

## Decision Notice

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### Decision 34/2019: Bermuda Police Service

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#### Correspondence with a company

**Reference no:** 20181024

**Decision date:** 19 December 2019

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for correspondence between the office of the Commissioner of Police or Assistant Commissioner of Police and a named company between January 2014 and June 2018.

The BPS refused the Applicant's request on the grounds that the information was exempt under section 25(1)(c) (commercial interest).

The Information Commissioner has affirmed the BPS's decision to deny access to records in accordance with section 25(1)(c) because disclosure of the records could reasonably be expected to have an adverse effect on commercial interests, and the balance of the public interest does not require disclosure.

## Relevant statutory provisions

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Public Access to Information (**PATI**) Act 2010: section 21 (public interest test); section 25(1)(c) (adverse effect on commercial interests).

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 21 June 2018, the Applicant made a Public Access to Information (**PATI**) request to the Bermuda Police Service (**BPS**) for "any correspondence between the office of the Commissioner of Police and/or Assistant Commissioner of Police . . . and the owners and operators of [a named company] from January 2014 to 21 June 2018".
2. On 7 August 2018, the BPS issued its initial decision refusing access to the responsive record on the basis that it is exempt from disclosure under section 25(1)(c) because disclosure could reasonably be expected to have an adverse effect on the commercial interests of the person to whom the information relates.
3. On 21 August 2018, the Applicant sought an internal review. On 1 October 2018, the BPS issued its internal review decision upholding the initial decision.

4. The Applicant submitted a request for an independent review by the Information Commissioner.

## **Investigation**

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5. 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.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the BPS to determine whether its reliance on the exemption was justified.
7. The Information Commissioner notified the BPS that the Applicant had made a valid application. The BPS provided the Information Commissioner's Office (**ICO**) with a copy of the withheld record that is responsive to the PATI request, which appears to be a draft of correspondence.
8. 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 BPS to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The BPS provided submissions on the searches it conducted and was asked specific questions to justify its reliance on the exemption in section 25(1)(c). Only the BPS made submissions.

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

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9. 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 BPS. She is satisfied that no matter of relevance has been overlooked.

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

10. 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 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.

11. As explained in Decision 12/2018, Ministry of Finance Headquarters, para. 74, a public authority must consider five questions when seeking to justify the exemption for adverse effects on commercial interests:

- [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?

12. '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.

13. Section 21 of the PATI Act states that the public interest test is "whether the public interest would, on balance, be better served by disclosure than by non-disclosure". The public interest is defined in section 2 of the PATI Regulations as including, but not limited to, things that may or tend to:

- a. promote greater public understanding of the process or decisions of public authorities;
- b. provide reasons for decisions taken by the Government;
- c. promote accountability of and within the Government;
- d. promote accountability for the public expenditure or the more effective use of public funds;
- e. facilitate public participation in decision-making by the Government;
- f. improve the quality of services provided by the Government and the responsiveness of the Government to the needs of the public or of any section of the public;
- g. deter or reveal wrong-doing or maladministration;

- h. reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
  - i. reveal untrue, incomplete or misleading information or acts of a public authority.
14. 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*

15. The BPS submitted that it evaluated the following considerations when deciding whether the record was exempt under section 25(1)(c):
- a. whether the content of the record could damage the company's reputation or the confidence that customers, suppliers, or investors may have in the company;
  - b. whether the company carried out its commercial activity in a competitive environment;
  - c. whether disclosure of the withheld record would benefit the company's competitors and/or have a significant impact on the revenue generated by the company;
  - d. whether the company consented to the release of information; and
  - e. the balance of the public interest and whether the potential harm caused to the company by disclosure outweighed the likely benefit to the wider public.
16. The BPS also considered the content of the record and submissions made by the company.
17. The BPS submitted that if the withheld record were to be disclosed, it was very likely that it would be circulated in the press and made available to a wide audience. The BPS assessed the likely negative impact of this disclosure.
18. When considering the public interest test, the BPS noted that although this subject may well be of some interest to the public, there is a public interest in ensuring that companies are able to compete fairly and without unfair harm to their commercial interests.

*Applicant's submissions*

19. The Applicant has not provided any submissions.

## Discussion

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

20. The person to whom the information relates is a named company.

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

21. The company's ability to conduct its business and maintain its profits are the commercial interests that are of concern.

[3] *What adverse effect could disclosure cause?*

22. The Information Commissioner has carefully reviewed the BPS's submissions, and the submissions made by the company during the initial decision stage, concerning the specific adverse effects that disclosure of the withheld record could cause. The Information Commissioner agrees with the BPS's assessment that disclosure, and any accompanying negative publicity, could have a negative effect on the commercial interests of the company, which the BPS described with specificity.

[4] *How likely is this to occur?*

23. The Information Commissioner is satisfied that the adverse effect to the company's commercial interests is likely to occur. The BPS's submissions are based on factual representations about the likelihood of commercial losses that are concrete and non-speculative.

[5] *If the exemption is engaged, whether the balance of the public interest requires disclosure?*

24. The Information Commissioner accepts that there is a public interest in understanding the BPS's decision-making with respect to businesses engaging in particular industries. There is also a public interest in ensuring that the BPS has performed its law enforcement function appropriately. Where a business has been found to have committed an offence, there may also be a public interest in that information being disclosed because it could affect the well-being of the public.

25. The Information Commissioner agrees with BPS, however, that it is not in the public interest to disclose a record involving unsubstantiated allegations made against a commercial business in the context of an investigation that never resulted in a criminal prosecution, particularly in circumstances where it is unclear whether the withheld record is a true copy of the correspondence sent to the company.

26. There is no evidence that the safety of the public is at risk. Further, disclosure would contribute very little to the public interest in promoting a greater public understanding of the BPS's decision-making or processes.
27. These minimal public interests in favour of disclosure do not outweigh the public interest in ensuring that businesses are able to compete fairly.
28. In this case, the Information Commissioner is satisfied that the public interest in non-disclosure outweighs the public interest in disclosure.

## Decision

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The Information Commissioner finds that the Bermuda Police Service (**BPS**) complied with Part 3 of the Public Access to Information (**PATI**) Act 2010 when relying on section 25(1)(c) to deny the Applicant's PATI request because disclosure could reasonably be expected to cause an adverse effect on the commercial interests of the company to whom the information relates, and the balance of the public interest did not require disclosure.

In accordance with section 48(1)(a) of the PATI Act, the Information Commissioner affirms the BPS's decision.

## Judicial Review

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The Applicant, the BPS, 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

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### 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.

#### 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;

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