

Hearing 88-202100094

Decision

Ministry of Finance & Economic Development

Sandy Hermiston

Ombudsman

22 September 2021

Summary

The applicant made a request to the Ministry of Finance & Economic Development (the Ministry) under the Freedom of Information Act (2021 Revision) (the FOI Act) for records relating to fee, duty and tax waivers negotiated between the government and private companies since 2017.

The Ministry released a wide scope of documents in redacted form, claiming exemptions relating to Cabinet deliberations, legal privilege, breach of confidence, personal information and commercial information. This appeal involved several exemptions applied to a wide variety of some 1,000+ pages of records

Some of the records were found to be out of scope, as the agreements they related to were older than 2017, or because they are agreements between private companies.

The Ombudsman found that Cabinet papers, Caucus papers and a memorandum to the Cabinet were exempt because they contained “opinions, advice or recommendations... prepared for or arising in the course of proceedings of the Cabinet”. A diagram showing the interrelationship between companies was exempt since disclosure would constitute an actionable breach of confidence. A driver’s licence and partial credit card numbers were exempt as personal information that would be unreasonable to disclose.

Some records were not disclosable under the FOI Act since other laws prohibit their disclosure, or because there are disclosure procedures in other legislation that overrule the FOI Act.

The other responsive records were not exempt, and the Ombudsman required that they be disclosed within 30 days.

Statutes¹ considered

Freedom of Information Law (2021 Revision) (FOI Act)

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

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A. INTRODUCTION

- [1] On 24 September 2020 the applicant made the following request to the Ministry under the FOI Act:

I would like to make a request for any MOUs, agreements deals, related documents and correspondence that your offices hold in relation to any project agreements that have been negotiated with private sector developers based here or overseas for large projects such as hotels, hospitals, offices or other commercial buildings that involve waiving the usual required fees, duties and other taxes associated with development since June 2017.

- [2] After extending the time period for a response under section 7(4), the Information Manager (IM) provided the initial decision on 23 November 2020. The Ministry asked the developers for their input, which caused delays. One developer, FIN, did not object to disclosure, and most records relating to that development were disclosed, other than records relating to Cabinet deliberations. The first release also included redacted records of Developers 1 and 2.

- [3] The Ministry stated that it was bound by confidentiality clauses in the respective agreements with four unnamed developers. It withheld the records relating to those developers in their entirety under the exemptions relating to actionable breach of confidence (section 17(1)(b)(i)), Cabinet deliberations (section 19(1)(a)) and commercial value (section 21(1)(a)(ii)).

- [4] A second batch of records was disclosed in redacted form on 8 December 2020. It related to three additional developers, HHG Cayman Ltd, Leeward Holdings (Cayman), and The Water

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.

Mark Ltd., which had not objected to the disclosure of records in redacted form. The Ministry relied on exemptions relating to Cabinet deliberations (section 19), personal information (section 23), and legal professional privilege (section 17(a)).

- [5] The Ministry stated that it needed to hear back from two more developers who had been given an opportunity to object to the disclosure of information under regulation 11, and, if they wished, appeal to the Ombudsman under regulation 12.
- [6] A third batch of redacted records was released on 7 January 2021. The records related to The Cottages and were partially redacted as personal information (section 23), deliberations of the Cabinet (section 19) and commercial information (section 21).
- [7] A fourth release followed on 5 February 2021. It consisted of records relating to Fujigmo, a developer whose records were later found to be out of scope.
- [8] On the applicant's request an internal review was conducted by the Chief Officer. He confirmed the IM's decisions and anticipated that additional records would be disclosed in the near future.
- [9] The applicant appealed to the Ombudsman, and we accepted the appeal on 25 February 2021.
- [10] After we pointed out that the agreement with Developer 1 was already publicly available elsewhere, the Ministry identified them as Beach Bay and re-released their records in partially redacted form in a fifth release. Those records were also later found to be out of scope, as further described below.
- [11] 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.

B. CONSIDERATION OF ISSUES

- [12] This appeal involved several exemptions applied to a wide variety of some 1,000+ pages of records, including concession requests and approvals, papers prepared for caucus and Cabinet meetings, Cabinet extracts, development concession agreements, email correspondence, and various ancillary records relating to the developers, the land on which the developments were built, and the Cabinet decisions taken.
- [13] For clarity, not all the companies that received concessions from the government are strictly speaking "developers". However, for ease of use I will refer to all of them as such. This is consistent with the Ministry's usage of the term.

[14] The Ministry interpreted the applicant's reference to "large projects" as any projects that benefited from concessions of \$ 100,000 or above. The applicant agreed with this approach.

Out of scope records

[15] A substantial number of records that the Ministry identified as responsive to the request related to concessions made prior to 2017 and therefore fall outside the scope of the applicant's request:

- All records relating to Developer 1 (agreement dated 2015) (Ministry appendices 1, 3, 7, 10);
- All records relating to Developer 3 (agreement dated 2015) (Ministry appendix 8);
- All records relating to Developer 4 (agreements dated 2011-2016) (Ministry appendix 12);
- Six letters relating to HHG, referring to prior concessions dated 2016 (Ministry appendix 13, pages 9-14);
- All records relating to Fujigmo (agreement dated 2009) (Ministry appendices 18, 19).

[16] Certain records relating to Developer 2 also fall outside the scope of the request. This concerns correspondence and appendices about land holding companies transfer tax. These records contain the Ministry's confirmation of the applicable legislation but do not grant a concession. The appendices consist of agreements between private companies and related documents, not agreements between any developer and the government.

[17] This left the records of the following developers under consideration:

- Developer 2;
- FIN;
- HHG;
- Leeward Holdings;
- The Water Mark; and,
- The Cottages.

Third party consultations

[18] As noted above, the Ministry stated that it had consulted with some of the developers about the disclosure of their records in compliance with regulations 11 and 12, while other developers were not consulted "as the Ministry had no intentions of disclosing the relevant records".

[19] However, this interpretation of the statutory requirements is not correct since regulations 11 and 12 only apply to third party personal information, and not to commercial

information as was the case here. Public authorities are free to consult with whomever they wish, but there is no provision to delay responses beyond the normal timelines for consultation with commercial entities.

Consistency of approach

[20] The Ministry has applied a number of exemptions inconsistently, for instance where certain information relating to one developer was disclosed, almost identical information in relation to another was exempted. The representations made by respective developers can account for some of this, but consent, or the lack thereof - as helpful as it may be - should never determine a public authority's decision under the FOI Act.

a) Are the records exempt under section 19(1(a)), because they contain opinions, advice or recommendations, or a record of consultations or deliberations prepared for, or arising in the course of, proceedings of the Cabinet or a committee of the Cabinet?

[21] Section 19(1)(a) states:

(1) Subject to subsection (2), a record is exempt from disclosure if it contains opinions, advice or recommendations, or a record of consultations or deliberations

—

(a) prepared for or arising in the course of proceedings of the Cabinet or the National Security Council or a committee of the Cabinet or the National Security Council; or

...

(2) Subsection (1) does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature.

[22] The Ministry applied this exemption to all relevant records related to the Cabinet:

- Cabinet extracts relating to Developer 2 (two extracts, one of which twice), FIN (one extract), The Cottages, HHG (one extract each);
- Cabinet papers relating to Developer 2 (two papers), FIN (2 papers), The Cottages (one paper);
- Caucus papers relating to Developer 2 (one paper), FIN (2 papers); and,
- a memorandum to the Cabinet relating to FIN.

Extracts

[23] On 21 July 2021, the Ministry disclosed summaries of Cabinet extracts regarding five concessions in its reply submission. Two of these related to the same developer (FIN). As the Ministry explained, this was done following the announcement by the new government that summaries of Cabinet decisions would henceforth be disclosed. The Ministry also stated that two further summaries, relating to Developer 2, would remain withheld.

[24] The Ministry gave the following rationale for exempting the Cabinet extracts:

[They] are extracts from the minutes of Cabinet meetings in relation to the requests for concessions. The Cabinet Extracts records [sic] the proposals brought to the attention of Cabinet, the topics under consideration by Cabinet and the decisions made.

With the exception of Developer 2 ..., the Ministry is of the opinion that Cabinet's decisions (i.e. name of the Developer, the approved amount of concession; and other information requested by the Applicant) have been disclosed to the Applicant. The actual Cabinet Extract (albeit in a different format) reflects the same requested information that was disclosed to the Applicant. There is no need to disclose a confidential Cabinet document when the requested information has already been disclosed.

[25] Access under the FOI Act is not a matter of "need", but of right. The FOI Act is intended to advance government openness and accountability. Openness is the default position. This means that access should be given to any record to which the Act applies. Exemptions are limited and are to be read narrowly.

[26] As I explained in a previous decision², the term "deliberations" in section 19 is not defined in the FOI Act or the Interpretation Act, 1995. Therefore, the phrase should be given its ordinary meaning, in accordance with the principles of statutory interpretation.

[27] The Merriam-Webster Dictionary defines the term "deliberation" as: a discussion and consideration by a group of persons (such as a jury or legislature) of the reasons for and against a measure".

[28] The Ministry stated that the extracts record "the proposals brought to the attention of Cabinet, the topics under consideration by Cabinet and the decisions made". However, an extract is a record of a decision of the Cabinet, which was reached after discussions on the matter at hand. While I understand that extracts may be identical to the relevant parts of the minutes of the Cabinet meeting, they are distinct documents. The extracts do not document any discussion, do not show how the Cabinet reached its decision, are silent on any matters taken into consideration, and give no details about positions taken by different Cabinet Members or others.

[29] Therefore, the extracts do not contain "opinions, advice or recommendations, or a record of consultations or deliberations... prepared for or arising in the course of proceedings of the Cabinet". Consequently, the exemption in section 19(1)(a) does not apply to the Cabinet

² See: Ombudsman, Hearing 83-202000817 Decision. Cabinet Office, 8 February 2021.

extracts in this case. I also note that Cabinet has adopted a new practice of disclosing these types of decisions. I commend Cabinet for this approach. By making this decision in this case, I am mindful that it will apply the FOI Act consistently to all of the developers involved in this request.

Cabinet and Caucus papers

[30] The Ministry applied the exemption in section 19(1)(a) to Cabinet papers relating to concessions for FIN (two papers), Developer 2 (2 papers) and The Cottages (one paper). The Ministry stated:

Pursuant to Section 19(1)(a), the Ministry exempted records and information such as draft papers that were prepared by the Ministry for the review, discussion and deliberation of Caucus and Cabinet. The Caucus and Cabinet Papers, which are presented to Caucus and Cabinet by the Minister for Finance, contain the Ministry's proposals, results of consultation with other agencies, and recommendations for Caucus' and Cabinet's consideration.

[31] The Cabinet papers consist of “opinions, advice or recommendations, or a record of consultations or deliberations ... prepared for or arising in the course of proceedings of the Cabinet” and are therefore exempt under section 19(1)(a). They are not “material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature” and are not subject to section 19(2). Therefore, the exemption in section 19(1)(a) applies to the Cabinet papers.

[32] Although any records that are appended to Cabinet papers should be considered in their own right, the Ministry applied the exemption to the entirety of each paper including all appendices, and did not consider whether subsection 19(2) applied. The records in question are as follows:

- The first Cabinet paper relating to Developer 2 (dated 30 November 2017) has the following appendices:
 - Appendix (a): letter from Developer 2 to the Ministry with revised application for concessions;
 - Appendix (b): valuation report;
 - Appendix (c): diagram with the interrelationship of companies; and,
 - Appendix (d): conceptual design prospectus of the planned development.

These appendices do not contain “opinions, advice or recommendations, or a record of consultations or deliberations... prepared for or arising in the course of proceedings of the Cabinet”. They are therefore not subject to the exemption in section 19(1)(a). Additionally, appendices (b), (c), and (d) are “material purely of a

factual nature...” as per section 19(2), and would therefore not be subject to the exemption in any event.

The diagram in Appendix (c) is discussed in paragraph 49.

- The second Cabinet paper relating to Developer 2 (dated 19 August 2020) was initially misidentified by the Ministry as a Caucus paper. It had the following appendices:
 - Appendix (e): Cabinet extract;
 - Appendix (f): request for concessions;
 - Appendix (g): draft approval letter;
 - Appendix (h): certificate of good standing;
 - Appendix (i): register of members; and,
 - Appendix (j): email chain regarding the beneficial ownership of the company.

These appendices also do not contain “opinions, advice or recommendations, or a record of consultations or deliberations... prepared for or arising in the course of proceedings of the Cabinet”. They are therefore not subject to the exemption in section 19(1)(a).

As a Cabinet extract, appendix (e) is not subject to the exemption in section 19(1)(a).

Appendices (f) and (g) are similar to other records requesting or approving concessions, and are further dealt with below.

Access to the register of members (except for exempt companies) in appendix (i) is governed by section 44(2) of the Companies Act which requires payment of a fee for inspection by the general public. Under section 6(4)(b) access must therefore be obtained using the administrative procedures established for that purpose, and not through the FOI Act. If the company is an exempt company, section 44 of the Companies Act does not allow public access, in which case section 3(7) of the FOI Act provides that “nothing in this Act shall be read as abrogating the provisions of any other Law that restricts access to records”, this information is not disclosable under the FOI Act.

Disclosure of appendix (j) is not allowed under section 264 of the Companies Act which protects such information from disclosure as confidential information that is subject to the Confidential Information Disclosure Act, 2016. Given that section 3(7) of the FOI Act provides that “nothing in this Act shall be read as abrogating the provisions of any other Law that restricts access to records”, this information is not disclosable under the FOI Act.

- The Cabinet paper relating to The Cottages (dated 17 August 2018) had the following appendices:
 - Appendix (k): request for concessions dated 10 February 2018;
 - Appendix (l): cover email message;
 - Appendix (m): certificate of incorporation;
 - Appendix (n): register of members;
 - Appendix (o): register of directors;
 - Appendix (p): register of officers;
 - Appendix (q): memorandum and articles of association.

Appendix (k) was already disclosed separately and is therefore not exempt.

Appendix (l) contains “opinions, advice or recommendations, or a record of consultations or deliberations... prepared for proceedings of the Cabinet...”. It is exempted under section 19(1)(a) and section 19(2) does not apply to it.

The other appendices (m)-(q) do not contain “opinions, advice or recommendations, or a record of consultations or deliberations... prepared for proceedings of the Cabinet”. They are therefore not exempted under section 19(1)(a).

However, appendix (n) is not disclosable under the FOI Act for the same reasons as appendix (i), above (except that this appendix does not involve an exempt company). Access is governed by section 44(2) of the Companies Act and should be obtained that way as per section 6(4)(b).

Appendices (o) and (p) are subject to section 55A of the Companies Act which provides procedures for inspection of a list of directors and officers upon payment of a fee to the Registrar of Companies. Under section 6(4)(b) of the FOI Act access to the record “shall be obtained in accordance with the provisions of ... those procedures”.

Appendix (q) is subject to sections 26(3) and (3A), and part 1A of schedule 5 of the Companies Act, which provides a procedure for obtaining a copy upon payment of a fee. Section 6(4) of the FOI Act applies to these records as well, and they are therefore not disclosable under the FOI Act.

[33] The Ministry also applied the exemption in section 19(1)(a) to papers prepared for Caucus meetings in relation to the concessions made to FIN and Developer 2. The Caucus is a political body which, in practice, has become a part of the Cabinet’s decision-making process, and which provides advice and recommendations to the Cabinet. Since in this case the Caucus papers contain the same information as the Cabinet papers, I find the Caucus papers are subject to the exemption in section 19(1)(a) as records containing “opinions, advice or recommendations, or a record of consultations or deliberations ... prepared for ... proceedings of the Cabinet”.

Memorandum to the Cabinet

The Ministry also applied section 19(1)(a) to a single memorandum. The memo is of an administrative scheduling nature relating to FIN, and does not contain any “opinions, advice or recommendations, or a record of consultations or deliberations ... prepared for or arising in the course of proceedings of the Cabinet...”. Consequently, the exemption does not apply to it.

b) Are the records exempt under section 17(1)(a) because their disclosure would be privileged from production in legal proceedings on the ground of legal professional privilege?

[34] Section 17(1)(a) states:

17. (1) A record is exempt from disclosure if —

(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege;

[35] The Ministry applied this exemption to information contained in records relating to HHG, specifically the names and addresses, letterheads and signature blocks of attorneys and law firms in concession approval letters from the Ministry, as well as a request for a refund.

[36] In its submission the Ministry stated:

In their written objection, the legal representatives for HHG Cayman Ltd ... argued that all references to the name of their Law Firm should be redacted as “the records are subject to solicitor-client privilege (work product privilege)”, pursuant to Section 17(1)(a) of the Act. Although the Ministry does not agree with the argument (as the Ministry disclosed the names of other Law Firms relating to the request), the Ministry obliged in this one instance and withheld the name of the Law Firm from the records relating to HHG Cayman Ltd (for concession request 13). The Ministry’s decision to withhold the name of the Law Firm was also due to the Applicant indicating on 5 January, 2021 that she was mainly interested in the “names of the individuals that own the companies doing the development...”.

[37] Taking the Ministry’s last point first, records that contain requests for concessions or refunds fall squarely within the applicant’s request, as they are “documents and correspondence that [the Ministry] hold[s] in relation to any project agreements that have been negotiated with private sector developers...”. Applicants always have the option of narrowing their request, but the applicant in this case made it clear that the request should be interpreted broadly.

[38] A four-step test is used to determine whether legal advice privilege attaches to all or part of a document:

- (i) there must be a communication, whether oral or written;
- (ii) the communication must be of a confidential character;
- (iii) the communication must be between a client (or his agent) and a legal advisor; and
- (iv) the communication must be directly related to the seeking, formulating or giving of legal advice.³

[39] The records redacted under this exemption do not contain confidential communications or legal advice between a professional legal advisor and his/her client, nor were they prepared for the sole or dominant purpose of preparing for litigation.

[40] It is unclear why the Ministry would consider the names and addresses of lawyers privileged, but not the actual content of the records they appear in. I note the Ministry's own submission states that it "does not agree with the argument" for exempting the names and business addresses of lawyers and law firms acting on behalf of the developers, and it did disclose similar information in the records of other developments.

[41] Consequently, the records are plainly not subject to legal professional privilege, and the exemption in section 17(1)(a) does not apply.

c) Are the records exempt under section 17(1)(b)(i) because their disclosure would constitute an actionable breach of confidence?

[42] The Ministry applied this exemption to all records of Developer 2, except the records redacted under section 19(1)(a) which are discussed above.

[43] As noted above, the records relating to Developer 2 include correspondence and appendices about the land holding companies transfer tax that fall outside the scope of the request. Therefore, this exemption in section 17(1)(b)(i) was only claimed for:

- Four approval letters from the Ministry, and
- A revised application letter.

[44] Section 17(1)(b)(i) exempts records from disclosure if disclosure would constitute an actionable breach of confidence.

[45] The Ministry relied on confidentiality clauses in the development agreement with Developer 2. However, it did not provide me with any agreement between Developer 2 and the

³ B v Canada, [1995] 5 W.W.R. 374 (B.C.S.C.).

government to substantiate this claim, even after I specifically asked for it in the course of this hearing.

[46] Apart from that argument, the Ministry has not explained why the four approval letters and the revised application letter relating to Developer 2 would be more confidential than similar records relating to other developers, which it has disclosed, in some cases with personal names or other items redacted (but not the substantial content of the letters).

[47] Therefore, the four approval letters and the revised application letter relating to Developer 2 are not exempt under section 17(1)(b)(i).

Additional record

[48] Section 43(5)(a) states:

(5) On the consideration of an appeal, the Ombudsman —

(a) may, subject to paragraph (b), make any decision which could have been made on the original application;

[49] Although the Ministry did not identify it as such, there is an additional record that involves confidential information. This concerns an appendix to a Cabinet paper relating to Developer 2 (identified above as “appendix (c)”), briefly discussed above, with of a diagram showing the interrelationship between companies some of which are exempted. This information is not in the public domain, is not trivial, and:

- is confidential given the nature of exempted companies;
- has retained its confidentiality; and,
- the disclosure would be detrimental to the party involved, in particular the exempted companies indicated on the diagram.

[50] This exemption is not subject to a public interest test in section 26(1). However, the duty of confidence is subject to a public interest consideration. The public interest in disclosure is significant, since it involves the government’s accountability for the concessions granted. However, given the approach taken to information of exempted companies in the Companies Act, the expectation of confidentiality is very high, and the public interest in disclosure does not override the public interest in maintaining the confidentiality of the information.

[51] Therefore, the record consisting of a diagram that was appended to the Cabinet paper dated 30 November 2017 (named “appendix (c)” above) is exempt under section 17(1)(b)(i) as its disclosure would constitute an actionable breach of confidence.

d) Are the records exempt under section 23(1) because their disclosure would involve the unreasonable disclosure of personal information of any individual, whether living or dead?

[52] The Ministry applied this exemption to a wide variety of information contained in various types of records including requests for concessions and refunds, approval letters, and ancillary documentation. The redacted information consists of:

- the names, business addresses, business emails and business phone numbers of attorneys, developers and their senior staff;
- names of staff/contact names, business names and addresses of freight and transportation companies used by the developers to import goods, on a purchase order, freight documentation and HM Customs forms.
- the names of shareholders, members, directors and officers of three developers (Leeward Holdings, The Water Mark, The Cottages); and,
- the name of an attorney certifying a document (The Water Mark);
- a driver's licence number [HHG, page 103 release 2 part 1];
- the last four digits of a credit card number (not sure what exemption they are claiming) (HHG, page 6 of release 2 part 2);

[53] The Ministry applied this exemption somewhat inconsistently, for instance by redacting personal information in records of some developers, but not in the same types of records of other developers. This is puzzling, as the records relating to all developers contain comparable information.

Information that is not personal in nature

[54] The Ministry has redacted some information under section 23(1) that is not personal in nature. This applies to the names, logos, addresses, websites, email addresses and phone numbers of businesses, whether belonging to the developers, the law firms they employed, domestic or overseas freight, transportation or brokerage companies, or other companies mentioned in the responsive records.

Personal information of developers, attorneys, senior staff, contact persons

[55] The names, addresses, etc. of developers, attorneys, senior staff and contact persons are personal information. In the context of the development concessions, these individuals are acting in a business-related capacity, and the information is not about them in a private capacity. They do not have a reasonable expectation of privacy, and disclosure does not constitute an invasion of their private life. Most of the names are widely available on company and news websites. In considering the Data Protection Act (2021 Revision) (DPA) in section 23(5) the information can be disclosed on the "legitimate interests" legal basis in paragraph 6, schedule 2 of the DPA. The disclosure is necessary for the requestor's legitimate interests in government accountability and transparency of government's expenditure of public funds, and is not unwarranted in the circumstances of this case by

reason of prejudice to the rights and freedoms or legitimate interest of the data subjects. Therefore, disclosure is not unreasonable, and the exemption in section 23(1) does not apply.

Personal information of shareholders and beneficial owners

- [56] Disclosure of shareholders is not allowed under section 264 of the Companies Act which states that this information is subject to the Confidential Information Disclosure Act, 2016. Given that section 3(7) of the FOI Act provides that “nothing in this Act shall be read as abrogating the provisions of any other Law that restricts access to records”.

In relation to exempted companies, section 3(1)(d) of the FOI Act prohibits disclosure of records containing information on shareholders by means of the FOI Act.

Personal information of members, directors, officers

- [57] The names of members (except members of exempt companies) are publicly available since section 44(2) of the Companies Act provides access procedures for the registers in which they appear. Section 55A of the Companies Act provides that the Registrar of Companies will make a list available for inspection for a fee. As per section 6(4) of the FOI Law, the registers must be obtained using the procedures established under section 44(2) of the Companies Act, rather than through the FOI Act.

In relation to exempted companies, section 3(1)(d) of the FOI Act prohibits disclosure of records containing information on directors and officers by means of the FOI Act.

Personal information of certifying attorney

- [58] Certification of a copy of a document requires that an authorized person, in this instance an attorney, signs and dates the document, and prints their name underneath.⁴ The authorized person acts in an official capacity, and his or her identity testifies to the correctness of the copy. In these circumstances there can be no expectation of privacy on the part of the authorized person. The disclosure of the personal information is therefore not unreasonable, and the information is not exempted.

Driver’s licence number and four last digits of a credit card number

- [59] This type of information appears in only a few locations in records appended to HHG’s request for a refund. Where they appear together with the name of an individual they are likely personal information. Out of an abundance of caution they are exempted and should remain redacted. Since there is no legal basis for disclosing this information under the DPA, section 23(5) states that these records are not subject to a public interest test.

⁴ See: Cayman Islands Monetary Authority, Guidance Notices on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands. March 2010, Section 3, 3.25.

- e) **Are the records exempt 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 were disclosed; or section 21(1)(b) because 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.**

[60] The relevant exemptions in section 21 state:

Records relating to commercial interests

21. (1) Subject to subsection (2), a record is exempt from disclosure if —

(a) its disclosure would reveal —

...

(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.

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

[62] I accept the definition of “commercial value” as outlined in a decision of the Queensland Information Commissioner⁵ 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 Information Commissioner (Queensland), *Cannon v Australian Quality Egg Farms Ltd* (1993 S0094, 30 May 1994), para 54

[63] I defined the term “commercial interests” in a previous decision, 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

[64] In general, therefore, for this exemption to apply the information must have a commercial value or represent a commercial interest, and secondly its disclosure must prejudice that value or interest.

[65] The Ministry redacted various information in the records on the basis of the exemptions in sections 21(1)(a)(ii) and 21(1)(b), arguing as follows:

- i. Pursuant to Sections 21(1)(a)(ii) and 21(1)(b) of the Act, the Ministry exempted information such as purchase prices which were stated on invoices, names and representatives of suppliers and vendors, valuation reports, project budgets and estimates and other financial information. This information is commercially sensitive and may prejudice Developers’ commercial interests and ability to negotiate fair market terms.*
- ii. The Ministry also took into account that Government’s own commercial values and interests may also be prejudiced if this information is released as the disclosure may reduce the Government’s bargaining power when negotiating with other Developers or future interested parties for the request of duty concessions.*
- iii. Further, for the applicable records, the Ministry exempted the names of other mentioned companies as such information could reveal the common beneficial ownership of the companies – which may itself be commercially sensitive or give rise to an actionable breach of confidence.*

[66] See Appendix A below for a table with details on the records the Ministry has redacted under section 21(1)(a)(ii) or 21(1)(b) and a summary of my findings.

Records that are not commercial in nature

[67] Some of the information the Ministry has redacted under these exemptions does not have a commercial value or does not represent any commercial interests, as defined above. This includes the following records relating to HHG and Leeward Holdings:

- The names, addresses, email addresses, etc. of developer’s senior staff;
- the amount of government fees and duties; and,
- the amount of a waiver being requested.

[68] Because these records are not valuable for the purposes of carrying out a commercial activity, and do not represent an interest that relates to trading such as the sale or purchase

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

of goods, they are not exempt under sections 21(1)(a)(ii) or 21(1)(b). The amount of stamp duty relating to Leeward Holdings was already disclosed in related documents.

Commercial but no prejudice

- [69] Some of the information the Ministry has redacted under these exemptions may have commercial value or represents a commercial interest, but the information is not sensitive and the Ministry has not sufficiently explained how its disclosure would destroy or diminish the value, or prejudice the commercial interests of the developers involved, for it to apply.
- [70] This concerns the following information in relation to developers HHG, The Cottages and Leeward Holdings:
- the actual or anticipated value of goods (e.g. computers, furnishings, uniforms/clothes, etc.) purchased overseas, the names of suppliers and freight companies, the shipping costs, as recorded in invoices, shipping documents, customs forms and correspondence, as part of a request for concessions or concession rebates; and,
 - the assessed value of the property and the anticipated sales value of a development.
- [71] While the value of overseas goods relates to commercial activity, the Ministry has not demonstrated that its disclosure would, or could reasonably be expected to destroy or diminish its commercial value, or that it would prejudice the commercial interests of any party.
- [72] The Ministry argues that the government's own bargaining power would be reduced by disclosure without specifying how or why. It also states that: "This information is commercially sensitive and may prejudice Developers' commercial interests and ability to negotiate fair market terms." However, it has not supported these claims with any specific argument explaining how the commercial interests might be prejudiced.
- [73] The assessed value of the Leeward Holdings development was already disclosed in the notice of stamp duty assessment of the Lands & Survey Department. The anticipated sales value of the Leeward Holdings development is almost five years old, and is no longer sensitive. It is not reasonable to assume that this information would have any commercial value, or would harm any commercial interest if disclosed so long after the statement was made.
- [74] As quoted above, the threshold for the exemptions is that the commercial value "would, or could reasonably be expected to be destroyed or diminished if the information were disclosed" (section 21(1)(a)(ii)), or that disclosure "would prejudice those [commercial] interests" (my emphasis). A mere possibility, as indicated by the Ministry, that prejudice "may" follow is not sufficient for the exemption to be triggered. Therefore, I do not find it

reasonably likely, let alone more likely than not, that the commercial value of the information or the commercial interests of the developers, the government or any other party would (or could reasonably) be harmed by disclosure of this information.

[75] Consequently, the information indicated above (and further detailed in Appendix A) is not exempt under sections 21(1)(a)(ii) or 21(1)(b).

[76] Since I have not found that the exemption applies, I do not have to conduct a public interest test under section 26(1).

C. FINDINGS AND DECISION

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

- The Cabinet papers, Caucus papers and Appendix (l) (the cover email message to Cabinet in the Cabinet paper relating to The Cottages dated 17 August 2018) are exempt under section 19(1)(a) because they contain “opinions, advice or recommendations... (a) prepared for or arising in the course of proceedings of the Cabinet”:
- Appendix (c) of the first Cabinet paper relating to Developer 2 - diagram of interrelationship between companies is exempt under section 17(1)(b)(i) because its disclosure would constitute an actionable breach of confidence.
- The driver’s licence number and last digits of credit card info (relating to HHG) are exempt under section 23(1) because their disclosure would involve the unreasonable disclosure of personal information of any individual, whether living or dead.
- The following records are not exempt, but they are not disclosable for the reasons stated:
 - Second Cabinet paper relating to Developer 2 (19 August 2020):
 - Appendix (i) register of members – subject to s.6(4) or 3(7);
 - Appendix (j) – email chain – subject to s.3(7).
 - Cabinet paper relating to The Cottages (17 August 2018):
 - Appendix (n) – register of members – subject to s. 6(4);
 - Appendix (o) and (p) – register of directors, register of officers – subject to s.6(4);
 - Appendix (q) – memorandum and articles of association – subject to s.6(4).

- Personal information of shareholders and beneficial owners – subject to s.3(7) and 3(1)(d).
 - Personal information of members, directors, officers – subject to s.6(4) and 3(1)(d).
- I require the Ministry to disclose the others records under consideration within 30 days from the date of this decision.



Sandy Hermiston
Ombudsman

Appendix A – Records redacted under sections 21(1)(a)(ii) (commercial value) or 21(1)(b) (commercial interests):

Item #			Location
	HHG		
1	the amounts of duty paid on specific items in a refund request (the total amount was released)	Not commercial information	Release 2, part 1, pages 19-20
2	the names of senior developer staff	Not commercial information	"
3	the amounts paid for items and freight, in a variety of shipping documents and customs forms	Commercial but no prejudice	Release 2, part 1, pages 22 and following (continued in part 2)
	Leeward Holdings		
4	the current assessed value of the property in an email chain between developer and Ministry	Commercial but no prejudice	Release 2, part 2, page 53
5	the amount of an additional waiver fee being requested in an email chain between developer and Ministry	Not commercial information	"
6	the anticipated market value of the development, in an email chain between developer and Ministry	Commercial but no prejudice	"
	The Cottages		
7	the value of goods for which a concession is being requested	Commercial but no prejudice	Release 3, page 3
8	the anticipated value of building materials/goods subject to a concession, in approval letter from the Ministry (the total is disclosed)	Commercial but no prejudice	Release 3, page 49