Hearing 77-201900138

**Decision**

Ministry of Finance and Economic Development

Sandy Hermiston
Ombudsman

27 May 2020

**Summary**:

On the 6th of August 2019 an applicant made a request under the Freedom of Information Law (2018 Revision) (FOI Law) to the Ministry of Finance and Economic Development (the Ministry) for information on revenue concessions granted to Davenport, a real estate developer, from 2000 to 2019.

The Ministry granted access to a table containing information on concessions granted from 2014 to 2019 to all developers, with their names and any identifiers redacted. The Ministry argued that the disclosure of the redacted information would inhibit the free and frank exchange of views for the deliberations of the Cabinet on future revenue concessions, and would prejudice the conduct of public affairs.

The Ombudsman reviewed the dispute and concluded that neither exemption applied to the redacted information, and ordered its disclosure.

**Statutes[1] 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.

**Contents:**



## A. INTRODUCTION

[1] On the 6th of August 2019 the applicant made a request to the Ministry under the FOI Law for duty concessions awarded to Davenport Development (the Company) between 2000 to 2019. The request was for the amount of, and the reasons for, any concessions awarded to the Company, as well as for the description of the imported items, and whether the concessions had expired or continued. It was logged as FOI # 87399

[2] This followed a previous request made to the Ministry by the same Applicant (FOI # 85944) for identical information relating to all developers, which the Ministry granted in part by redacting a table that listed concessions from 2014 to 2019, relating to a number of different companies. The Ministry redacted information which they claimed contained personal information under section 23(1), and which identified the actual developers.

[3] On 23 August the Ministry granted partial access to the same table again, which included information about the Company as well as a number of other entities. Certain parts were redacted on the basis of sections 23(1) (personal information), 20(1)(b) (free and frank deliberations) and 20(1)(d) (effective conduct of public affairs).

[4] The responsive record is a table that contains certain details on concessions granted to a number of different developers. In redacted form the table does not specify which entries relate to the Company. For each concession, the table includes the approval date, type/value and the duration of the concessions granted between 2014 and 2019. However, the names and postal addresses of developers (including the Company's) were redacted.

[5] Since the exemptions in sections 20(1)(b) and (d) were claimed by the Minister, in accordance with section 33(3) there was no internal review, and the applicant made an appeal directly to the Office of the Ombudsman.

[6] In the course of our attempt at informal resolution, the Ministry dropped its reliance on section 23(1) (personal information), which was again confirmed in the course of this hearing.

## B. CONSIDERATION OF ISSUES

### a. Whether the requested records are exempt because their disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, pursuant to section 20(1)(b). If so, whether disclosure would nevertheless be required in the public interest, under section section 26(1).

[7] Section 20(1)(b) states:

> *20. (1) A record is exempt from disclosure if —*
>
> *…*
>
> *(b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;*

[8] The Ministry explained that the Cabinet has discretion to grant revenue concessions under section 52 of the Customs and Border Control Law, 2018, and under section 53(2) of the Development and Planning Law (2017 Revision). Section 52 of the Customs and Border Control Law, 2018 is entitled "Cabinet may waive or order refund" and states,

> *52. The Cabinet may, in any particular case, waive or order refund of any duty, package tax or part of any duty or package tax which would otherwise be payable or would not be liable to refund under this Law, subject to such conditions as the Cabinet may think fit to impose.*

Section 53(2) of the Development and Planning Law (2017 Revision) is entitled "Application" and states:

> *(2) The Cabinet may, in any particular case, waive or order the refund of any fee prescribed in Schedule 1 to the Development and Planning Regulations (2017 Revision); but nothing in this subsection shall be construed so as to allow the Cabinet to waive or order the refund of any other fee prescribed by this Law or any regulations made under this Law.*

Schedule 1 of the Development and Planning Regulations lists details of application fees for planning permissions.

[9] In addition, the Ministry asserted that the Cabinet may approve revenue concessions wherever legislation does not specifically prohibit Cabinet from doing so, although the legal basis of this assertion was not explained.

[10] The Ministry stated that one of the reasons for granting revenue concessions is to stimulate certain types of economic activity. In this context the Ministry asserts the Cabinet's

prerogative "to set policies and priorities" for the social and economic development of the Islands, explaining that,

> *The Government is committed to ensuring that revenue concessions are managed in a manner that respects sound stewardship and the highest level of integrity, transparency, and accountability. Moreover, the Government is resolved to ensuring that revenue concessions are designed, administered and managed in a manner that is fair, accessible and effective for all involved – Government entities, applicants (individuals and business entities) and the people of the Cayman Islands.*

[11] The Ministry stated that it is,

> *concerned that the disclosure of revenue concessions awarded to Davenport Development, or any other developer or business entity, may result in public scrutiny, discord, pressure and criticism of Cabinet which will prejudice the effective conduct of public affairs and inhibit the free and frank exchange of views for the purpose of deliberation;*

[12] The Ministry provided a policy with criteria to be used by the Cabinet to decide whether a revenue concession is granted. These included the relevance of the project to government's strategy, issues relating to transparency and conflicts of interest, the feasibility of the project, and the impact on the government's fiscal strategy. It was later clarified that this policy is still under development, which the Ministry said will be published as soon as it has been approved by the Cabinet.

[13] According to the Ministry, a deferment of payment granted in 2006 by the Premier to the developer of the Ritz hotel resulted in a substantial debt owed to government. The ensuing media comments raised accusations of fraud, mismanagement and corruption. The Ministry concluded that,

> *Due to the likelihood that Cabinet will be criticised and accused of fraud, mismanagement and corruption, if the names of developers are disclosed, future deliberations by Cabinet are likely to be inhibited and opportunities for the Government to stimulate the economy and generate employment may be lost.*

[14] In an earlier decision relating to the free and frank exchange of views, the previous Information Commissioner found that,

> *for a record to have any prospect of protection under this exemption it is a prerequisite that the record must actually document a free and frank deliberation in the first place. I can think of no circumstances where free and frank deliberation would be inhibited by the release of any other record, or partial record, than the*

*account of an actual free and frank deliberation itself. This is not to say that other exemptions may not apply.*[2]

[15] The UK Information Commissioner shared this approach, stating that the similarly worded exemption in the UK's Freedom of Information Act, 2000 (FOIA),[3]

> *… is based on the premise that disclosure of free and frank discussions... would be likely to inhibit future deliberations... The Commissioner does not dispute the logic of this argument. However, in order for this argument to be reasonable the information that is being withheld has to contain free and frank comments.*[4]

[16] However, the UK Commissioner also recognized that this exemption is

> *about the processes that may be inhibited, rather than what is in the information... In order to engage the exemption, the information requested does not necessarily have to contain views... that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the... exchange of views.*[5]

[17] The responsive record shows the concessions granted to different developers, but it does not contain any kind of statements, least of all details of deliberations of any kind. Rather, it is a record of the decision made after having a free and frank discussion. In this sense, the redacted information is of a "neutral" or general nature, and consists of information that could identify the developers that received government revenue concessions. However, it does not contain any information on Cabinet deliberations, positions taken by different member of the Cabinet, or the like.

[18] For the exemption to apply, the disclosure "would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation". In **McIntyre** the UK Information Tribunal clarified, in relation to similar wording in the UK's Freedom of Information Act, 2000 (FOIA) that,

> *The words "would prejudice" have been interpreted by the Tribunal to mean that it is "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*

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[2] Information Commissioner *ICO Hearing 9-02210 Decision Cayman Islands National Insurance Company (CINICO),* 24 March 2011 para 42
[3] Section 36(2)(b)(ii) of the FOIA
[4] Information Commissioner's Office (UK) *Arts Council England Decision FS50191595* 23 November 2009 para 85
[5] Information Commissioner's Office (UK) *Prejudice to the effective conduct of public affairs (section 36). Freedom of Information Act Version 3* 19 May 2015 para 45

*mean that there is a "real and significant risk of prejudice" to the interest in the exemption.*[6]

[19] The meaning of "likely" has been considered on a number of occasions, including by Munby J in **R (on the application of Lord) v Secretary of State for the Home Office**:

> *In my judgment "likely" … connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there "may very well" be prejudice to those interests, even if the risk falls short of being more probable than not.*[7]

This interpretation has been consistently relied on by the UK Information Commissioner and the UK Information Tribunal under the FOIA, and forms part of the guidance issued by the former.[8]

[20] **The redacted information does not contain any statements or accounts of Cabinet's deliberations or views held by different members of the Cabinet. I do not consider it more likely than not that the free and frank exchange of views would be inhibited by the disclosure of the exempted information, nor do I believe there is a real and significant risk of such deliberations being inhibited by the disclosure of the responsive record. For these reasons I find that the exemption in section 20(1)(b) does not apply to the requested records.**

[21] Since I have found that the exemption in section 20(1)(b) does not apply, I am not required to consider whether it would be in the public interest nevertheless to disclose the requested records under section 26.

**b. Whether the requested records are exempted because their disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs. If so, whether the disclosure would nevertheless be required in the public interest, pursuant to section 26(1).**

[22] The Ministry claimed that future deliberations of the Cabinet on revenue concessions would be harmed if the redacted information in the responsive records - i.e. the names of the

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[6] Information Tribunal (UK) *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068 para 40

[7] *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), paras 96-100

[8] See for instance, *Connor v Information Commissioner* EA/2005/0005 para 15; see also: Information Commissioner's Office (UK) *The prejudice test. Freedom of Information Act.* Version 1.1 5 March 2013 paras 30-32

developers who received a revenue concession - was disclosed. They argued that even if the Cabinet correctly applied the established criteria in selecting developers to support,

> *Cabinet may be inhibited to award revenue concessions due to the likelihood that the public may criticize and accuse it of fraud, mismanagement and corruption – especially if there is a perceived conflict of interest between developers and Members of the Cabinet*.

[23] The Ministry pointed to the criticisms aired in the media in 2006 against the decision of the, then, Premier to "approve the deferral of payment of import duties in order for [his] real estate company to receive commissions on the sale of the Ritz condos", as described above.

[24] The Ministry stated that the public's perception of conflicts of interest between the developers and Members of the Cabinet would result in criticisms and accusations which in turn "may result in the Government losing opportunities to stimulate the economy and generate employment", and may lead to "discord and scrutiny amongst the public and developers if the value of each revenue concession can be linked to a particular developer".

[25] The Ministry asserted that government should be permitted to withhold information that might provoke scrutiny or criticism from the public because it would, or would be likely to harm the Cabinet's decision making process in regard to revenue concessions.

[26] The Ministry considered it "very likely" that the future Cabinet deliberations on concessions would be prejudiced if the redacted information were disclosed.

[27] The exemption in section 20(1)(d) is a prejudice-based exemption. This means it applies only where prejudice "would or would be likely" to result from the disclosure of the redacted records. There has to be a causal link between the potential disclosure and the prejudice that is claimed to follow. In the words of the UK Information Commissioner, there must be:

> *… more than a mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption*.

[28] Openness and transparency form an inextricable part of our democratic form of government, and are a prerequisite for public scrutiny and open, informed debate on matters of public interest. Expenditure of public funds certainly falls within the broad area of government activities that should be subject to scrutiny. Such scrutiny should be welcomed as it helps build trust between government and the public, and creates space for public debate and participation in decision making.

[29] The importance of accountability and transparency is recognized in the FOI Law, section 4 of which describes the intent of the Law as follows:

> *The objects of this Law are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely —*
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> *(a) governmental accountability;*
>
> *(b) transparency; and*
>
> *(c) public participation in national decision-making,*
>
> *by granting to the public a general right of access to records held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information.*

[30] **I do not find the Ministry's arguments convincing. The argued causal link between the disclosure of the names of developers who are recipients of government concessions, and the harm purportedly done to the decision making process of the Cabinet in regard to revenue concessions does not meet the required standard of likelihood. I do not consider it more likely than not that the Cabinet's ability to conduct public affairs would be inhibited by the disclosure of the exempted information, nor do I believe there is a real and significant risk of any public affairs being inhibited by the disclosure of the responsive record. For these reasons I find that the exemption in section 20(1)(d) does not apply to the requested records.**

[31] Since I have found that the exemption in section 20(1)(d) does not apply, I am not required to consider whether it would be in the public interest nevertheless to disclose the requested records under section 26.

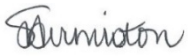
[32] The responsive record is a table that contains certain details on concessions granted to a number of different developers between 2014 - 2019. The Ministry confirmed that they had undertaken a search, but had not located any records that predate the information in this table. In redacted form the table does not specify which entries relate to the Company, as the names and other identifiers for all developers have been removed. Given that the request was for information relating to the revenue concessions received by one particular developer (the Company), and not by other developers, the Ministry would be correct to redact any information that does not relate to the Company.

## C. FINDINGS AND DECISION

[33] Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I make the following findings and decisions:

a) The exemption in section 20(1)(b) does not apply to the requested records.
b) The exemption in section 20(1)(d) does not apply to the requested records.

Therefore, the responsive record is not exempted and must be disclosed within 30 calendar days.



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Ombudsman