

## Decision Notice

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**Decision 27/2019: Bermuda Health Council**

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**Communications with Chief Medical Officer regarding physicians**

**Reference no: 09082017-01**

**Decision date: 25 November 2019**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Health Council (**Health Council**) for any communications between the Health Council and the Chief Medical Officer regarding two specific physicians between 19 May 2016 and 11 April 2017. The Health Council refused the request on the basis the records were exempt under the following sections of the PATI Act: 25(1)(c) (commercial interests), 26(1)(a) (information given in confidence), 30(1)(a) (prejudice to tests, examinations, etc.), and section 37 (disclosure prohibited by other legislation).

The Information Commissioner has found that part of one of the records falls under section 4(1)(b) of the PATI Act and, therefore, the Act is not applicable to this part of the record. The Information Commissioner has also found that the Health Council was justified, in accordance with section 16(1)(a), in administratively denying access to some of the requested records because the records did not exist after all reasonable steps had been taken to locate them. The Information Commissioner has also upheld the Health Council's decision to deny access to some records under section 37. Finally, the Information Commissioner has found that the denial of one record was not justified.

The Information Commissioner has varied the Health Council's internal review decision. The Information Commissioner has affirmed the decision to deny access to records or part of a record in accordance with section 16(1)(a) and section 37 of the PATI Act. The Information Commissioner has reversed the Health Council's decision with respect to one record and ordered its disclosure, in accordance with this Decision.

## Relevant Statutory provisions

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Public Access to Information (**PATI**) Act 2010: section 4 (application); section 12 (access to records); section 21 (public interest); section 25(1)(c) (commercial interests); section 26(1)(a) (information given in confidence); section 30(1)(a) (prejudice to tests, examinations, etc.); and section 37 (disclosure prohibited by other legislation).

Public Access to Information Regulations 2014: regulation 5 (reasonable search).

Bermuda Health Council Act 2004: section 18 (confidentiality).

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 11 April 2017, the Applicant made a Public Access to Information (**PATI**) request to the Bermuda Health Council (**Health Council**) for any communications—including emails, letters or other records—between the Health Council and the Chief Medical Officer for the Government of Bermuda regarding two physicians. The Applicant specified 19 May 2016 to 11 April 2017 as the relevant time.
2. On 30 May 2017, the Health Council denied access to the request on the basis that the requested records were exempt pursuant to section 37(1) of the PATI Act. The Health Council referred to the Bermuda Health Council Act 2004 and asserted that the Act expressly prohibited disclosure of the records to unauthorised persons. The Health Council also stated that the records requested contained information exempt under sections 23 (personal information), 25(1)(c) (commercial interests), 25(1)(d) (contractual negotiations), 26(1) (information received in confidence), 29(1) (deliberations of public authorities), 30(1)(a) (prejudice to tests, examinations, etc.), and 34(1) (law enforcement).
3. On 7 June 2017, the Applicant requested an internal review. On 19 July 2017, the Health Council issued its internal review decision upholding the initial decision to deny the request on the same grounds.
4. On 9 August 2017, the Applicant submitted a request for an independent review by the Information Commissioner, challenging the Health Council’s internal review decision.

## Investigation

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5. 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.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Health Council to determine whether its reliance on the exemptions was justified.
7. On 14 September 2017, the Information Commissioner’s Office (**ICO**) notified the Health Council that the Applicant had made a valid application. The Health Council provided the ICO with copies of the nine withheld records.

8. During the course of the investigation, the Health Council clarified and refined its basis for denying access to the records several times. The end result was that the issues in the review were both revised and narrowed. The Health Council confirmed that it relies on sections 25(1)(c), 26(1)(a), 30(1)(a) and 37 in withholding the existing records that are responsive to the PATI request.
9. The Health Council also clarified that it did not hold any records of communications concerning one of the physicians. The ICO requested that the Health Council inform the Applicant of this fact, which the Health Council did.
10. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and applicant a reasonable opportunity to make representations. The Health Council and the Applicant were invited to comment on this application and make submissions to the Information Commissioner for consideration during this review. The Health Council was further asked specific questions to justify its reliance on the exemptions and to show the reasonableness of the search it conducted. The Applicant was provided an opportunity to provide additional submissions when the Health Council revised the issues in the review.
11. Both the Health Council and Applicant provided submissions.

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

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12. 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 the Health Council. She is satisfied that no matter of relevance has been overlooked.
13. 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.

#### ***Applicability of the PATI Act – section 4(1)(b)***

14. As set out in Decision 02/2019, Office of the Governor and Decision 19/2019, Department of Internal Audit, section 4 of the PATI Act defines the scope of the records to which the PATI Act applies.
15. Section 4(1)(b) states that the PATI Act does not apply to “records obtained or created by any of the following public authorities in the course of carrying out their functions” and lists

the named authorities. Section 4(2) explains that 4(1) “does not include records relating to the general administration” of these authorities.

16. As section 4 of the PATI Act addresses the scope and applicability of the Act, the Information Commissioner may address it even if the parties do not raise the issue, as is the case here.

17. For section 4(1)(b) of the PATI Act to apply, the following must be considered:

- [1] Was the record obtained or created by one of the public authorities listed in section 4(1)(b)?
- [2] Was it obtained or created in the course of that public authority carrying out its functions?
- [3] Does the record relate to the general administration of the public authority?

#### *Discussion*

- [1] *Was the record obtained or created by a public authority listed in section 4(1)(b)?*

18. The Information Commissioner is satisfied that page 2 of record 5 is a record created by a public authority listed in section 4(1)(b).

- [2] *Was it obtained or created in the course of that public authority carrying out its functions?*

19. After carefully reviewing record 5, the Information Commissioner is satisfied that page 2 of record 5 was created by a public authority listed in section 4(1)(b) in the course of carrying out its functions.

- [3] *Does the record relate to the general administration of the public authority?*

20. Page 2 of record 5 does not relate to the general administration of that office.

#### *Conclusion*

21. The Information Commissioner is satisfied that page 2 of record 5 falls within section 4(1)(b) of the PATI Act and, therefore, the PATI Act is not applicable to that part of the record.

*Records do not exist – section 16(1)(a)*

22. Section 16(1)(a) allows public authorities to refuse a PATI request because the records do not exist or cannot be found after all reasonable steps have been taken to find them.

23. In assessing the reasonableness of search conducted by public authorities, the Information Commissioner considers the following, as set out in Decision 04/2017, Department of Health and Decision 02/2018, Department of Human Resources:

- [1] the quality of the public authority's analysis of the request,
- [2] the scope of the search that it decided to make on the basis of that analysis, and
- [3] the rigour and efficiency with which the search was then conducted.

24. The circumstances of each case will inform the assessment of whether a reasonable search has been conducted.

25. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has conducted a reasonable search for records.

*Public authority's submissions*

26. The Health Council submitted that it searched the email accounts of the Acting Chief Executive Officer (**CEO**) and former Chief Executive Officer, as well as the Health Council's shared drive using the relevant keywords. It provided screen shots of the searches, which showed that no responsive records were found.

27. The Health Council also submitted its search log, which explained the steps it had taken to locate records.

*Applicant's submissions*

28. The Applicant did not provide submissions on the reasonableness of the Health Council's search.

## *Discussion*

### *[1] Quality of the public authority's analysis of the request*

29. The Health Council understood the request to be any form of correspondence between the Health Council and the Chief Medical Officer concerning the two physicians.
30. The Information Commissioner is satisfied that the Health Council's analysis of this PATI request was correct and adequate.

### *[2] The scope of the public authority's search based on its analysis of the request*

31. The Health Council demonstrated that it had identified the relevant locations, which included all record locations for both the Acting and former CEO. The documentation to support the scope of its search was also thorough.
32. The Information Commissioner is satisfied that the scope of the Health Council's search was adequate.

### *[3] The rigour and efficiency with which the search was then conducted*

33. After careful review of the submissions provided by the Health Council, and the Health Council's further submissions at the ICO's request, the Information Commissioner is satisfied that the Health Council conducted its search with adequate rigour and efficiency, and that no responsive records regarding the physician were identified.

## *Conclusion*

34. The Information Commissioner is satisfied that, on the balance of probabilities, the Health Council has taken reasonable steps to locate records regarding this physician that are responsive to the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations, before concluding that it does not hold the records.
35. The Information Commissioner is also satisfied that the Health Council was justified in relying on section 16(1)(a) to administratively deny this part of the PATI request.

## ***Disclosure prohibited by other legislation – section 37***

36. Section 37(1) of the PATI Act allows public authorities to refuse a PATI request if disclosure of the responsive records is prohibited by "any statutory provision" that is not the PATI Act.

37. The exemption in section 37(1) is absolute, which means that it is not subject to the public interest test.

38. As set out by the Information Commissioner in Decision 05/2017, Bermuda Monetary Authority, Decision 12/2018, Ministry of Finance Headquarters, and most recently in Decision 12/2019, Bermuda Monetary Authority, to rely appropriately on the exemption in section 37(1) of the PATI Act, a public authority must ask:

[1] What is the statutory provision creating the mandatory prohibition on disclosure?

[2] Does the record fall within this statutory provision?

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

39. The mandatory prohibition on disclosure in a provision may be indicated by the use of the word 'shall' and an accompanying provision setting out penalties for unauthorised disclosures.

40. If the relevant statutory prohibition only applies when particular functions or duties of a public authority have been engaged, the public authority must identify these functions or duties and explain how the records fall within the prohibition.

41. Finally, the burden is on the public authority to satisfy the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying an exemption.

#### *Public authority's submissions*

42. The Health Council submitted that it relies on section 37 of the PATI Act to withhold records 1-9 on the grounds that section 18 of the Bermuda Health Council Act 2004 imposes a complete bar on disclosure of records.

43. The Health Council submitted that records 1-9 were based upon a written account of information that came to the Health Council's knowledge in the course of its duties under the Health Insurance Act 1970 and its Regulations, including the Health Insurance (Standard Health Benefit) Regulations 1971, and under section 5 of the Bermuda Health Council Act 2004.

### *Applicant's submissions*

44. The Applicant submitted that section 18(1) of the Bermuda Health Council Act states that confidentiality must be preserved “except in so far as may be necessary for the due performance of a person’s functions under this Act or any other statute” (emphasis added). In the Applicant’s view, disclosing the records is necessary for the due performance of the Health Council’s functions under section 5 of the Bermuda Health Council Act, which is to:

conduct research, collect, evaluate and disseminate to the public information on the incidence of illness and other relevant information necessary to support objective decision making with respect to public health and the optimal use of resources.

45. The Applicant also submitted that the phrase “any other statute” in section 18 of the Bermuda Health Council Act should be interpreted to include the PATI Act. The Applicant asserted that this means that if records should be disclosed under the PATI Act, they fall within the exception in section 18(1) of the Bermuda Health Council Act.

### *Discussion*

[1] *What is the statutory provision creating the mandatory prohibition on disclosure?*

46. Section 18(1) of the Bermuda Health Council Act provides that:

Except in so far as may be necessary for the due performance of a person’s functions under this Act or any other statute and subject to subsections (3), (4) and (5), any person who is a member of the Council shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties.

(emphasis added).

47. Section 18 of the Health Council Act was already in existence when the PATI Act came into effect on 1 April 2015. In accordance with section 37(5) of the PATI Act, it does not need to expressly reference the PATI Act to have effect.
48. Section 18(1) also contains mandatory language, “shall”, and section 18(2) creates a criminal offense for unauthorised disclosures.

49. The Information Commissioner does not agree with the Applicant's interpretation of the language in section 18(1), "any other statute", as including disclosures that are required under the PATI Act. Section 37 of the PATI Act expressly preserves existing legal prohibitions on disclosures in statutory provisions. Where such prohibitions exist, a public authority is under no obligation to disclose under the PATI Act. This is consistent with other access to information legislation containing similar provisions<sup>1</sup>. Any other understanding would render the exemption in section 37 meaningless.
50. The Information Commissioner is satisfied that section 18(1) of the Health Council Act creates a mandatory prohibition on disclosure.

[2] *Does the record fall within this statutory provision?*

51. Section 18(1) provides that members of the Health Council "shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties".
52. The Information Commissioner adopts the ordinary, plain meaning of 'matters', 'affairs', and 'duties' in her interpretation of section 18(1) of the Health Council Act. The Oxford Dictionary of English (3<sup>rd</sup> ed. 2010) defines these terms as follows:
- (a) Matters: "a subject or situation under consideration"
  - (b) Affairs: "business or financial dealings"
  - (c) Duties: "a task or action that one is required to perform as part of one's job"
53. The duties of a member of the Health Council are derived from the functions of the Health Council, as contained in section 5 of the Health Council Act. These functions include, among others:

- (a) to ensure the provision of essential health services and to promote and maintain the good health of the residents of Bermuda;
- (b) to exercise regulatory responsibilities with respect to health services and to ensure that health services are provided to the highest standards;

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<sup>1</sup> See Philip Coppel QC, *Information Rights Law and Practice* (2014), Oxford: Hart Publishing, page 870.

- (c) to regulate health service providers by monitoring licensing and certification, establishing fees in respect of the standard health benefit, and establishing standards and codes of practice;
- (d) to regulate health professionals by monitoring licensing, certification, standards and codes of practice; and
- (e) to conduct research, collect, evaluate and disseminate to the public information on the incidence of illness and other relevant information necessary to support objective decision making with respect to public health and the optimal use of resources.

54. As part of their duties, members of the Health Council may also receive and investigate complaints that pertain to the Health Council's mandated functions, in accordance with its Complaints and Queries Policy effective 1 January 2009, revised on 15 June 2016<sup>2</sup>.

55. After carefully reviewing the withheld records, the Information Commissioner is satisfied that records 1-4, 6-9 and the remainder of record 5 all fall within section 18(1) of the Health Council Act. This is because they are matters relating to the affairs of the Council and these matters came to the Council's officers' knowledge in the course of their duties.

56. The Information Commissioner does not accept the Applicant's argument that public disclosure of the Health Council's records is "necessary for the due performance of [its] functions under this Act", in particular the due performance of its functions to conduct research, collect, evaluate and disseminate to the public information necessary to support objective decision making with respect to public health and the optimal use of resources. The records at issue do not address these issues.

[3] *Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?*

57. Section 18(3) of the Health Council Act provides two exceptions or gateways to public disclosure, one of which is relevant in this case. Section 18(3)(b) states that the confidentiality provision in subsection (1) does not preclude the disclosure of information "if the information is or has been available to the public from other sources".

58. In July 2017, the Bermuda Medical Council, pursuant to a PATI request, disclosed records related to one of the physicians. One of those records contained excerpts from minutes of

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<sup>2</sup> The Policy is available at <http://www.bhec.bm/wp-content/uploads/2018/07/Complaints-and-Queries-Policy-20160615.pdf>.

the Bermuda Medical Council, which stated that there was a request from the Bermuda Health Council for the credentials of one of the relevant physicians in this review. Record 7 in this review is the covering email regarding the request from the Bermuda Health Council. The Information Commissioner is satisfied that record 7 falls within the gateway for public disclosure in section 18(3)(b) because the information contained in record 7 is available to the public from other sources.

59. With regard to the remaining records, the Information Commissioner is not aware of any publicly available information that discloses the information contained in these records. The Information Commissioner is satisfied that records 1-4, 6, 8-9 and the remainder of record 5 do not fall within the gateway to public disclosure in section 18(3)(b) of the Bermuda Health Council Act.

#### *Conclusion*

60. The Information Commissioner is satisfied that the Bermuda Health Council correctly relied upon section 37(1) of the PATI Act to withhold records 1-4, 6, 8-9 and the remainder of record 5. The Information Commissioner is not satisfied that the exemption in section 37(1) applies to justify denying public access to record 7.

#### *Prejudice to tests, examinations, etc. – section 30(1)(a)*

61. The Information Commissioner considers whether the exemption in section 30(1)(a) of the PATI Act is applicable to record 7.
62. Section 30(1)(a) of the PATI Act allows public authorities to refuse a PATI request if disclosure could reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits by, or on behalf of, the public authority; or the procedures or methods used to conduct them.
63. The exemption in section 30(1)(a) is a qualified exemption, which means that it is subject to the public interest test. If the exemption is engaged, a public authority must then apply the public interest test before deciding whether to disclose the record. Despite the exemption, the record must be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it, as set out in section 21 of the PATI Act.

#### *Tests, examinations, etc.*

64. The PATI Act does not define 'tests, examinations, investigations, inquiries or audits' and these terms are to be given their normal, ordinary meaning. Section 30(1)(a) may apply to

the tests, examinations, investigations, inquiries or audits that are ongoing or to similar proceedings that may be conducted in the future.

65. The exemption in section 30(1)(a) also applies to the procedures or methods used to conduct the relevant tests, examinations, investigations, inquiries or audits.
66. Examples of the procedures or methods used to conduct the relevant functions may include audit methodologies, forms, and the process for appointing inspectors or auditors. Further, communication that is directly related to procedures and methods used to conduct the relevant functions might also be included, such as correspondence between auditors and those subject to audit.

*Conducted by or on behalf of the public authority*

67. Section 30(1)(a) will apply to functions (or the procedures or methods used to perform them) that are conducted by a public authority. It will also extend to functions (or the procedures or methods) that are conducted on behalf of the public authority by another entity.

*Harm test: prejudice to the effectiveness*

68. 'Prejudice' is not defined in the PATI Act. It is understood in its plain meaning as a harm that is actual, real and significant to the effectiveness of the relevant function, procedures or methods. It cannot be a speculative or hypothetical harm. Prejudice also implies that the disclosure would not just have an effect, but that the effect would be negative or detrimental in a way that undermines the effectiveness of the function, procedure or method.
69. While not defined in the PATI Act, 'effectiveness' in section 30(1)(a) may be understood as the ability of the tests, examinations, investigations, inquiries or audits (or the procedure or method) to produce or lead to a result of some kind. If the function, procedure or method could still be used to achieve its purposes after the disclosure of the record, reliance upon the exemption in section 30(1)(a) may not be appropriate.

*Could reasonably be expected to*

70. 'Could reasonably be expected to' is a lesser likelihood of the prejudice occurring. It requires a public authority to distinguish between what is merely speculative, irrational or absurd and expectations that are likely, plausible, or possible based on real and substantial facts. If a public authority cannot show this, the exemption is not available. Simply speculating to justify the exemption is insufficient.

71. In sum, to withhold a record under section 30(1)(a), a public authority must ask:

- [1] What is the relevant test, examination, investigation, inquiry, or audit, or the procedures or methods employed to conduct any of these?
- [2] How can disclosure cause prejudice to the effectiveness of the relevant test, examination, etc., describing the circumstances or events that can lead to the prejudice?
- [3] Whether the prejudice could reasonably be expected to occur under the circumstances?
- [4] If the exemption is engaged, whether the balance of the public interests requires disclosure of the records?

72. The public authority bears the burden of satisfying the Information Commissioner that the records are exempt from disclosure under section 30(1)(a) of the PATI Act.

*Public authority's submissions*

73. The Health Council submitted that section 30 of the PATI Act applies to record 7.

74. With respect to the public interest test, the Health Council's submissions included details of how disclosure could undermine its role as a regulator and this would weaken its ability to carry out its functions.

*Applicant's submissions*

75. The Applicant made submissions focused on the public interest test. The Applicant highlighted the context concerning the provision of health care in Bermuda, including rising health care costs, the potential over-ordering of diagnostic tests, the arrest and investigation of a physician, and the lawsuit against the Lahey Clinic in the United States. The Applicant urged that the Health Council, as a regulatory body concerned with healthcare quality, has a role to play in the investigation, monitoring and regulating the alleged over-ordering of potentially dangerous medical tests and a duty to disseminate its findings to the public.

76. The Applicant stated that it is very much in the public interest to know what the Health Council is doing from a regulatory standpoint in relation to the potential over-ordering of tests.

## *Discussion*

- [1] *What is the relevant test, examination, investigation, inquiry, or audit, or the procedures or methods employed to conduct any of these?*

77. After carefully reviewing record 7, the Information Commissioner is satisfied that it relates to a specific test, examination, investigation, inquiry or audit by the Health Council, or the procedures or methods employed to conduct them, regarding a private physician. This is clear from the content of the record.

- [2] *How can disclosure cause prejudice to the effectiveness of the relevant test, examination, etc., describing the circumstances or events that can lead to the prejudice?*

78. The Information Commissioner does not accept the Health Council's submission that disclosure of record 7 would prejudice its ability to carry out its functions. The specific test, examination, etc., is one that all healthcare service providers are required to engage in with the Health Council. The information is provided to the Health Council with the expectation that the Health Council and other health care regulators will have the ability to monitor and inspect this information.

79. Furthermore, in response to a PATI request, the Bermuda Medical Council has already disclosed the fact that the Health Council engaged in this regulatory activity.

80. The Information Commissioner is not satisfied that the disclosure of record 7 would prejudice the Health Council's tests, examinations, etc., in the future. Because the Information Commissioner is not satisfied that disclosure could cause prejudice to the effectiveness of the relevant test, examination, etc., by the Health Council, the Information Commissioner does not consider this exemption further.

## ***Commercial Interests – section 25(1)(c)***

81. Section 25(1)(c) allows a public authority to refuse access to records if they consist of information which, if disclosed, would have or could reasonably be expected to have an adverse effect on the commercial interest 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.

82. The test for the commercial interests exemption is set out in Decision 12/2018, Ministry of Finance Headquarters, paragraphs 74-75.

### *Discussion*

83. Because all of the information in record 7 is already available in the public domain, the Information Commissioner is not satisfied that the disclosure of the record could reasonably be expected to have any adverse effect on the commercial interests of the physician. The Information Commissioner does not consider this exemption further.

### ***Information given in confidence – section 26(1)(a)***

84. Section 26(1)(a) allows a public authority to refuse access to records if they consist of information that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential.
85. The test for exemption for information given in confidence is set out in Decision 02/2019, Office of the Governor, paragraphs 131-32.

### *Discussion*

86. For the exemption in section 26(1)(a) to apply, the record must consist of information that was given to a public authority by a “third party (other than another public authority)” (emphasis added). Record 7 consists of a request from one public authority to another public authority for information.
87. The Information Commissioner is not satisfied that record 7 consists of any information that was given to a public authority by a third party, as required by section 26(1)(a). The Information Commissioner does not consider this exemption further.

## Decision

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The Information Commissioner finds that the Bermuda Health Council (**Health Council**) 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, part of record 5 falls within section 4(1)(b) of the PATI Act and, therefore, the PATI Act is not applicable to this part of the record. The Health Council was also justified in denying part of the PATI request on the administrative grounds in section 16(1)(a). The Health Council was also justified in relying on the exemption in section 37(1) to deny access to the remainder of the records, except for record 7. Finally, the Health Council was not justified in denying access to record 7 under sections 30(1)(a), 25(1)(c), and 26(1)(a).

In accordance with section 48(1) of the PATI Act, the Information Commissioner affirms the Health Council's administrative denial of access for part of the PATI request, in accordance with section 16(1)(a), and the denial of access of the remainder of the records, except record 7, in accordance with section 37(1). The Information Commissioner further varies the Health Council's internal review decision as follows:

- annuls the decision with respect to part of record 5 that falls outside the scope of the PATI Act, in accordance with section 4(1)(b) of the Act; and
- reverses the decision to deny access to record 7 and grant access to this record.

The Information Commissioner requires that the Health Council grant access to record 7, as directed by this Decision and the accompanying Order **on or before Monday, 6 January 2020**.

## Judicial Review

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The Applicant, the Bermuda Health Council, or any person 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 the Bermuda Health Council 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.



Gitanjali S. Gutierrez  
Information Commissioner  
25 November 2019

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Access to records

12 ...

(2) Public authorities shall make every reasonable effort to—

(a) assist persons in connection with requests; and

(b) respond to requests completely, accurately and in a timely manner.

#### Refusal of request on administrative grounds

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

(a) the record does not exist or cannot be found after all reasonable steps have been taken to find it;

...

#### 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.

#### Commercial information

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

...

(2) A record shall be disclosed if disclosure of it is in the public interest.

#### Information received in confidence

26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—

(a) information,

(i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and

(ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or

...

(2) A record shall be disclosed if disclosure of it is in the public interest.

#### **Law enforcement**

30 (1) Subject to subsection (2), a record is exempt if its disclosure could reasonably be expected to—

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the public authority concerned or the procedures or methods employed for the conduct of those tests, examinations, investigations, inquiries or audits;

...

(2) A record shall be disclosed if disclosure of it is in the public interest.

#### **Disclosure prohibited by other legislation**

37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.

...

(5) Where a statutory provision made after the coming into operation of this section prohibits the disclosure of a record, the provision shall not have effect unless it provides specifically that it is to have effect notwithstanding this Act.

...

### **Public Access to Information Regulations 2014**

#### **Reasonable search**

5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information officer has been unable to locate a record referred to in paragraph (1), he shall make a record of the efforts he made.

## Bermuda Health Council Act 2004

### Confidentiality

18 (1) Except in so far as may be necessary for the due performance of a person's functions under this Act or any other statute and subject to subsections (3), (4) and (5), any person who is a member of the Council or who is acting as an officer, a servant, an agent or an adviser of the Council shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties.

(2) Any member, officer or servant of the Council who—

(a) communicates any matter relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties to any person other than—

(i) the Minister;

(ii) a member of the Council; or

(iii) an officer of the Council authorized in that behalf by the Chief Executive Officer; or

(b) permits any unauthorized person to have access to any books, papers or other records relating to the Council,

commits an offence and is liable on summary conviction, to a fine of \$10,000.00 or to imprisonment for a term of six months or to both such fine and imprisonment and on conviction on indictment to a fine of \$25,000.00 or to imprisonment for a term of two years or to both such fine and imprisonment.

(3) Subsection (1) does not preclude the disclosure of information—

(a) for the purpose of enabling or assisting the Minister to exercise any functions conferred on him by this Act or Regulations made under this Act or in connection with the dealings between the Minister and the Council when the Council is exercising its functions under this Act or any regulations made under this Act;

(b) if the information is or has been available to the public from other sources.

(4) No officer, servant, agent or adviser of the Council shall be required to produce in any court any book or document or to divulge or communicate to any court any matter or

thing coming under his notice in the performance of his duties under this Act, except on the direction of the court or in so far as may be necessary for the purpose of carrying into effect this Act or any other statutory provision.

(5) For the avoidance of doubt, this section does not apply to the publication of a statement by the Council pursuant to section 25(4A) of the Health Insurance Act 1970.

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