

Hearing 74-201900014

Decision

Ministry of District Administration, Tourism and Transport

Sandy Hermiston

Ombudsman

12 November 2019

Summary:

An applicant made a request for access under the Freedom of Information Law to two letters of intent between the government and two cruise lines in relation to a procurement exercise for a cruise berthing facility in George Town.

The Ministry of District Administration, Tourism and Transport argued that the procurement process is still ongoing, and disclosure would prejudice the commercial interests of the cruise lines and the Cayman Islands government (section 21(1)(b)), the effective conduct of public affairs (section 20(1)(d)) and would constitute an actionable breach of confidence (section 17(b)(i)).

The Ombudsman considered whether the letters of intent were exempted and found that the exemption in section 21(1)(b) was engaged, and that it would not be in the public interest to disclose the responsive records while the negotiations relating to cruise berthing continue.

Statutes¹ Considered:

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

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

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

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A. INTRODUCTION

[1] On the 7th of December 2018 the Applicant made the following request under the Freedom of Information Law (“FOI Law”) to the Ministry of District Administration, Tourism and Transport (“the Ministry”), relating to the planned Cruise Berthing Facility (“CBF”) at the George Town port:

- a) The passenger commitment made by each cruise line*
- b) The timelines this refers to*
- c) What terms were approved by Cabinet*
- d) The total financial commitment.*

[2] On the 2nd of January 2019 the Ministry’s Information Manager (“IM”) exempted the requested records in their entirety under sections 17(b)(i) (actionable breach of confidence), 20(1)(b) (free and frank deliberation), 20(1)(d) (prejudice the conduct of public affairs), and 21(1)(b) (prejudice commercial interests).

[3] The responsive records consist of two letters of intent, each between the Government and a cruise line.

[4] The initial decision was made with the involvement of the Chief Officer (“CO”) and an internal review was therefore not possible. The Applicant appealed to the Office of the Ombudsman.

[5] During the investigation of the appeal the CO indicated that a number of records would be disclosed once the procurement process was complete. This would include the Bonfire contents relating to the project (i.e. the information on the project in the Government’s electronic procurement system) and the ESTAR report (the evaluation report of the Public Procurement Committee), but not the individual financial models which are considered commercially sensitive. The CO also indicated that the disclosure of the phasing proposed by unsuccessful bidders would need to be evaluated at that time due to copyright concerns.

[6] In their written submissions to this hearing, the Ministry introduced a further exemption, namely section 19(1)(a) and (b) respectively relating to “opinions, advice or recommendations” prepared for proceedings of the Cabinet.

B. CONSIDERATION OF ISSUES

- a) Are the two letters of intent exempted under section 21(1)(b), and, if so, would access to the records nevertheless be in the public interest under section 26(1)?**

[7] The Ministry stated that the responsive records are part of an active procurement process, the integrity of which must be protected. They argued that,

It is both necessary and important that distinction is made between disclosures relating to a completed procurement process and an active procurement, where the duty to protect the commercial interests must supersede the public's right to know while the process is ongoing. During active procurement, the process must be permitted to continue unimpeded by public sentiment and/or lobbying for or against one or more of the parties involved in the competition.

The agreements [i.e. the letters of intent] have been formally approved by Cabinet, form part of the Port Redevelopment Project tender documentation, and must remain in a protected environment until all evaluations have been completed, and the project reaches the contract award stage.

[8] The Ministry also gave the following explanation on the procurement process:

The Cayman Islands Government has been involved in the process of developing a Cruise Berthing Facility for a number of years. The most recent iteration commenced in 2013 with the production of a Strategic Outline Case; and the Outline Business Case, Environmental Impact Assessment, and Preliminary Design were produced subsequently. The procurement process began in May 2017 with the issuance of the Pre-qualification Questionnaire. The Invitation to Submit Outline Solutions (ISOS) and the Invitation to Submit Final Tender (ISFT) were issued subsequently in 2017 and 2018, respectively. The agreements formed part of the ISFT. The procurement process is ongoing as no contract award has been finalized.

[9] Some time passed since the request was made and the Ministry's arguments were formulated. Therefore, we asked for an update and were told the procurement process continues to be in progress in regard to the matters discussed in the letters of intent, namely the cruise berthing arrangements.

[10] The Ministry made the following claim in support of the exemption in section 21(1)(b):

The records include interest rates, loan amounts, abatement amounts, berthing allocations, and term periods that are very commercially sensitive for each of the parties that have executed [the] agreements [i.e. the letters of intent].

[11] The letters of intent served two purposes: providing a funding option to the bidders for the CBF and outlining arrangements for preferred cruise berthing. While the successful bidder for the CBF will not be utilizing the funding option outlined in the letters of intent, the issue of the berthing arrangements has not yet been finalized. The letters of intent will inform the terms of the final agreements regarding preferred berthing for the cruise lines. Therefore, the Ministry argues that the claimed exemptions remain engaged.

[12] The Ministry added that the letters of intent could be subject to further amendment. They will likely be put forward for reconsideration by the Cabinet together with other components of the overall agreements relating to the CBF. Disclosure would undermine the procurement process and would call into question the government's decision-making process. This also brings into focus the exemption in section 20(1)(d) relating to the importance of protecting the effective conduct of public affairs.

[13] Section 21(1)(b) provides for the following exemption from the general right to access:

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

...

(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.

[14] The term "commercial interest" is not defined in the FOI Law. In a recent decision I found that,

Given that there are specific exemptions for "commercial value" and "trade secrets" I must find an interpretation that makes sense of the words "commercial interests" and find a meaning that does not repeat or contradict the other two exemptions listed in section 21. It is my opinion that this provision refers to interests that relate to trading such as the sale or purchase of goods which are undertaken for the purpose of revenue generation and normally take place within a competitive environment.²

² Ombudsman Hearing Decision 72-201800330/72-2018000337 Ministry of Commerce, Planning and Investment 18 October 2018, para 17(iii).

[15] The UK Information Tribunal clarified that the term “would” means:

“more probable than not” that there will be prejudice to the specific interest set out in the exemption...³

[16] I consider the letters of intent to be of a commercial nature as they involve the trading of goods and services by the contracted parties. They relate to commercial activities of named cruise lines to be undertaken for the purpose of revenue generation within a competitive environment. Therefore, they represent the commercial interests of the cruise lines and the government.

[17] The letters of intent were composed and agreed in the context of negotiations, and form an intrinsic part of the broader procurement exercise relating to the CBF. Consequently, I consider it is highly likely that their disclosure would prejudice the commercial interests represented in the records. **Therefore, the exemption in section 21(1)(b) applies to the letters of intent that are responsive to the Applicant’s request.**

[18] The exemption in section 21(1)(b) is subject to a public interest test under section 26(1), requiring a determination whether access would nevertheless be in the public interest, notwithstanding that the exemption applies to parts of the responsive record.

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

[20] Neither party explicitly identified public interest factors. The Ministry has pointed out the importance of allowing the government’s procurement process relating to the matters agreed in the letters of intent to proceed in an uninterrupted and confidential manner in order to protect the commercial interests involved. On the other hand, the CBF project involves a high level of expenditure and the public has a right to hold its government to account, and demand transparency.

[21] Notwithstanding the considerable importance of accountability and transparency in this case, it is highly important that any ongoing procurement negotiations be allowed to proceed in a confidential manner.

[22] **Therefore, it would not be in the public interest to disclose the letters of intent exempted under section 21(1)(b), and the exemption is upheld.**

³ UK Information Tribunal *Ian Edward McIntyre v Information Commissioner and Ministry of Defence* 11 February 2008 EA/2007/0068 para 40

[23] Since I have found that the letters of intent are exempted under section 21(1)(b), I do not have to consider whether the other claimed exemptions apply.

C. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law (2018 Revision)*, I find that the two letters of intent between the government and cruise lines are exempted under section 21(1)(b). The public interest in disclosure does not outweigh the maintenance of the exemption.

No further action is required on the part of the Ministry.



Sandy Hermiston
Ombudsman