

Decision Notice

Decision 15/2020: Bermuda Police Service

Correspondence between senior management

Reference no: 20200407

Decision date: 30 November 2020

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for email exchanges between members of the senior management in the BPS that relate to the Applicant. The BPS refused the PATI request in accordance with the exemption in section 30(1)(a) of the PATI Act because disclosure could reasonably be expected to prejudice the effectiveness of investigations or the procedures used to conduct them.

The Information Commissioner has affirmed the BPS's reliance on the exemption in section 30(1)(a) of the PATI Act because disclosure could reasonably be expected to prejudice the effectiveness of the procedures used in the BPS's disciplinary investigations, and the balance of the public interest favours non-disclosure. The Information Commissioner does not require the BPS to take any further action in response to this Decision.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); section 30(1)(a) (operations of public authorities).

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. The Applicant is an officer with the Bermuda Police Service (**BPS**). The Applicant was served with a notice of an alleged breach of the Standards of Professional Behaviour, in accordance with Order 14(1) of the Police (Conduct) Orders 2016 (**Order 14 Notice**). The Order 14 Notice informed the Applicant that an investigation will be carried out related to allegations about the Applicant's conduct.
2. Shortly after the Order 14 Notice was served on the Applicant, and while an internal investigation of the Applicant was ongoing, the Applicant filed a PATI request to the BPS asking for email correspondence between named senior officers in the BPS, including between the Commissioner of Police and the Deputy Commissioner of Police, during a specified time period which related to the Applicant.

3. In response, the BPS provided the Applicant with an initial decision refusing the PATI request under the exemption in section 30(1)(a) of the PATI Act for operations of public authorities.
4. The Applicant sought an internal review decision but was informed by the BPS that the Applicant should apply for an independent review by the Information Commissioner. This was because the head of the BPS, the Commissioner of Police, was part of the decision making for the initial decision.

Investigation

5. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Because of the involvement and direction of the Commissioner of Police in the initial decision, the Information Commissioner accepted that a referral by the BPS under section 44(1) of the PATI Act was deemed to have taken place.
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 and requested that the BPS provide copies of the withheld records, which it did.
8. This review considers the BPS's refusal to disclose ten records responsive to the PATI request: 1, 2, 2a, 2b, 3, 4, 5, 6, 7 and 7a¹. It does not consider eleven additional records that the BPS processed or disclosed while this review was ongoing.
9. During this review, the BPS also invoked a late reliance on the exemption in section 29 of the PATI Act, which is not considered, given the Information Commissioner's conclusion on the BPS's reliance on the exemption in section 30(1)(a), as discussed below.
10. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. The BPS and the Applicant were invited to comment on this application and to make

¹ The BPS provided records 1, 2, 3, 5, 6, 7 and 7a to the ICO on 13 May 2020; record 2b on 6 July 2020; and records 2a and 4 on 11 August 2020.

submissions to the Information Commissioner for consideration in this review. The BPS was further asked specific questions to justify its reliance on section 30(1)(a) of the PATI Act. Both the BPS and the Applicant made submissions.

Information Commissioner's analysis and findings

11. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the BPS and the Applicant. She is satisfied that no matter of relevance has been overlooked.

Prejudice to the effectiveness of investigations – section 30(1)(a)

12. Public authorities may refuse to disclose a record under section 30(1)(a) of the PATI Act if its disclosure could reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by, or on behalf of, the public authority; or the procedures or methods used to conduct them².
13. The exemption in section 30(1)(a) is subject to the public interest test. This means that if the exemption in section 30(1)(a) is engaged, the records must still be disclosed if the balance of the public interest favours disclosure, as set out in section 21 of the PATI Act.
14. In the absence of a definition of 'tests, examinations, investigations, inquiries or audits' as well as 'procedures or methods' in the PATI Act and the Interpretation Act 1951, these terms are to be read in their plain, ordinary meaning. Relevant in this review are the following definitions³:
 - a. 'investigation' is defined as 'the action of investigating something or someone', and 'investigate' means to 'carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth'; and

² The exemption in section 30(1)(a) of the PATI Act is similar to section 30(1)(a) of the Irish Freedom of Information (FOI) Act 2014:

A head may refuse to grant an FOI request if access to the record concerned could . . . reasonably be expected to—(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof.

³ Oxford Dictionary of English, 3rd Edition.

- b. 'procedures' is defined as 'an established or official way of doing something' or 'a series of actions conducted in a certain order or manner'.
15. The exemption in section 30(1)(a) may apply to either ongoing or future investigations. It may also be applied to the procedures or methods used to conduct the relevant investigations.
 16. For the exemption to apply, the relevant investigation must be conducted by or on behalf of the public authority concerned.
 17. For the purposes of section 30(1)(a), 'prejudice' should be understood as a harm that is actual, real and significant to the effectiveness of investigations or the procedures used to conduct the investigation. Public authorities must be able to show that the effect caused by disclosure would be negative or detrimental in a way that undermines the effectiveness of the investigations or their procedures.
 18. As the Information Commissioner explained in Decision 27/2019, Bermuda Health Council, 'effectiveness' in section 30(1)(a) refers to the ability of the investigations or the procedures to produce or lead to a result of some kind. If, after disclosure, the investigations or their procedures could still be used to achieve their purposes, section 30(1)(a) may not be applicable.
 19. To appropriately rely on the exemptions in section 30(1)(a), public authorities should also be able to show that disclosure 'could reasonably be expected to' cause the harm. This means a public authority must be able to show that their expectations on the negative impact of disclosure are likely, plausible or possible based on real and substantial facts.
 20. As summarised in Decision 27/2019, Bermuda Health Council, 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 it?
 - [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?

21. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 30(1)(a) to deny access to the records.

Public authority's submissions

22. The BPS asserted that disclosure of the records could reasonably be expected to prejudice the effectiveness of the ongoing investigation conducted by its Professional Standards Department (**PSD**) into the allegations that the Applicant's behaviour fell below the Standards of Professional Behaviour set out in the schedule to the Police (Conduct) Orders 2016 (**Conduct Orders**). Disclosure could reasonably be expected to interfere with the PSD investigator's ability to conduct a fair investigation for both parties. The BPS also explained that disclosure would interfere with the free flow of communications between senior management.
23. The BPS submitted that the disclosure also could reasonably be expected to prejudice any future investigations by the PSD.
24. According to the BPS, disclosure also could reasonably be expected to prejudice the effectiveness of the procedures set out in the Conduct Orders to carry out a disciplinary investigation, including those in Order 4(a) and (g)⁴, as well as Parts 3 (Investigations) and 4 (Misconduct Proceedings), and particularly Order 20(1)(c)⁵.

⁴ Order 4 states:

The harm test

4 Information in documents which are stated to be subject to the harm test under these Orders must not be supplied to the person concerned in so far as the appropriate authority considers that preventing disclosure to that person is—

- (a) necessary for the purpose of preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, any criminal proceedings;

...

- (g) otherwise in the public interest.

⁵ Order 20(1)(c) states:

Notice of referral to misconduct proceedings and panel membership

20 (1) Where a case is referred to misconduct proceedings, the appropriate authority must as soon as practicable give the police officer concerned—

25. With respect to Order 4(a), the BPS explained that information in the documents subjected to the ‘harm test’ must not be supplied to an officer under investigation if the appropriate authority⁶ considers that preventing disclosure is necessary for the purpose of preventing the premature disclosure of information that is relevant to, or may be used in, “the disciplinary investigation and any potential disciplinary hearing”.
26. The BPS further explained that Part 4, Order 20(1)(c) identifies when any documents referred to in the disciplinary investigation, or gathered during the course of the investigation, can be released to the relevant officer.
27. The BPS acknowledged that transparency and accountability, as well as ensuring justice and fair treatment, are public interest factors in favour of disclosing the records.
28. The BPS considered the following public interest factors against disclosing the records:
 - a. The records are exempt under sections 29 and 30 of the PATI Act.
 - b. Disclosure would personally benefit the Applicant, and not the public. Therefore, in the BPS’s view, disclosure does not fit the purposes set out in section 2 of the PATI Act.
 - c. The Applicant’s personal interest to access the records was due to an internal misconduct investigation, which remained ongoing.
29. On this basis, the BPS concluded that the balance of the public interest was against disclosure of the records.

Applicant’s submissions

...

(c) subject to the harm test, a copy of—

- (i) the investigator’s report or such parts of that report as relate to him (together with any document attached to or referred to in that report which relates to him); and
- (ii) any other relevant document gathered during the course of the investigation.

⁶ According to Order 2(1), ‘appropriate authority’ refers to either the Commissioner of Police or, if the officer subject to disciplinary investigation is the Commissioner of Police or the Deputy Commissioner, the Governor. Order 2(5) allows the Commissioner of Police to delegate any of his functions under the Conduct Orders to a member of the BPS of at least the rank of chief inspector, or a human resources professional who is of at least a similar level of seniority to a chief inspector.

30. The Applicant provided detailed background information on the internal investigation the BPS was carrying out on the Applicant.
31. The Applicant also explained that they had no knowledge of the background to the allegations, because the relevant information had not been provided during the disciplinary investigation. The Applicant was of the view that the BPS's withholding of records during the disciplinary investigation was in conflict with the principle of natural justice, inappropriate and unfair because it prohibited the Applicant from adequately defending themselves or supporting counter allegations. The Applicant resorted to filing a PATI request to address these issues.

Discussion

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

32. The BPS has identified a relevant investigation and a relevant set of procedures.

Disciplinary investigation

33. The Information Commissioner accepts that the relevant investigation is the ongoing disciplinary investigation⁷ of the Applicant as set out in the Order 14 Notice, as well as any future disciplinary investigations conducted by the PSD. The disciplinary investigations, which are aimed at investigating any potential breach of the Standards of Professional Behaviour, fall within the definition of an investigation for purposes of section 30(1)(a) of the PATI Act and are conducted by a public authority, i.e., the BPS.

Procedures employed in disciplinary investigations

34. The Information Commissioner further accepts that the Conduct Orders set out the procedures employed by the BPS to conduct the disciplinary investigation of the Applicant, as well as any future disciplinary investigation.

[2] *How can disclosure cause prejudice to the effectiveness of the investigation or procedures, describing the circumstances or events that can lead to the prejudice?*

Disciplinary investigation

⁷ The Information Commissioner understands 'disciplinary investigation' to refer to both an investigation conducted under Part 3 of the Conduct Orders and a misconduct proceeding under Part 4 of the Conduct Orders, which include misconduct hearings and misconduct meetings. See Order 2 of the Conduct Orders for definitions of misconduct proceedings, hearings and meetings.

35. The BPS made summary assertions that disclosure could interfere with the PSD investigator's ability to conduct a fair investigation and would interfere with the free flow of communication among senior management. The BPS did not provide any further information to support this assertion, nor did it explain how disclosure of the ten records at issue could lead to the claimed harm. No explanation was provided, for example, about what information in the records was or was not already known to the Applicant, or how disclosure could actually inhibit senior management from continuing their professional responsibilities and carrying on their communications.
36. In the absence of further information or explanation from the BPS, the Information Commissioner does not accept that disclosure could prejudice the effectiveness of either the BPS's ongoing investigation of the Applicant or its future disciplinary investigations.
37. The BPS's justification of this exemption based upon the disciplinary investigation of the Applicant, as well as any future disciplinary investigation, is not considered further in this Decision.

Procedures employed in disciplinary investigations

38. The records in question contain information about the alleged conduct of the Applicant that led to the decision to initiate the disciplinary investigation.
39. The procedures employed by the BPS to conduct disciplinary proceedings are set out in the Conduct Orders. According to the Conduct Orders, officers subject to disciplinary proceedings have the right to be provided with certain documents and information at particular times, for example:
 - a. An Order 14 Notice must contain, among other things, a description of the conduct that is the subject matter of the allegation and how the conduct is alleged to fall below the Standards of Professional Behaviour.
 - b. The Conduct Orders set a specific timeline for providing updates about the progress of the investigation (see Order 14(4)).
 - c. If the case against the officer is withdrawn and the investigation is completed, a copy of the investigator's report, or such parts of the reports as relate to the officer, may be available upon request to the officer (see Order 19(2)(b)(ii)).
 - d. When a referral to misconduct proceedings is made, written notices of the referral, the relevant conduct in question, how it is alleged to amount to misconduct or gross misconduct, and other information must be provided to

the officer (see Order 20(1)(a)), along with a copy of the investigator's report and any other relevant documents gathered during the investigation (see Order 20(1)(c)).

40. The Information Commissioner is satisfied that the BPS has sufficiently demonstrated how the Conduct Orders have set out the categories of information and documents to be provided to officers subjected to a disciplinary investigation. The Conduct Orders also prescribe a specific timeline for the provision of such information and documents.
41. The Conduct Orders balance an officer's right to obtain particular documents and information against the BPS's need to maintain the confidentiality of certain information, either temporarily or permanently. As part of the procedures for disciplinary investigations, the Conduct Orders afford the appropriate authority and the investigator the discretion to determine whether certain information or documents should not be provided to an officer subject to a disciplinary investigation. The investigator, for example, is not required to provide an officer with an Order 14 Notice if its provision might prejudice the investigation or any other investigation⁸. The investigator is also given the discretion to decide what information the investigator considers "appropriate in the circumstances of the case" to allow the officer to have to prepare for an interview, if an interview is to be conducted⁹.
42. Further, the BPS highlighted that the Conduct Orders establish that a 'harm test' is applicable to the production of some documents and information, such as a copy or part of the investigator's report and other documents gathered during the investigation¹⁰.
43. The BPS explained that information in any documents that are subject to the harm test must not be provided to the relevant officer if the appropriate authority considers that non-disclosure is necessary for the purpose of preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, the 'disciplinary investigation and any potential disciplinary hearing'. The Information Commissioner notes, however, that the relevant provision for the harm test in Order 4(a) refers to avoiding premature or inappropriate disclosures that are relevant only to "any criminal proceeding", not to a disciplinary investigation or hearing.
44. The BPS's arguments with respect to Order 4(g) are more persuasive. Order 4(g) states broadly that information subject to the harm test in Order 4 should not be supplied

⁸ Order 14(3).

⁹ Order 16(6).

¹⁰ Orders 19(2)(b)(ii) and 20(1)(c).

to the officer if the appropriate authority determines that withholding the information is in the 'public interest'.

45. The Information Commissioner is further persuaded by additional provisions in the Conduct Orders that address an officer's concern that the proceedings may have been unfair. Order 37(2)(c) specifically provides that an officer, whose case was decided at a misconduct meeting or hearing, may raise a challenge that "there was a serious breach of the procedures set out in these Orders or other unfairness which could have materially affected the finding or decision on a disciplinary action". These procedures outline how the BPS will address a claim on appeal that an officer lacked sufficient information about the allegations against the officer such that the officer could not adequately defend themselves, in violation of natural justice and fairness.
46. Given these provisions in the Conduct Orders, the Information Commissioner accepts that disclosure of the responsive records could prejudice the effectiveness of the procedures the BPS uses to conduct disciplinary investigations. First, the PATI request in this review was made shortly after the Applicant was served with the Order 14 Notice, and while the disciplinary investigation against the Applicant was ongoing. Disclosure of the responsive records as a result of a PATI request would undermine the timelines specifically set out in the Conduct Orders.
47. Second, and perhaps most importantly, disclosure under the PATI Act of the responsive records could reasonably be expected to undermine the authority granted by the Conduct Orders to the BPS's assigned investigator and the appropriate authority to make decisions on withholding certain information or documents from the Applicant. Disclosure under the PATI Act would circumvent the procedures and decision making authority in the Conduct Orders, and render them less effective, if not meaningless.
48. Although the procedures in the Conduct Orders would still be technically available, disclosure of the responsive records under the PATI Act would defeat the purposes of the structured processes, timelines and decision making authority in the Conduct Orders. This, in turn, defeats the balance struck in the Conduct Orders between an officer's right to a fair proceeding and maintaining the integrity of the BPS's disciplinary investigations.

[3] *Whether the prejudice could reasonably be expected to occur under the circumstances?*

49. The Information Commissioner finds that the effectiveness of the procedures used to conduct disciplinary investigations are dependent upon parties' adherence to them.

This effectiveness could reasonably be expected to be prejudiced by disclosure of the records responsive to the PATI request. Disclosure would allow one party, the officer, to circumvent the provisions of the Conduct Orders, as explained above.

50. Under the circumstances of this review, disclosure could reasonably be expected to undermine, if not eliminate, the decision making authority given to the BPS's investigator and appropriate authority.
51. The Information Commissioner is satisfied that the exemption is engaged because disclosure of the responsive records could reasonably be expected to prejudice the effectiveness of the procedures used to conduct disciplinary investigations.

[4] *If the exemption is engaged, whether the balance of the public interests requires disclosure of the records?*

52. As explained above, the procedures laid out in the Conduct Orders afford the BPS the authority to decide whether it will provide certain information and documents to officers subjected to a disciplinary investigation. The procedures in the Conduct Orders balance the need for a fair process with the BPS's need to protect its other interests outlined in the Conduct Orders, such as safeguarding other pending disciplinary or criminal investigations or other public interests. Inherent in the procedures under the Conduct Orders is a need to protect broader public interests.
53. The exemption in section 30(1)(a), however, is not absolute. Under the circumstances of each particular case, if the public interest would, on balance, be better served by disclosure rather than non-disclosure, the responsive records should be released even if it could prejudice the procedures set forth in the Conduct Orders.
54. The Information Commissioner agrees with the Applicant that the public has an interest in ensuring that police officers subject to disciplinary investigations are provided with relevant information and documents to enable them to make meaningful representations and to sufficiently defend themselves. The procedures set forth in the Conduct Orders outline and protect the right of an officer to fair proceedings. The Conduct Orders do so in the specific context of the BPS's other disciplinary or criminal investigations, and broader public safety mandate. This framework satisfies the public's interest in a fair process for disciplinary investigations of the BPS's officers.
55. The Applicant also asserts a public interest in the fairness of how these procedures were applied in the specific proceeding against the Applicant. Here, the Information Commissioner does not agree with the Applicant.

56. The Information Commissioner acknowledges that there may be circumstances in which records related to one individual may raise concerns that impact the broader public interest. These circumstances, however, are not present in this case. The Applicant is dissatisfied with how the disciplinary procedures have been applied in the Applicant's proceedings, and filed this PATI request while those proceedings were ongoing. The Applicant's individual interest in the fairness of the ongoing disciplinary process against the Applicant is safeguarded by the availability of an appeal to the Public Service Commission (PSC) and judicial review in the Supreme Court.
57. Under these circumstances, the Conduct Orders still provide a process for the Applicant to appeal any future disciplinary decision by the BPS on the grounds that the proceedings were unfair because the Applicant lacked sufficient information about the allegations. The effectiveness of the process outlined in the Conduct Orders and the accompanying rights of appeal and review have been exemplified in recent cases in the public domain¹¹. Under these circumstances, the public interest is better served by the orderly administration of justice through an established, comprehensive framework for addressing disciplinary proceedings and the Applicant's individual interest.
58. No further public interest favours disclosure of the responsive records. On balance, the public is better served by withholding the responsive records under the circumstances of this case.

Conclusion

59. The Information Commissioner is satisfied that the exemption in section 30(1)(a) of the PATI Act is engaged for records 1, 2, 2a, 2b, 3, 4, 5, 6, 7 and 7a because their disclosure could reasonably be expected to prejudice the effectiveness of the

¹¹ One such applicant's subsequent appeal to the PSC resulted in the PSC finding that unfairness occurred and varying the disciplinary action from a dismissal to reinstate the officer with a final written warning. See Pereira v Commissioner of Police, Decision of the Public Service Commission (17 August 2020), in which the PSC concluded, among other things, in an appeal pursuant to Order 37 that the failure of the Misconduct Proceedings Panel to allow the accused officer to present certain evidence was unfair to the officer and allowed this ground of appeal. In addition to an appeal under Order 37, judicial review is available for officers challenging the fairness of their disciplinary proceedings. See Boden v Governor of Bermuda and Commissioner of Police and Pereira v Governor of Bermuda and Commissioner of Police, [2019] SC (Bda) 50 Civ (19 August 2019), at para. 2, in which the applicants' grounds included a challenge that the "current structure of the prosecution and adjudication of disciplinary offenses as prescribed by the Orders violates the rules of natural justice". Although the Court did not find a violation of natural justice, the Hon. Chief Justice Hargun observed that "any breach of the rule of natural justice in the proceedings before the tribunal constituted under Order 24(5) was capable of being cured as a result of the appeal proceedings".

procedures set out in the Conduct Orders for conducting the BPS's disciplinary investigations.

60. The Information Commissioner is further satisfied that the balance of the public interest would be better served by non-disclosure.
61. Because the Information Commissioner is satisfied that the BPS is justified in withholding the responsive records under section 30(1)(a) of the PATI Act, she does not consider the BPS's reliance on section 29(1) of the PATI Act.

Decision

The Information Commissioner finds that the Bermuda Police Service (**BPS**) was justified in denying access to the responsive records in accordance with section 30(1)(a) of the Public Access to Information (**PATI**) Act 2010 because disclosure of the records could reasonably be expected to prejudice the effectiveness of the procedures in the Police (Conduct) Orders 2016 for conducting disciplinary investigations, and the balance of the public interest does not require disclosure.

In accordance with section 48(1)(a) of the PATI Act, the Information Commissioner upholds the decision by the BPS to deny access to the responsive records under section 30(1)(a) of the PATI Act.

Judicial Review

The Applicant, the BPS or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez
Information Commissioner
30 November 2020

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.

Operations of public authorities

- 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.

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