

Decision Notice

Decision 30/2019: Ministry of Health Headquarters

Medical cannabis import application records

Reference no: 25102017-01

Decision date: 19 December 2019

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Health Headquarters (**Ministry**) for physician referral letters submitted to the Ministry in support of applications for licenses to import controlled drugs containing cannabinoids in accordance with section 12 of the Misuse of Drugs Act 1972 and regulation 4 of the Misuse of Drugs Regulations 1973.

The Ministry refused the Applicant's request on the grounds that the records were exempt under section 23 (personal information), section 25(1)(c) (commercial interests), section 25(1)(d) (prejudice to negotiations), and section 26(1)(a) (information given in confidence) of the PATI Act. The Ministry further refused to provide partial access to the records because it would be misleading, in reliance on section 18(2) of the PATI Act.

The Information Commissioner has affirmed the Ministry's decision to deny access to names of the physicians and the physicians' specialities in the physician referral letters because this information is exempt under section 23(1).

This case is related to two subsequent Decisions, Decision 31/2019 and Decision 32/2019, involving related requests and should be read together with those Decisions.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 25(1)(c) (adverse effect on commercial interests); section 25(1)(d) (prejudice to negotiations); section 26(1)(a) (information received in confidence).

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

1. Prior to 25 November 2017, products containing cannabidiol (**CBD**) could only be imported into Bermuda by persons that had obtained authorisation from the Office of the Chief Medical Officer (**OCMO**) and the Minister responsible for drug control pursuant to section 12 of the Misuse of Drugs Act 1972 and regulation 4 of the Misuse of Drugs Regulations 1973. For authorisation to import such products, persons had to

submit an application to the OCMO (**section 12/regulation 4 applications**) providing, among other things, a physician's referral letter confirming that the individual required the CBD product for medicinal use.

2. On 8 July 2017, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Health Headquarters (**Ministry**) for copies of all physician referral letters submitted in support of the section 12/regulation 4 applications. The Applicant acknowledged that "[i]t will be necessary to redact much of the letter as it contains patient's private medical information". The Applicant specifically requested that the physicians' names be left unredacted and that the application reference number be attached to each letter. If this was not possible, the Applicant expressly requested a list of physician's names who have supported each application and the associated "PIL" application reference number.
3. On 1 September 2017, following consultation with some of the relevant third parties, the Ministry issued an initial decision, refusing the Applicant's request because the information was exempt as personal information under section 23(1); information given in confidence under section 26(1)(a); and commercial interests information under section 25(1)(c). The Ministry also relied on section 18(2) to refuse to release part of the records because it would be misleading.
4. On 1 September 2017, the Applicant sought an internal review.
5. On 24 September 2017, the Ministry issued an internal review decision upholding the refusal on the same grounds as in the initial decision as well as an additional ground, the exemption in section 25(1)(d) for information that would prejudice negotiations.
6. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the Ministry's internal review decision.
7. This review is related to two other Decisions issued by the Information Commissioner, Decisions 31/2019 and 32/2019, and should be read together with those Decisions.

Investigation

8. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid 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.

9. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Ministry to determine whether its reliance on the exemptions was justified.
10. The Information Commissioner notified the Ministry that the Applicant had made a valid application. The Ministry provided the Information Commissioner's Office (**ICO**) with copies of the records that are responsive to the PATI request.
11. The Ministry provided twenty files, each containing a separate application for a license to import products containing CBD. The twenty files contained some duplicate physicians' letters and some documents were misfiled. To the best that the ICO could assess, eight of the files contained a total of twelve distinct letters from local registered physicians, as some applications contained letters from two different physicians.
12. Twelve of the application files did not contain a physician's letter. The Ministry explained that seven of these files did not contain a physician's letter because when an individual submitted a repeat application, the individual did not need to resubmit the physician's letter provided as part of the previous application. A copy of the physician's letter was therefore not included in the subsequent file. It was unclear why the other five files did not have a physicians' letter. During the course of this investigation, the Ministry informed the Applicant that it did not hold physicians' letters relating to five of the applications.
13. The twelve physicians' letters are the records that are responsive to the Applicant's request and considered in this review. All of the records contain information related to the patient's medical history and diagnosis, as well as the physicians' names. All but two of the records contain the physician's speciality, identified either in the signature field or on the letterhead. One of the letters contains the PIL reference number associated with the application.
14. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review a reasonable opportunity to make representations. The ICO invited the Applicant and the Ministry to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The Ministry provided submissions on the searches it conducted and was asked specific questions to justify its reliance on the exemptions in sections 23(1), 25(1)(c), 25(1)(d), and 26(1)(a). The Ministry was also asked to justify its refusal to provide partial records, in reliance on section 18(2). Both the Applicant and the Ministry made submissions.

Information Commissioner's analysis and findings

15. 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 Ministry. She is satisfied that no matter of relevance has been overlooked.

Personal information – section 23(1)

16. Section 23(1) allows public authorities to withhold records containing personal information, subject to exceptions in section 23(2), none of which are relevant in this case.

17. 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.

18. Section 24(2) excludes certain categories of information from the definition of personal information, which are not relevant in this case.

19. To invoke the personal information exemption, a public authority must ask¹:

[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?

20. 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

¹ See Decision 01/2018, Bermuda Tourism Authority, para. 37; Decision 02/2019, Office of the Governor, paras. 34-59.

in regulation 2 of the PATI Regulations. See Decision 02/2019, Office of the Governor, paras. 48-55.

21. 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.
22. 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

23. The Ministry submitted that the physician referral letters concerning their patient's medical care falls within the definition of personal information. The Ministry expressly highlighted the examples of personal information listed in section 24(1) of the PATI Act including:
 - a. information relating to the medical history of an individual [section 24(1)(b)];
 - b. the name of an individual when it appears with other personal information related to that individual or disclosure of the name alone would reveal information about the individual [section 24(1)(e)];
 - c. correspondence sent to a public authority by the individual that is expressly or implicitly of a private or confidential nature [section 24(1)(f)]; and
 - d. the views or opinions of any other person about the individual [section 24(1)(g)].
24. With respect to the public interest test, the Ministry considered factors in favour of disclosure and non-disclosure. The Ministry found that disclosure was supported by the public interests in furtherance of transparency and accountability, the need to assist the Applicant with a policy research report, and the benefit of informing patients of the physicians who support medical cannabis. The Ministry also found that non-disclosure was supported by the public interests recognised as the need for confidentiality of records containing professional clinical opinions and information which was received in confidence, the need to prevent any reputational impact for the physicians, the lack of context of each medical circumstance in each record, and the need to prevent a

potential negative impact on physicians' willingness to support applications for medical cannabis for fear of being publicly exposed.

25. In its submissions to the ICO, the Ministry discussed the public interest factors further. It stated that a general drug policy is of public interest, but that the specific information requested by the Applicant did not serve to provide a greater understanding of the Ministry's decision-making process or to inform debate on the subject. The Ministry submitted that the information requested would not provide any evidence of wrongdoing by a public authority or provide transparency or accountability. Furthermore, the Ministry stated that there had been no concerns raised regarding the prescribing practices under the application process. The Ministry explained that it had been transparent in its policy regarding the licensing procedures and intended policy direction.

26. At the ICO's request, the Ministry also provided information obtained during its consultations with three of the relevant physicians. The physicians raised concerns that disclosure may cause bias in the selection of physicians or may have an impact upon the reputation of a physician due to the controversial nature of CBD-containing products.

Applicant's submissions

27. The Applicant's submission focused on the public interest in disclosure of the records. The Applicant explained that the records were intended for use in a non-governmental report on drug law and policy in Bermuda.

28. The Applicant further explained that one chapter of the report is dedicated to the application process for the importation of medical cannabis pursuant to section 12 and regulation 4 of the Misuse of Drugs Act and Regulations. The Applicant seeks to use the records to identify the strengths and weaknesses of the application process, as well as to evaluate inconsistencies in the information provided by the various government bodies involved in the application process.

29. The Applicant intends to make the information available to the public to inform drug law and policy decisions.

Discussion

30. The Information Commissioner has carefully reviewed the withheld records, which consists of twelve physicians' referral letters. The letters contain the following information:

- a. patient information, including medical information and information related to clinical care recommendations;
 - b. physicians' names; and
 - c. physicians' specialities contained in the letterhead or signature in all but two of the letters.
31. The Applicant expressly stated that the PATI request did not seek patients' private medical information. The Decision considers the application of the personal information exemption only for the physicians' names and their specialities.

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

32. The physicians' names clearly fall within the definition of personal information, including the various provisions the Ministry relied upon. With respect to section 24(1)(e), even disclosing only the name of the physician on a referral letter would itself reveal that the physician supported the importation of CBD-containing products for a patient. This is personal information about each physician.
33. The Information Commissioner also agrees with the Ministry's assessment that the records fall within section 24(1)(f) as correspondence that is implicitly of a private and confidential nature. The records are referral letters from private physicians sent to the Ministry on behalf of their private patients to support the patients' application to import CBD-containing products.
34. The Information Commissioner also agrees with the Ministry that the identification of the physicians' specialities, itself, is also personal information within the meaning of section 24(1)(e). Some of the letters indicate the physician's area of speciality. In the circumstances of this case, the speciality of the physicians who have made referrals could easily lead to the identification of the individual physicians, given the small number of various physician specialists in Bermuda.
35. This is supported by the approach taken in other jurisdictions, when disclosure of certain information about individuals within a small group could lead to the identification of specific individuals. For example, in Ontario, "even where personal identifiers have been removed from a record, disclosure will be considered to reveal personally identifiable information where the record's contents relate to a sufficiently

small group of individuals”.² In Bermuda, with a population of 65,000 people, and a very small group of specialists for many of the practice areas, the group of specialists at issue in this case are sufficiently small that disclosure of the specialities could reveal the individual physicians’ identifies.

36. The Information Commissioner is satisfied that both the physicians’ names and their specialities are information about an identifiable individual within the meaning of section 24(1) of the PATI Act.

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

37. None of the exclusions in section 24(2) to the definition of personal information are applicable in this review.

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

38. The exceptions in section 23(2), which prohibit the application of the personal information exemption, are not applicable in this case. In particular, no physician has consented to the disclosure of the letters.

39. Therefore, the Information Commissioner is satisfied that the exemption for personal information in section 23(1) is engaged for the records.

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

40. The Information Commissioner accepts the Applicant’s submissions that there is a public interest in promoting the understanding of the processes and decision of the Ministry as it relates to drug regulation and the importation of CBD-containing products. This includes the process under section 12/regulation 4 for applying for a license to import CBD-containing products. This remains true even if the process is no longer in place due to legislative changes³.

² See Order PO-1834 Ministry of Health and Long-Term Care, 23 November 2000, at page 10, available at <https://decisions.ipc.on.ca/icp-cipvp/orders/en/131138/1/document.do>. The Ontario Freedom of Information and Protection of Privacy Act 2000 has a similar definition of ‘personal information’ as the PATI Act: see section 2 of the Freedom of Information and Privacy Act 2000.

³ On 24 November 2017, pursuant to legislative amendments, the sale of CBD products containing less than 1% tetrahydrocannabinol (THC) were allowed to be sold in pharmacies by a pharmacist without a prescription. This meant that the application process and the requirement for a physician referral was no longer in place.

41. Strong public interests, however, also favour non-disclosure of the records.
42. In this case, the records relate to medical referral letters submitted by private physicians on behalf of their patients. The letters contain the professional clinical opinions of the physicians. The Information Commissioner accepts the Ministry's submissions that disclosure of the letters could result in a misrepresentation of the clinical opinions of the physicians because the letters do not provide any further content or background on the patient's condition or the broader course of care. The Information Commissioner also notes that the small number of letters also risks providing sufficient information to identify the patients, even if heavily redacted letters were disclosed. The referring physicians (and their patients) have a reasonable expectation that correspondence under these circumstances would remain private.
43. An individual's right to privacy under these circumstances carries great weight, and a significant public interest is required to overcome those privacy rights⁴.
44. The Information Commissioner is not persuaded that the release of the letters would further serve the public interests identified above in favour of disclosure. As the Ministry correctly points out, there is no evidence in this case to suggest a suspicion of wrongdoing or maladministration that might support disclosure of the letters. It is also important to emphasise that the purpose of the PATI Act, including the public interest test in section 21, was to increase openness and transparency about the way in which public authorities conduct their operations and carry out their functions. In this case, it would be related to the Ministry's regulatory functions regarding the license application process to import CBD-containing products for medical use.
45. Disclosure of the letters would be an unfair and unnecessary intrusion in to the privacy of the physicians and their clinical opinions regarding the care of their patients. It would not provide sufficient insight into how the Ministry exercised its regulatory functions to justify the intrusion into the physicians' clinical care of their patients.

Conclusion

46. The Information Commissioner is satisfied that the 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.

⁴ See Decision 02/2019, Office of the Governor, at paras. 48-55; Decision 10/2019, Department of Corrections, at para. 35.

47. Given this, the Information Commissioner does not consider the remaining exemptions the Ministry relied upon in its internal review decision: section 25(1)(c), 25(1)(d), and 26(1)(a).

Related PATI requests

48. As noted above, this review is one of three related cases involving successive PATI requests to the Ministry by the same Applicant, which all seek information about the physician referral letters for section 12/regulation 4 applications.

49. Following the denial of the PATI request in this case, the Applicant submitted a new PATI request in an attempt to revise the request in a manner that would allow the Ministry to disclose some of the non-personal, non-confidential information that the Applicant sought. It was then that the Ministry invited the Applicant to clarify what information was sought and whether it could be obtained without disclosing personal information. This dialogue is consistent with the Ministry's duty to assist a requester in connection with a PATI request. The Information Commissioner notes that this assistance and communication did not occur until *after* the Ministry denied the Applicant's initial PATI request in this case.

50. Decision 31/2019, Ministry of Health Headquarters, addresses the second PATI request that flowed from these communications.

51. Turning back to the current case, the Information Commissioner is satisfied that the Ministry correctly relied upon section 23(1) to deny the physicians' names and specialities, but the Information Commissioner has significant doubts that the Ministry adequately complied with the duty to assist, when this case is viewed alone. When viewed together with Decision 31/2019 and Decision 32/2019, it is clear that the handling of this PATI request was not the final interactions between the Ministry and the Applicant.

52. In light of this, any additional measures that the Information Commissioner would have required the Ministry to take in this case to address the handling of the PATI request, were either taken by the Ministry when handling the Applicant's second PATI request, or are otherwise addressed by the Information Commissioner in Decision 31/2019 and Decision 32/2019.

Decision

The Information Commissioner finds that the Ministry of Health Headquarters (**Ministry**) complied with Part 3 of the Public Access to Information (**PATI**) Act 2010 when relying on section 23(1) to deny the public access to the physicians' names and specialities in the withheld physician referral letters. Any other matters related to the Ministry's handling of this request and related PATI requests are addressed in Decisions 31/2019 and 32/2019.

In accordance with section 48(1) of the PATI Act, the Information Commissioner affirms the Ministry's decision to deny access to names of the physicians and the physicians' specialities in the physician referral letters because this information is exempt under section 23(1).

Judicial Review

The Applicant, the Ministry, 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.



Gitanjali S. Gutierrez
Information Commissioner
19 December 2019

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

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. . . .

**Information Commissioner for Bermuda
Valerie T. Scott Building
60 Reid Street
Hamilton, HM 12
www.ico.bm
441-294-9181**