

## Decision Notice

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### Decision 24/2019: Bermuda Hospitals Board

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#### **Executive Team compensation**

**Reference no:** 01032016

**Decision date:** 31 October 2019

## Summary

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The Applicant made a request to the Bermuda Hospitals Board (**BHB**) for records concerning the compensation of individual members of the Executive Team. BHB administratively denied the request under section 16(1)(d) of the Public Access to Information (**PATI**) Act 2010 because the publication of the information was required by law. BHB also denied access to the records on the grounds that they were exempt under section 23 (personal information); section 25(1)(b) (commercial value); section 25(1)(c) (commercial interests); and section 25(1)(d) (prejudice to negotiations).

The Information Commissioner has found that BHB did not justify its reliance on the exemptions in sections 25(1)(b), 25(1)(c) and 25(1)(d), and did not justify its administrative denial in accordance with section 16(1)(d). The Information Commissioner has also found that BHB justified its reliance on section 23(1) to deny public access to some, but not all, parts of the records related to the compensation of the Executive Team members. Finally, the Information Commissioner has found that the public interest requires access to more narrow bands for the range of total cost for individual Executive Team positions.

In accordance with section 48(1), the Information Commissioner affirms BHB's decision to deny access to parts of the records that are exempt in accordance with section 23(1) and reverses the decision to deny access to the remainder of the records. The Information Commissioner further requires BHB to grant access to the parts of the records relating to social and health insurance rates and amounts; the payroll tax rate; the pension rate; a list of payments to PricewaterhouseCoopers; and the total cost range of each Executive Team position in a band of \$10,000.

## Relevant statutory provisions

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Public Access to Information (**PATI**) Act 2010: section 16(1)(d) (publication required by law); section 23 (personal information); section 24 (definition of personal information); section 25(1)(b) (commercial value); section 25(1)(c) (commercial interests); section 25(1)(d) (prejudice to negotiations).

Bermuda Hospitals Board Act 1970: section 20(2)(b).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

## Background

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1. On 26 January 2016, the Applicant made a Public Access to Information (**PATI**) request to the Bermuda Hospitals Board (**BHB**) for records related to the salaries and other compensation received by the seven members of BHB's Executive Team, separated by individual staff member.
2. On 25 February 2016, BHB issued its initial decision denying access to the records on administrative grounds. Specifically, BHB relied on section 16(1)(d) of the PATI Act because the salary information would be made public within three months in accordance with section 20(2)(b) of the Bermuda Hospitals Board Act 1970.
3. On 1 March 2016, the Applicant sought an internal review.
4. The same day, BHB issued an internal review decision. BHB refused the Applicant's request on the same grounds as the initial decision.
5. The Applicant requested an independent review by the Information Commissioner.

## Early Resolution

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6. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was appropriate for consideration because the three-month period for publications in accordance with section 16(1)(d) of the PATI Act was to expire on 26 April 2016. BHB agreed to disclose the responsive records on or before 16 May 2016, as agreed to by both parties.
8. On 16 May 2016, BHB disclosed its Employee Compensation Report for the years 2011/12, 2012/13, 2013/14, and 2015/16. The disclosure provided the ranges of base pay, total compensation, and total cost received by its staff, including the Executive Team members. In the disclosures, BHB explained that 'total compensation' includes "base pay, performance pay and, for work permit holders, housing benefits and

relocation expenses”<sup>1</sup>. BHB also explained that ‘total cost’ includes “total compensation, current years movement in leave pay provision, social insurance payments, health insurance payments, payroll tax and pension deductions”. For consistency and clarity, this Decision will refer to ‘total compensation’ and ‘total cost’ as BHB has defined them.

9. Except for records concerning the Chief Executive Officer (**CEO**), the 16 May 2016 disclosure did not provide the salary and compensation details for the individual Executive Team members.
10. After seeking the views of the Applicant, the Information Commissioner determined that the early resolution was unsuccessful and notified the parties in July 2016 that the case was progressed to an investigation in accordance with section 47 of the PATI Act.

## Investigation

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11. The PATI request did not specify the time period for the records sought. This Decision considers the records related to the individual salaries and other compensation received by the members of the Executive Team that were current at the time of the PATI request, i.e., for the Financial Year 2015/2016.
12. BHB provided the Information Commissioner’s Office (**ICO**) with records that are responsive to the PATI request. Some of these records have been disclosed to the public and will not be considered in this Decision.
13. The Applicant has confirmed that BHB’s disclosure of the CEO’s salary and compensation details satisfied the PATI request in part. This Decision only considers the responsive records relating to the other members of the Executive Team: the Chief of Psychiatry, Chief Operating Officer for the Mid-Atlantic Wellness Institute, Chief of Nursing, Chief Operating Officer, Chief of Staff, and Chief Financial Officer.
14. During the review, BHB invoked additional grounds for refusing access to the records. It maintained its reliance on section 16(1)(d), but also now relied upon the exemptions in sections 23(1) (personal information), 25(1)(b) (commercial value), 25(1)(c) (commercial interests), and 25(1)(d) (prejudice to negotiations). The Information

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<sup>1</sup> See [http://bermudahospitals.bm/wp-content/uploads/2016/10/495\\_File\\_5.pdf](http://bermudahospitals.bm/wp-content/uploads/2016/10/495_File_5.pdf). Although total compensation may include performance pay, the Executive Team members have not received performance-based pay since 2011/12. See <http://bermudahospitals.bm/bhb-releases-salary-data-20/>.

Commissioner accepted the late reliance on new exemptions. The Applicant was notified of the new exemptions.

15. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review and any concerned third party a reasonable opportunity to make representations. As explained below, one of the records was a list of payments to PricewaterhouseCoopers (**PwC**) Bermuda for services. The ICO invited the Applicant, BHB, and PwC Bermuda (as a third party) to comment on this application, including the new exemptions invoked, and to make submissions to the Information Commissioner for consideration in this review. BHB was also asked specific questions to justify its reliance on its administrative denial under section 16(1)(d) and the exemptions in sections 23(1), 25(1)(b), 25(1)(c), and 25(1)(d). Both the Applicant and BHB made submissions concerning the administrative denial and exemptions. PwC Bermuda did not make any submissions.
16. The ICO also met with BHB to review supporting documents on several occasions. The notes from those meetings, approved by BHB, are considered as part of BHB's submissions.

### **Information Commissioner's analysis and findings**

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17. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Applicant and BHB. She is satisfied that no matter of relevance has been overlooked.
18. The Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

#### ***Future publication of the record required by law – section 16(1)(d)***

19. Section 16(1)(d) allows public authorities to administratively deny access to a record when "publication of the record is required by law and is intended to be effected not later than three months after receipt of the request by the authority".
20. Section 16(1)(d) requires that the requested record is required to be published by 'law'. This would include any provision of law that is in effect in Bermuda, including any

statutory provision, any provision of the common law, and any provision of the Constitution<sup>2</sup>.

21. The provision of law must also require the publication within three calendar months of receipt of the PATI request.

22. In sum, a public authority relying on the administrative denial under section 16(1)(d) of the PATI Act must ask:

[1] Whether a provision of law requires publication of the record that has been requested?

[2] Whether that publication is required within three calendar months of the receipt of the PATI request?

#### *Public authority's submissions*

23. BHB submitted that section 16(1)(d) is applicable to the responsive records because their disclosure is required by section 20(2)(b) of the Bermuda Hospitals Board Act 1970.

24. BHB also explained that it had never published the details of salaries listed by the individual members of the Executive Team, other than the details of the CEO.

#### *Applicant's submissions*

25. The Applicant submitted that the PATI request sought individual salary and compensation details of the Executive Team members. The Applicant noted that section 20(2)(b) of the Bermuda Hospitals Board Act does not require publication of this information. It only states that the scales of salaries and wages paid to the officers and servants of BHB should be included in its annual report. Therefore, section 16(1)(d) is inapplicable because the records being sought were not required to be published under the law.

#### *Discussion*

[1] *Whether a provision of law requires publication of the record that has been requested?*

26. Section 20(2)(b) of the Bermuda Hospitals Board Act states:

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<sup>2</sup> Interpretation Act 1951, section 2.

(1) The Board shall, within six months after the end of each financial year, forward to the Minister—

(a) a report on the operations of the Board during that year and on the Board's policy and programme for future years;

...

(2) The report prepared for the purposes of subsection (1)(a) shall set out—

...

(b) the scales of salaries and wages paid to officers and servants of the Board.

27. Section 20(2)(b) is a provision of law that applies to BHB.

28. The plain language of section 20(2)(b), however, requires only that BHB publish salary and wage scales of the Board's officers and servants. The Information Commissioner agrees with the Applicant that this is not the record that the Applicant has requested. A salary scale required to be published by section 20(2)(b) of the Bermuda Hospitals Board Act is different than the actual salary and other compensation paid to an individual. The Applicant seeks the latter records.

29. Further, BHB has acknowledged that except for the CEO of BHB, the individual salaries and other compensation of individual Executive Team members has not been published.

30. Because section 20(2)(b) of the Bermuda Hospitals Board Act does not require publication of the record, and no other provision of law has been proffered, the Information Commissioner need not consider the second requirement in section 16(1)(d) of the PATI Act.

31. The Information Commissioner is not satisfied that BHB justified its reliance on section 16(1)(d) to administratively deny access to the requested records.

***Personal information – section 23(1)***

32. Section 23(1) allows public authorities to withhold records containing personal information, subject to exceptions in section 23(2).

***Definition of 'personal information' – section 24***

33. Personal information is broadly defined in section 24(1) as “information recorded in any form about an identifiable individual”. Section 24(1) also provides a non-exhaustive list of categories of personal information, such as race, religion, medical or employment history, and education.

34. Section 24(2) excludes certain categories of information from the definition of personal information. Section 24(2)(a) excludes information in the record about an individual who is or was an officer or employee of a public authority and relates to the position or functions of the individual. The plain meaning of ‘position’ means a job. Section 7 of the Interpretation Act 1951 states that ‘functions’ refers to a power conferred or duty imposed on an officer by or under a provision of law.<sup>3</sup>

35. In accordance with section 24(2)(b), the definition of personal information also excludes information about an individual who was performing services under a contract for a public authority that relates to the services performed. This includes the terms of the contract and name of the individual.

36. To invoke the personal information exemption, a public authority must ask<sup>4</sup>:

- [1] Whether the records consist of information about an identifiable individual?
- [2] Whether the information falls within any of the exclusions to the definition of person information in section 24(2)?
- [3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?
- [4] If the exemption for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure, or whether disclosure would benefit the individual?

37. Balancing the public interests requires consideration of the public interest factors in favour of disclosing an individual’s personal information, on the one hand, against the individual’s privacy rights and freedoms, along with any other public interest in favour of confidentiality, on the other. The factors in favour of disclosure include those listed in regulation 2 of PAIR. See Decision 02/2019, Office of the Governor, paras. 48-55.

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<sup>3</sup> See Decision 01/2018, Bermuda Tourism Authority, paras. 32-33.

<sup>4</sup> See Decision 02/2019, Office of the Governor, para. 34-59.



38. An individual's privacy rights and freedoms involve consideration of whether it would be fair to disclose the information under all of the circumstances. This includes whether sensitive personal information is involved, the consequences to the individual of disclosure, and the individual's reasonable expectations of privacy concerning the information. It also involves assessing whether disclosure of the personal information is necessary to further the public interests in favour of disclosure.
39. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

*Public authority's submissions*

40. BHB submitted that the information in the withheld records amounts to personal information because it is about an identifiable individual. BHB specifically referred to section 24(1)(e), which states that personal information includes "the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual". BHB explained that, in its view, the disclosure would allow the public to identify the name of the individual based on their position within the BHB Executive Team.
41. BHB also argued that none of the exceptions to the definition of personal information in section 24(2) are applicable. In its view, section 24(2)(a) only permits disclosure of the position or functions of an officer or employee of a public authority. Section 24(2)(b) is inapplicable because the Executive Team members are retained under an employment contract as defined by the Employment Act 2000, and not under a service contract. The discretionary financial benefit referred to in section 24(2)(c) does not apply to remuneration for employment under the Employment Act.
42. BHB contrasted the PATI Act's requirements with those of Canada's Public Sector Salary Disclosure Act 1996. Unlike the Canadian Act, which requires all employers in the public sector to proactively disclose the compensation of particular employees, BHB understands the PATI Act as only requiring disclosure of the job title and functions of individuals working for a public authority. The PATI Act does not expressly state that compensation or wages must be disclosed for these individuals.
43. Regarding the public interest test, BHB submitted that it must take reasonable steps to protect its employees' private information. Disclosure of the exact base pay amount for the Executive Team members will unfairly erode their right to privacy. Disclosure will also unduly increase the risk of discrimination or prejudice because of the small

community and the ability for such information to be leveraged against the members in their personal lives.

44. BHB also argued that the \$10,000 salary range set by the Information Commissioner in Decision 01/2018, Bermuda Tourism Authority, is too narrow. In a 'micro-community' such as Bermuda, disclosure has the potential to generate prejudice against the officers. A wider reporting range supported by a robust compensation governance structure would provide the community with greater assurance that competitive market-based salaries were being awarded, as opposed to simply publishing a more precise figure. BHB pointed out that it has adopted a methodology to disclose the base pay range, total compensation, and total cost of employees grouped in their natural cohorts.
45. BHB argued that disclosure will put the Executive Team members in a prejudicial position, as there are no other senior executives in Bermuda that are required to have their total compensation disclosed. BHB noted that, in the civil service, what is disclosed is the range of total cost, rather than total compensation<sup>5</sup>. Thus, if any disclosure was to be required, it should be based on total cost associated with the employment of the Executive Team members, which would inform the public of the true value.
46. BHB provided extensive documentation about its recruiting, hiring, and compensation processes to support its assertions.

#### *Applicant's submissions*

47. The Applicant argued that because the Executive Team members are on the public payroll, disclosure of their salary and compensation details is necessary and should have been expected.
48. The Applicant also pointed out that around 2017, BHB received more than \$120 million from the public purse. It received \$143.6 million in the year before. The Applicant acknowledges that BHB's funding is complex, but as a publicly funded body, its officers must be subject to the same rules regarding salary transparency as any other public officer.
49. Further, the Applicant submitted that the salary range disclosed by BHB was too wide and cannot be justified.
50. The Applicant noted that the Health Minister in 2013 stated that BHB legislation requires full disclosure regarding salaries.

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<sup>5</sup> See paragraph 8 for the meaning of 'total cost' and 'total compensation'.

## *Discussion*

[1] *Whether the withheld records consist of information about identifiable individuals?*

51. The Information Commissioner has carefully reviewed the withheld records, which contain the names and employment information of identifiable individuals which, for purposes of this decision, will be categorised into two groups:

- a. Category A: information relating to the Executive Team members
- b. Category B: information relating to a consultant contract to fulfil an Executive Team member role.

52. Employment information contained in the withheld records includes details about the Executive Team members' base pay, total compensation, and total cost. The Information Commissioner is satisfied that the withheld records consist of information about identifiable individuals.

[2] *Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?*

*Information related to the position or function of an officer or employee of a public authority – section 24(2)(a)*

53. The Information Commissioner next considers the exclusion in section 24(2)(a) when the information in the records is about an individual who is or was an officer or employee of a public authority and relates to the position or functions of the individual.

54. The Information Commissioner does not agree with BHB's reading of section 24(2)(a) as only requiring disclosure of the position or functions of an officer or employee of a public authority. BHB overlooks the phrase 'relates to' in section 24(2)(a). The plain English meaning of 'relates' is to "have reference to; concern".<sup>6</sup> This section refers to any information that concerns the position or functions of a public authority's officers or employees.

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<sup>6</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

55. Thus, section 24(2)(a) excludes from the definition of personal information any information that is attached to the individual's position or functions in the public authority. The applicability of section 24(2)(a) depends on whether the information in question is attached to an individual as a person, or is attached to the position or functions generally.<sup>7</sup>
56. Having carefully reviewed the withheld records, the Information Commissioner is satisfied that they contain some information that does not relate to the position or functions but, instead, relates to the individuals. This includes the names of the Executive Team members, and the exact amount of their base pay, total compensation, and total cost.
57. As explained by BHB in its prior disclosures, an individual's total compensation includes base pay and, for work permit holders, housing benefits and relocation expenses – all of which depend heavily on various information that relates to the individual. The elements that make up an individual's total cost also depend heavily on the circumstances of a specific individual. This information continues to fall within the definition of personal information in section 24(1).
58. There is only limited information in the withheld records that is applicable to the post or functions, regardless of the individual who holds it. This includes information on standardised rates applicable for payroll deductions, such as those for social and health insurances, payroll tax and pension contributions. These standardised rates relate to the position and thus fall within the scope of the exclusion in section 24(2)(a). Note, however, that the remaining actual figures reached when applying the standardised rates are derived from an individual's actual compensation. These figures are personal information. This includes, for example, the actual amounts of payroll deductions.

*Information related to a contract for services provided to a public authority – section 24(2)(b)*

59. The withheld records contain a list of invoices for services provided by PwC Bermuda to BHB to fulfil the Chief Financial Officer role<sup>8</sup>.

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<sup>7</sup> See Decision 01/2018, Bermuda Tourism Authority, paras. 53-59.

<sup>8</sup> See Bermuda Hospitals Board, Update on the Chief Financial Officer Position at BHB, 25 April 2014, available at <http://bermudahospitals.bm/update-on-the-chief-financial-offic-87/>. BHB announced the appointment of the permanent Chief Financial Officer on 3 April 2017. See Bermuda Hospitals Board, Bill Shield appointed as BHB chief financial officer, 4 April 2017, available at <http://bermudahospitals.bm/bill-shields-appointed-as-bhb-chief-financial-officer/>.

60. BHB has confirmed that the Chief Financial Officer was seconded from PwC Bermuda and was not a BHB employee. The Information Commissioner is satisfied that the list of invoices relates to the contract for services performed by PwC Bermuda. Thus, the list falls within the exclusion in section 24(2)(b). The personal information exemption in section 23(1) is inapplicable to these payment figures.

*Information related to discretionary benefit of a financial nature – section 24(2)(c)*

61. The Information Commissioner agrees with BHB and is satisfied that section 24(2)(c) is not applicable to any parts of the responsive records. Although the records contain information relating to payments of compensation and benefits of a financial nature made to the Executive Team members, they are not ‘discretionary’ but were based on set parameters and processes.

[3] *Whether any of the exceptions to the exemption in section 23(2) apply to the records?*

62. The exceptions in section 23(2), which prohibit the application of the personal information exemption, are not applicable in this case. Specifically, the information concerned does not relate to the Applicant and the individuals to whom the information relates have not provided written consent to its disclosure.

63. Therefore, the Information Commissioner is satisfied that the exemption for personal information in section 23(1) is engaged for part of the information in the records. Specifically, the Information Commissioner is satisfied that the personal information exemption is engaged for the names of the Executive Team members, their actual base pay, total compensation, and total cost, along with the various figures and factors that are combined to reach those figures.

[4] *Whether the balance of the public interest requires disclosure?*

64. Both BHB and the Applicant addressed the public interest in accountability and transparency in public spending.

65. The Information Commissioner accepts that the public has a weighty interest in knowing whether public dollars are being spent appropriately and effectively. This interest is consistent with the purposes of the PATI Act to promote accountability for public expenditures and decision making, in accordance with section 2 of the Act. The actual base pay, total compensation and total cost for individual members of the Executive Team relate directly to the expenditure of BHB as a public authority. The

Information Commissioner also notes that BHB received grants from the public purse of almost \$148 million for the year 2015/2016<sup>9</sup>.

66. The Information Commissioner notes that payments received by BHB's Executive Team have been the topic of public scrutiny on several occasions. Disclosure of the actual base pay, total compensation, and total cost for individual Executive Team members would afford the public an opportunity to assess the decision making relating to executive compensation at BHB.

67. As BHB explained, however, these interests favouring disclosure must be weighed against the privacy interests involved, along with any other public interests favouring non-disclosure of the information.

### Fairness

68. The Information Commissioner is satisfied that only a small portion of the personal information in the withheld records constitutes 'sensitive personal information'.<sup>10</sup> She is satisfied that disclosure of the sensitive personal information would not be fair to the individual because it is not the type of information that an employee would expect to be made public.

69. There is a broad public interest in upholding an individual's reasonable expectation of privacy rights and freedoms. The Executive Team members hold the most senior executive positions within BHB. It is reasonable to expect these Executive Team members to have less expectation of privacy concerning their compensation. These individuals are accountable to the public for the management of Bermuda's only hospital facility. The governance and management of BHB by the Executive Team also has a direct impact on how the public funds received by BHB are spent. BHB's claims of discrimination or prejudice against its Executive Team members appears to be speculative, as no support was provided for those claims.

70. Despite this lesser expectation of privacy, the Information Commissioner agrees with BHB that disclosure of the Executive Team members' names along with their actual base pay, total compensation, or total cost would be an unfair invasion of their privacy. The

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<sup>9</sup> See the Government of Bermuda Approved Estimates of Revenue and Expenditure for the Year 2017/18, page C-17, available at [https://www.gov.bm/sites/default/files/Budget\\_Book\\_full\\_version\\_2017-18\\_sm.pdf](https://www.gov.bm/sites/default/files/Budget_Book_full_version_2017-18_sm.pdf).

<sup>10</sup> According to section 7(1) of the Personal Information Protection Act 2016, 'sensitive personal information' means "any personal information relating to an individual's place of origin, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information".

Information Commissioner has recognised that disclosing an individual's actual compensation will reveal what an individual receives in their banks accounts or other benefits. Once such information is disclosed, an individual's family, friends, business associates, and acquaintance will have these details and the disclosure will follow the individual forever.<sup>11</sup> The Information Commissioner agrees with BHB that the small size of our community and the irreversible nature of the disclosure gives substantial weight to this factor, as discussed below.

71. Against these fairness concerns, the Applicant argues that the Executive Team members are on the public payroll and if they wished their salary to remain confidential, they should seek employment in an entity that is not publicly-funded. The Information Commissioner agrees that a lesser expectation of privacy is reasonably expected, but cannot accept that all individuals within public authorities lack any privacy expectations concerning the details of their compensation.

#### Necessary

72. The strongest public interest in disclosure is promoting accountability for the expenditure of the substantial amount of public funding given to BHB, the related decision making concerning those public funds, and the provision of hospital services in Bermuda. The key question here is whether disclosure of the personal information is necessary to further these identified public interests or whether a more limited and less personally intrusive disclosure may still further them.
73. The Information Commissioner is satisfied that disclosure of the actual amounts of payroll tax and pension contributions paid by the Executive Team members as well as the sensitive personal information in the withheld records, is unnecessary to promote accountability for public spending.
74. Disclosure of the actual base pay or total compensation of individual Executive Team posts could certainly promote transparency and accountability for public expenditure. Such disclosure, however, is unnecessary to achieve these purposes because alternatives exist which are less intrusive of individuals' privacy rights.
75. Information on the total cost associated with the employment of the Executive Team members will be more informative for the public. As BHB explained, information about the total cost of the Executive Team members will inform the public of the true value of the Executive Team members' employment to the public purse.

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<sup>11</sup> See Decision 01/2018 Bermuda Tourism Authority, para. 70.

76. Disclosure of the actual total cost of employment for each Executive Team member, however, is also an unnecessary intrusion into the privacy of the individuals on the Executive Team. The relevant public interest can be satisfied by disclosing the total cost within a range, rather than as actual amounts. This strikes an appropriate balance between the Executive Team members' privacy and the important public interests at stake.
77. BHB has already made public the total cost for the Executive Team members as a group in a range between \$158,300 and \$504,200. This range, however, is very broad. The Information Commissioner agrees with the Applicant that such a broad range does not further the accountability purposes of the PATI Act. This broad range also resulted in instances in which the cost figures for the Executive Team members were subject to less transparency than for the employees at the middle and junior levels.<sup>12</sup>
78. The Information Commissioner is not persuaded by BHB's argument that a salary range band of \$10,000, as required in Decision 01/2018, Bermuda Tourism Authority, is too narrow. As the Applicant highlights, a difference does exist between professionals who choose to enter public service or employment with publicly-funded bodies and those who remain in the private sector. The commitment in the public sector, especially for those in executive positions, is to be accountable to the public, including for an individual's compensation. At times this accountability may generate criticism, both fair and unfair. But at the heart of this dynamic is the reality that the compensation for such executive officers comes from the public and those officers are accountable for managing the delivery of services to the public.
79. The Information Commissioner is of the view that the current disclosures for the Executive Team as a group are insufficient to allow the public to assess BHB's award of competitive market-based salaries. The Information Commissioner notes that in jurisdictions in Canada and the UK, executive team members of hospitals have their actual salaries or salary ranges disclosed in accordance with the public sector laws in those jurisdictions<sup>13</sup>. With the current disclosures, it is impossible for the public to

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<sup>12</sup> See BHB disclosure accessible at [http://bermudahospitals.bm/wp-content/uploads/2016/10/495\\_File\\_5.pdf](http://bermudahospitals.bm/wp-content/uploads/2016/10/495_File_5.pdf). The cost ranges for employees at the BIU, BPSU, and Non-Union Staff and Directors levels were between \$46,500 and \$115,700; \$53,700 and \$265,300; and \$63,800 and \$362,900, respectively.

<sup>13</sup> See, e.g., Ontario's Public Sector Salary Disclosure Act, 1996, available at <https://www.ontario.ca/laws/statute/96p01a>; Executive compensation detail, Green River Hospital (Ontario, Canada), available at <http://www.grhosp.on.ca/about/accountability-plans/executive-compensation> (providing the hospital executive compensation framework and a copy of the contract for the hospital President and CEO); see also UK's NHS University College London Hospitals, Annual report and accounts, 2018/19, pp. 73-78, available at <http://www.uclh.nhs.uk/aboutus/wwd/Annual%20reviews%20plans%20and%20reports%20archive/Annual%20Re>



determine if a particular position on the Executive Team has a compensation range comparable to the compensation offered to public hospital administrators in other jurisdictions, taking into account the higher costs of living in Bermuda.

80. The Information Commissioner also does not agree with BHB's claim that disclosure of a more limited range of total cost will place the Executive Team members in a prejudicial position because no other senior executives in Bermuda are required to have their salaries disclosed. For senior executives in the public sector, including those in the public service, total cost ranges are precisely what is disclosed. Further, a number of senior executive posts have an associated actual salary published, not salary range. It is unclear how BHB Executive Team members would have more challenges with public accountability for their salary ranges than any other senior executive in the public sector whose salary range or salary is published in a proactive manner for the public, or is otherwise disclosed in response to a PATI request.

### *Conclusion*

81. The Information Commissioner is satisfied that some information in the withheld records is not personal information as defined in section 24(1). This includes information on social and health insurances rates and actual payments; payroll tax rates; pension rates; and the list of payments made to PwC Bermuda.
82. The Information Commissioner is satisfied that some information in the withheld records is personal information, that the balance of the public interest does not require disclosure, and that reliance on the exemption in section 23(1) is justified. This includes, among other things, the names of the Executive Team members, along with their actual base pay, total compensation, payroll tax contribution, pension contribution, and actual total cost.
83. The Information Commissioner is also satisfied that to promote the public interest in accountability and transparency for public expenditures, while continuing to protect the reasonable privacy rights and freedoms of the individual members of the Executive Team, BHB must disclose the total cost of each Executive Team position in a maximum range of \$10,000 together with the title of the position for 2015-2016.

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[port%20and%20Accounts%202018-19.pdf](#) (detailing remuneration for hospital executives and senior managers); Cayman Islands Heath Services Authority's Disclosure Log, available at <https://www.hsa.ky/about-your-hsa/foi/disclosure-log/> (including salary ranges for executive team members disclosed in response to access to information requests).

*Prejudice to negotiations – section 25(1)(d)*

84. Section 25(1)(d) allows a public authority to refuse access to records if the records consist of information which, if disclosed, would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates. There are exceptions to this exemption which are not relevant in this case.

85. As set out in Decision 01/2018, Bermuda Tourism Authority, for a public authority to establish that a record is exempt under section 25(1)(d), it must ask:

- [1] Who is the person to whom the information relates?
- [2] What are the negotiations of this person that are of concern?
- [3] What is the specific prejudice to either the conduct or outcome that is of concern?
- [4] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?
- [5] Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?
- [6] If the exemption is engaged, whether the balance of the public interest requires disclosure?

86. Generally, this exemption will apply to ongoing negotiations involving the person to whom the information relates to ensure that premature disclosure of the information does not harm their position in the process or with respect to the outcome. If negotiations are finished, the requested information must be released unless there is a real and significant risk to identifiable future negotiations, or the information is exempt under another provision of the PATI Act.

87. Factors that may be relevant in deciding whether a negotiation exists include whether the person was trying to reach some compromise or some mutual agreement. It may be helpful to consider whether there is any proposal for settlement or compromise, any indication of a fall back or alternative position, information created for the purpose of negotiation, any negotiation strategy, and an opening position with a view to further negotiations.

88. Prejudice should be understood as an actual, real, and significant harm. It cannot be a speculative or hypothetical harm. It also implies a negative or detrimental effect.

89. Finally, a public authority has the burden to show, on the balance of probabilities, that the exemption is justified. It should do so by showing objective and reasonable facts to support its arguments.

#### *Public authority's submissions*

90. BHB explained that at the time of the PATI request, it was recruiting individuals for the positions of Chief Financial Officer and Chief of Staff, both of whom are members of the Executive Team, and anticipated compensation package negotiations. BHB provided documentation of its recruitment and appointment process. BHB explained that these positions are statutory and required by sections 7 and 8 of the Bermuda Hospitals Board Act 1970.

91. BHB explained that it had a commercial objective to retain the highest quality candidate at the least total cost. It reasoned that if the salary and compensation details of the incumbent were disclosed, the individuals under consideration for the positions would be put in a competitively advantageous position when negotiating their salary with BHB.

#### *PwC Bermuda*

92. PwC Bermuda was invited to make submissions in relation to the payments made to its staff member who was seconded to BHB as the Chief Financial Officer. The ICO notified PwC Bermuda that the failure to make submissions would be treated as no objection to disclosure.

93. PwC Bermuda did not provide any submissions.

#### *Applicant's submissions*

94. The Applicant did not make specific submissions on section 25(1)(d), but made submissions on the public interest test set out in paragraphs 47-50, above.

#### *Discussion*

95. As noted above, paragraph 82, the Information Commissioner is satisfied that the personal information exemption is applicable to parts of the records. Therefore, the Information Commissioner will only consider the applicability of section 25(1)(d) to the remaining parts of the withheld records: social and health insurance rates and actual amounts; payroll tax and pension rates; and the list of payments made to PwC Bermuda. The Information Commissioner will also consider the applicability of section 25(1)(d) to

the total cost of each individual Executive Team position in a maximum range of \$10,000.

[1] *Who is the person to whom the information relates?*

96. The Information Commissioner is satisfied that the information described in paragraph 95 relates to BHB as it reflects its expenses for the Executive Team members. The list of payments made to PwC Bermuda relates to both BHB and PwC Bermuda.

[2] *What are the negotiations of this person that are of concern?*

97. BHB asserted that the relevant negotiations relate to the hiring of its Chief of Staff and Chief Financial Officer positions, which are required by section 8(1) of the Bermuda Hospital Boards Act 1970. The Information Commissioner notes that BHB refers to both the general recruitment for these two positions, as well as the compensation negotiations once a successful candidate was identified. General recruitment efforts are relevant only to show that future compensation negotiations between identifiable parties was a real and reasonable next step to expect after the recruitment process ended.

98. BHB provided details of the hiring process and the approval process for the final compensation for the successful candidates. After carefully reviewing these documents, and taking into consideration BHB's required recruitment of two statutory posts, the Information Commissioner accepts that in early 2016 BHB was in negotiations, or objectively and reasonably anticipated being in negotiations, with the successful candidates to determine the compensation for the Chief of Staff and Chief Financial Officer. The fact BHB subsequently engaged in these compensation negotiations further indicates that its anticipation of negotiations was not speculative.

[3] *What is the specific prejudice to either the conduct or outcome that is of concern?*

99. BHB asserts a detriment to its bargaining position when negotiating compensation packages with the successful candidates for Chief of Staff and Chief Financial Officer. The Information Commissioner accepts that a weakening of BHB's bargaining position constitutes prejudice to the conduct, and potentially the outcome, of the negotiations.

[4] *How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?*

100. The Information Commissioner does not accept that the disclosure of parts of the withheld records that are not personal information could cause prejudice to BHB's bargaining position.

101. As explained above, social and health insurance rates and amounts, the payroll tax rate, and the pension contribution rate are standardised. Therefore, these figures are not subject to negotiations. The Information Commissioner is not satisfied that disclosure of this information can cause prejudice to BHB's negotiations.

102. The total cost includes total compensation. The total compensation, in turn, consists of, among other things, base pay and other benefits that are subject to negotiations between BHB and its candidates for the Executive Team member positions. Prior to recruitment, however, BHB identifies a specific base pay range with a relatively narrow amount for each post, as well as clear and concrete criteria for eligibility for other benefits. The policies and procedures BHB provided to the ICO during this review indicate that the criteria for total compensation is carefully calculated and applied.

103. While disclosure may result in a successful candidate being more informed concerning BHB's executive compensation structure, this does not necessarily lead to a weakening of BHB's bargaining position. BHB's position concerning its clear and established eligibility criteria for executive compensation and the standard application of these criteria to a particular candidate's circumstances would remain the same.

104. In the absence of sufficient evidence from BHB, the Information Commissioner is not satisfied that disclosure of the payments made to PwC Bermuda or a range of the total cost for individual Executive Team member posts can cause prejudice to BHB's negotiations.

[5] *Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?*

105. The Information Commissioner does not accept that disclosure of social and health insurance information, payroll tax rate, pension rate, payments made to PwC Bermuda, and the total cost in bands of \$10,000 can cause prejudice to BHB's compensation negotiations. As a result, the Information Commissioner does not need

to consider the likelihood of the harm, e.g., whether it could reasonably be possible for the prejudice to occur, or the remaining requirements for section 25(1)(d).

***Information with commercial value – section 25(1)(b)***

106. Section 25(1)(b) allows a public authority to refuse access to a record if it consists of information with a commercial value and disclosure would, or could reasonably be expected to, destroy or diminish the value of such information. Section 25(1)(b) is also subject to exceptions to the exemption which are not relevant in this case.

107. The PATI Act does not define ‘commercial value’. As the Information Commissioner explained in Decision 09/2019, Department of Public Lands and Buildings, information may have commercial value because it is important to the performance of the owner’s commercial activities or because it can be sold for value to an arms-length buyer, i.e., intrinsic commercial value.<sup>14</sup>

108. The PATI Act and Regulations do not define ‘commercial’ or ‘commercial activities’. In Decision 12/2018, Ministry of Finance Headquarters, the Information Commissioner read ‘commercial’ in its ordinary meaning, namely, “concerned with or engaged in commerce”. ‘Commerce’ is defined as “the activity of buying and selling” or “making or intended to make a profit”.<sup>15</sup>

109. Importantly, the exemption in section 25(1)(b) protects the commercial information of private sector businesses as well as public authorities that are engaged in commercial activities. A public authority relying on section 25(1)(b) must explain the commercial activity that is involved.

110. Commercial activity usually requires a business undertaking carried on to generate income or profit.<sup>16</sup> Under some circumstances, the activity may be indirectly

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<sup>14</sup> See Decision 09/2019, Department of Public Lands and Buildings, para. 170.

<sup>15</sup> See Decision 12/2018, Ministry of Finance Headquarters, para. 66.

<sup>16</sup> In Glass Media Pty Ltd and Department of the Premier and Cabinet; Screen Queensland Pty Ltd (Third Party); The Walt Disney Company (Australia) Pty Ltd (Fourth Party), for example, the Queensland Information Commissioner stated that the commercial value harm factor should be read narrowly, in that it is only applicable “to information concerning activities or affairs that are carried on in a business-like fashion for the purpose of generating income or profits”. See paras. 108-122, [2016] QICmr 30 (18 August 2016).

related to a public authority's commercial activity, but is still necessary for the public authority to engage in the commercial activity.<sup>17</sup>

111. Unlike some other access to information laws<sup>18</sup>, section 25(1)(b) involves only commercial information. It will not extend to cover information that relates solely to the finances of a public authority, e.g., its money resources and their management.

112. The plain meaning of 'destroy' or 'diminish' refers to the commercial value of the information being lost or lessened.

113. 'Could reasonably be expected to' requires distinguishing between what is merely speculative, irrational or absurd and identifying expectations that are likely, plausible, or possible based on real and substantial facts. A speculation alone will not be sufficient.

114. If a record falls within the exemption in section 25(1)(b), it must be disclosed if the balance of the public interest favours disclosure.

115. In sum, a public authority must ask the following questions when seeking to apply the exemption for information with commercial value<sup>19</sup>:

- [1] Does the information have commercial value, and can the specific nature of the commercial value be described?
- [2] What is the destruction or diminishment of the commercial value of the information that could occur?
- [3] How could disclosure cause this destruction or diminishment?
- [4] Could it reasonably be expected to occur under the circumstances?

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<sup>17</sup> The UK Information Tribunal applies a broader definition of 'commercial' that is not limited to competitive participation in the buying and selling of goods or services. Rather, the UK Tribunal includes activities such as debt collection that, if compromised, could prejudice the public body's commercial interests, although this case was acknowledged as being 'near the borderline' of the definition, [see Student Loan Company Ltd v Information Commissioner, EA/2008/0092 \(17 July 2009\)](#). Similarly, the UK Tribunal has recognised the provision of university course materials as a commercial interest because the course materials are the 'assets' which the university depends upon for its commercial activity of recruiting students in a competitive environment, [see University of Central Lancashire v Information Commissioner, EA/2009/0034 \(8 December 2009\)](#).

<sup>18</sup> [See, e.g.,](#) section 45(c) of the Queensland Freedom of Information Act 1992 (applicable to information concerning business, professional, commercial or financial affairs whose disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the provision of such information in the future to government).

<sup>19</sup> Decision 09/2019, [Department of Public Lands and Buildings](#), paras. 170-174.

[5] If the exemption is engaged, does the balance of the public interest still require disclosure?

116. Finally, a public authority invoking section 25(1)(b) has the burden to show that, on the balance of probabilities, the exemption is justified. It should do so by showing objective and reasonable facts to support its assertions.

#### *Public authority's submissions*

117. BHB submitted that its commercial activity is the recruitment of new members of the Executive Team. It argued that salary and compensation details of its Executive Team members are valuable to its recruitment of new members because keeping this information withheld prevents others from luring away members of the Executive Team, as well as BHB staff more generally.

118. BHB explained that disclosure will destroy or diminish the commercial value of the records at issue because its competitors and recruiters will be on notice about the exact compensation of Executive Team members. This will afford competitors and recruiters a competitive advantage over BHB and will further allow them to attract away BHB's Executive Team members.

119. BHB described the highly competitive environment in which it recruits its staff. Although Bermuda has only one hospital, BHB explained that approximately 45 general practitioner medical practices in Bermuda engage in a variety of medical disciplines. BHB finds that these medical practices are always looking to recruit the medical specialists from BHB. BHB also has up to 70% of its Professional Clinic staff on contract and is only able to recruit them when the commercial terms are favourable.

120. BHB also noted that one of the Executive Team members during this period also provided front-line clinical services. Disclosing their compensation would make them vulnerable to patients, which would have a detrimental impact on the clinician's effectiveness in delivering clinical services.

#### *PwC Bermuda*

121. PwC Bermuda did not provide any submissions, as explained above in paragraphs 92-93.

#### *Applicant's submissions*

122. The Applicant did not make specific submissions on section 25(1)(b), but made submissions on the public interest test set out in paragraphs 47-50, above.



## Discussion

123. The Information Commissioner will only consider the applicability of section 25(1)(b) to the parts of the records that were not found exempt under the sections previously considered, identified above in paragraphs 81 and 83.

[1] *Does the information have commercial value, and can the specific nature of the commercial value be described?*

124. The total cost in a range of \$10,000 and the payments made to PwC Bermuda may be valuable to BHB's attempts to recruit the best candidates to its Executive Team. BHB has not demonstrated, though, that its recruitment of Executive Team members is a commercial activity in itself. BHB's Executive Team recruitment may relate to its finances, but it is not a commercial activity.

125. BHB attempted to justify its reliance on section 25(1)(b) by making a number of arguments related to its ability to retain clinicians and other BHB staff. This PATI request does not involve those positions. Instead, this PATI request seeks the compensation information for only BHB's Executive Team members. The arguments BHB raised concerning its ability to retain professional clinic and other staff more broadly are not relevant under the circumstances of this case.

126. BHB did not proffer further description of its commercial interests that were involved with the recruitment and retention of Executive Team members.

127. The same reasoning applies to information on social and health insurance rates and amounts, the payroll tax rate, and the pension rate. Under the circumstances in this case, these rates and amounts related to BHB's financial, not commercial, activity.

128. In light of the above, the Information Commissioner is not satisfied that BHB has shown that the information at issue has commercial value. Even if the recruitment and retention of Executive Team members was viewed as a commercial activity, the remaining requirements of section 25(1)(b) have not been met.

[2] *What is the destruction or diminishment of the commercial value of the information that could occur?*

129. BHB has argued that disclosure will allow its competitors and recruiters to lure away the Executive Team members. It argues that this, in turn, lessens the value of its recruitment and retention of Executive Team members.

[3] *How could disclosure cause this destruction or diminishment?*

130. Other than describing the competitive environment for its professional clinic staff in Bermuda, BHB did not explain how disclosure of the salary would allow its competitors or recruiters to attract away its Executive Team members.

131. BHB did not identify the competitors for hiring its Executive Team members, and BHB remains Bermuda's only hospital system. No local competitors for the Executive Team members was offered. Similarly, no evidence was given that overseas hospitals or their recruiters have succeeded in recruiting, or attempted to recruit, BHB Executive Team members to other countries.

[4] *Could it reasonably be expected to occur under the circumstances?*

132. BHB has not presented tangible evidence that BHB could reasonably be expected to lose its Executive Team members to competitors or recruiters if the remaining parts of the withheld record were disclosed. BHB's concerns appear to be only speculative.

133. For the loss of its recruitment and retention activities to occur because of the disclosure of the information listed in paragraphs 81 and 83, for example, the successful candidate would need to have a simultaneous offer from one of BHB's competitors to allow a competitor to 'outbid' BHB's total cost offer. This also assumes that the candidate will not consider any other factor apart from the range of total cost offered when making a decision between two offers, which is unrealistic.

134. With respect to retention or departure of Executive Team members, BHB has similarly not provided evidence or explanation of how disclosure of the information listed in paragraphs 81 and 83, would enable a competitor to convince an Executive Team member to leave their existing position. If an individual is in an established executive position, for example—presumably with a market-competitive compensation package—the individual is likely to consider a number of other factors, including their responsibilities, opportunities for professional growth, geography, family stability, and other matters.

135. The Information Commissioner is not satisfied that the exemption is engaged and, therefore, does not consider the balance of the public interests.

***Adverse effect on commercial interests – section 25(1)(c)***

136. Section 25(1)(c) allows a public authority to deny access to records if they consist of information which, if disclosed, would or could reasonably be expected to

have an adverse effect on the commercial interests of any person to whom the information relates. This exemption is subject to exceptions in section 25(2) that are not applicable in this case.

137. A commercial interest relates to an entity or person's ability to participate in a commercial activity<sup>20</sup>. The meaning of 'commercial activity' is explained above, paragraphs 108-110.

138. 'Could reasonably be expected to' requires distinguishing between what is merely speculative, irrational or absurd and identifying expectations that are likely, plausible, or possible based on real and substantial facts. A speculation alone will not be sufficient.

139. A public authority seeking to justify the exemption for adverse effects on commercial interests must consider the following questions<sup>21</sup>:

- [1] Who is the person to whom the information relates?
- [2] What are the commercial interests of this person that are of concern?
- [3] What adverse effect could disclosure cause?
- [4] How likely is this to occur?
- [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?

140. Finally, a public authority has the burden to show that, on the balance of probabilities, the exemption is justified. It should do so by referring to objective and reasonable facts to support its assertions.

#### *Public authority's submissions*

141. BHB explained that disclosure would affect its participation in a commercial activity, i.e., the recruitment of its Executive Team members. BHB argued that its recruitment of staff is an ongoing process.

142. BHB described the nature of the business environment as highly competitive, repeating its arguments above, paragraph 119.

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<sup>20</sup> Decision 12/2018, Ministry of Finance Headquarters, para. 66.

<sup>21</sup> Decision 12/2018, Ministry of Finance Headquarters, para. 74.

*PwC Bermuda*

143. PwC Bermuda did not provide any submissions, as explained above in paragraphs 92-93.

*Applicant's submissions*

144. The Applicant did not make specific submissions on section 25(1)(c), but made submissions on the public interest test set out in paragraphs 47-50, above.

*Discussion*

145. The Information Commissioner will only consider the applicability of section 25(1)(c) to parts of records that were not found to be exempt under the sections previously considered as described above in paragraphs 81 and 83.

[1] *Who is the person to whom the information relates?*

146. The Information Commissioner accepts that the information relates to BHB's expenses. The list of payments made to PwC Bermuda relates to both BHB and PwC Bermuda.

[2] *What are the commercial interests of this person that are of concern?*

147. As noted above, paragraphs 124-128, the Information Commissioner does not accept that BHB's recruitment and retention of its Executive Team members is part of a commercial activity by BHB as a public authority.

148. The remaining information at issue relates to BHB's financial interests, but not a commercial interest for the purposes of section 25(1)(c).

149. Because the Information Commissioner is not satisfied that BHB has identified the relevant commercial interest, she is satisfied that section 25(1)(c) is not applicable.

150. Even if BHB had established that its recruitment and retention of its Executive Team members is a commercial interest, the Information Commissioner is not satisfied that disclosure of the information listed in paragraphs 81 and 83, could reasonably be expected to have an adverse effect for the reasons explained above in paragraphs 132-134.

*Conclusion*

151. The Information Commissioner finds that BHB was not justified in relying on section 16(1)(d) to administratively deny access to the requested records.

152. The Information Commissioner finds that BHB was justified in applying the personal information exemption in section 23(1) to deny access to parts of the requested records, including the names of the Executive Team members as well as the actual amount of base pay, actual total compensation, and actual total cost for individual positions.
153. The Information Commissioner finds, however, that the public interest in accountability and transparency for effective public spending requires disclosure of the total cost for individual Executive Team positions in a range of \$10,000, and that the exemptions for prejudice to negotiations in section 25(1)(d), prejudice to commercial value in section 25(1)(b), or prejudice to commercial interests in section 25(1)(c) are inapplicable to the total cost range.
154. Finally, the Information Commissioner finds that BHB was not justified in applying the exemptions for personal information in section 23(1), prejudice to negotiations in section 25(1)(d), prejudice to commercial value in section 25(1)(b), or prejudice to commercial interests in section 25(1)(c) to deny access to the social and health insurance rates and amounts; the payroll tax rates; the pension rates; and the list of payments made to PwC Bermuda.

## Decision

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The Information Commissioner finds that the Bermuda Hospitals Board (**BHB**) complied in part, and failed to comply in part, with Part 3 of the Public Access to Information (**PATI**) Act 2010 in responding to the Applicant's PATI request.

Specifically, BHB justified its reliance on section 23(1) to deny the public access to parts of records related to the compensation of its Executive Team members. BHB failed to justify its denial of public access to the remainder of the parts of the records, in accordance with the exemptions in sections 23(1), 25(1)(b), 25(1)(c), and 25(1)(d). The Information Commissioner also finds that the public interest requires access to more narrow bands of the range for total cost for individual Executive Team Member positions. Finally, BHB failed to justify its reliance on section 16(1)(d) to administratively deny access to all of the records.

In accordance with section 48(1) of the PATI Act, the Information Commissioner affirms the decision to deny access to parts of the records that are exempt in accordance with section 23(1) and reverses the decision to deny access to the remainder of the records. The Information Commissioner requires that BHB disclose:

- (a) parts of the records relating to social and health insurance rates and amounts; the payroll tax rate; the pension rate; and the list of payments to Pricewaterhouse Coopers Bermuda; and
- (b) the total cost range of each Executive Team position in a band of \$10,000, replacing any names with the position title.

as directed in this Decision and accompanying Order **on or before Thursday, 12 December 2019**.

## Judicial Review

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The Applicant, Bermuda Hospitals Board, or any party aggrieved by this Decision have the right to seek and apply for judicial review to the Supreme Court according to section 49 of the PATI Act. Any such application must be made within six months of this Decision.

## Enforcement

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This decision has been filed with the Supreme Court, according to section 48(3) of the PATI Act. If Bermuda Hospitals Board fails to comply with this decision, the Information

Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.

A handwritten signature in black ink, appearing to read 'G. Gutierrez', with a long horizontal stroke extending to the right.

Gitanjali S. Gutierrez  
Information Commissioner  
31 October 2019

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Refusal of request on administrative grounds

16 (1) A public authority may refuse to grant a request if—

...

- (d) publication of the record is required by law and is intended to be effected not later than three months after the receipt of the request by the authority;

#### Public interest test

21 For the purposes of this Part, the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure.

#### Personal information

23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.

...

- (6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

#### Definition of personal information

24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—

...

- (2) But “personal information” does not include—
  - (a) Information about an individual . . . ; who is or was an officer or employee of a public authority that relates to the position or functions of the individual. . . .

#### Commercial information

25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—

...



- (b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;
  - (c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates; or
  - (d) information, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates.
- (2) Subsection (1) does not apply if—
- (a) The information concerned relates to the requester;
  - (b) The person to whom the information relates consents in writing to its disclosure; or
  - (c) The information was given to the public authority concerned by the person to whom it relates and the person was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public.
- (3) A record shall be disclosed if disclosure of it is in the public interest.

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