

Hearing 78-201900153

Decision

Ministry of Commerce, Planning and Infrastructure

Sandy Hermiston

Ombudsman

17 June 2020

Summary

An applicant requested records from the swipe access system of ministers and ministerial councillors of the Ministry of Commerce, Planning and Infrastructure (the Ministry) entering and leaving the Government Administration Building (GAB) and adjoining parking garage. This request was made under the Freedom of Information Law (2018 Revision) (FOI Law) as amended.

The Ministry claimed that the requested records were exempt and, in the course of the appeal, the minister responsible issued a ministerial certificate under section 25(1) of the FOI Law, certifying that the records were exempt under section 20(1)(d) because their disclosure would, or would be likely to, prejudice the effective conduct of public affairs. The certificate cannot be nullified by the Ombudsman, but the applied exemption is subject to a public interest test, which was the basis of this hearing.

In making her decision, the Ombudsman weighed up the factors for and against disclosure and found that the public interest in disclosing the records did not override the public interest in maintaining the exemption.

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) as amended, and all references to regulations are to the Freedom of Information (General) Regulations 2008, unless otherwise specified.

Contents

A. INTRODUCTION	2
B. CONSIDERATION OF ISSUES.....	3
C. FINDINGS AND DECISION.....	6

A. INTRODUCTION

- [1] On 15 July 2019, the applicant made a request to the Ministry of Commerce, Planning and Infrastructure (the Ministry) under the FOI Law for:

All records held by the Ministry of Planning, Lands, Agriculture, Housing and Infrastructure – The Facilities Office – in relation to the first swipe in and last swipe out of the security cards or fobs at Government Administration Building for every government minister and ministerial counsellor [sic] for every day of the week since the last election (22 May 2013).

All records held by the Ministry of Planning, Lands, Agriculture, Housing and Infrastructure – The Facilities Office – in relation to the first swipe in and last swipe out of the security cards or fobs at the parking facilities at Government Administration Building for every government minister and ministerial counsellor [sic] for every day of the week since the last election (22 May 2013).

All records held by the Ministry of Planning, Lands, Agriculture, Housing and Infrastructure – The Facilities Office – in relation to the attendance at the Government Administration Building for every government minister and ministerial counsellor [sic] for every day of the week since the last election (22 May 2013).

- [2] On 23 August 2019, the Ministry denied the applicant access to these records claiming that they were exempt under sections 16(a) (endangerment of a person’s life or safety), 16(d) (prejudicing methods or procedures for preventing, detecting, etc., breaches or evasions of the law) and 23(1) (unreasonable disclosure of personal information).
- [3] The applicant requested an internal review, but that review decision was not issued until after the appeal to our office had been made. The internal review decision contained different reasons for refusing to disclose the records based on sections 9(c) (unreasonable diversion of resources), 20(1)(d) (prejudicing the effective conduct of public affairs) and 24(b) (endangerment of the safety of an individual).
- [4] Since one of the reasons given in the internal review decision was that compliance with the request would be an unreasonable diversion of resources, we advised the Ministry to invite the applicant to narrow the scope of the request, as required by regulation 10(1)(b). The

applicant agreed to narrow the date range to which the request related to start on 1 July 2017 instead of on the date of the last election (22 May 2013).

- [5] On 10 February 2020, the Minister of Commerce, Planning and Infrastructure (the Minister) issued a certificate (the Certificate) under section 25(1)(b) certifying that the records were exempt from disclosure because their release could prejudice the effective conduct of public affairs.

B. CONSIDERATION OF ISSUES

a. The impact of the Certificate

- [6] The Certificate was issued pursuant to section 25, which states:

25. (1) Where –

(b) a Minister responsible is satisfied that an application for access relates to a record to which sections 15, 16, 20(1)(b), (c) and (d) and 22, as the case may be, applies,

the Governor or the Minister responsible, as the case may require, may issue a certificate to the effect that the record is an exempt record and shall specify the basis of the exemption.

- [7] The Certificate indicated that “the requested records are exempt from disclosure pursuant to section 25(1)(d)”, which the Ministry later corrected by email to refer to section 20(1)(d).
- [8] I am prohibited from nullifying the Certificate according to section 42(4)(b) of the FOI Law. However, since the exemption in section 20(1)(d) is subject to a public interest test, I must decide whether it would nevertheless be in the public interest to disclose the records by virtue of section 26(1).

b. Whether disclosure of the records would be in the public interest

- [9] Section 26(1) provides that a public interest test must be conducted when certain exemptions are applied, including section 20(1)(d):

26. (1) Notwithstanding that a matter falls within sections 18, 19(1)(a), 20(1)(b), (c) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.

- [10] A public interest test involves weighing up the public interest arguments for and against disclosure to determine whether, considering all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the requested information. A public authority should explain to the applicant what arguments for and against disclosure it has considered.
- [11] Public interest can include a wide range of values and principles relating to the public good or what is in the best interests of society. It is something that is of serious concern and benefit to the general public, not just something of interest to an individual. It serves the interests of the public at large, although it does not necessarily relate to the entire population. However, public interest is not the same as “something the public is interested in”. It is what is in the interest of the public good or society at large.²
- [12] Regulation 2 defines public interest as follows:

“public interest” means but is not limited to things that may or tend to-

- (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;*
- (e) facilitate public participation in decision making by the Government;*
- (f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;*
- (h) deter or reveal wrongdoing or maladministration;*
- (i) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or*
- (j) reveal untrue, incomplete or misleading information or acts of a public authority.*

- [13] The Ministry acknowledged government accountability – in the form of making the public aware of the number of times ministers and councillors entered the GAB for official business – as a public interest factor in favour of disclosure.
- [14] The Ministry argued the following factors for withholding the requested records:

² Information Commissioner’s Office (UK), *The Public Interest Test: Freedom of Information Act*, Version 2.1, 19 July 2016.

- (a) The general public may misconstrue the requested records, because the access system at the GAB is not intended to be a time management system or for signing in and out.
- (b) The general public may misinterpret the requested records because each minister or councillor is not required to swipe their card or fob to gain access, and multiple persons may enter with a single swipe. Upon exit, ministers and councillors are not required to swipe their cards or fobs. Therefore, the requested records would not accurately reflect each time a minister or councillor had entered or exited the GAB or garage.
- (c) The integrity and viability of the swipe entry system could be impaired by disclosure of the requested records:
- Civil servants could be discouraged from using the system out of fear that their information would be made public.
 - If as a result civil servants were to use the manual sign-in system, this would tie up the resources of Facilities Management.
 - Resources would be wasted if “new controls to monitor and mitigate behavioural changes” had to be implemented.
 - The system would contain inaccurate information if persons were to enter the building unrecorded, which could cause delays in the response of emergency services in situations such as earthquakes or fires.
 - Facilities Management would be unable to monitor the system effectively and efficiently if the data was inaccurate.
- (d) The requested records cannot be limited to information regarding entry to and exit of the building and garage, but would reflect all swipes. According to the Ministry, “This would ultimately allow the public to decipher patterns and behaviours of the Ministers and Counsellors [*sic*] within the [GAB]. Consequently, the movement times and key meeting locations within the [GAB] would be made available to the public.”

[15] Based on these arguments, the Ministry argued that the factors in favour of maintaining the exemption are not outweighed by the public interest factors in favour of disclosing the requested records, and that disclosure is therefore not required in the public interest.

[16] The applicant did not make any submissions for this hearing.

[17] Section 4 of the FOI Law states that the Law is intended to balance the general right of access “. . . against the public interest in exempting from disclosure governmental, commercial or personal information”. The UK Information Commissioner’s Office clarifies that each exemption represents a public interest in itself, in particular where a prejudice-based exemption, such as the exemption in section 20(1)(d), is concerned, which protects information from disclosure that would or would be likely to harm a particular interest:

The fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test.³

- [18] I agree that it would not be in the public's interest to gain access to what appears to be (unavoidably) partial and incomplete information on the movements of ministers and councillors in and out of the GAB. Disclosure of that information would not meaningfully contribute to holding government to account.
- [19] The GAB is equipped with "access management software" (the Access System) that is capable of exporting data about access swipes in a RAW format that can be printed. The average number of swipes recorded per user each week is said to be about 100, which translates into about 3.5 printed pages per user per week or an estimated 4,300 pages for the entire period and all users covered by the request. In addition to the abovementioned factors in favour of maintaining the exemption, it is also not in the public interest to burden the public purse with the significant expenditure that would be required to search for and print out this lengthy record, which is (unavoidably) incomplete in nature and meaningless as a record of attendance, as intended by the applicant.
- [20] The other public interest factors listed in regulation 2 are not relevant to the circumstances of the present case. Therefore, I find the public interest factors in favour of disclosure very weak.
- [21] **Since the public interest factors in favour of withholding the requested records outweigh the factors in favour of disclosing them, I find that it would not be in the public interest to disclose the requested records, and no further action is required on the part of the Ministry.**

C. FINDINGS AND DECISION

- [22] Under section 43(1) of the Freedom of Information Law, I find that the public interest in disclosing the requested records does not override the public interest in maintaining the exemption. No further action is required on the part of the Ministry.



Sandy Hermiston
Ombudsman

³ Information Commissioner's Office (UK), op. cit., para. 24.