following:

- *If performers accepted lower than normal rates for reasons such as DOT-provided ancillary support and assistance this requires greater - not less – disclosure of information to the public. Unless the information is made public, it is impossible to know if DOT ... were more generous to some performers than others.*
- *It is unconvincing and irrelevant for DOT to claim that people won't be able to understand that a performer may have agreed to a discounted rate with government for love of country or other various reasons.*
- *The DOT likens discounted fees paid to performers to discounted fees paid to publications. Please note that the DOT has in fact disclosed fees paid to publications.*
- *The DOT's reference to its 2009 decision regarding Alicia Keys is not relevant to this hearing, other than to demonstrate the DOT's previous improper application of the commercially sensitive exemption.*
- *The DOT's reference to the Commissioner's 2009 decision is also not relevant because I am not requesting individual salaries.*

[36] The Applicant also notes that the DOT did not provide "information which explains the sponsorship evaluation process for amounts of less than CI \$10,000 and exceeding \$10,000" and questions the usefulness of the information proactively provided on the Department's website.

Discussion

[37] The exemption in section 21(1)(b) is intended to protect information (other than trade secrets and commercial information, which is dealt with in section 21(1)(a)) which, if disclosed, would prejudice commercial interests. The exemption requires that a harms test be applied, and the threshold is high ("would prejudice"). Public authorities using this exemption to withhold records must therefore present objective and reasonable evidence of the certainty of harm.

[38] On the other hand, the Law must assure that an appropriate degree of transparency exists when Government, on behalf of the public, pays money to private parties, and this exemption is therefore also subject to a public interest test.

Document 1 - CTO Expenditure Spreadsheet (undated)

[39] This document provides details on airfares for Swanky Band (total) and named individuals, hotel accommodation costs for named individuals (some with dates of stay), details of cost of merchandise/giveaways, event catering, Swanky equipment rentals and transportation and other miscellaneous costs. This information has all been disclosed. Redacted from the document are the amounts for per diem for named individuals, Swanky Band (total) and Swanky Band Performance Fees.

[40] I can find no rationale for the redaction of the per diem amounts. The exemption being relied on relates to commercial interests, and I do not consider that a per diem paid to individuals qualifies as commercial interests. The amount that Government pays as a per diem to individuals for a publicly funded event should be based on a set policy and a matter of public knowledge.

[41] This leaves the last redacted line, which is Swanky Band Performance Fees. I reject the argument of DOT that their ability to negotiate future contracts for entertainers would be adversely affected by disclosing this fee. I do not see how disclosing a fair or discounted fee, which this amount is claimed to be, would constitute a commercial interest of DOT which would be prejudiced by disclosure.

[42] It also has not been demonstrated to me that the commercial interests of the band in question would be caused any harm by the disclosure of these fees. In fact, I would expect that a performer would benefit from the public knowing that they performed at a reduced rate to promote the Cayman Islands. The DOT has not submitted any statement from the band to substantiate their claim of prejudice to the commercial interests of the band.

[43] As the information redacted does not pertain to a Sponsorship Agreement, the quoted section of this document is not relevant.

[44] DOT refers to their previous response to an FOI request where fees paid to an entertainer were withheld. This decision was not appealed to me, and I agree with the Applicant that the previous decision of the public authority may have been incorrect and is not relevant to this case.

[45] The argument that remuneration paid to performers can be viewed as salary for the service provided is addressed in paragraphs 57 & 58 below, and I also reject this argument.

[46] **I therefore find that section 21(1)(b) does not apply to the information redacted from Document 1 and this information should be disclosed.**

Document 2 – Other costs for events hosted/organized by DOT

[47] This record is a spreadsheet setting out a breakdown of ten events hosted or organized by DOT between 9 November 2011 and 1 May 2012, giving date, venue, food and beverage costs, entertainment, audio visual equipment and other costs. All costs are disclosed except for five of the six figures given for entertainment, which have been redacted. The Sunny Jim Weekend entertainment costs are given as a total, covering the 5 different performers at this event.

[48] While the event is named, as well as the date and venue, the actual names of performers have not been given. While it would be possible for a person to recall or to research who the performers were at these events, which took place over a year ago, it is difficult to see how harm could be done to the commercial interests of either the performers or the DOT in disclosing this information.

[49] For reasons stated in my consideration of Document 1 above, I do not see, and it has not been demonstrated to me, how these figures could be construed to contain information concerning the commercial interests of either the unnamed performer or the DOT and that disclosure would prejudice those interests.

[50] **I therefore find that section 21(1)(b) does not apply to the information redacted from Document 2 and this information should be disclosed.**

Document 3 – Sunny Jim Concert Event Budget

[51] This record is a spreadsheet detailing the costs for this event, and all costs have been disclosed except individual fees for the five performers. Information disclosed include costs for work permits, tickets, car rental, accommodation, sound equipment, banners, and newspaper advertisements.

[52] While DOT maintains that other negotiated costs are competitively sensitive information which would not ordinarily be divulged, they have in this case provided details of all costs other than fees for individual performers. In addition, other records provided to the Applicant in full contain more details of costs such as catering, transport, and décor which are not deemed by DOT to concern commercial interests. The only information redacted pertains to performers.

[53] For reasons stated above, I am not convinced that the redacted information in Document 3 concerns the commercial interest of any person or organization which if disclosed would prejudice these interests.

[54] **I therefore find that section 21(1)(b) does not apply to the information redacted from Document 3 and this information should be disclosed.**

Public Interest Test

[55] While both the Applicant and the Public Authority have referred to whether disclosure of the redacted information would be in the public interest, it is not necessary for me to apply the public interest test, as I have found that the exemption does not apply to the records.

[56] For avoidance of doubt, I believe that the public interest arguments in favour of disclosure are very strong as the redacted information pertains to government expenditure and DOT's accountability in respect of compensating performing artists fairly and equitably.

Other exemptions claimed

[57] In their submission, the Department of Tourism makes reference to personal information, but they do not actually claim the exemption in section 23. There was no reference to this

exemption in the submissions, Notice of Hearing or the Fact Report for this Hearing, the last two of which were agreed by both parties.

[58] Nonetheless, for clarity, I take the opportunity to respond to DOT's claim that performers' fees can be considered the salary of a performer, and qualify as the personal information of the performer, which it would be unreasonable, and not in the public interest, to disclose.

[59] In this case, I reject this argument as personal information is defined as information about an individual whose identity is apparent. In addition, even if the information relates to an individual performer rather than a band, the exemption in section 23 would not apply in this case, as the individual would have been providing services to a public authority. Such information clearly falls outside the definition of personal information in regulation 2, which excludes:

(ii) where the individual is or was providing a service for a public authority under a contract for services, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service;

[60] The Applicant rightly objects to the personal information exemption being raised for the first time at the submission stage of this Hearing. They also argue that multiple people are involved in a performance (technical support, agents etc.), even if there happens to be only one performer on stage. A performance fee is then split up amongst all the persons involved in a band or performance, and cannot be considered the salary of any one individual.

Provision of records in response to the request

[61] As noted above, I am not satisfied that adequate records were provided to the Applicant in response to the request, and I am concerned as to the accuracy of those records provided.

[62] It is often the case that requests are answered by a public authority in the form of a simple spreadsheet or summary of information derived from more complex source records. In most cases this approach is convenient for both the applicant and the public authority. However, there is no obligation on the part of the public authority to create any new records in response to an FOI request, particularly if the provision of source records is possible or preferable. The FOI Law explicitly and purposefully grants a right to access records, which mean that applicants have the right to request that any existing source records be disclosed, even if they are at first instance provided with a computed spreadsheet or summary.

[63] In the present case, although the Applicant has not had sight of the source documents, they would be aware that they exist, in order for a spreadsheet to be created. However, they have not questioned the extent of records provided or requested further records. Therefore, I believe it is reasonable to assume that the Applicant will be satisfied with the records under consideration here.

F. FINDINGS AND DECISION

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

Findings:

I find that the responsive records provided are not exempt from disclosure under section 21(1)(b) of the *Freedom of Information Law, 2007*.

Decision:

Under section 43(3)(a) of the *Freedom of Information Law, 2007* I overturn the decision of the Ministry of Tourism and Development to withhold information from the responsive records in this Hearing and require the Ministry of Tourism and Development to disclose the records in full.

A copy of the cover letter, together with the records supplied to the Applicant, should be forwarded to the ICO.

I require the Department of Tourism to liaise with the ICO with respect to the accuracy of the spreadsheets.

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

11 April 2013