

Decision Notice

Decision 17/2020: Office of the Clerk of the Legislature

Parliamentary Joint Select Committee records

Reference no: 20190515-02

Decision date: 21 December 2020

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Office of the Clerk of the Legislature (**Legislature**) for various records related to the work of the Parliamentary Joint Select Committee 'Examining the Events of the 2 December 2016 Incident at the House of Assembly'. The Legislature disclosed some records, but withheld most of the responsive records under the exemption for parliamentary privilege in accordance with section 36(b) of the PATI Act. The Legislature also relied on the exemption in section 37(1) of the PATI Act when disclosure of the records is prohibited by other legislation.

The Information Commissioner has affirmed the Legislature's internal review decision to deny access to the withheld records in accordance with section 36(b) of the PATI Act because disclosure would be an infringement of parliamentary privilege. The Information Commissioner does not require the Legislature to take any further action in response to this Decision.

Relevant statutory provisions

Public Access to Information Act 2010: section 36(b) (parliamentary privilege).

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. On 2 December 2016, Bermuda experienced a historic event outside of the House of Assembly. A large number of individuals gathered and protested against the redevelopment proposal for the L.F. Wade International Airport. As the protest continued, Members of Parliament were unable to enter the House of Assembly, which was scheduled to consider, among other things, the controversial Airport Redevelopment Concession Bill 2016 during its session that day. Eventually, the Bermuda Police Service (**BPS**) deployed its Police Support Unit (**PSU**). A member or members of the PSU used captor spray, commonly known as 'pepper spray', against the protestors. A number of individuals were injured by the pepper spray, including seniors. The use of force by the BPS led to an investigation into the events on 2 December 2016 by a Parliamentary Joint Select Committee (**Joint Select Committee**) formally established in February 2018.

2. On 16 January 2019, the Applicant filed a request under the Public Access to Information (**PATI**) Act 2010, seeking the following:

All records concerning the Joint Select Committee inquiring into the events of the 2 December 2016 incident at the House of Assembly. This would include (but not be limited to):

- the current membership of the Joint Select Committee;
 - details and minutes of any meetings held by the Joint Select Committee;
 - any decisions taken by the Joint Select Committee;
 - details and transcripts of any hearings held before the Joint Select Committee;
 - a list of witnesses who have given evidence so far;
 - a list of witnesses still to give evidence;
 - details of any forthcoming meetings and hearings; and
 - correspondence between the Joint Select Committee Chairman and witnesses.
3. The Legislature provided the Applicant with an initial decision on 22 February 2019, which helpfully informed the Applicant that the Parliamentary website had begun to be updated periodically to include a listing of all Parliamentary committee meeting dates and times. The initial decision also attached a list of the Joint Select Committee members' names as well as the dates, locations and times of its meetings between 27 February 2018 and 8 February 2019. The Legislature denied access to the rest of the responsive records under the exemption for parliamentary privilege in section 36(b) of the PATI Act.
 4. On 5 March 2019, the Applicant sought an internal review of the initial decision. The Legislature's internal review decision, dated 14 May 2019, upheld the refusal to disclose the remaining records responsive to the PATI request. In addition to relying on the exemption for parliamentary privilege in section 36(b) of the PATI Act, the Legislature's internal review decision refused the request under section 37(1) of the PATI Act because disclosure of the responsive records was prohibited by section 27(2) of the Parliament Act 1957.

5. The Applicant submitted a request for an independent review by the Information Commissioner on 15 May 2019, challenging the Legislature's reliance on the exemptions.
6. In July 2019, while the Information Commissioner's review was ongoing, the Joint Select Committee published its final 146-page report on the events of 2 December 2016¹. In light of the Legislature's disclosure in response to this PATI request and the publication of the Joint Select Committee's report, the Applicant confirmed that they no longer seek records on the Joint Select Committee's membership and on the details of any forthcoming meetings or hearings.

Investigation

7. The application to the Information Commissioner 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.
8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Legislature to determine whether its reliance on the exemption was justified.
9. On 10 June 2019, the Information Commissioner notified the Legislature that the Applicant had made a valid application and requested that the Legislature provide copies of the withheld records, which it did on 9 September 2019.
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 Legislature and the Applicant were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The Applicant made submissions. The Information Commissioner considered the Legislature's initial and internal review decisions, although no further submissions were received from the Legislature.

¹ The report itself is dated May 2019, but it was tabled in the House of Assembly on 5 July 2019. A full copy of the report is available at <http://cloudfront.bernews.com/wp-content/uploads/2019/07/Report-of-the-JSC-Examining-the-Events-of-December-2nd-2016-1.pdf>.

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 Legislature and the Applicant. She is satisfied that no matter of relevance has been overlooked.

Parliamentary privilege – section 36(b)

12. Section 36(b) of the PATI Act allows a public authority to deny public access to records if their disclosure would, or could reasonably be expected to, be an infringement of parliamentary privilege.
13. The exemption in section 36(b) is an absolute exemption. This means that it is not subject to the public interest test. A record that falls within the exemption in section 36(b) does not have to be disclosed under the PATI Act, even when the balance of the public interest may favour disclosure.
14. Although parliamentary privilege is not defined in the PATI Act, it is a well-established constitutional doctrine that affords individual Members of Parliament, as well as Parliament collectively, certain privileges and immunities. In essence, the doctrine of parliamentary privilege protects the constitutional role and independence of Parliament. As Blackstone described, “The whole of the law and custom of Parliament has its origin from this one maxim, ‘that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere’.”² Under this doctrine, Parliament “is answerable to its collective conscience, and in the ultimate analysis, to the electorate”.³
15. The Bermuda Constitution Order 1968 recognises this and relates Bermuda’s parliamentary privilege to that recognised in the United Kingdom. Section 46 of the Constitution states that the Legislature “may by law determine and regulate the privileges, immunities and powers of either House and the members thereof, but no such privileges, immunities or powers shall exceed those of the Commons House of Parliament of the United Kingdom or of the members thereof”. Part II of the Parliament Act 1957 also expressly sets forth certain parliamentary privileges.
16. Consistent with the Constitution, Standing Order 13(1) of the House of Assembly sets out that privileges “are the rights enjoyed by the House collectively and by the

² Sir William Blackstone, *Commentaries on the Laws of England*, (17th ed. (1830)), volume 1, page 163.

³ *Corporate Officer of the House of Commons v Information Commissioner*, [2008] EWHC 1084 (Admin), at para. 2.

Members of the House individually conferred by the Bermuda Constitution Order 1968, the Parliament Act 1957 and other statutes, or by practice, precedent, usage and custom”.⁴

17. A key aspect of parliamentary privilege is each House’s ‘exclusive cognisance’ of its own affairs. This means that each House has the right to manage its own affairs and to exercise sole jurisdiction over its own proceedings.⁵
18. The exemption for parliamentary privilege in the PATI Act protects this exclusive cognisance by recognising that each House of Parliament has the right to control publication of its proceedings. It is generally accepted that the term ‘proceedings’ in Parliament embraces some formal action, i.e., a decision taken by either House in its collective capacity, the forms of business in which the House takes action, and the whole process by which it takes a decision. This includes proceedings within committees formally appointed by the House.⁶
19. With this in mind, not every record relating to Parliament will fall within this exemption. The Information Commissioner’s understanding of the parliamentary privilege exemption in the PATI Act is informed by the UK High Court’s consideration of a similar exemption in the UK’s Freedom of Information Act (FOIA) 2000 in Corporate Officer of the House of Commons v Information Commissioner. The UK High Court emphasised that Parliament had “expressly included the House of Commons among the public authorities to which FOIA applies”⁷. Parliamentary privilege was not invoked in that case, and the Court went on to order the disclosure of records of the members’ expenses related to an “Additional Costs Allowance (ACA)”. The Court found “no reason why the right to and extent of access to information relating to the administration of ACA should not be litigated under FOIA”⁸.
20. Similarly, Bermuda’s Parliament has included the Office of the Clerk of the Legislature in the Schedule to the PATI Act, and the exemption in section 36(b) is inapplicable to

⁴ House of Assembly Official Standing Orders, revised 12 July 2013.

⁵ See the discussion in the Executive Summary of the UK Parliament’s Joint Committee on Parliamentary Privilege – First Report (9 April 1999), available at <https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm>.

⁶ This understanding is drawn from the UK ICO guidance on parliamentary privilege (section 34), para. 10.

⁷ [2008] EWHC 1084 (Admin), at para. 2.

⁸ Id. The 2009 controversy over Members of Parliament’s expenses resulted in ongoing scrutiny of MPs’ expenses and allowances that continues to this day. See, e.g., Martin Williams, After the duck . . . where MPs’ expenses went next, The Guardian, 17 May 2016, available at <https://www.theguardian.com/politics/2016/may/17/mps-expenses-martin-williams-parliament-ltd>; Emily Maitlis, MPs’ expenses: The scandal that changed Britain, BBC News, 25 March 2019, available at <https://www.bbc.com/news/uk-47669589>.

the records held by the Legislature whose disclosure will not be an infringement of parliamentary privilege.

21. The likelihood of harm required for this exemption is that the infringement 'would' or 'could reasonably be expected to' occur. 'Would' means there is a high probability that an infringement of parliamentary privilege can occur. 'Could reasonably be expected to' is a lesser likelihood of harm. 'Reasonable' refers to what a reasonable person would expect considering all of the circumstances of the case.
22. In light of the scope of the parliamentary privilege doctrine, any unpublished record relating to proceedings in Parliament may fall within the exemption in section 36(b) of the PATI Act. When considering applying section 36(b), a public authority must consider the following:
 - [1] Whether the records relate to proceedings in Parliament?
 - [2] Could disclosure be reasonably expected to be an infringement of parliamentary privilege?
23. 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 36(b) to deny access to the records.

Public authority's submissions

24. The Legislature submitted that the remainder of the responsive records are exempt under section 36(b) because the records pertain to the in camera, or closed, deliberations of the Joint Select Committee. The Legislature referred to the provision in Standing Order 38(8), which states the sittings of a select committee shall be private, subject to any order of the House or resolution of the committee.
25. The Legislature further explained that an unauthorised disclosure of the proceedings or deliberation of any select committee of either House or of any joint select committee, prior to the committee reporting to the House or Houses of the Legislature, is prohibited under section 27(2) of the Parliament Act.

Applicant's submissions

26. The Applicant acknowledged the provision in section 27(2) of the Parliament Act, but emphasised that it refers to disclosure prior to the Joint Select Committee reporting to the House. The Applicant argued that section 27(2) of the Parliament Act is no

longer applicable to the records being requested because the Joint Select Committee's report was made public as of 5 July 2019.

Discussion

[1] *Whether the records relate to proceedings in Parliament?*

27. This PATI request asked for all records concerning the Joint Select Committee, and identified a number of examples of the records sought. Having carefully reviewed the withheld records provided by the Legislature, the Information Commissioner is satisfied that these records relate to the work of the Joint Select Committee.
28. The establishment of the Joint Select Committee was a collective decision made by the House of Assembly and the Senate, and its work was also the collective work of both Houses. The Information Commissioner is satisfied that the work of the Joint Select Committee falls within the scope of 'proceedings in Parliament'.

[2] *Could disclosure reasonably be expected to be an infringement of parliamentary privilege?*

29. A PATI disclosure of the withheld records relating to the Joint Select Committee as requested by the Applicant would be an infringement of parliamentary privilege because it would encroach upon Parliament's right to control the publication of its work and records.
30. The Applicant referred to the Joint Select Committee's release of its final report to argue that the confidentiality provision in section 27(2) of the Parliament Act is no longer applicable. The Information Commissioner notes that at the time of the internal review decision, the Joint Select Committee had not yet published its final report, although it appears that the report was completed in May 2019. Regardless of the timing of the publication of the final report, the Joint Select Committee would still retain exclusive cognisance under parliamentary privilege to regulate its own proceedings, including its publications.
31. In its final 146-page report, the Joint Select Committee made a decision concerning what information to publish in July 2019 about its proceedings and work. The final report contains extensive information for the public. This includes, for example, the details of its proceedings, the challenges it faced to securing the appearance of witnesses, details of its communications with witnesses and relevant parties, and the conclusions it reached. Further, the numerous appendices to the final report provide primary source records from the events, including some of the submissions received

by the relevant parties, statements from witnesses filed with the BPS and anonymised comments received from interviewees.

32. It falls within Parliament's exclusive cognisance for the Joint Select Committee to exclude certain documents or information from its final report. Requiring disclosure through a PATI request of records or information which the Joint Select Committee has not published would be an infringement of Parliament's right to exclusive cognisance. It would effectively introduce a new decision maker (e.g., the Information Commissioner) into the workings of Parliament.
33. The Information Commissioner is satisfied that disclosure of the withheld records would be an infringement of parliamentary privilege.

Conclusion

34. The Information Commissioner is satisfied that the Legislature was justified in relying upon the exemption in section 36(b) to deny access to the withheld records because disclosure would be an infringement of parliamentary privilege.
35. Because the Information Commissioner is satisfied that the Legislature is justified in denying access to the withheld records under section 36(b) of the PATI Act, she does not consider the Legislature's reliance on section 37(1) of the PATI Act.
36. In this case the exemption for parliamentary privilege prevents disclosure of the withheld records to the public to safeguard the important constitutional role of Parliament. Although the PATI Act does not provide an avenue for access to the committee records in this case, the Information Commissioner offers some observations on the public's access to the records of Parliamentary committees.
37. First, as historians will note, the exemption for parliamentary privilege is not applicable to records over thirty years old, in accordance with section 40(1) of the PATI Act. This means that for important historic events, such as the 2 December 2016 protest, the passage of time would disallow a public authority from relying on the parliamentary privilege exemption in the PATI Act to deny access to the full records.
38. Second, Parliament's right to manage its own affairs and to exercise sole jurisdiction over its own proceedings does not mean that Parliament operates in secrecy. Parliament has published extensive information related to its proceedings, including

the procedures and final reports of its various committees⁹. For example, Standing Orders 38(10) to 38(15) describe the requirement for a select committee to table a report upon the matters it considered, as well as the procedures for doing so. Standing Order 38(16) specifies the information that must be recorded in the committee's minutes, which include the names of the members present at each sitting of the committee, the names of witnesses, and documentation if a division takes place between the members.

39. Through its constitutional authority to regulate its own proceedings, alongside Parliament's customs, practice and Standing Orders, Parliament has provided the public with a general understanding of what publications to expect from select committees. Parliament remains "answerable to its collective conscience, and in the ultimate analysis, to the electorate".¹⁰

⁹ The Parliamentary Joint Select Committee on the 'Causes of Violent Crime and Gun Violence in Bermuda', for example, issued its 120-page report in July 2011, after conducting the majority of its proceedings in public. It also offered to make the transcripts of its public proceedings available upon request at no cost, and stated that the transcripts of any closed proceedings could be provided if the interviewee's permission were secured. A full copy of the report is available at <https://rgb-prod-public-pdfs.s3.us-east-2.amazonaws.com/RG101522127.pdf>.

¹⁰ [2008] EWHC 1084 (Admin), at para. 2.

Decision

The Information Commissioner finds that the Office of the Clerk of the Legislature (**Legislature**) was justified in denying access to the withheld records in accordance with section 36(b) of the Public Access to Information (**PATI**) Act 2010 because disclosure of the records would be an infringement of parliamentary privilege.

In accordance with section 48(1)(a) of the PATI Act, the Information Commissioner upholds the decision by the Legislature to deny access to the responsive records under section 36(b) of the PATI Act.

Judicial Review

The Applicant, the Legislature 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
21 December 2020

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Contempt of court and parliamentary privilege

36 A record is exempt if its disclosure would, or could reasonably be expected to be—

...

(b) an infringement of parliamentary privilege.

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