

Decision Notice

Decision 14/2021: Office of the Governor

Complaint records

Reference no: 20200619

Decision date: 25 November 2021

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Officer of the Governor (**Government House**) for records on complaints filed by the Applicant against certain judicial officers. Government House disclosed the responsive records in part, but withheld access to the remainder under the exemption in section 29(1) (deliberations of public authorities) of the PATI Act.

The Information Commissioner has found that Government House was justified, in part, in relying on section 29(1) to deny access to some of the withheld records. Further, the Information Commissioner has found that some parts of the remaining records are exempt under section 23(1) because they consist of personal information. The Information Commissioner has ordered Government House to disclose the remaining parts of records that are not exempt under section 29(1) or 23(1) of the PATI Act.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); and section 29 (deliberations of public authorities).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. Appendix 1 forms part of this Decision.

Background

1. In 2018, the Applicant submitted to the then Governor a complaint against a judicial officer (**First Complaint**). In accordance with the Judicial Complaints Protocol for Bermuda (**Protocol**)¹, the Applicant's First Complaint was considered by the Judicial and Legal Services Committee for Bermuda (**JLSC**).
2. Pursuant to the Protocol, the JLSC determined that the Applicant's First Complaint should not be summarily dismissed. Later in 2018, the JLSC provided the Applicant

¹ Judicial Complaints Protocol for Bermuda (2018), available at <https://www.gov.bm/sites/default/files/JLSC-Convening-Note-and-Complaints-Protocol.pdf>. The Protocol took effect on 1 January 2014 and was authored by the then President of the Court of Appeal and the then Chief Justice.

with a decision on the First Complaint. The decision found that the Applicant's First Complaint was not one which "appears may be valid" and thus should be dismissed.

3. In March 2019, the Applicant filed another complaint to the Governor, challenging the JLSC's handling of their First Complaint. The Applicant asserted that some of the JLSC members who handled the First Complaint were conflicted (**Second Complaint**).
4. In August 2019, the Applicant informed the Governor that they would not be pursuing their First Complaint through the Protocol.
5. On 24 January 2020, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Office of the Governor (**Government House**), seeking the following records:
 - a. all documents regarding the Applicant's First Complaint (**item 1**);
 - b. all documents and communications related to the First Complaint between the Governor, the JLSC or any of the members of the JLSC, and a specified private sector entity (**item 2**); and
 - c. all documents and communications between the JLSC, or any of the members of the JLSC, and the judicial officer who was subject of the First Complaint, insofar as the records were related to the First Complaint (**item 3**).
6. As of the time of the PATI request, it was unclear whether the Applicant's Second Complaint was still open.
7. Government House's initial decision of 6 March 2020 granted the Applicant access to records responsive to item 1, in part. The names of the JLSC members in the disclosed records were redacted, or were clearly meant to have been redacted. Government House's initial decision denied access to all records responsive to items 2 and 3 under the exemption in section 29(1) of the PATI Act (deliberations of public authorities), although certain records responsive to item 1 were also responsive to item 3.
8. The Applicant sought an internal review, and Government House issued a timely internal review decision on 18 May 2020. The internal review decision granted the Applicant access to more redacted records pursuant to section 29(2)(a), which created an exception that removes factual information from the scope of the exemption. Government House continued to rely on section 29(1) to withhold the remaining responsive records or parts of records. This included the names of the JLSC members who considered the First and Second Complaints.

9. The Applicant made a timely application on 19 June 2020 for an independent review by the Information Commissioner.

Investigation

10. 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. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
11. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine whether its reliance on the exemption was justified.
12. The Information Commissioner notified Government House of the Applicant's valid application on 2 July 2020, and requested a copy of all the withheld records responsive to the request. Government House provided a total of 41 records to the Information Commissioner's Office (**ICO**). It withholds 26 of these records under section 29(1), some in part only. These are marked records 1, 1a, 1b, 3, 11, 19-25, 27, 28, 28a, 29, 30, 32-35, 35a, 36-38 and 40.
13. Government House also informed the ICO that the remaining 15 records could be disclosed to the Applicant in full. These are marked records 4-10, 12-18 and 26. Because Government House has not disclosed these records to the Applicant and because they contain information about identifiable individuals, the Information Commissioner considers the applicability of the personal information exemption in section 23(1) to these records on her own accord in this Decision.
14. 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. Government House and the Applicant were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review, which both parties did.

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

16. The Information Commissioner strives to provide as full an explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis of various issues cannot be as detailed as would otherwise be preferred.

Deliberations of public authorities – section 29(1)

17. Section 29(1) of the PATI Act allows public authorities to deny access to records when the record consists of information whose disclosure would undermine, or could reasonably be expected to undermine, the deliberative process of a public authority, including free and frank discussion and provision of advice in the course of that process.
18. For reliance on section 29(1) to be justified, disclosure of the information in the records must undermine a public authority's 'deliberative process'. The Information Commissioner understands a 'deliberative process' in section 29(1) as referring to the consideration or evaluation of competing arguments, information and facts with a view to making a decision². A deliberative process is, at its most basic, the thinking process of an agency³. This exemption is in place to safeguard the integrity of this process for public authorities' decision making.
19. To rely on section 29(1), a public authority must demonstrate that, at a minimum, disclosure 'could reasonably be expected to' undermine a public authority's deliberative process. The plain meaning of 'undermine' is "lessen the effectiveness, power or ability of, especially gradually or insidiously"⁴. Whether it is reasonable to think that the harm will occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
20. The exemption in section 29(1) does not apply to certain categories of information, such as factual or statistical information (section 29(2)(a)) or information in the nature of the reasons of a public authority for making a particular decision (section 29(2)(d)).

² See Decision 02/2019, Office of the Governor, para. 168.

³ See Queensland's Office of the Information Commissioner (17 September 2019), Interpreting the legislation – Right to Information Act 2009, Deliberative Process, para. 3.1, available at https://www.oic.qld.gov.au/data/assets/pdf_file/0014/40343/guideline-deliberative-process.pdf. See also Western Australia's Office of the Information Commissioner (October 2001), FOI Guide No. 3, Deliberative Process, p. 1, available at <https://www.oic.wa.gov.au/Materials/ExemptionGuides/Clause6.pdf>.

⁴ Oxford Dictionary of English (3rd ed. 2010).

21. 'Factual information' is not defined in the PATI Act or the Interpretation Act 1951. The Irish Freedom of Information Act 2014 has a provision similar to section 29(2)(a) of the PATI Act, and the Irish Information Commissioner's discussion of that provision offers a useful definition of 'factual information' in this context. The Irish Information Commissioner has adopted the following plain meaning of "factual" as: "[s]omething that has really occurred or is actually the case; something certainly known to be of this character; hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it"⁵. Factual information is "distinguishable from information in the form of [a] proposal, opinion or recommendation"⁶.
22. Generally, the release of factual information will not reveal deliberations or otherwise threaten a public authority's deliberative process. Two contexts arise when this distinction between factual and deliberative materials may not stand⁷. First, in some records, the factual information may be so inextricably connected with the deliberative material that disclosure would reveal and cause harm to the public authority's deliberation. The second context arises when a record contains selective facts collated from a larger group of facts, and the distilling of facts itself is a deliberative process. It indicates the facts the author found relevant or significant and those deemed irrelevant or insignificant to the matter at hand.
23. The exemption in section 29(1) is subject to the public interest test. If the exemption is engaged, the records or parts of records must still be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.
24. In sum, to appropriately rely on section 29(1), a public authority must consider the following:

[1] What is the relevant deliberative process involved?

⁵ Ireland's Office of the Information Commissioner (August 2015), Guidance Note, Freedom of Information Act 2014 Section 29 – Deliberations of FOI Bodies, paras. 3.3.1, available at <https://www.oic.ie/guidance-and-resources/guidance-notes/1-Section-29-Guidance-Note.pdf>. The decisions cited in the Guidance Note relied on the definition provided by the Oxford English Dictionary.

⁶ Ireland's Office of the Information Commissioner (August 2015), Guidance Note, Freedom of Information Act 2014 Section 29 – Deliberations of FOI Bodies, paras. 3.3.1, available at <https://www.oic.ie/guidance-and-resources/guidance-notes/1-Section-29-Guidance-Note.pdf>.

⁷ See, for example, Office of the Australian Information Commissioner (December 2016), FOI Guidelines, Part 6 – Conditional exemptions, para. 6.73, available at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions>.

- [2] Does any of the information fall within the exceptions listed in section 29(2)?
- [3] Could disclosure of the record reasonably be expected to undermine the identified deliberative process of a public authority?
- [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?

25. Finally, the underlying presumption of the PATI Act is that requests for access to records will be granted, subject only to the exemptions or other administrative restrictions in the PATI Act. For section 29(1), the 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 to deny access to public records.

Public authority's submissions

- 26. Referring to the definition of 'deliberative process' set out in the Information Commissioner's Decision 02/2019, Government House asserted that the withheld records were part of a deliberative process in reaching decisions on the Applicant's complaints against certain judicial officers.
- 27. Government House asserted that disclosure could reasonably be expected to undermine the identified deliberative process. It explained that the Applicant's complaints were still pending at the date of the PATI request and as of its submissions to the ICO in February 2021. Government House also claimed to have not received clarification from the Applicant on which portion of the complaints was being withdrawn.
- 28. Government House further submitted that disclosure could reasonably be expected to undermine its deliberative process of complaints against members of the Judiciary in general. It explained that there was a clear need for the JLSC and the Governor to receive and weigh various competing ideas, information and options before making their decisions.
- 29. After receiving the ICO Investigator's preliminary view, Government House accepted that some parts of records 1b, 21, 23 and 24 were factual information and could be disclosed by virtue of section 29(2)(a). Government House continued to maintain that other parts of records 1b and 21, including the names of the JLSC members, should be withheld.

30. Government House submitted that the exception to the exemption in section 29(2)(d), for the reasons a public authority made a particular decision, did not apply. This was because the reasons for the Governor and JLSC's decisions on the substance of the Applicant's complaints had been properly explained to the Applicant.
31. Government House accepted that disclosure might be beneficial to the Applicant's private interest. It asserted, however, that disclosure might not necessarily serve public interests. The Applicant's private interest was not necessarily the same as the public interest. Government House further asserted that there was a strong interest in ensuring that decision makers could maintain the integrity of free and frank discussion and the provision of advice, including in important matters relating to complaints against members of the Judiciary.
32. Government House clarified that there was no record on file to support the Applicant's claims that a member or members of the JLSC had disclosed information to the specified third party. Such would have been responsive to item 2 of the request.

Applicant's submissions

33. The Applicant provided the background of their First and Second Complaints and PATI request, including their concern that the JLSC's decision in their First Complaint was neither independent nor impartial, because some of the JLSC members were conflicted.
34. The Applicant was also concerned that an unknown member of the JLSC informed a specific, private third party of the outcome of the Applicant's First Complaint. The Applicant submitted that this disclosed information had been used against the Applicant. The Applicant alleged that records documented the disclosure of their information by the JLSC to the private third party. According to the Applicant, because the information had been used to make allegations against them, and given that the existence of the records had been disclosed, the exemption in section 29 was not available. Government House could not claim that the information in the record was exempt when a member of the JLSC had disclosed it to the private third party.
35. The Applicant explained that they needed the withheld records to defend themselves in a proceeding. They emphasised their right to a fair hearing under section 6(8) of the Constitution and that the PATI Act was subject to their constitutional rights.

Discussion

36. The Information Commissioner considers Government House's reliance on section 29(1) to withhold records or parts of records 1, 1a, 1b, 3, 11, 19-25, 27, 28, 28a, 29, 30, 32-35, 35a, 36-38 and 40.
37. For clarity, certain parts of the records listed above are not considered in this review because Government House already disclosed them during its initial handling of the PATI request. Only the redactions are now considered. With specific regard to records 1, 1a, 19 and 28a, the Information Commissioner only considers Government House's decision to withhold information identifying the JLSC members because Government House disclosed the remaining parts of these records to the Applicant during the initial handling of this PATI request.

[1] What is the relevant deliberative process involved?

38. The Information Commissioner accepts that the relevant deliberative process is the Governor and JLSC's decisions on the Applicant's First and Second Complaints.

[2] Does any of the information fall within the exceptions listed in section 29(2)?

39. Relevant here are the exceptions to the exemption for "factual or statistical information" in section 29(2)(a) and "information in the nature of the reasons of a public authority for making a particular decision" in section 29(2)(d).
40. Records 1b, 3, 11, 20-22, 25, 27, 28, 29, 30, 32-35, 36, 37 and 40 are emails. With respect to factual information, the Information Commissioner is satisfied that the names and email addresses of the senders and recipients, dates and times as well as the subjects of the emails and the filename of any email attachment (**email details**) in these records fall within the exception listed in section 29(2)(a).
41. Record 38 is an email sent by the Governor to himself as a Note for File. The record captures information about the Applicant obtained by the Governor from a telephone conversation. Although the information in the record describes factual information, its disclosure will reveal the Governor's thought process in relation to the facts discussed. The factual information is inextricably intertwined with the considerations the Governor was weighing. It cannot be disclosed without revealing the Governor's deliberations. For this reason, the exception in section 29(2)(a) is inapplicable to the other details of records 38.

42. The Information Commissioner is of the view that the names and signatures of the JLSC members as well as the descriptions of their participation in the handling of the Applicant's complaints in records 1, 1a, 1b, 3, 19, 21, 23 and 28a fall within the exception for factual information. The authorship details in records 23, 24 and 35a are also factual information that fall within section 29(2)(a). It is a matter of fact that these individuals were members of the JLSC and involved in the handling of the Applicant's complaints. Government House expressed concerns on the disclosure of their names but did not elaborate on the nature of the concerns. In any event, this does not impact the names of the JLSC members being categorised as factual information.
43. Further, the exception for factual information in section 29(2)(a) applies to certain parts of records 1b, 3, 20-24, 27, 28, 29, 30, 32-35, 36, 38 and 40 and the entirety of record 11, which contain objective factual information.
44. The Information Commissioner agrees with Government House, albeit for a different reason, that the exception in section 29(2)(d) is inapplicable. Contrary to Government House's assertion, this exception would still apply even if a public authority has disclosed its reasons for a particular decision. The relevant records in this review, however, do not contain the reasons why the JLSC dismissed the Applicant's First Complaint. The majority of records relate to the Applicant's Second Complaint, but the JLSC and the Governor had not issued a decision on that matter at the time of the PATI request.
45. To summarise, section 29(2)(a) applies to parts of records 1, 1a, 1b, 3, 19-25, 27, 28, 28a, 29, 30, 32-35, 35a, 36-38 and 40, as well as record 11 in its entirety. The exception removes this information from the scope of the exemption for deliberations of public authorities. The Information Commissioner will not consider further the applicability of section 29(1) to this information.

[3] Could disclosure of the record reasonably be expected to undermine the identified deliberative process of a public authority?

46. For clarity, this question is not considered for records 1, 1a, 11, 19 and 28a because the relevant information in these records either had been disclosed by Government House or the Information Commissioner finds it to fall within the exception in section 29(2)(a), as explained above.
47. The Information Commissioner now considers whether disclosure of the remaining parts of records 1b, 3, 20-25, 27, 28, 29, 30, 32-35, 35a, 36-38 and 40 could reasonably have been expected to undermine Government House's deliberative process. This involves an assessment of whether disclosure of these parts of records could

reasonably have lessened the effectiveness of Government House's thinking process on the Applicant's complaints or similar complaints in the future.

48. The Information Commissioner agrees with Government House's submission that disclosure of certain responsive records or part of records could have undermined its deliberative process on the Applicant's complaints. The Information Commissioner acknowledges that the JLSC had issued its decision on the Applicant's First Complaint and that the Applicant had expressly stated that they no longer wanted to pursue the complaint through the Protocol. The Information Commissioner also notes that Government House considered the complaint as withdrawn at one point. These details do not mean, however, that the matter was no longer live and the deliberative process was not ongoing at the time of the PATI request. The Applicant expressly stated that their First Complaint still stands in substance and they were pursuing another avenue for redress. It could therefore be expected that Government House will continue its deliberative process on the Applicant's complaints, albeit not within the context or framework of the Protocol.
49. The Information Commissioner accepts that disclosure of certain parts of records 20, 23-25, 27, 28, 29,30, 32-35, 35a, 36-38 and 40 could have been expected to undermine the free and frank discussion between the Governor and the JLSC members, or amongst the JLSC members, given that the Governor and JLSC's pending decisions on the course of action on the Applicant's complaints were still under consideration at the time of the PATI request, as well as the sensitive nature of the deliberations.
50. In contrast, although they contain information on Government House's processing of the Applicant's complaints, certain parts of records 20, 23-25, 27, 28, 29, 30, 32-35, 35a, 36-37 and 40, as well as the remainder of records 1b, 3, 21 and 22 cannot reasonably be expected to have undermined Government House's consideration of the Applicant's complaint or any future complaint against judicial officers. This is because either they do not contain substantive discussion about the complaints considered by the JLSC and the Governor, or because they contain information that has been previously disclosed to the Applicant.
51. In sum, the Information Commissioner is not satisfied that disclosure of the parts of records 1b, 3, 20-25, 27, 28, 29, 30, 32-35, 35a, 36, 37 and 40, which are not factual information, can reasonably be expected to undermine a public authority's deliberations. These particular parts of records are not exempt under section 29(1) of the PATI Act.

52. Consequently, Government House was not justified in relying on section 29(1) to withhold any part of records 1b, 3, 21 or 22. The Information Commissioner does not consider the public interest test for these records.
53. The Information Commissioner agrees with Government House that disclosure of certain parts of records 20, 23-25, 27, 28, 29, 30, 32-35, 35a, 36-38 and 40 can reasonably be expected to undermine Government House's deliberations. She is satisfied that the exemption in section 29(1) is engaged for these parts of the records.

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

54. The Information Commissioner considers the public interest test for those parts of records for which the exemption in section 29(1) is engaged, as listed in paragraph 53.
55. The Information Commissioner agrees with Government House that allowing free and frank discussion and the provision of advice is required for an effective assessment of complaints against members of the Judiciary. The quality of the outcome of such assessment could be compromised if the Governor were unable to receive and weigh various competing ideas, information and options. As discussed in the Information Commissioner's Decision 02/2019, a strong public interest exists to ensure that decision makers maintain the integrity of free and frank discussion and the provision of advice, particularly when deliberating on matters having a significant impact upon their work or on the public⁸. The Information Commissioner is satisfied that the relevant decision making process in this case has a significant impact on the public because it relates to both former and current senior judicial officers who play a significant role in the administration of justice.
56. Given the strong public interest in maintaining free and frank discussion and the provision of advice, disclosure of the exempt records or parts of records in this case cannot be based solely on the general public interest in transparency and in the promotion of greater public understanding of public authorities' decision making. A specific public interest factor, with greater weight, is needed for disclosure of the exempt records or parts of records in this case.
57. One specific public interest consideration weighs in favour of disclosure of certain, limited exempt records or part of records. Although the Information Commissioner cannot discuss the details of the content of withheld records, record 36 raises what

⁸ See Decision 02/2019, Office of the Governor, para. 186.

appears to be a question about the procedures under the Protocol, in general as well as specifically with respect to their use in the Applicant's First Complaint.

58. As the Protocol explains, prior to its adoption, "[t]he absence of any transparent and formal procedure for complaints against judges leaves no clear channel for public dissatisfaction and, arguably, exposes the Judiciary to avoidable and unjustifiable 'wildcat' public attacks"⁹. The Protocol was established to ensure transparent and formal procedures for complaints against judges¹⁰. Given the questions about these procedures discussed in record 36, the Information Commissioner disagrees with Government House that disclosure is for the Applicant's personal or private interests only, rather than for the broader public interest. While the records being sought relate to complaints filed by the Applicant, record 36 raises broader questions about the procedures in the Protocol. For these reasons, the Information Commissioner is of the view that the public interest would, on balance, be better served by the limited disclosure of parts of record 36.
59. Lastly, the Information Commissioner addresses the Applicant's concern that a member of the JLSC disclosed information about the Applicant's complaint to a private entity. Having carefully reviewed the withheld records and parts of records, the Information Commissioner is satisfied that none of the records contain information exhibiting that this occurred.
60. In sum, the public interest would be better served by maintaining the exemption for parts of records 20, 23-25, 27, 28, 29, 30, 32-35, 35a, 37, 38 and 40, as well as most parts of record 36.

Conclusion

61. The Information Commissioner is satisfied that Government House was not justified in relying on section 29(1) to withhold record 11 and parts of records 1, 1a, 1b, 3, 19-25, 27, 28, 28a, 29, 30, 32-35, 35a, 36-38 and 40, because they consist of factual information that comes within the exception to the exemption in section 29(2)(a) of the PATI Act.

⁹ Judicial Complaints Protocol for Bermuda (2018), Part 1 para. 6 (page 3), available at <https://www.gov.bm/sites/default/files/JLSC-Convening-Note-and-Complaints-Protocol.pdf>.

¹⁰ See Judicial Complaints Protocol for Bermuda (2018), Part 1 para. 6 (page 3) and Part 2 para. 6 (page 7), available at <https://www.gov.bm/sites/default/files/JLSC-Convening-Note-and-Complaints-Protocol.pdf>. The Governor also sought to improve the transparency and institutional framework to address judicial recruitment, appointments and promotions, as explained in Part 1 paragraphs 5 and 7 (pages 3-4) of the Protocol.

62. Further, Government House was not justified in relying on section 29(1) to withhold certain parts of records 1b, 3, 20-25, 27, 28, 29, 30, 32-35, 35a, 36-37 and 40 that are not factual information and whose disclosure cannot reasonably have been expected to undermine public authority's deliberations.
63. Finally, the Information Commissioner is satisfied that the exemption in section 29(1) is engaged for the remaining parts of records 20, 23-25, 27, 28, 29, 30, 32-35, 35a, 36-38 and 40 and that the balance of the public interest requires disclosure of certain, limited parts of record 36.

Personal information – section 23(1)

64. Under section 23(1) of the PATI Act, public authorities may refuse access to a record if it consists of personal information, subject to exceptions in section 23(2) which includes when the information relates to the requester (section 23(2)(a)).
65. 'Personal information' is broadly defined in section 24(1) as 'information recorded in any form about an identified individual'. Section 24(1) also provides a non-exhaustive list of categories of personal information.
66. Certain categories of information about an identifiable individual, however, do not fall within the definition of 'personal information'. Section 24(2) dictates that these categories include, among other things, information about an individual who is or was an officer or employee of a public authority when it relates to the position or functions of the individual, or the details of a contractor providing services to the government. As the Information Commissioner has explained, however, routine personal work information of public sector employees as well as the personal information of elected officials and other public officials still fall within the definition of 'personal information' in section 24(1)¹¹.
67. Records consisting of personal information should be disclosed if the public interest would be better served, on balance, by disclosure than non-disclosure. Factors that should be taken into account when balancing the public interest relating to a disclosure of personal information are¹²:
 - a. Whether the disclosure will further any public interest considerations;

¹¹ See Decision 02/2019, Office of the Governor, paras. 43-47.

¹² See Decision 02/2019, Office of the Governor, para. 51.

- b. Whether disclosure would be fair to the individual under all of the circumstances; and
 - c. Whether disclosure is necessary to further the public interests that have been identified.
68. Consideration of the fairness of disclosure to the individual requires a public authority to assess whether the information amounts to ‘sensitive personal information’¹³, the potential consequences of disclosure upon the individual, and the individual’s expectation of privacy.
69. In sum, to rely upon the exemption for personal information, a public authority must ask¹⁴:
- [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 personal 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?
70. Government House did not rely on section 23(1). The personal information exemption in section 23(1) is the only exemption the Information Commissioner will consider on her own accord.

Discussion

71. The Information Commissioner considers the applicability of the exemption for personal information to parts of records 1, 1a, 1b, 3, 11, 19-25, 27, 28, 28a, 29, 30, 32-

¹³ Section 7(1) of the Personal Information Protection Act 2016 defines ‘sensitive personal information’ as “any personal information relating to an individual’s place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information”.

¹⁴ See Decision 02/2019, Office of the Governor, para. 56.

35, 35a, 36-38 and 40 which she did not find to be exempt under the exemption in section 29(1).

72. The Information Commissioner also considers the applicability of the personal information exemption to records 4-10, 12-18 and 26, which Government House does not withhold under the section 29(1) exemption, as explained in paragraph 13.

[1] Whether the records consist of information about an identifiable individual?

73. The records identified in paragraphs 71 and 72 contain information about identifiable individuals, including the Applicant, the Governor, the staff of Government House, the subjects of the Applicant's complaints and the JLSC members.

[2] Whether the information falls within any of the exclusions to the definition of personal information?

74. Some of the individuals whose information appears in the records were officers or employees of a public authority, such as Government House, at the relevant time. Yet, their information, for example their names, email addresses and expressed opinions, does not fall within the exclusion to the personal information definition in section 24(2)(a). This is because the information is not attached generally to the position or functions, regardless of who is holding such position or function. Rather, the information falls within the scope of routine personal work information, as explained in Decision 02/2019¹⁵. The generic email address for the Executive Officer falls within the section 24(2)(a) exclusion and therefore is not defined as personal information.

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

75. In accordance with section 23(2)(a), the exemption does not apply to personal information that relates to the requester. Because the PATI request asked for records relating to the Applicant's complaints filed with the JLSC, much of the information contained in the records is information that relates to the Applicant.

76. The applicability of the exception in section 23(2)(a), however, applies only to the Applicant's personal information that can be separated from others' personal information. Because the Applicant's complaints were made against and considered by other individuals, most of the Applicant's personal information in the records is intertwined with other individuals' personal information. The exception in section

¹⁵ See Decision 02/2019, Office of the Governor, paras. 43-44.

23(2)(a) does not apply to the parts of records containing mixed personal information of the Applicant and third parties.

[4] If the exemption for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure?

77. There is a general public interest weighing in favour of transparency about the work of public authorities, including, for example, understanding how public authorities operate, what challenges they may face, and the process by which decisions are made.
78. With respect to the question of the fairness of disclosing personal information, the Information Commissioner notes that the names of the JLSC members, on their own, do not fall within the scope of sensitive personal information as defined in section 7(1) of the Personal Information Protection Act 2016 (see footnote 13).
79. The JLSC members' participation in the JLSC in general, and in the handling of the Applicant's First Complaint specifically, also relates to their public lives rather than their private lives. Because of this, it is reasonable to conclude that the members would have had expectations that some information relating to their work with the JLSC would be available to the public, such as their membership on the committee.
80. In announcing the establishment and appointment of the first JLSC in 2013, to advise the Governor on their Constitutional responsibilities relating to the Judiciary, Government House issued the following statement affirming that the membership would be public:

In the past, Governors have generally convened an appropriate group to provide advice when decisions have had to be made. The new body, which is not a statutory body, is intended to be permanent, *with a publicly known membership*.¹⁶

81. Appointment to the JLSC, though, is not the same as being identified as handling a particular complaint. The Protocol does not require the JLSC's decisions to be made publicly available beyond the relevant parties. The JLSC advises the Governor on judicial discipline¹⁷, while the Governor exercises the "general disciplinary control

¹⁶ Bernews, 'Standing Committee on Judicial, Legal Services' (1 November 2013), available at <https://bernews.com/2013/11/standing-committee-on-judicial-legal-services/> (emphasis added).

¹⁷ Judicial Complaints Protocol for Bermuda (2018), Part 1 para. 16(a) (page 5), available at <https://www.gov.bm/sites/default/files/JLSC-Convening-Note-and-Complaints-Protocol.pdf>.

over superior judges in respect of all matters which do not give rise to any consideration of removal”¹⁸. Because of this, it is reasonable to conclude that the JLSC members have a reasonable expectation that their involvement in the handling of specific complaints, and making recommendations to the Governor for decision, will not be made public. It is the Governor, not the advisory JLSC, who makes the final decision on the complaints. Nothing in the Protocol or statements from Government House suggest that the identities of the JLSC members who decide a particular complaint will be made public, including the members of the JLSC who handled the Applicant’s First Complaint and made recommendations to the Governor.

82. This conclusion by no means suggests that the names of the JLSC members who considered the Applicant’s complaints should be denied to the Applicant. For the sake of procedural fairness, the JLSC might need to inform a complainant of the identities of the members sitting on the sub-committee reviewing their complaint,¹⁹ as was done in this case for the Applicant’s First Complaint. The PATI Act has no bearing on an individual’s access to records or information through other frameworks.
83. For these reasons, the Information Commissioner is satisfied that the public interest will be better served by denying public disclosure under the PATI Act of the names of the JLSC members who handled the Applicant’s complaints. The balance of the public interest also does not require disclosure of the JLSC members’ contact information. Although the public has an interest in the JLSC members remaining accessible to the public, the concern is met by the availability of the JLSC’s contact details in the public domain²⁰.
84. Nor would it be in the public interest to disclose any information through the PATI Act which could identify the individuals that are the subjects of the Applicant’s complaints. As explained above, the Applicant’s First Complaint was determined to be unfounded, and no decision has been made on the Second Complaint. Public disclosure through the PATI Act of the names of these individuals as well as the allegations made by the Applicant could reasonably be expected to result in unwarranted negative impacts on those individuals.

¹⁸ Judicial Complaints Protocol for Bermuda (2018), Part 1 para. 12 (page 5), available at <https://www.gov.bm/sites/default/files/JLSC-Convening-Note-and-Complaints-Protocol.pdf>.

¹⁹ For example, this could assist with safeguarding the procedure set out in Part 2 paragraph 18 (page 10) of the Protocol concerning conflicts of interests.

²⁰ The Protocol provides the contact details of Government House’s Executive Officer.

85. Disclosure of the information identifying the staff of Government House is also not in the public interest. These individuals were not decision makers for the complaints filed by the Applicant and simply assisted the Governor and JLSC as they carried out their work. Because the staff do not have a public facing role with the JLSC or the complaint process more generally, it would be reasonable for them to expect that their work-related personal information in the records will not be publicly disclosed.
86. The balance of the public interest only requires disclosure of the name of the former Governor due to the Governor's very public facing role, lesser expectation of privacy associated with the Governor's public duties under the Bermuda Constitution, and the necessity to disclose the Governor's name in documents related to the Governor's decision making to promote accountability and transparency. In the context of this review, however, no public interest requires disclosure of the Governor's Bermuda Government or UK Foreign and Commonwealth Office email addresses.

Conclusion

87. The Information Commissioner is satisfied that the exemption for personal information in section 23(1) of the PATI Act is engaged for parts of records 1, 1a, 1b, 3-28, 28a, 29, 30, 32-35, 35a, 36-38 and 40. The balance of the public interest requires disclosure only of the name of the former Governor.

Conclusion

88. The Information Commissioner finds that Government House was justified in relying on section 29(1) of the PATI Act to deny access to parts of records 20, 23-25, 27, 28, 29, 30, 32-35, 35a, 36-38 and 40 because disclosure of these parts of records could reasonably have been expected to undermine the deliberative process of the Governor and JLSC. Government House was not justified in relying on section 29(1) to refuse access to records 1b, 3, 11, 21 and 22 as well as certain parts of records 1, 1a, 19, 20, 23-25, 27-28, 28a, 29, 30, 32-5, 35a, 36-38 and 40.
89. The Information Commissioner also finds that the exemption for personal information in section 23(1) is engaged for parts of records 1, 1a, 1b, 3, 19-25, 27, 28, 28a, 29, 30, 32-35, 35a, 36-38 and 40 which she did not find to be exempt under section 29(1). She also finds that section 23(1) is engaged for parts of records 4-10, 12-18 and 26. She is satisfied that the balance of the public interest requires disclosure only of the name of the then Governor.

Decision

The Information Commissioner finds that the Office of the Governor (**Government House**) was justified in denying public access to certain parts of records 20, 23-25, 27, 28, 29, 30, 32, 33-35, 35a, 36-38 and 40 in accordance with the exemption in section 29(1) of the PATI Act, because disclosure of these parts of the records could reasonably be expected to undermine the deliberative process of the Governor and Judicial and Legal Services Committee. Government House was not justified, however, in relying on this exemption to refuse public access to records 1b, 3, 11, 21 and 22 as well as other parts of records 1, 1a, 19, 20, 23-25, 27, 28, 28a, 29, 30, 32-35, 35a, 36-38 and 40.

The Information Commissioner further finds that the exemption in section 23(1) is engaged for certain parts of records 1, 1a, 1b, 3, 11, 19-25, 27, 28, 28a, 29, 30, 32-35, 35a, 36-38 and 40 which she did not find to be exempt under section 29(1). The Information Commissioner also finds that section 23(1) is engaged for parts of records 4-10, 12-18 and 26, and that the balance of the public interest requires disclosure only of the name of the then Governor.

In accordance with section 48 of the PATI Act, the Information Commissioner:

- upholds Government House's decision to deny access to certain parts of records 20, 23-25, 27, 28, 29, 30, 32-35, 35a, 36-38 and 40 as exempt under section 29(1) of the PATI Act;
- varies the decision to deny access to personal information in certain parts of records 1, 1a, 1b, 3-28, 28a, 29-30, 32-35, 35a, 36-38 and 40 as exempt under section 23(1) of the PATI Act, except for the name of the then Governor as instructed in the Confidential Annex (Appendix 2), which forms part of this Decision; and
- orders Government House to disclose the remaining parts of the records that are not exempt under section 29(1) or 23(1), as instructed in the Confidential Annex.

The Information Commissioner requires that Government House grant access to the non-exempt parts of records listed above, as directed by this Decision and the accompanying Order, on or before **Thursday, 6 January 2022**.

Judicial Review

The Applicant, Government House, 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.

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If Government House fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez
Information Commissioner
25 November 2021

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Public interest test

21 For the purposes of [Part 4], 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 . . .

...

(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;

...

Deliberations of public authorities

29 (1) Subject to subsections (2) and (3), a record is exempt from disclosure if it consists of information, the disclosure of which would undermine, or could reasonably be expected to undermine, the deliberative process of a public authority, including free and frank discussion and provision of advice in the course of that process.

(2) Subsection (1) does not apply to information contained in a record that is—

(a) factual or statistical information;

...

(d) information in the nature of the reasons of a public authority for making a particular decision.

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

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