OMBUDSMAN
CAYMAN ISLANDS

Hearing 100-202200303
Decision

Department of Tourism

Sharon Roulstone
Ombudsman

14 September 2023

Summary

An applicant made a request under the Freedom of Information Act (2021 Revision) (FOIA) to the Department of Tourism [DOT] for records related to sponsorship and partnership agreements, and public relations campaigns as well as the related business cases and costs from 2020 – 2022.

Over a period of several months, the DOT granted access to a number of records, some of which were partially redacted, but it withheld the business cases, and disclosed the sponsorship/partnership agreements in redacted form, relying on the exemptions relating to commercial values and interests in section 21 of the FOIA.

In this hearing decision, the Ombudsman reached the following findings and conclusions:

- The withheld records do not contain trade secrets.
- The disclosure of the business cases and agreements would not prejudice any commercial value or commercial interests.
- The names, positions and official contact information relating to DOT employees are not personal information, and it is reasonable to disclose these.
- The contact details and signatures of the private entities that received a sponsorship or engaged in a partnership with the DOT are personal information, and it is not reasonable to disclose it. The public interest in disclosure does not override the public interest in withholding the personal information.
- Therefore, the business cases and agreements are required to be disclosed in full, except for the above-mentioned personal information.

The Ombudsman also considered the following procedural issues:

- The Chief Officer (or designate) did not conduct an internal review as required.
- The DOT caused significant delays in disclosing records over a period of a full year.

- The DOT was wrong in claiming that a request for any penalties indicated in the agreements already requested should be treated as a new FOI application.

Statutes[1] considered

Freedom of Information Act (2021 Revision) (FOIA)
Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)

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A. INTRODUCTION

[1] On 7 February 2022, the applicant made a request under the FOIA for sponsorship agreements, including public relations campaigns and related business cases, undertaken by the Ministry of Tourism and/or the DOT from 2020 to 2022 inclusive.

[2] On 9 March 2023, the DOT's Information Manager (IM) provided the applicant with access to a table that outlined local sponsorships and costs. However, the IM exempted records related to public relations campaigns pursuant to section 21(1)(a)(i) (trade secrets) and section 21(1)(b) (prejudice the commercial interests of any person or organization).

[3] The next day the applicant requested an internal review under section 33 of the FOIA. However, no internal review was conducted, and on 14 June 2022 the applicant made an appeal to the Office of the Ombudsman, which was accepted on 17 June 2022.

[4] Upon completion of our review of the responsive records and exemptions applied, and further communications with the DOT, another set of records was disclosed on 15 August 2022, and after some delays more records were disclosed on 23 December 2022. These records covered both local and international sponsorships and partnerships.

[5] In the course of the appeal, we attempted to mediate an amicable resolution, but the dispute could not be resolved, and the appeal progressed to the Ombudsman for a formal decision.

[6] For clarity, in this hearing, two records are in dispute:

[1] In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

- A document containing <u>business cases</u> for eleven sponsorships and partnerships ("the business cases") has been <u>withheld in full</u>.
- A document containing thirteen sponsorship and partnership <u>agreements</u> with twelve entities ("the agreements"). The agreements have been <u>partially redacted</u>.

B. CONSIDERATION OF ISSUES

a) The questions for consideration are whether the records are exempt:

- **under section 21(1)(a)(i) because their disclosure would reveal trade secrets;**
- **under section 21(1)(a)(ii) because their 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 where disclosed; and/or**
- **under section 21(1)(b) because the records contain information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.**

And, if one or more of these exemptions apply, would disclosure nevertheless be in the public interest, pursuant to section 26(1)?

[7] Section 21 states:

> *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; or*
>
> *(b) it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.*
>
> *(2) Subsection (1) shall not apply where the applicant for access is the person or organisation referred to in that subsection or a person acting on behalf of that person or organisation.*

[8] The DOT has not separated its arguments for the three commercial exemptions in section 21. I will consider the matter of trade secrets first, and I will then combine my consideration of sections 21(1)(a)(ii) (commercial values) and 21(1)(b) (commercial interests).

<u>Section 21(1)(a)(i) - Trade secrets:</u>

[9] The term "trade secret" is not defined in the FOIA. Guidance from the UK Information Commissioner's Office (ICO) based on the UK's *Trade Secrets (Enforcement, etc.) Regulations, 2018*, considers that to be a trade secret, information should:

(a) be secret, in the sense that it is not generally known among, or readily accessible to, people within the circles that normally deal with that kind of information;
(b) have a commercial value, because it is secret. Its disclosure should also be liable to cause real (or significant) harm to the owner or be advantageous to any rivals; and,
(c) be subject to reasonable steps under the circumstances, taken by the owner, to keep it secret.[2]

[10] The ICO also states that a trade secret is the property of its owner, and that trade secrets may be technical or business secrets. A technical secret could, for instance, be: an invention; a manufacturing process; engineering and design drawings; or a recipe or formula. A business secret could, for instance, be: cost information, such as how much money an organization spends on product development; pricing information, such as how much a company plans to charge for a product it sells; supplier lists and contact details; or plans for the development of new products / the discontinuance of old products. These examples are not exhaustive. However, the Information Commissioner notes:

> *… just because information falls into one of the above categories does not necessarily mean that it is a trade secret. In particular, a business secret is less likely to be a trade secret than a technical secret.*

[11] Furthermore, the UK's First-tier Tribunal added:

> *… the concept of a 'trade secret' related to a particular kind and quality of information. In terms of 'kind', it considered this suggested "something technical, unique and achieved with a degree of difficulty and investment". In terms of 'quality', the Tribunal indicated that the term 'trade secret' suggested the "highest level of secrecy".*[3]

[12] Elsewhere, the UK Information Tribunal confirmed that the term "would" means:

> *"more probable than not" that there will be prejudice to the specific interest set out in the exemption…*[4]

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[2] Information Commissioner's Office, *Section 43 – Commercial Interests*. Available at: https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/ .
[3] UK Information Tribunal, *Department for Work and Pensions v IC,* 20 September 2010, EA/2010/0073, para 68.
[4] UK Information Tribunal, *Ian Edward McIntyre v Information Commissioner and Ministry of Defence,* 11 February 2008, EA/2007/0068, para 40

[13] The DOT offers very little in terms of argumentation. It claims that releasing the withheld information "would result in the disclosure of trade secrets and commercial [sic] sensitive interests of the [DOT] and potentially third parties and the Department has a duty to maintain confidentiality."

[14] The DOT does not provide a rationale why or how the information that has been withheld would constitute a trade secret. The DOT has not demonstrated that the withheld records constitute or contain trade secrets that would be subject to "the highest level of secrecy", nor that the information amounts to "something … unique and achieved with a degree of difficulty and investment". Even if the information constituted a trade secret, the DOT has failed to explain the likelihood that it is more probable than not that the disclosure of the responsive records amounts to "revealing trade secrets" as stated in the exemption. Its submissions refer to "potentially" affecting unnamed third parties, but for an exemption to apply more is needed than a potentiality.

[15] **Therefore, after reviewing the responsive records, and considering the guidance from the ICO and the decisions of the Information Tribunal, and in view of the paucity of the DOT's argumentation in this regard, I find that the responsive records do not constitute or contain any trade secrets, and that consequently the exemption in section 21(1)(a)(i) is not engaged.**

[16] The broader issue of commercial value and commercial interests relating to the withheld records (i.e. the sponsorship agreements and business cases) under sections 21(1)(a)(ii) and 21(1)(b) is further discussed below.

Section 21(1)(a)(ii) and 21(1)(b) – Commercial value and commercial interests:

[17] I will consider these two exemptions together since both are closely related and involve a prejudice test (as well as potential public interest test). However, I note that the likelihood threshold differs slightly, as stated in the statute, which I will consider further below.

[18] The terms "commercial value" and "commercial interests" are not defined in the FOIA. Therefore, these phrases should be given their ordinary meaning, in accordance with the principles of statutory interpretation.

[19] I accept the definition of "commercial value" as outlined in a decision of the Queensland Information Commissioner, as follows:

> *… information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction.*[5]

[5] Information Commissioner (Queensland), *Cannon v Australian Quality Egg Farms Ltd* (1993 S0094, 30 May 1994), para 54.

[20] I also accept the definition of "commercial interests" used by the previous Ombudsman, as:

> *… interests that relate to trading such as the sale or purchase of goods which are undertaken for the purpose of revenue generation and normally take place within a competitive environment.*[6]

[21] I accept that the information that has been withheld is of a commercial nature, in that it has commercial value and represents commercial interests of the DOT and the entities it intended to contract with or has contracted with. The fact that most of the sponsored entities are amateur organizations and that the DOT is a public authority, does not mean they cannot engage in commercial activities.

[22] Section 43(2) places the burden of proof on the public authority. In other words, the DOT has to demonstrate that prejudice "would, or could reasonably be expected to" follow from disclosure of the information with commercial value, or "would" result from disclosure of information containing commercial interests. This involves a three-step test:

- Identify the "applicable interests" within the relevant exemption;
- Identify the "nature of the prejudice". This means:
  - Show that the prejudice claimed is "real, actual or of substance"; and,
  - Show that there is a "causal link" between the disclosure and the prejudice claimed;
- Decide on the "likelihood of the occurrence of prejudice".[7]

[23] According to guidance from the ICO, a prejudice-based exemption is one where "the authority has to satisfy itself that the prejudice or harm that is specified… either would or would be likely to occur."[8] In this instance, both exemptions respectively require that the prejudice "would, or could reasonably be expected" (section 21(1)(a)(ii)) or "would" (section 21(1)(b)) result from the disclosure. As described above, I take "would" to mean that something is "more probable than not".

[24] The DOT states that it carries out several marketing campaigns each year. If the withheld records were disclosed, the DOT claims that this "could hinder the commercial interest of DOT and CIG's ability to participate competitively and negotiate in a commercial environment." As noted above, in respect of commercial interests (section 21(1)(b)) the mere possibility of hindrance (as reflected in the DOT's use of "could") is not sufficient to engage either of the exemptions.

[25] The DOT also states that (my emphasis):

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[6] Ombudsman, *Hearing Decision 72-201800330/72-2018000337, Ministry of Commerce, Planning and Investment*, 18 October 2018, para 17(iii).

[7] *The prejudice test,* op cit, p.5.

[8] Information Commissioner's Office (UK) *The prejudice test. Freedom of Information Act. Version 1.1* 5 March 2013, p. 3; See: UK Information Tribunal, *Hogan and Oxford City Council v Information Commissioner,* EA/2005/0026 and 0030, 17 October 2006, paras 28-36.

… releasing the sponsorship/partnership and business case details would provide a level of information that ***could prejudice any future income generation*** *and/or* ***could potentially jeopardise any future contractual negotiations and value for money*** *because it would indicate to any company/organisation the price [DOT] would be willing to pay for various sponsorships/partnerships and provide companies/organisations with a starting point around which to base their own negotiations and budgets. Ultimately causing harm to the commercial interest of DOT in ensuring the Cayman Islands as a competitive tourism destination.*

[26] In regard to the argument around future income generation, the DOT has not fully explained how or why disclosure of the agreements and/or business cases would, or could reasonably be expected to prejudice future income generation. After all, it is the DOT that is expending (rather than receiving) funds on sponsorships and partnerships in order to advertise the Cayman Islands as a tourism destination. The only income generation in these circumstances is on the part of the private entities that are sponsored by or partnered with DOT, and it is not likely that the expenditures documented in the responsive records would, or could reasonably be expected to be prejudiced by the disclosure of the records in question, as most of the agreements expired in 2022, and any payments have presumably already been made.

[27] The DOT argues that disclosure of the withheld information might jeopardize future negotiations with sponsors or partners. While I am not bound by precedent set by my decisions under the FOIA, it is useful to note that a similar argument was raised in previous hearing decisions by the Information Commissioner/Ombudsman under a range of exemptions. As required, the issues were considered in the circumstances of each specific case:

- Decisions 15 and 72 respectively concluded that disclosure of actual bids for government financing and an agreement with Tech City would undermine future bids or negotiations and certain information was therefore exempted.[9]
- On the other hand, in decisions 29, 77 and 88 the Information Commissioner/Ombudsman disagreed with similar arguments in decisions involving DOT's contracts with musicians, and the government's concessions to developers. In these cases the information was not found to be exempted. [10]

The business cases

[28] As noted above, the DOT withheld the business cases for twelve international sponsorships and partnerships in full. Most of the business cases provide information in a standardized manner. They include information on the procurement method, the cost and funding source, the business

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[9] *See Information Commissioner, Hearing Decision 15-00611, Ministry of Finance, Tourism and Development, 2 September 2022;* Ombudsman*, Hearing Decision 72-201800330/72-2018000337,* op cit.

[10] See: Information Commissioner, *Hearing Decision 29-02312, Ministry of Tourism and Development*, 11 April 2013; Ombudsman, *Hearing Decision 77-201900138, Ministry of Finance and Economic Development,* 27 May 2020; Ombudsman, *Hearing Decision 88-202100094, Ministry of Finance and Economic Development*, 22 September 2021.

objective, options considered, assumptions, constraints, benefits, etc. of each sponsorship/partnership.

[29] The cost of each sponsorship/partnership and a number of general conditions have already been disclosed in the unredacted parts of the agreements, in a separate document and in previously disclosed documents.

[30] The DOT states its commitment to being as transparent as possible in regard to commercial information and public spending, but also claims a blanket non-disclosure of the business cases on the following basis:

> *Releasing the sponsorship/partnership and business case details would provide a level of information that … could potentially jeopardise any future contractual negotiations … because it would indicate to any company/organisation the price that [DOT] would be willing to pay for various sponsorship/ partnerships and provide companies/organisations with a starting point around which to base their own negotiations and budgets. Ultimately causing harm to the commercial interest of DOT …*
>
> *the information held within the business cases, highlights why the [DOT] has made the decision to partner with another organisation. By sharing this information publicly, it highlights to a potential competing destination, a part of our marketing plan which could provide an advantage to other destinations and destroy or diminish the commercial value if disclosed.*

[31] The applicant disagrees, stating:

> *… the information that was available did not satisfactorily provide details of … any business case or cost/benefit analysis to show value for money in the spending of taxpayer dollars…*

[32] The applicant also points to two articles that appeared in the Press in February 2023 which, amongst other things, question the allocation of a sponsorship agreement to an amateur sports club apparently connected with the DOT's regional manager in the UK, something that appeared to be unknown to the DOT at the time.[11]

[33] I find the arguments raised by the DOT unconvincing. The cost of each sponsorship and partnership is known from previous disclosures, as it should be, but the general public also has a reasonable expectation to understand the rationale behind the expenditures of public funds.

[34] I find that the commercial information revealed in the business cases is quite unsurprising, in that each business case is focused on a rather predictable rationale why each sponsorship entity/partner represents a good opportunity to promote the Cayman Islands as a tourist destination. I do not

[11] See: https://www.caymancompass.com/2023/02/02/compass-investigation-sun-sea-and-suspect-sponsorships/; https://www.caymancompass.com/2023/02/02/tourism-officials-defend-sports-sponsorship-strategy/

consider that the commercial information relating to the DOT or the sponsored entities/partners is sufficiently sensitive to jeopardize future negotiations or engage either of the claimed exemptions.

[35] I am also aware that a further boost to striking the balance in favour of disclosure is provided by the Procurement Act (2023 Revision). On its website, the Central Procurement Office states that a business case "provides a structure for good decision-making on projects…" and "the procurement process should be accountable, ethical and transparent…"[12]

[36] **Consequently, having reviewed the records and considered their status under the FOIA, on the balance of probabilities I am unconvinced by the DOT's arguments that the disclosure of the business cases would, or could reasonably be expected to destroy or diminish their commercial value, or that the commercial interests included in the business cases would prejudice those interests. Therefore, the exemptions in sections 21(1)(a)(ii) and 21(1)(b) are not engaged in respect of the business cases.**

[37] Since I have found that neither of the exemptions claimed apply to the business cases, I am not required to conduct a public interest test under section 26(1). For the avoidance of doubt, I wish to state that I consider that the balance of a public interest test would be decided in favour of disclosure, given the strong applicable public interest factors listed in regulation 2 of the FOI (General) Regulations:

(a) promote greater public understanding of the processes or decisions of public authorities;
(b) provide reasons for decisions taken by Government;
(c) promote the accountability of and within Government;
(d) promote accountability for public expenditure or the more effective use of public funds;

and potentially,

(g) deter or reveal wrongdoing or maladministration.

The agreements – general

[38] As noted above, the DOT has already disclosed thirteen agreements between the DOT and twelve overseas sponsorship/partnership entities in redacted form.

[39] The unredacted parts of the agreements include the names of the sponsors and partners, as well as general terms such as the general contractual conditions, the total costs and the applicable dates for each agreement. However, the specific terms of each sponsorship/partnership, which constitute the essential "deliverables" of both parties have been withheld.

[40] Also redacted are the names, initials, signatures and contact details of the signatories. This information has not been withheld as personal information, but rather under the same exemptions as the rest of the redacted information relating to commercial information (i.e. sections 21(1)(a)(ii) and 21(1)(b)).

[12] See: https://www.procure.gov.ky/business-case

[41] The arguments raised by the DOT in regard to the agreements largely overlap with those relating to the business cases, as quoted above and as follows (my emphasis):

> *… the Department has a duty to **maintain confidentiality**. Additionally, disclosure of these records could hinder the commercial interests of DOT and CIG's ability to participate competitively and negotiate in a commercial environment.*
>
> *Releasing the sponsorship/partnership … details would provide a level of information that … could potentially **jeopardise any future contractual negotiations** … because it would indicate to any company/organisation the price that [DOT] would be willing to pay for various sponsorship/ partnerships and provide companies/organisations with a starting point around which to base their own negotiations and budgets. Ultimately causing harm to the commercial interest of DOT … Additionally, within the agreements there is information that is of commercial interest of private companies (third parties) that the department has made an agreement with … By sharing this information publicly, it highlights to a potential competing destination, a part of our marketing plan which could **provide an advantage to other destinations and destroy or diminish the commercial value** if disclosed.*

The agreements – confidentiality

[42] The DOT does not elaborate on its claim that it has a duty to maintain confidentiality, and this point is raised in the context of the same exemptions relating to commercial value and interests as discussed above, not in the context of the common law duty of confidence.

[43] The inclusion of a confidentiality clause in an agreement can express a legitimate expectation that certain information will not be divulged to third parties. However, public authorities cannot "contract out" of their lawful obligations under primary legislation such as the FOIA. This approach was confirmed by the (UK) Court of Appeal which stated 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.[13]

[44] Several previous hearing decisions under the FOIA have dealt with agreements subject to confidentiality clauses, including the following:

- In hearing decision 15-00611 actual bids for government financing (containing confidentiality clauses) were found to be exempted as actionable breaches of confidence.[14]

[13] *Attorney General v Guardian Newspapers Ltd and Others* [1990] 1 A.C.109 at 146-148, 176-177, 215-216.
[14] *Hearing Decision 15-00611*, op cit, para 70.

- In hearing decisions 43-00814 and 70-201800316 the disclosure of personal settlement payments to individuals also constituted actionable breaches of confidence, and the records were accordingly exempted.[15]
- However, hearing decision 29-02312 concluded that detailed records on the expenditure relating to DOT event sponsorships and musicians were not exempted on the basis of section 21(1)(b) (commercial interests) and required to be disclosed in full.[16]

[45] The DOT's sponsorships/partnerships are for the most part with small, amateur sports organizations who presumably are quite happy to have the name and logo of the Cayman Islands associated with their events in exchange for a reasonable monetary payment. Many of the sponsorship/partnership agreements are fairly uncomplicated in nature, but seven agreements include confidentiality clauses which themselves have already been disclosed with the other general conditions. Each clause indicates that the agreement it is part of is to be kept confidential, but also that it is subject to applicable legal requirements, without mentioning the FOIA specifically.

The agreements - future negotiations

[46] It seems to me that the effects of the disclosure of the redacted "deliverables" on future negotiations might work both ways. It seems very unlikely, but it is possible, that a new entity might seek to benefit from knowing the detailed conditions of a disclosed agreement. On the other hand, the DOT might also adjust the deliverables it agrees with a new entity or the monetary value of a sponsorship/partnership to what has been previously agreed with similar entities.

[47] I do not consider these outcomes more likely than not to occur, or not reasonably to be expected to occur, as each entity will have specific strengths and weaknesses in what it can offer the DOT, which cannot necessarily be straightforwardly compared to the strengths and weaknesses of other entities. As well, I find it highly unlikely that any negative result would, or could reasonably be expected to follow from the disclosure of the detailed deliverables in these agreements, since it seems to me that there will be a large pool of entities that would gladly engage with the Cayman Islands' DOT to receive a sponsorship or partnership.

The agreements - other jurisdictions

[48] The motivations for the DOT's engagement with entities they have contracted with will not be hard to ascertain, given the entities' general profiles and/or locations, which are public knowledge. It is possible that a competing jurisdiction will review or adjust its own marketing approach on the basis of what the DOT has agreed in these agreements. However, it is worthwhile considering that general information on the identity of the recipients and the amounts they received has already been disclosed, as well as on the Cayman Islands' general plan for tourism.[17] Other jurisdictions may not have the same tourism profile or focus as the Cayman Islands' DOT, and the redacted

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[15] Information Commissioner, *Hearing Decision 43-00814, Portfolio of Legal Affairs,* 10 April 2015; Ombudsman, *Hearing 70-201800316, Ministry of Health, Environment, Culture & Housing,* 6 June 2019.

[16] Information Commissioner, *Hearing Decision 29-02312, Ministry of Tourism and Development/Department of Tourism*, 11 April 2013.

[17] See for instance: https://www.visitcaymanislands.com/en-gb/ourcayman/business-in-tourism/laws-policies/national-tourism-planning

information is therefore likely of limited value for them. As such, I do not consider that the redacted information is likely to prejudice the commercial values or commercial interests of the DOT or those of the sponsorship holders or partners. I accept that there is a risk that harm may follow from disclosure, but a mere possibility is not sufficient to trigger the exemption in these circumstances.

[49] Disclosure of the redacted agreements (with entities that amount to successful bidders) is also generally in line with the expectations of the Procurement Act, already mentioned above, section 4 of which states:

> ***Principles***
> *4. Every entity shall carry out procurement of goods and services in accordance with this Act and the principles set out in Schedule 1 shall be observed at all times by public officers involved in procurement.*

[50] Paragraph 12 of schedule 1 of that same Act states:

> ***12. Transparency***
> *Public sector entities should ensure that there is openness and clarity in the conduct of the procurement policy including in the carrying out of all actions and decisions.*

[51] **Therefore, on the balance of probabilities I find that the exemptions in section 21(1)(a)(ii) and 21(1)(b) do not apply to the redacted portions of the agreements, as their disclosure would not reveal any information of a commercial value that would, or could reasonably be expected to be destroyed or diminished, and the disclosure concerning the commercial interests of any person or organisation (including a public authority) would not prejudice those interests.**

[52] Since I have found that the exemptions in sections 21(1)(a)(ii) and 21(1)(b) are not engaged, I am not required to complete a public interest test under section 26(1). However, for the avoidance of doubt, as I have found above in relation to the business cases, I consider that the balance of a public interest test in regard to the agreements would be decided in favour of disclosure, given the strong applicable public interest factors listed in regulation 2 of the FOI (General) Regulations:

> (a) promote greater public understanding of the processes or decisions of public authorities;
> (b) provide reasons for decisions taken by Government;
> promote the accountability of and within Government;
> (d) promote accountability for public expenditure or the more effective use of public funds; and potentially,
> (g) deter or reveal wrongdoing or maladministration.

Personal information – DOT employees

[53] As noted above, the redacted agreements contain the names, signatures, initials, position titles, email addresses and phone numbers of the signatories to the agreements, i.e.: (1) the person

signing on behalf of the DOT, and (2) the individuals signing on behalf of the sponsored entities/partners.

[54] The above information relating to the DOT employee does not constitute "personal information", since paragraph 2 of schedule 1 of the Regulations states:

> *2. The scope of "personal information", as defined in regulation 2, does not include —*
>
> > *(a) where the individual occupies or has occupied a position in a public authority —*
> > *(i) the name and official contact details of the individual;*
> > *(ii) information relating to the position, or its functions;*
> > *…*

[55] In regard to section 23(5), which requires a consideration of the Data Protection Act (2021 Revision) (DPA), as a senior member of the overseas staff of the DOT with authority to sign off on agreements that are subject to the FOIA, the DOT employee would not have a reasonable expectation of privacy in respect of the above types of information, and the disclosure of the information is not prohibited by the DPA. There is a legal basis for the disclosure under the sixth processing condition in schedule 2 of the DPA ("processing for legitimate interests"), since the processing (i.e. disclosure) is necessary for the purposes of legitimate interests (the openness of government under the FOIA) pursued by the data controller (the DOT), and the disclosure is not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

[56] **Therefore, the name, signature, initials, position title, email address and phone number relating to the DOT employee who signed the agreements are not exempt under section 23, and the information is to be disclosed.**

Personal information – private sector individuals

[57] The names, signatures, positions and contact details of the officers who signed the agreements on behalf of the sponsored entities/partners are "personal information", as defined in paragraph 1 of schedule 1 of the FOI (General) Regulations, since this information relates to private individuals, and not to public officers.

[58] I have checked the websites of the sponsored entities/partners and other publicly available sources, and I have confirmed that all the names and positions of the signatories are already in the public domain. Therefore, it is reasonable for the <u>names and positions</u> of these individuals to be disclosed.

[59] However, the <u>signatures and contact details</u> of the private sector individuals who signed the agreements (including their email addresses and phone numbers) <u>would</u> be unreasonable to disclose, as disclosure would pose an increased risk of identity theft and harassment. This information is in any event not material to interpreting the agreements. As required, I have considered section 26(3), and I confirm that the information is not required to be disclosed under the DPA.

Public interest test

[60] Having found that the signatures and contact details of the private individuals who signed the agreements would not be reasonable to disclose, I must now consider whether that information should, nevertheless, be disclosed in the public interest under section 26(1).

[61] In considering the public interest, I find that none of the public interest elements in favour of disclosure listed in regulation 2 are relevant, whereas there is a significant public interest in maintaining the exemption in regard to the signatures and the contact details of the private individuals to protect the individuals against potential identity theft and harassment.

[62] **Therefore, I find that the public interest in withholding the signatures and contact details of the private individuals outweighs the public interest in disclosure, and the exemption in section 23 continues to apply.**

Procedural matters - internal review

[63] If an applicant is not satisfied with the initial decision of the IM, he/she has the right to request an internal review by the Chief Officer. Section 34(3) of the FOIA states (emphasis added):

> *(3) A person who conducts an internal review —*
>
> *(a) may take any decision in relation to the application which could have been taken on an original application; and*
>
> *(b)* ***shall take that decision within a period of thirty calendar days after the date of receipt of the application****.*

[64] The applicant requested an internal review of the IM's decision on 10 March 2023. However, by 14 June 2023 the applicant had not received an internal review decision and appealed to the Ombudsman.

[65] **Consequently, since the FOIA does not allow for an extension of the internal review decision, in this case the Chief Officer (or delegate) neglected to conduct an internal review.**

Procedural matters – delayed disclosure

[66] I cannot find any good reason for the slow and selective response the DOT gave to the applicant's request. While an initial, partial disclosure of records took place within the initial statutory timeline, the applicant had to insist time and again that more records must be held. These were then very gradually (and in some cases partially) provided over a period of multiple months, under close scrutiny of my office. The final explanations for withholding some of the records were not given until more than a year after the request was made.

[67] This is not an acceptable way of answering requests under the FOIA, or of cooperating with my office to seek an amical solution to the dispute.

Procedural matters - new request

[68] In his submission for this hearing, the applicant alleged that there were significant omissions in the records thus far disclosed, and asked whether there were any "penalties" included in the agreements in case of non-compliance.

[69] In response, the DOT stated that,

> *… this is an additional request outside of the original FOI request that was submitted on February 7th, 2022 and therefore a response would not be covered under this FOI Request.*

[70] The applicant's initial request of 7 February 2022 amongst other things had asked for:

> *Details of all sponsorship agreements and public relations campaigns undertaken by the Ministry of Tourism and/or the Department of Tourism in 2020, 2021 and so far in 2022 (including but not limited to event sponsorship, product sponsorships, sports team sponsorships and advertising/marketing campaigns)…*

[71] **Therefore, the request was sufficiently broad in scope and should have been understood to include whatever was specified in the agreements, including any penalties in case of non-compliance by either party. Therefore, it was not correct for the DOT to suggest treating the applicant's question in his submission as a separate request. Especially since doing so would have caused further delays in a case that had already progressed extremely slowly, contrary to the statutory timelines in the FOIA.**

C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above I make the following findings, decisions and recommendations:

a) Trade secrets:
The responsive records do not constitute or contain any trade secrets, and consequently the exemption in section 21(1)(a)(i) is not engaged and the records cannot be withheld on that basis.

b) The business cases:
On the balance of probabilities, the disclosure of the business cases would not, or could not reasonably be expected to destroy or diminish their commercial value, and the commercial interests included in the business cases would not be prejudiced. Therefore, the exemptions in sections 21(1)(a)(ii) and 21(1)(b) are not engaged in respect of the business cases, and the business cases must be disclosed in full.

c) The agreements:

On the balance of probabilities, the exemptions in sections 21(1)(a)(ii) and 21(1)(b) do not apply to the redacted portions of the agreements, as their disclosure would not reveal any information of a commercial value that would, or could reasonably be expected to be destroyed or diminished, and the disclosure concerning the commercial interests of any person or organisation (including a public authority) would not prejudice those interests. Therefore, the agreements must be disclosed in full, except as stated below.

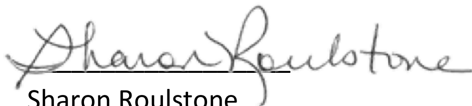
d) Personal information:
   - The exemption in section 23 does not apply to the name, signature, initials, position title, email address and phone number of the DOT employee, and this information is required to be disclosed.
   - The names of the private sector individuals who signed the agreements are public knowledge and must also be disclosed.
   - However, the exemption in section 23 applies to the signatures and contact details (including email addresses and phone numbers) of the private sector individuals who signed the agreements.
   - The public interest in withholding the personal details of the private sector individuals outweighs the public interest in disclosure, and the information is to remain withheld.

Additional matters:

e) Internal review:
   The FOIA does not allow for an extension of the internal review decision, and in this case the Chief Officer (or delegate) neglected to conduct an internal review.

f) Drip-feeding disclosure:
   The DOT caused delays in the manner in which it disclosed or partially disclosed the responsive records and claimed exemptions.

g) New request:
   The request was sufficiently broad in scope and should have been understood to include whatever was specified in the agreements, including any penalties in case of non-compliance by either party. It was incorrect for the DOT to suggest treating the applicant's question in his submission as a separate request.



Sharon Roulstone
Ombudsman