

## Decision Notice

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### Decision 18/2022: Ministry of Health Headquarters

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#### **Records related to payment agreement**

**Reference no:** 20180904-01

**Decision date:** 3 August 2022

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Health Headquarters (**Ministry Headquarters**) for records relating to an agreement between the Government of Bermuda and the Brown-Darrell Clinic and Bermuda Healthcare Services. The Ministry Headquarters granted access to an extensive number of records, while denying access to various others under the exemptions in Part 4 of the PATI Act, including those for breach of confidence in section 26(1)(b) and for Cabinet documents in section 27(1).

The Information Commissioner has concluded that the PATI Act does not apply to certain records created or obtained by the Attorney General's Chambers (**AG's Chambers**), by virtue of section 4(1)(b)(vi). Further, the Information Commissioner has affirmed the Ministry Headquarters' decision that certain records or parts of records were exempt from public disclosure in accordance with sections 23(1) (personal information), 25(1)(c) (prejudice to commercial interests), 27(1)(a), (c) and (d) (Cabinet documents) and 37(1) (disclosure prohibited by other legislation).

Finally, the Information Commissioner has reversed the Ministry Headquarters' decision in part, finding that it was not justified in relying on sections 23(1), 27(1)(c) and 27(1)(d) as well as sections 28(1) (ministerial responsibility) and 30(1)(c) (ongoing negotiations) to deny access to the remaining records.

The Information Commissioner has ordered the Ministry Headquarters to disclose some of the records or parts of records considered in her review, in accordance with this Decision.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 4 (application); section 21 (public interest); section 23 (personal information); section 24 (definition of personal information); section 25 (commercial information); section 27 (Cabinet documents); section 28 (ministerial responsibility); section 30 (operations of public authorities); section 37 (disclosure prohibited by other legislation).

Bermuda Health Council Act 2004: section 18 (confidentiality).

Appendix 1 provides the text of these statutory provisions, and forms part of this Decision.

## Background

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1. At the relevant time, the Brown-Darrell Clinic and Bermuda Healthcare Services were companies said to belong to Dr. Ewart Brown, the former Premier of Bermuda and a former leader of the Progressive Labour Party, the government of the day.
2. On 1 June 2017, the Bermuda Hospitals Board (Hospital Fees) Amendment Regulations 2017 came into effect. It reduced fees for diagnostic imaging services, including CT scans and MRI. The reductions generated criticism from Dr. Brown amongst other healthcare providers<sup>1</sup>.
3. The Government of Bermuda (**Government**) entered into an agreement with the Brown-Darrell Clinic and Bermuda Healthcare Services on 8 December 2017, and this was made public six weeks later<sup>2</sup>.
4. On 12 January 2018, the Brown-Darrell Clinic announced that its CT scan unit would close on 31 January 2018 as a “result of severe reductions in payments” by the Bermuda Health Council (**Health Council**)<sup>3</sup>, and the Health Council released a statement in response<sup>4</sup>.
5. The Minister of Health made the following public statement on 14 January 2018:

The new Government took steps to mitigate the impact of significant fee reductions by the previous government.

The Brown-Darrell Clinic, Bermuda Health Care Services and the Bermuda Hospitals Board were negatively affected by the reduction in fees they were able to charge for CT and MRI services.

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<sup>1</sup> The Royal Gazette, ‘[Doctor hits out over fees cut](#)’ (8 July 2017), accessed 21 July 2022.

<sup>2</sup> Bermuda House of Parliament, *Official Hansard Report*, 9 February 2018, p. 983, accessed 21 July 2022.

<sup>3</sup> Bernews, ‘[Brown-Darrell CT scan unit to close on Jan 31](#)’ (14 January 2018), accessed 21 July 2022; The Royal Gazette, ‘[CT scan service to close at Brown-Darrell](#)’ (13 January 2018), accessed 21 July 2022.

The Clinic reopened its CT scan unit in December 2018; see Bernews, ‘[Brown-Darrell Clinic re-open on Dec 19](#)’ (13 December 2018), accessed 21 July 2022.

<sup>4</sup> Bermuda Health Council, ‘[Health Council responds about imaging services](#)’ (13 January 2018), accessed 21 July 2022.

When the current Government came into office, the situation was reviewed and several options were considered to mitigate the adverse impact caused by the former government's rate reductions.

After review, it was decided to supplement the fees for MRI and CT services performed at all entities from Government funds rather than raise residents' health insurance midyear<sup>5</sup>.

6. Following this statement, the Government released a fact sheet informing the public that financial supplements were granted to the Brown-Darrell Clinic, the Bermuda Healthcare Services and the Bermuda Hospitals Board "to help ensure CT and MRI services are readily available to the public"<sup>6</sup>. The Minister of Health detailed the supplements in a parliamentary statement, explaining that, as of 9 February 2018, \$120,000 had been paid to the Brown-Darrell Clinic and \$480,000 to the Bermuda Healthcare Services using funds from the Ministry of Health Headquarters (**Ministry Headquarters**). The Minister also confirmed that "there were discussions taking place between the Government and the learned Attorney General" prior to the 8 December 2017 agreement<sup>7</sup>.
7. Against this background, on 14 February 2018, the Applicant filed a request with the Ministry Headquarters under the Public Access to Information (**PATI**) Act 2010, seeking:
  - a. The agreement reached on 8 December 2017 between the Ministry Headquarters and the Brown-Darrell Clinic and Bermuda Healthcare Services regarding payments of \$120,000 and \$480,000, respectively (**item 1**);
  - b. All communications concerning that agreement (**item 2**);
  - c. Records showing how the amounts were calculated (**item 3**); and
  - d. The 'letter before action' received by the Ministry Headquarters in October 2017 pertaining to judicial review of the Bermuda Hospitals Board (Hospital Fees) Amendment Regulations 2017 as well as the response and any further communications (**item 4**).

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<sup>5</sup> The Royal Gazette, '[Wilson: affordable healthcare a priority](#)' (14 January 2018), accessed 21 July 2022.

<sup>6</sup> Ministry of Health Headquarters, '[CT and MRI Fees Fact Sheet](#)' (17 January 2018), accessed 21 July 2022.

<sup>7</sup> [Official Hansard Report](#), 9 February 2018, pp. 983-984.

8. Thereafter, a Government Senator announced that \$778,000 had been paid to the Bermuda Healthcare Services and Brown-Darrell Clinic for the period of 1 June 2017 to 31 March 2018, and that no additional payments were required<sup>8</sup>.
9. The Ministry Headquarters issued an initial decision for the PATI request on 10 May 2018. It found that some records fell outside the scope of the PATI Act by virtue of section 4(1)(b)(vi) because they were obtained or created by the Attorney General's Chambers (**AG's Chambers**) in the course of carrying out its functions. The Ministry Headquarters also granted access to an extensive number of responsive records and parts of records<sup>9</sup>. Finally, it denied access to the remaining records, relying on various exemptions in Part 4 of the PATI Act, including sections 26(1)(b) (breach of confidence) and 27(1) (Cabinet documents).
10. The Applicant requested an internal review, and the Ministry Headquarters issued an internal review decision on 20 July 2018 upholding its initial decision.
11. The Applicant made a timely application for an independent review by the Information Commissioner.

## Investigation

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12. 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.
13. 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 exemptions and section 4 of the PATI Act was justified.
14. On 5 October 2018, the Information Commissioner's Office (**ICO**) notified the Ministry Headquarters of this review and asked for a copy of the records withheld under the various provisions of the PATI Act.

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<sup>8</sup> The Royal Gazette, '[Grant to clinics awarded from health budget](#)' (20 March 2018), accessed 21 July 2022.

<sup>9</sup> The Royal Gazette, '[Brown plea for 'political interference'](#)' (31 August 2018), accessed 21 July 2022 (linked at 'Related Media').

15. The Ministry Headquarters clarified that, instead of section 26(1)(b), its internal review decision meant to rely on the exemption in section 37(1) because section 18 of the Bermuda Health Council Act 2004 (**Health Council Act**) prohibited disclosure of some of the records.
16. The Ministry Headquarters initially provided the ICO with a limited number of responsive records. The Ministry Headquarters explained that it would not provide the Information Commissioner with records which it claimed to fall outside the scope of the PATI Act by virtue of section 4(1)(b)(vi) as well as those that were withheld under the exemptions in sections 27(1) and 37(1) for purposes of her review.
17. On 26 August 2019, the Ministry Headquarters submitted a Schedule of Records listing a total of 189 withheld records. It identified 79 records as falling outside the scope of the PATI Act by virtue of section 4(1)(b)(vi) because they were created or obtained by AG's Chambers in the course of carrying out its functions. The Ministry Headquarters maintained its position that it could not provide these records to the Information Commissioner. The Ministry also did not provide copies of records falling within section 27(1) because it gave these records back to AG's Chambers and the Cabinet Office, respectively, for those authorities to respond directly to the Information Commissioner about accessing the records for purposes of this review. The Ministry Headquarters, however, provided the remaining withheld under various other exemptions in the PATI Act, including section 37(1). The Ministry Headquarters also explained the public interest factors that it took into account when considering whether the records withheld under qualified exemptions should be publicly disclosed.
18. Relying on the Schedule of Records alone, the Information Commissioner was unable to assess the correctness of the Ministry Headquarters' decision that 79 records fell outside the scope of the PATI Act by virtue of section 4(1)(b)(vi), as well as those withheld under section 27(1). After a protracted effort to access these records for purposes of her review, on 26 November 2020, the Information Commissioner issued Summonses against the Acting Permanent Secretary for the Ministry Headquarters (**Acting PS**), the Solicitor General and the Cabinet Secretary, requiring them to grant her access to the remaining withheld records. In response to the Summons, on 10 December 2020, the Cabinet Office provided the ICO with a copy of the records withheld under section 27(1).
19. The Attorney General sought a judicial review on 17 December 2020, challenging the Information Commissioner's Summonses against the Solicitor General and the Acting PS that required them to provide the Information Commissioner with copies of the records deemed to fall outside the scope of the PATI Act by virtue of section 4(1)(b)(vi).

20. In light of the Attorney General's judicial review application, the Information Commissioner split her review to proceed with assessing the Ministry Headquarters' decision with respect to the exemptions. The Information Commissioner's review of the Ministry Headquarters' reliance on section 4(1)(b)(vi) is pending the outcome of the appeal in that matter<sup>10</sup>.
21. The ICO then clarified the records at issue in this review, removing duplicates and any previously disclosed. Through discussions with the ICO, the Ministry Headquarters released more records to the Applicant, thus removing them from further consideration. The Ministry Headquarters was no longer able to locate and provide a clean copy of a handful of records, some of which were disclosed with redactions to the Applicant. In such absence, the Information Commissioner is unable to consider in this review the Ministry Headquarters' reliance on the exemptions, including section 23(1) or 30(1)(c), to withhold parts of records 156-160, 163, 167, 168 and 189.
22. With this background in mind, this Decision considers the Ministry Headquarters' decision to withhold records or parts of records 2, 3, 5, 14, 15, 38, 40, 42, 43, 45, 49, 51, 54, 55, 57, 59-63, 66, 69, 72, 78, 79, 81, 101, 112, 113, 115-118, 123, 132-135, 138-142, 144, 145, 149-155, 176, 179-182 and 184.
23. On examining the records, the Information Commissioner identified that certain records consisted of correspondence with the Attorney General or her Chambers. This raised the question of the PATI Act's applicability by virtue of section 4(1)(b)(vi), although the Ministry Headquarters did not raise section 4 for these records. Consequently, the Information Commissioner exercised her own initiative to first consider the PATI Act's application to eight records.
24. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any third party concerned a reasonable opportunity to make representations. The ICO identified a third party concerned (**Third Party**) within the meaning of section 47(4) in relation to one record. The Ministry Headquarters, the Applicant and the Third Party were invited to make submissions to the Information Commissioner for her consideration.

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<sup>10</sup> Justice Williams issued her decision in [Attorney General v Information Commissioner](#) [2022] SC (Bda) 6 Civ, on 25 January 2022. Justice Williams held that the Information Commissioner could review a public authority's decision that the PATI Act did not apply to a record by virtue of section 4(1). The Information Commissioner was limited, however, to relying on the description of the record in the PATI request and could not require access to the record, for purposes of her review of the public authority's decision. The Information Commissioner filed a notice of appeal on 7 March 2022. The matter, Civil Appeal No. 7 of 2022, is currently pending before the Court of Appeals.

25. The ICO received submissions from the Ministry Headquarters and the Applicant, but not the Third Party.

### Information Commissioner's analysis and findings

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26. In coming to this Decision, the Information Commissioner considered all the relevant submissions, or parts of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.
27. The Information Commissioner strives to provide as full a public 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 below cannot be as detailed as would otherwise be preferred.

#### *Applicability of the PATI Act – section 4(1)(b)(vi)*

28. As Justice Williams explained in Attorney General v Information Commissioner [2022] SC (Bda) 6 Civ (25 January 2022), para. 24, “the scope of the application of the PATI Act may be determined by section 4, which lists the classes of materials to which the legislation does not apply”. In accordance with section 4(1)(b)(vi), the PATI Act does not apply to records obtained or created by AG’s Chambers in the course of carrying out its functions.
29. ‘Functions’ should be understood as “powers conferred, or duties imposed, on a public authority or public officer by or under any provision of law”, as defined by the Interpretation Act 1951 (**Interpretation Act**).
30. The PATI Act applies to records relating to the general administration of AG’s Chambers by virtue of section 4(2)(b). In Attorney General v Information Commissioner, para. 37, Justice Williams adopted the definition of ‘general administration’ set out by the Irish Information Commissioner, i.e., as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures and the like. Justice Williams further agreed that records related to matters concerning the core business of the relevant public authority are not records relating to its general administration<sup>11</sup>.

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<sup>11</sup> See Attorney General v Information Commissioner, para. 40. In Decision 02/2019, Office of the Governor, para. 20, the Information Commissioner adopted this definition of ‘general administration’ as applied by the Irish Information Commissioner. See also Decision 09/2021, Human Rights Commission, para. 17; Decision 05/2020, Human Rights Commission, para. 15; and Decision 19/2019, Internal Audit Department, para. 19.



31. For a record to be removed from the scope of the PATI Act by virtue of section 4(1)(b)(vi), the following must be considered:

[1] Was the record obtained or created by AG's Chambers?

[2] Was the record obtained or created by AG's Chambers in the course of carrying out its functions?

[3] Does the record relate to AG's Chambers' general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

32. Because section 4(1) addresses the applicability of the PATI Act, the Information Commissioner may consider this provision on her own accord when the parties do not raise it, as has occurred in this review.

#### *Discussion*

33. The Information Commissioner considers the applicability of the PATI Act to records or parts of records 45, 54, 112, 116, 117, 135, 138 and 141.

[1] Was the record obtained or created by AG's Chambers?

34. Having reviewed their content, the Information Commissioner is satisfied that records 112 and 117 as well as parts of records 45, 54, 116, 135, 138 and 141 were obtained or created by AG's Chambers.

[2] Was the record obtained or created by AG's Chambers in the course of carrying out its functions?

35. In accordance with section 71(1) of the Bermuda Constitutional Order 1968 (**Constitution**), the Attorney General is the principal legal advisor to the Government. In this case, the Attorney General and her Chambers provided legal advice to the Government concerning the payments that would be made to the Brown-Darrell Clinic and Bermuda Healthcare Services. The Information Commissioner is satisfied that these records or parts of records were obtained or created by AG's Chambers in the course of carrying out its constitutional functions.

[3] Does the record relate to AG's Chambers' general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

36. The Information Commissioner is satisfied that the provision of legal advice by AG's Chambers on the payments relates to its core constitutional functions. Therefore, none of the relevant records or parts of records relate to its general administration.

### *Conclusion*

37. The Information Commissioner is satisfied that the PATI Act does not apply to records 112 and 117, the withheld part of record 135 (which duplicates record 117), and certain parts of records 45, 54, 116, 138 and 141, in accordance with section 4(1)(b)(vi), because AG's Chambers obtained or created them when fulfilling its constitutional functions, and they do not relate to its general administration.
38. Because the Information Commissioner finds that the PATI Act does not apply to the listed records, the Ministry Headquarters' reliance on exemptions to withhold them is not considered. The remaining withheld parts of records 45, 54, 116, 138 and 141, for which the Information Commissioner did not invoke section 4, are later discussed.

### *Adverse effect on commercial interests – section 25(1)(c)*

39. Public authorities are entitled under section 25(1)(c) to refuse a PATI request if the requested record consists of information which, if disclosed, would have or could reasonably be expected to have an adverse effect on the commercial interests of any person to whom the information relates. This exemption is subject to exceptions in section 25(2) that are not applicable in this case.
40. A 'commercial interest' relates to a person's ability to participate in a commercial activity, such as the sale of goods or collection of a debt<sup>12</sup>. A commercial activity usually requires a business undertaking carried on to generate income or profit<sup>13</sup>.
41. The plain meaning of 'adverse effect' is bringing about an unfavourable or harmful result. The commercial information exemption, however, cannot be used to avoid embarrassment. It may only be applied when a real risk of harm to commercial interests could reasonably be expected to occur.
42. Section 25(1)(c) requires the disclosure 'would or could reasonably be expected to' cause the adverse effect. 'Would' means there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring. 'Could reasonably be expected to' is a lesser likelihood of the adverse effect occurring. It requires a public authority to distinguish between what is merely

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<sup>12</sup> Decision 12/2018, [Ministry of Finance Headquarters](#), para. 66.

<sup>13</sup> Decision 24/2019, [Bermuda Hospitals Board](#), para. 110.

speculative, irrational or absurd and expectations that are likely, plausible or possible based on real and substantial facts<sup>14</sup>.

43. If the exemption in section 25(1)(c) is engaged, the public authority must then consider whether the balance of the public interest still requires disclosure of the records.
44. In sum, to rely on section 25(1)(c), public authorities must consider the following:
  - [1] Who is the person to whom the information relates?
  - [2] What are the commercial interests of this person that are of concern?
  - [3] What adverse effect could disclosure cause?
  - [4] How likely is this to occur?
  - [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?
45. Finally, the public authority bears the burden to establish, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

*Public authority's submissions*

46. The Ministry Headquarters explained that it relied on section 25(1)(c) to withhold records 149-152, which relate to the Bermuda Healthcare Services and Brown-Darrell Clinic's insurance claims and fee details generated from the service providers' system.
47. The Ministry Headquarters asserted that the records contain commercially sensitive, proprietary information about private businesses, and disclosing the records would negatively impact those whom the proprietary information concerned. The companies' reputations and the confidence of their client bases would be harmed, which, in turn, would cause a decrease in revenue for the businesses and further harm the financial stability of the organisations.
48. The Ministry Headquarters asserted that the adverse effect is very likely to occur, due to the nature of operating a 'speciality type' business in Bermuda.
49. The Ministry Headquarters acknowledged that the public has an interest in disclosure as it promotes transparency for the public with respect to the precise amounts involved in the calculation of the Government's payments. Disclosure, however, would also reveal

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<sup>14</sup> Decision 12/2018, [Ministry of Finance Headquarters](#), paras. 70-72.

proprietary information of health insurers whose individual market share and utilisation data could be inferred from the records. The Ministry Headquarters argued that such data adds nothing to the public interest in the total amounts paid. This detailed information is available for audit by the Auditor General, who acts in the public interest with respect to the management of public funds.

#### *Applicant's submissions*

50. The Applicant did not think the commercial information exemption would apply, because the Brown-Darrell Clinic and Bermuda Healthcare Services were the only ones receiving the payments. The Applicant highlighted that, in any event, disclosure would be in the public interest.
51. The Applicant noted they had no evidence showing the Ministry Headquarters had applied the public interest test. The internal review decision stated, without elaborating, that “[i]n these instances there is no public interest for their release”.
52. The Applicant questioned the then-Head of Authority’s objectivity to properly apply the public interest test because they were closely involved with the Ministry Headquarters making the payments. The Applicant believed the Head of Authority should have removed themselves from the internal review—or at least explained in the decision whether they had considered these points.
53. The Applicant stated that disclosure was generally in the public interest to promote transparency, accountability, public understanding, and involvement in the democratic process. They noted there had been much public discussion about the payments, including that the public lacked a full, clear explanation from the Government of why it made the payments.
54. The Applicant asserted a specific public interest on the basis that these payments were made from the public purse to a former leader of the political party in power. The Applicant referred to the initial disclosure made by the Ministry Headquarters in response to the PATI request, showing that the former leader had urged the current Minister of Health to “politically interfere” so that his clinics did not suffer financially. The Applicant cited an article discussing the Ministry Headquarters’ prior disclosure<sup>15</sup>.
55. The Applicant submitted that such request for political interference was a plausible basis for a suspicion of wrongdoing on the public authority’s part. At the very least, the

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<sup>15</sup> The Royal Gazette, ‘[Brown plea for ‘political interference’](#)’ (31 August 2018), accessed 21 July 2022.

Applicant believed the Government's reasons for these payments remained unclear and that the public have a right to a full picture.

### *Discussion*

56. The Information Commissioner considers the Ministry Headquarters' reliance on section 25(1)(c) to deny public access to records 149-152. These records are spreadsheets listing the MRI and CT scan procedures by the Bermuda Healthcare Services and Brown-Darrell Clinic, respectively, between June and December 2017.

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

57. The Information Commissioner accepts the Ministry Headquarters' submissions that the records contain information relating to the Bermuda Healthcare Services and Brown-Darrell Clinic. The Information Commissioner is of the view that the information relates to the healthcare insurers as well.

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

58. The Information Commissioner agrees with the Ministry Headquarters that the records contain details about the insurance claims and fees generated from providing MRI and CT services. This includes insurance claims itemised by individual procedure, with the date of service and service rendered. Plainly, the relevant commercial interest is the ability of these businesses to continue making a profit by providing MRI and CT services. The information further involves the commercial interest of the healthcare insurers to cover patients using MRI and CT scan services at the Bermuda Healthcare Services and Brown-Darrell Clinic.

[3] What adverse effect could disclosure cause?

59. The records reveal how many scans per day the providers had conducted, the primary insurers that the providers worked with, and the specific fees charged and received. This detailed information about the providers' business practices is not available to competitors in the normal course of business. Other details about the providers' client bases can be gleaned from the face of the records, for instance, how many patients had coverage with a particular insurer. Such information could allow competitors to strategise on enticing patients away from the providers or encourage physician referrals.
60. Another adverse effect concerns the healthcare providers and insurers' business reputations and the confidence of their client bases. On their own, these do not amount to commercial interests within the meaning of section 25(1)(c). The Information Commissioner accepts, however, that an erosion or loss of patient trust could reasonably

be expected to result in a decrease in revenue, which, in turn, could harm the healthcare providers' financial stability.

61. Further, records 149-152 list patients' individual treatments. While disclosing this information might not allow actual patients to be identified, disclosure could deter the providers' existing patients, or prevent potential ones, from using their services. Given the sensitive nature of information held by healthcare providers on patients and relationships between these parties, the Information Commissioner accepts that their patients' trust is a business asset for these providers.
62. The Information Commissioner is satisfied that a decrease in revenue and harm to a business's financial stability—caused either by disclosing business practice details or by damage to a provider's reputation or confidence of its client base—constitute an 'adverse effect' to the commercial interest identified above.

[4] How likely is this to occur?

63. The health insurance industry is a competitive market in Bermuda. While the Bermuda Healthcare Services and Brown-Darrell Clinic were two among the three licensed providers (along with the Bermuda Hospitals Board), another potential competitor had been identified in the media at the time<sup>16</sup>. For this reason, the Information Commissioner is satisfied that the adverse effects could reasonably have been expected to occur, and the exemption in section 25(1)(c) is engaged.

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

64. The Information Commissioner accepts the Applicant's point of a general public interest in promoting transparency and accountability as well as public understanding and involvement in the democratic process.
65. While records 149-152 do not explain why the payments were made, the Information Commissioner is satisfied that their disclosure will inform better public understanding of how the Government and the Bermuda Healthcare Services and Brown-Darrell Clinic determined the initially agreed figures of \$480,000 and \$120,000. The public has the right to know, for example, whether the figures for payments made from the public purse were based on rational considerations.

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<sup>16</sup> Bernews, '[Photos & video: Hamilton Medical Center opens](#)' (18 January 2021), accessed 21 July 2022; '[New medical centre to open in Hamilton in 2017](#)' (9 October 2016), accessed 21 July 2022.

66. At the same time, the Information Commissioner acknowledges that the public interest in transparency about this use of public funds can be furthered while maintaining the public interest in protecting private businesses' proprietary information.
67. To balance these public interests, the Information Commissioner is of the view that disclosure is required of certain parts of records 149-152, which would inform the public of the relevant factors that were taken into account in calculating the \$480,000 and \$120,000 payments. It would inform the public of whether the calculation of these payments was based on objective data, while, at the same time, protecting the commercial interests of the private entities. Disclosure of the table headings aligns with information in records already disclosed to the Applicant in the Ministry Headquarters' initial decision on the PATI request.
68. The public interest would be better served by non-disclosure of the remaining parts of the records, including any details that would reveal the number of the treatments provided or claims made.

#### *Conclusion*

69. The Information Commissioner is satisfied that the Ministry Headquarters was justified in finding that the exemption under section 25(1)(c) was engaged for records 149-152 in full. The Information Commissioner finds, however, that the public interest requires disclosure of limited parts of these records, as explained in paragraph 67 above.

#### ***Records submitted for Cabinet's consideration – section 27(1)(a)***

70. Section 27(1)(a) entitles public authorities to deny public access to a record that has been submitted to the Cabinet for its consideration or is proposed by a Minister of Government to be so submitted. The exemptions in section 27(1) for various Cabinet records are grounded in a constitutional convention to safeguard the proper functioning of the Cabinet and enable Ministers to exchange views and deliberate, while at the same time enabling the disclosure of the outcomes of the Cabinet's deliberations.
71. The exemption in section 27(1)(a) specifically protects records brought into existence for the purpose of submission for the Cabinet's consideration. This requires public authorities to determine the purpose of the document's creation. Section 27(1)(a) does not apply to a record if the sole or dominant purpose for creating the record was not to submit for the Cabinet's consideration.
72. The exemption's application is limited to records actually submitted, or proposed to be submitted, by a Minister. Further, the submission (or proposed submission) must be for

‘consideration’ by the Cabinet. This means that the submitted records will more likely require some action by or on behalf of the Cabinet, such as its discussion or decision. This aligns with the exemption’s purpose to safeguard the integrity of the Cabinet process.

73. By virtue of the exceptions set out in section 27(2), the exemptions in section 27(1) do not apply to a record that contains purely statistical, technical or scientific material. The exemptions still apply, however, if its disclosure would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet. This may occur because the information consists of selective material or facts, or because it is so inextricably intertwined with the Cabinet’s deliberative thinking that it will reveal deliberations, e.g., what options, advice or recommendations are considered.
74. The Information Commissioner has consistently interpreted ‘deliberation’ in the PATI Act as the consideration or evaluation of competing arguments, information and facts with a view to making a decision.<sup>17</sup>
75. In the context of discussing an exemption equivalent to section 27(1)(d) in the Freedom of Information Act in Victoria, Australia, the Victorian Information Commissioner emphasised that:

Deliberation means the actual debate that took place, and not just the subject of the debate. In other words, how the subject matter was treated (how arguments were weighed up and evaluated) by Cabinet, not just the subject matter itself.

If the information itself disclosed what is to be deliberated or a document is key to Cabinet deciding an issue, such as a statistic or advice, it could also reveal the deliberations of Cabinet.

Decision means any conclusions as to the courses of action the Cabinet adopts, whether they are conclusions as to final strategy on a matter or conclusions about how a matter should proceed<sup>18</sup>.

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<sup>17</sup> Decision 02/2019, [Office of the Governor](#), para. 168.

<sup>18</sup> Office of the Victorian Information Commissioner, ‘[Exemption Practice Note 1: Section 28 – Cabinet documents](#)’ (June 2020) (**Victorian ICO Exemption Practice Note**), p. 4, accessed 21 July 2022.



76. 'Would' means that there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring. 'Could reasonably be expected to' is a lesser likelihood of the adverse effect occurring. It would still require a public authority to distinguish between what is merely speculative, irrational or absurd, and expectations that are likely, plausible or possible based on real and substantial facts<sup>19</sup>.
77. Where the decision of the Cabinet has been made public already, releasing information is unlikely to 'disclose' the Cabinet's decision or deliberation<sup>20</sup>.
78. In accordance with section 3 of the Interpretation Act, the 'Cabinet' means the Cabinet for Bermuda constituted in accordance with section 57 of the Constitution, i.e., the Premier and Ministers appointed under section 58 of the Constitution. As set out in section 27(3), the Cabinet also includes any committee of the Cabinet.
79. Neither the PATI Act nor the Interpretation Act define 'statistical, technical or scientific material'. These phrases should be read in their ordinary meaning<sup>21</sup>:
- a. Statistical means "relating to the use of statistics". Statistics are defined as the "practice or science of collecting and analysing numerical data in large quantities, especially for the purpose of inferring proportions in a whole from those in a representative sample".
  - b. Technical means "relating to a particular subject, art, or craft, or its techniques".
  - c. Scientific means "based on or characterised by the methods and principles of science".
80. 'Purely' in section 27(2) distinguishes information that is objectively factual, on the one hand, from information that reflects the Cabinet's deliberations because it consists of selective material or is so inextricably intertwined with deliberative thinking that it will reveal deliberations (e.g., what options, advice, recommendations were considered).

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<sup>19</sup> Decision 12/2018, [Ministry of Finance Headquarters](#), paras. 71-72.

<sup>20</sup> The Victorian ICO Exemption Practice Note referred to [Honeywood v DIIRD](#) [2004] VCAT 1657, para. 26, accessed 21 July 2022.

<sup>21</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

81. Given that the provisions in section 27 are equivalent to that of section 28 of the Victorian Freedom of Information Act, the Information Commissioner finds it helpful to look at how the Victorian courts interpreted some phrases. In Mitchell v Victorian Competition and Efficiency Commission (General), the Victorian Civil and Administration Tribunal found that a record containing “opinions and analysis in relation to policy issues” is not “purely statistical, technical or scientific material”<sup>22</sup>.

82. The following paragraph in Department of Infrastructure v Asher by the Victorian Court of Appeal might also be helpful in understanding the exception<sup>23</sup>:

At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view. The former would say nothing as to Cabinet’s deliberations, the latter might say a great deal.

83. The Cabinet document exemptions in section 27(1) are absolute exemptions, meaning that none of them are subject to the public interest test.

[1] Whether the record has been submitted to the Cabinet for its consideration or whether it is proposed by a Minister to be submitted?

[2] Whether the record was brought into existence for the purpose of submission for consideration by the Cabinet?

[3] Whether the record, or part of the record, contains purely statistical, technical or scientific material?

[4] If so, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet’s deliberation or decision?

84. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

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<sup>22</sup> [Mitchell v Victorian Competition and Efficiency Commission \(General\)](#) [2009] VCAT 2218 (22 October 2009), para. 49, accessed 21 July 2022.

<sup>23</sup> [Secretary, Department of Infrastructure v Asher](#) [2007] VSCA 272 (4 December 2007), para. 8, accessed 21 July 2022.

*Public authority's submissions*

85. The Ministry Headquarters relies on section 27(1)(a) to withhold in full records 42, 43 and 60. The Ministry Headquarters confirmed during the review that it no longer relies on section 27(1)(a) to withhold records 3, 62, 66 and 115 and that these records are withheld under section 27(1)(c) instead.
86. The Ministry Headquarters submitted that record 43 and its two annexes contain statistical information and relevant analysis of data which allowed the Cabinet to deliberate and make decisions. The Ministry Headquarters submitted that the exception in section 27(2) does not apply to this record.

*Applicant's submissions*

87. The Applicant accepted generally that many of the Cabinet's documents are exempt under the various exemptions in section 27(1). However, in this case, the Applicant believed that a majority of these records will not fall into the exemption, because they would include statistical, technical or scientific content which would help further the public's understanding of how the payment amounts were reached.

*Discussion*

88. The Information Commissioner considers the Ministry Headquarters' reliance on section 27(1)(a) to withhold records 42, 43 and 60.

[1] Whether the record has been submitted to the Cabinet for its consideration or whether it is proposed by a Minister to be submitted?

89. The Information Commissioner is satisfied that records 42, 43 and 60 are Cabinet Memorandum that had been submitted to the Cabinet for its consideration or were proposed by a Minister to be so submitted.

[2] Whether the record was brought into existence for the purpose of submission for consideration by the Cabinet?

90. The relevant records were all Cabinet Memorandum. The Information Commissioner is satisfied that they were brought into existence for the purpose of submission for the Cabinet's further action, i.e., its discussion or decision. These include the annexes to record 43, which were created specifically to explain the history and details of the options that the Cabinet was considering, as well as the recommendations for further action.

[3] Whether the record, or part of the record, contains purely statistical, technical or scientific material?

91. The Information Commissioner is of the view that the information in paragraphs 3 and 4 of records 42 and 60 is purely technical.
92. The Information Commissioner is of the view that section 27(2) applies to the annexes and certain parts of record 43 because they consist of purely technical material.

[4] If so, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

93. The Information Commissioner is satisfied that disclosing the technical material could reasonably be expected to involve the disclosure of the Cabinet's deliberation. Much of the technical information offered an analysis of options under the Cabinet's consideration and the impact of those options. Other technical material was selectively included in a manner that reflected the options being considered. Disclosing the technical material in records 42, 43 and 60, as identified in paragraphs 91-92, could reasonably be expected to disclose the advice sought by the Cabinet and the options under consideration.

#### *Conclusion*

94. The Ministry Headquarters was justified in engaging the exemption in section 27(1)(a) to deny public access to records 42, 43 and 60, because they are records that had been submitted to the Cabinet for its consideration or were proposed by a Minister of Government to have been so submitted. These records were brought into existence for the purpose of submission for consideration by the Cabinet. Although parts of the records contain technical material, the Information Commissioner is satisfied that disclosure of such material could reasonably be expected to involve the disclosure of the Cabinet's deliberation.

#### ***Draft of Cabinet document – section 27(1)(c)***

95. Section 27(1)(c) entitles public authorities to deny public access to a record if it is a draft or copy of, or an extract from, a record referred to in subsection (a) or (b). As explained above, subsection (a) refers to records submitted for the Cabinet's consideration or those that are proposed by a Minister to be submitted. Subsection (b) refers to an official record of any deliberation or decision of the Cabinet.
96. The applicability of section 27(1)(c) is limited by section 27(2), as discussed above in paragraph 73. This exemption is not subject to the public interest test.

97. In its Exemption Practice Note 1<sup>24</sup> for an exemption similar to section 27(1)(c), the Victorian Information Commissioner's Office provided helpful guidance on what constitutes a copy, draft or extract:

A copy is a reproduction or duplicate of the document, for example, a photocopy or printed copy.

A draft is a preliminary version of the document. It should be the actual document, preferably marked as draft. A 'draft' does not extend to source documents that were created for other purposes before the relevant submission or briefing, and where they contain information subsequently reproduced in the submission or brief.

An extract usually contains a reproduction of part of the text or material such as a quote, paraphrase, or summary. Simply referring to a Cabinet document is not sufficient. Consider whether there is a footnote or other attribution in the text to show that the information came from an official record, Cabinet submission or relevant Ministerial brief.

98. In sum, to appropriately rely on the exemption in section 27(1)(c) in denying public access to a record, public authorities must consider and demonstrate:

[1] Whether the record is a draft of, copy of, or extract from a record referred to in section 27(1)(a) or (b)?

[2] Whether the record contains purely statistical, technical or scientific material?

[3] If so, whether the disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

99. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

*Public authority's submissions*

100. The Ministry Headquarters relies on section 27(1)(c) to withhold records or parts of records 3, 38, 45, 62, 66, 69, 115 and 134. It submitted that these records are either a

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<sup>24</sup> Victorian ICO Exemption Practice Note, p. 4.

draft of a Cabinet document or contain an extract or conclusion of a Cabinet document which are exempt under section 27(1)(a) or (b) and, as such, fall within section 27(1)(c).

101. With regard to record 38, the Ministry Headquarters relies on section 27(1)(c) to withhold the third paragraph of part 3 only. The remaining parts of record 38 are withheld under section 27(1)(d).

*Applicant's submissions*

102. The Applicant's submissions described in paragraph 87 are applicable to the Ministry Headquarters' reliance on section 27(1)(c).

*Discussion*

103. The Information Commissioner considers the Ministry Headquarters' reliance on section 27(1)(c) to withhold records or parts of records 3, 38, 45, 62, 66, 69, 115 and 134.

[1] Whether the record is a draft of, copy of, or extract from a record referred to in section 27(1)(a) or (b)?

104. Records 3, 62, 66, 69 and 115 are drafts of record 42, which is a Cabinet Memorandum as explained above in paragraph 89. They feature handwritten edits or electronic tracked changes to record 42.
105. The Information Commissioner is satisfied that the identified paragraph of record 38 and the remaining parts of records 45 and 134 contain an extract from another record, which is likely to be a meeting minute that captures the Cabinet's deliberation and conclusions about providing payments to, amongst another, the Bermuda Healthcare Services and Brown-Darrell Clinic.

[2] Whether the record contains purely statistical, technical or scientific material?

106. As noted above, paragraphs 3 and 4 of record 42 contain purely technical information. Records 3, 62, 66, 69 and 115 are drafts of record 42 and, therefore, contain purely technical material. Certain paragraphs in records 45 and 134 are similar to that of record 42 and contain purely statistical or technical material.

[3] If so, whether the disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

107. As discussed above, disclosing the technical information described in paragraph 106 could reasonably be expected to disclose the advice sought by the Cabinet and the options under its consideration. The technical information offered an analysis of various

options under consideration by the Cabinet and their impacts, or was selectively included in a manner that reflected the options, advice and considerations before the Cabinet.

### *Conclusion*

108. The Information Commissioner is satisfied that the Ministry Headquarters was justified in engaging the exemption under section 27(1)(c) for records 3, 62, 66, 69 and 115 as well as the specified parts of records 38, 45 and 134, because they are a draft or copy of, or an extract from, a record referred to in section 27(1)(a).

### *Records disclosing Cabinet's deliberation or decision – section 27(1)(d)*

109. Section 27(1)(d) entitles public authorities to deny public access to a record if its disclosure would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet. What amounts to 'deliberation' of the Cabinet, and disclosure of such deliberation, are discussed above, paragraphs 74-75.
110. The exemption in section 27(1)(d), however, does not apply to a record by which a decision of the Cabinet is officially published.
111. This exemption is not engaged if the exception in section 27(2) applies, which is described above in paragraph 73. As with other exemptions in section 27(1), this exemption is not subject to the public interest test.
112. An officially published deliberation or decision must be written or issued as a function of the person or body responsible for publishing it, and publishing must make the decision or deliberation generally known. This could occur, for example, through the Throne Speech, an official press release, an official speech by the relevant Minister or a Ministerial statement in Parliament. Disclosure of the deliberations or decision to a smaller group, with the expectation of confidentiality, is not considered an official publication.
113. In sum, when relying on section 27(1)(d), a public authority must consider:
- [1] What is the deliberation or decision of the Cabinet?
  - [2] How could disclosure of the record reasonably be expected to involve disclosure of the identified deliberation or decision of the Cabinet?
  - [3] What is the likelihood of that harm occurring?
  - [4] Is the record one by which a decision of the Cabinet is officially published?

[5] If the record contains purely statistical, technical or scientific material, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

114. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

*Public authority's submissions*

115. The Ministry Headquarters relies on this section to withhold records or parts of records 2, 5, 38, 51, 54, 55, 57, 59, 61, 63, 72, 78, 79, 113, 116, 133 and 138.
116. The Ministry Headquarters accepted during this review that records 81 and 123 related to discussions between a Minister and public officers, whose disclosure could not reasonably be expected to disclose the Cabinet's deliberation or decision.
117. The Ministry Headquarters explained its reliance on section 27(1)(d) as follows:
- a. Record 2 contains information from a discussion between two members of the Cabinet regarding an upcoming meeting and deliberation of the Cabinet.
  - b. Record 5 contains information intended for use in the Cabinet's meetings.
  - c. Record 38 contains information pertaining to the Cabinet's deliberation and decision.
  - d. Records 51 and 72 are email correspondence.
  - e. Records 54, 55 and 57 are correspondence between members of the Cabinet which, if disclosed, would allow inference of the Cabinet's deliberations.
  - f. Records 59, 61 and 63 are documents prepared for the Cabinet and emails which, if disclosed, would allow or involve disclosure of the Cabinet's deliberations and decisions.
  - g. Record 78 refers to the Cabinet's deliberation between the Minister of Health and the Minister of Finance.
  - h. Record 79 contains information which, if disclosed, could affect the ability of a civil servant to have free and frank discussion with the Minister on matters. The Ministry Headquarters submitted that this record is also withheld under section 28(1).



- i. Record 113 shows information about the Cabinet's deliberation on a Cabinet Memorandum.
- j. Record 116 contains information relating directly to the Cabinet's deliberations and decisions.
- k. Record 133 identifies a decision and deliberation of the Cabinet.
- l. Record 138 shows the operational status of a deliberation and decision of the Cabinet.

*Applicant's submissions*

118. The Applicant relied on the submissions explained above in paragraph 87.

*Discussion*

119. The Information Commissioner considers the Ministry Headquarters' reliance on section 27(1)(d) to withhold records, or parts of records, 2, 5, 38, 51, 54, 55, 57, 59, 61, 63, 72, 78, 79, 113, 116, 133 and 138. The Information Commissioner does not consider the Ministry Headquarters' reliance on this exemption to withhold the same parts of records 54, 116 and 138 to which the PATI Act does not apply, as discussed above, paragraphs 33-38; nor those records accepted as not exempt under section 27(1)(d), i.e., records 81 and 123.

[1] What is the deliberation or decision of the Cabinet at issue?

120. The Cabinet's deliberation or decision at issue is that of the subject of the PATI request, i.e., the deliberations and subsequent decision to approve the awarding of a grant to the providers to offset losses caused by the reduction in diagnostic imaging fees.

[2] How could disclosure reasonably be expected to involve disclosure of the identified deliberation or decision of the Cabinet?

121. Save for record 5, all records withheld by the Ministry Headquarters in this review under section 27(1)(d) are emails. The Information Commissioner is satisfied that disclosure of the email details in these records—i.e., the name and address of recipients and senders, the date and email subject, the title of attachments, and authorship information—cannot be expected to involve disclosure of the Cabinet's deliberation or decision.
122. Similarly, the sender and recipient information as well as the date and subject of the Ministry Headquarters' internal memo in record 5 cannot be expected to disclose the Cabinet's deliberation or decision.

123. The Information Commissioner is further satisfied that disclosure of records 51, 55, 59 and 72 or parts of records 2, 5, 38, 54, 57, 61, 63, 78, 79, 113, 116, 133 and 138 could not reasonably be expected to involve disclosure of the identified Cabinet deliberation or decision because they contain administrative information (for example, about the status of completing tasks, people's availability for discussion, or the basic task of passing documents back and forth), views of public servants on operationalising a Cabinet decision, or other information that simply does not reveal the Cabinet's deliberation or decision.
124. On this basis, the exemption is not properly engaged for these records or parts of records, and the Ministry Headquarters' reliance on section 27(1)(d) to deny their public access was not justified.
125. The Information Commissioner is further satisfied that, for records 5 and 79, the exemption is not engaged for certain references to specific healthcare reviews. Information about these reviews was included selectively in a manner reflecting the recommendations for the Cabinet's consideration. But its disclosure cannot reasonably be expected to 'disclose' the Cabinet's deliberations, as the recommendation from the healthcare reviews had been publicly announced by the time of the PATI request<sup>25</sup>.
126. In contrast, the remaining parts of records 5 and 79 as well as parts of records 2, 54, 57, 61, 63, 78, 113, 116 and 133 refer to the either the Cabinet's deliberation or the actual content of the Cabinet's conclusion or draft Cabinet Memorandum.

[3] What is the likelihood of that harm occurring?

127. The Information Commissioner needs to consider this question for certain parts of records 2, 5, 54, 57, 61, 63, 78, 79, 113, 116 and 133 only.
128. While the relevant emails and the Ministry Headquarters' internal memo were not exchanged between members of the Cabinet, the Information Commissioner is satisfied that disclosure of certain parts of records 2, 5, 54, 57, 61, 63, 78, 79 and 113 could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision.
129. Although the remaining withheld parts of records 116 and 133 did not refer to the Cabinet's conclusion or draft Cabinet Memorandum, disclosure of certain parts of these

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<sup>25</sup> [Official Hansard Report](#), 9 February 2018, p. 984.

records would involve the disclosure of the Cabinet's decision, which was not publicly available at the time of the PATI request.

[4] Is the record one by which a decision of the Cabinet is officially published?

130. The Information Commissioner is satisfied that those parts of records 2, 5, 54, 57, 61, 63, 78, 79, 113, 116 and 133 whose disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision are not records by which a decision of the Cabinet was officially published.

[5] If the record contains purely statistical, technical or scientific material, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

131. The Information Commissioner is satisfied that certain parts of records 5, 78 and 79 contain technical material. Their disclosure, however, would involve the disclosure of the Cabinet's deliberation because the technical information offered an analysis of various options considered by the Cabinet. The technical information was selectively included in a manner that reflected the options, advice and considerations before the Cabinet. As a result, disclosure could reasonably be expected to disclose the advice sought by the Cabinet and the options under consideration.

#### *Conclusion*

132. The Information Commissioner is satisfied that the Ministry Headquarters was not justified in engaging the exemption under section 27(1)(d) for records 51, 55, 59 and 72, as well as parts of records 2, 5, 38, 54, 57, 61, 63, 78, 79, 113, 116, 133 and 138, because their disclosure could not reasonably be expected to involve the disclosure of the Cabinet's deliberations or decisions.
133. The Information Commissioner is further satisfied that the Ministry Headquarters was justified in engaging the exemption under section 27(1)(d) for certain parts of records 2, 5, 54, 57, 61, 63, 78, 79, 113, 116 and 133, because their disclosure would involve the disclosure of the Cabinet's deliberations or decision—and these records were not any by which a decision by the Cabinet was being officially published.

#### ***Ministerial responsibility – section 28(1)***

134. Section 28(1) allows public authorities to deny public access to a record if it consists of information which, if disclosed, would undermine or could reasonably be expected to undermine individual ministerial responsibility, including free and frank discussion and

advice between Ministers, or between Ministers and public officers, in the course of their public duties.

135. A record falling within the exemption in section 28(1) should be disclosed if the public interest would, on balance, be better served by disclosure than non-disclosure.
136. As the Information Commissioner explained in Decision 10/2019, [Office of the Governor](#), individual ministerial responsibility is the doctrine by which “ministers are responsible to Parliament for all that happens in their departments, though they will only be regarded as culpable in respect of their own decisions or failures”<sup>26</sup>. The section 28(1) exemption prevents disclosure of records that could reasonably be expected to undermine the policies, decisions and actions of their Ministry<sup>27</sup>.
137. For the exemption in section 28(1) to apply, public authorities must demonstrate that disclosure of the record ‘would’ or ‘could reasonably be expected to’ undermine individual ministerial responsibility. The definitions of ‘would’ and ‘could reasonably be expected to’ have been explained in paragraph 42.
138. To appropriately rely on section 28(1), public authorities must consider:
  - [1] What is the information in the record that could reasonably be expected to undermine individual ministerial responsibility?
  - [2] How can disclosure of that information reasonably be expected to undermine individual ministerial responsibility?
  - [3] What is the likelihood of that harm occurring?
  - [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?
139. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

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<sup>26</sup> Decision 02/2019, [Office of the Governor](#), para. 152, citing Dawn Oliver, ‘Reforming the United Kingdom in Parliament’ as cited in Le Sueur and Sunkin, *Public Law: Text, Cases, and Materials* (2<sup>nd</sup> ed. 2013), p. 257.

<sup>27</sup> Decision 02/2019, [Office of the Governor](#), para. 153.

*Public authority's submissions*

140. The Ministry Headquarters relies on the exemption in section 28(1) to withhold the remaining parts of record 79 because their disclosure would affect the ability of the Permanent Secretary to have free and frank discussion with the Minister regarding matters.
141. The Ministry Headquarters no longer relies on section 28(1) to withhold record 167, which was disclosed to the Applicant during the review, with a certain individual's personal information redacted.

*Applicant's submissions*

142. The Applicant relies on their submissions made in paragraphs 53-55, above.

*Discussion*

143. The Information Commissioner considers the Ministry Headquarters' reliance on section 28(1) to withhold the remaining parts of record 79, which she did not find to be exempt under section 27(1)(d) and were not already disclosed at the initial decision stage (as part of record 123).

[1] What is the information in the record that could reasonably be expected to undermine individual ministerial responsibility?

144. While the Ministry Headquarters did not specify what was of concern, the Information Commissioner notes that record 79 described information that the Permanent Secretary summarised for their Minister's consideration about past and current decisions on diagnostic imaging fees.

[2] How can disclosure of that information reasonably be expected to undermine individual ministerial responsibility?

145. Some information in the remaining withheld parts of record 79 was already available to the public at the time of the PATI request. The Information Commissioner is therefore not satisfied that its disclosure could reasonably be expected to undermine individual ministerial responsibility. Further, given the administrative nature of other information, the Information Commissioner is not satisfied that disclosing such remaining parts of record 79 could undermine individual ministerial responsibility.
146. The Information Commissioner does not need to continue considering the Ministry Headquarters' reliance on section 28(1).

## *Conclusion*

147. The Information Commissioner is not satisfied that the Ministry Headquarters was justified in engaging the exemption in section 28(1) for the remaining parts of record 79, because their disclosure could not reasonably be expected to undermine individual ministerial responsibility.

### ***Ongoing negotiations – section 30(1)(c)***

148. Section 30(1)(c) allows public authorities to deny public access to a record if its disclosure could reasonably be expected to disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any ongoing negotiations by or on behalf of the Government or a public authority.
149. In the absence of a definition in the PATI Act and Interpretation Act, ‘negotiation’ should be understood in its plain meaning, i.e., ‘discussion aimed at reaching an agreement’<sup>28</sup>. ‘Negotiate’ means to ‘obtain or bring about by discussion’ or to ‘try to reach an agreement or compromise by discussion’<sup>29</sup>.
150. For section 30(1)(c) to apply, the relevant negotiations must be conducted by or on behalf of the Government or a public authority. The negotiations also have to be ongoing at the time the PATI request was made. Factors that indicate a negotiation is ongoing include:
- a. an opening position with a view to furthering the negotiation;
  - b. the presence of a proposal for settlement or compromise;
  - c. indications of a negotiating strategy or ‘fall-back’ position; or
  - d. the presence of information created, or advice taken, for the purpose of negotiations.
151. The standard of likelihood in section 30(1) is ‘could reasonably be expected to’. This means public authorities must demonstrate that the expectations on the harm occurring are likely, plausible or possible based on real and substantial facts.

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<sup>28</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

<sup>29</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

152. To appropriately rely on section 30(1)(c), public authorities must consider:

- [1] What are the ongoing negotiations to which the record relates?
- [2] Were the negotiations conducted by or on behalf of the Government or a public authority?
- [3] What is the position, plan, procedure, criteria or instruction at issue?
- [4] How will disclosure of the record reveal the positions, plans, procedures, criteria or instructions?
- [5] What is the likelihood of the harm occurring?
- [6] If the exemption is engaged, whether the balance of the public interest requires disclosure?

153. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

*Public authority's submissions*

154. The Ministry Headquarters relies on section 30(1)(c) to withhold records or parts of records 38, 140-142, 156-159 and 168.

155. The Ministry Headquarters submitted that their disclosure would prejudice negotiations on the Government's execution of the agreement between the Government and the Brown-Darrell Clinic and Bermuda Healthcare Services.

156. The Ministry Headquarters explained that, at the time of the PATI request, the negotiation was pending because it had not determined whether any additional funds would need to be paid out. It also had not determined how much would need to be paid for reconciling the amount to make up for the lost revenue, which was caused by changes to the allowable fee for specific diagnostic imaging procedures.

157. The Ministry Headquarters submitted that their disclosure would show the position, planning and procedures for implementing other such requirements or completing further action on other forms of cost control within healthcare in the future.

158. The Ministry Headquarters acknowledged a public interest in disclosure for promoting public transparency about the process involved in executing the payments at issue.

Disclosure ultimately was not in the public interest, because the information in the specified records was exempt under various provisions in the PATI Act.

*Applicant's submissions*

159. The Applicant relies on their submissions made in paragraphs 53-55, above.

*Discussion*

160. The Information Commissioner considers the Ministry Headquarters' reliance on section 30(1)(c) to withhold:
- a. the remaining parts of records 38 and 141, i.e., excluding those parts the Information Commissioner found to be exempt under section 27(1)(d) or to fall outside of the PATI Act's application; and
  - b. the remaining parts of records 140 and 142, i.e., excluding those parts already disclosed at initial decision;
161. The Information Commissioner does not consider the Ministry Headquarters' reliance on section 30(1)(c) for the redacted parts of records 156-159 and 168, because the Ministry Headquarters could not provide a clean copy of these records.

[1] What are the ongoing negotiations to which the record relates?

162. The relevant agreement between the Government and the Brown-Darrell Clinic and Bermuda Healthcare Services was reached on 8 December 2017, months before the PATI request was made. The Information Commissioner is of the view that there were no ongoing negotiations at the time of the PATI request.
163. The Information Commissioner is of the view that what the Ministry Headquarters characterised as an ongoing negotiation related to the technical execution of the agreement. Specifically, the Ministry Headquarters pointed to the ongoing calculations of agreed payments determined by a set framework that resulted from a completed negotiation between the Government and the providers. Consequently, the Information Commissioner does not consider this exemption further.

*Conclusion*

164. The Information Commissioner is not satisfied that the Ministry Headquarters was justified in relying on the exemption in section 30(1)(c) to withhold the remaining parts of records 38, 140, 141 and 142.



***Disclosure prohibited by other legislation – section 37(1)***

165. Section 37(1) of the PATI Act allows public authorities to refuse public access to a record whose disclosure is prohibited by a statutory provision other than the PATI Act.
166. The exemption in section 37(1) is not subject to the public interest test.
167. To rely on section 37(1), public authorities must consider the following<sup>30</sup>:
- [1] What is the statutory provision creating the mandatory prohibition on disclosure?
  - [2] Does the record fall within this statutory provision?
  - [3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?
168. A public authority bears the burden of showing that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

***Public authority's submissions***

169. The Ministry Headquarters relies on section 37(1) to withhold records or parts of records 14, 15, 40, 49, 101, 118 and 144, because their disclosure is prohibited by the confidentiality provision in section 18 of the Health Council Act.
170. The Ministry Headquarters described the records as follows:
- a. Record 14 relates directly to the regulation of the cost of healthcare services in Bermuda.
  - b. Records 15 and 40 are minutes of meetings of the Health Council.
  - c. Record 49 is a letter from the Health Council, enclosing a legal opinion.
  - d. Record 101 refers to the position of the Health Council on the settlement.
  - e. Record 118 is about edits to minutes of a special Board meeting of the Health Council.
  - f. Record 144 related to a meeting per the 'letter before action' received.

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<sup>30</sup> Decision 12/2018, [Ministry of Finance Headquarters](#), para. 45.

### *Applicant's submissions*

171. The Applicant did not make a specific submission on this exemption. The absence of their submissions, however, was not considered a factor against disclosure of the records withheld by the Ministry Headquarters under section 37(1).

### *Discussion*

172. The Information Commissioner considers the Ministry Headquarters' reliance on section 37(1) to deny public access to records 15, 40, 49 and 118, as well as parts of records 14, 101 and 144.

[1] What is the statutory provision creating the mandatory prohibition on disclosure?

173. Section 18(1) of the Health Council Act reads:

Except in so far as may be necessary for the due performance of a person's functions under this Act or any other statute and subject to subsections (3), (4) and (5), any person who is a member of the Council or who is acting as an officer, a servant, an agent or an advisor of the Council shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties.

174. The Information Commissioner has previously decided that section 18 of the Health Council Act creates a mandatory prohibition on disclosure by the Health Council<sup>31</sup>. The Permanent Secretary of the Ministry Headquarters is an *ex officio* member of the Health Council<sup>32</sup> and holds a number of Health Council records as a result. Based on this, the mandatory prohibition on disclosure extends to the records held by the Permanent Secretary of the Ministry Headquarters.

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<sup>31</sup> Decision 27/2019, [Bermuda Health Council](#), paras. 46-50; Decision 09/2020, [Bermuda Health Council](#), para. 24.

<sup>32</sup> Section 6(1) of the Health Council Act reads: "The Council shall consist of the following ex officio members— ... (c) the Permanent Secretary of the Ministry responsible for Health".

[2] Does the record fall within this statutory provision?

175. For section 18 of the Health Council Act to apply, the relevant records must concern a matter related to the Health Council's affairs (or those of any person) and have come to its knowledge in the course of its duties.
176. The Information Commissioner adopts the ordinary, plain meaning of 'matters', 'affairs', and 'duties' in her interpretation of section 18(1) of the Health Council Act<sup>33</sup>:
- a. Matters refer to 'a subject or situation under consideration'.
  - b. Affairs refer to 'business or financial dealings'.
  - c. Duties refer to 'a task or action that one is required to perform as part of one's job'.
177. Having carefully reviewed the withheld records, the Information Commissioner agrees that records 15, 40, 49 and 118, as well as the relevant parts of records 14, 101 and 144 regard matters relating to the Health Council's affairs, in addition to the affairs of the Government, and the Brown-Darrell Clinic and Bermuda Healthcare Services.
178. The Information Commissioner agrees that the records came to the Health Council's knowledge during the course of its statutory duty to advise the Minister on any matter related to health services, in accordance with section 5(k) of the Health Council Act.<sup>34</sup>

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

179. Section 18(3) of the Health Council Act allows disclosure of records that fall within the scope of subsection (1) in certain circumstances. For example, if such disclosure is required to assist the Minister (subsection 3(a)) or if the information is or has been available to the public from other sources (subsection 3(b)).
180. The Information Commissioner is satisfied that the gateway provision in section 18(3)(a) does not apply, because disclosure of the relevant records under the PATI Act were not for the purpose of enabling or assisting the Minister to exercise their functions.

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<sup>33</sup> See Decision 27/2019, [Bermuda Health Council](#), para. 52, citing Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

<sup>34</sup> Section 5(k) of the Health Council Act reads: "The functions of the Council are— ... (k) to advise the Minister on any matter related to health services that may be referred to the Council by the Minister."

181. The Information Commissioner notes that the Ministry Headquarters had disclosed a number of records of the Health Council in response to a related, but separate, PATI request<sup>35</sup>. However, none of the records, or part of records, that are withheld by the Ministry Headquarters under section 37(1) in this review were included in that disclosure. Based on this, the records at issue here do not fall within either gateway provision in section 18(3) of the Health Council Act.

### *Conclusion*

182. The Ministry Headquarters was justified in withholding records 15, 40, 49 and 118 as well as parts of records 14, 101 and 144 under section 37(1) of the PATI Act, because their disclosure is prohibited by section 18(1) of the Health Council Act.

### *Personal information – section 23(1)*

183. Under section 23(1) of the PATI Act, public authorities may refuse access to a record if it consists of personal information, i.e., information about an identifiable individual as defined by section 24(1).
184. Certain information about an identifiable individual is excluded from the definition of 'personal information' under section 24(2) of the PATI Act. For example, information about an officer or employee of a public authority that relates to the position or function of that officer or employee (section 24(2)(a)).
185. The Information Commissioner explained in her Decision 02/2019, Office of the Governor, that the definition of personal information in section 24(1) is very broad and the exclusion in 24(2)(a) is very narrow. Routine personal work information of elected public officials still falls within the definition of personal information. This does not mean their personal information will always have to be withheld. Rather, the disclosure of their personal information should be based on the consideration of the public interest test.
186. In accordance with section 24(2)(c), information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority does not fall within the definition of personal information. The exclusion applies to, for example, the name of the individual and the exact nature of the benefit.
187. The personal information exemption does not apply in certain circumstances set out in section 23(2). The exemption does not apply, for example, if the information relates to

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<sup>35</sup> The Ministry Headquarters received PATI request no. 499 on 16 January 2018.

the requester or if the individual to whom the information relates has given their written consent for disclosure.

188. The personal information exemption is subject to the public interest test. This means a record consisting of a third party's personal information should be disclosed if the public interest would, on balance, be better served by disclosure. When considering the public interest against and in favour of a personal information disclosure, public authorities should take into account the following factors<sup>36</sup>:

- a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations 2014;
- b. Whether disclosure would be fair to the individual under all of the circumstances, including, for instance, a consideration of whether sensitive personal information was involved, the potential consequences of disclosure on the individual and the individual's expectation of privacy; and
- c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.

189. In sum, to appropriately rely on the personal information exemption in section 23(1), public authorities must consider<sup>37</sup>:

- [1] Whether the record consists 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 exemptions in section 23(2) apply to the record?
- [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?<sup>38</sup>

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<sup>36</sup> Decision 02/2019, [Office of the Governor](#), para. 51.

<sup>37</sup> Decision 02/2019, [Office of the Governor](#), para. 56.

<sup>38</sup> Disclosure of records consisting of personal information should also be made if disclosure would benefit the individual, in accordance with section 23(6) of the PATI Act. But this part of section 23(6) is irrelevant in this case.

190. The personal information exemption is the only exemption which the Information Commissioner will invoke on her own accord<sup>39</sup>.

*Public authority's submissions*

191. The Ministry Headquarters relies on the personal information exemption to withhold records or part of records 132, 145, 154, 155, 160, 176, 179-182 and 184. It described certain records as follows:

- a. Record 132 contains the names of patients and a third party's information, including their non-gov.bm email address.
- b. Record 145 may be disclosable as the individual operates as an officer or employee of a government department.

*Applicant's submissions*

192. The Applicant confirmed that the PATI request is not seeking the personal information of patients.

193. The Applicant also asserted that disclosure of the relevant records or parts of records, besides a patient's personal information, is in the public interest, as described in paragraphs 53-55.

*Discussion*

194. The Information Commissioner considers the personal information exemption for:

- a. Records 132, 145, 154, 155, 176, 179-182 and 184, which the Ministry Headquarters continues to withhold under section 23(1).
- b. Records that have been found to not be exempt and for which the Information Commissioner invokes section 23(1) of her own accord, namely records or parts of records 2, 5, 38, 51, 54, 55, 57, 59, 61, 63, 72, 78, 79, 113, 116, 123, 133, 138 and 140-142.
- c. Parts of record 81, which the Ministry Headquarters no longer considered exempt under the PATI Act, but has not yet disclosed to the Applicant.

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<sup>39</sup> Decision 01/2018, [Bermuda Tourism Authority](#), para. 27.

d. The redacted parts of any record disclosed by the Ministry Headquarters during this review, i.e., records 139 and 153.

195. The Information Commissioner cannot consider the Ministry Headquarters' reliance on the personal information exemption to withhold parts of record 160 because the Ministry Headquarters was unable to provide a clean copy of the record.

[1] Whether the record consists of information about an identifiable individual?

196. The Information Commissioner is satisfied that three of the four redacted parts of record 132 (apart from the patient information) and record 145 do not contain information about an identifiable individual. Therefore, the exemption is not engaged for them.

197. The Information Commissioner is satisfied that the remaining records contain information about identifiable individuals, which can be grouped as follows:

- a. Identifying information about officers or employees of public authorities, including executives and senior leaders and elected officials (current and former), as at the time of the PATI request. This includes their views on matters relating to the payments made to the Brown-Darrell Clinic and Bermuda Healthcare Services;
- b. Patient information (e.g., records 132, 154 and 155); and
- c. Individuals associated with private entities, including the Third Party and members of the media.

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

198. None of the information relating to the individuals in the relevant records falls within the exclusion in section 24(2)(a). As explained above, paragraphs 184-185, this exclusion is limited to information that is attached to the position or functions of an officer or employee of a public authority only.

199. The exclusion in section 24(2)(c) does not apply to any information in the relevant records. As explained above, this exclusion applies to information relating to discretionary benefits of a financial nature conferred on individuals, i.e., natural persons, only. While the financial supplements in this case were discretionary benefits of a financial nature, they had not been conferred to an individual but, rather, to legal entities.

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

200. None of the exceptions in section 23(2) is applicable to the information about individuals in the relevant records. Specifically, the information does not relate to the requester, and the individuals to whom the information relates have not given their consent in writing to disclosure.

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

201. The Information Commissioner agrees with the Applicant that disclosure of certain parts of the records would promote transparency, accountability and a better public understanding of the decision making process. Factors favouring disclosure of some key actors' personal work information include that the payments were made from the public funds; the significant amount of the payments; and the payment beneficiaries being associated with a former Premier. In its reply to a question by a sitting senator at the time, the Ministry Headquarters, itself, has acknowledged that payments of this nature were 'extraordinary' and 'there is no precedent of this experience and it is not expected to occur again'<sup>40</sup>.

202. The Information Commissioner is satisfied that disclosure of most personal information of the key actors within the Government and other public authorities would be fair. This includes their names, positions or roles (or lack thereof) in the decision making process or the execution of the agreement and, for the most part, their views on the relevant matter. Disclosure would clarify the operational details of how the payments were made, which appears to have been unique to these payments.

203. The individuals were also either senior officers of public authorities with responsibility to adhere to public sector financial management guidelines or elected officials with decision making authority. As such, they had or should have had an expectation that some information relating to their work could be subject to public scrutiny<sup>41</sup>. The Information

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<sup>40</sup> The reply was disclosed by the Ministry Headquarters on 10 May 2018 during its handling of this PATI request.

<sup>41</sup> For example, with respect to the accountability of senior public officers for adhering to Financial Instructions and reporting on the accounts within their responsibility, see the various witness statements from numerous public officers submitted to the Commission of Inquiry (COI) that discussed their awareness of the Government's financial transactions investigated by the COI, available at [inquirybermuda.com](http://inquirybermuda.com). Senior public officers have also appeared before the Public Accounts Committee, as explained in the '[Report of the Parliamentary Standing Committee of the Public Accounts on: The Work and Activities of the Public Accounts Committee over the Period from June 2018 to November 2019](#)', (29 November 2019), accessed 21 July 2022.



Commissioner acknowledges that disclosure might bring unwanted attention to these individuals, but the strong public interest in disclosure, as discussed above, outweighs the public interest in non-disclosure of their personal work information.

204. The Information Commissioner is satisfied that disclosing the Third Party's name in the relevant records is in the public interest, given their former position. Much of the information about the Third Party was in the public domain at the time of the PATI request.
205. The Information Commissioner is satisfied that the disclosure of other individuals' personal information in the withheld records is not in the public interest. This includes information related to other officers or employees of public authorities who were not key actors in the decision making process or for executing the agreement, such as those who helped respond to media inquiries about the settlement. Although employees or officers of public authorities, their involvement in what can fairly be described as a controversial matter was minor, and it is reasonable for these individuals to expect their information be withheld from the public. Disclosure would not be necessary to assist the public in understanding the Government's decision making process and would risk placing unwarranted and unnecessary attention on the individuals. Disclosure of their information is neither fair nor necessary, and therefore is not in the public interest.
206. Similarly, the Information Commissioner is satisfied that the public interest would be better served by non-disclosure of patient information and other individuals associated with private entities, rather than disclosure. Disclosure is unnecessary to promote accountability, further understanding of public decision making, increase transparency or otherwise support other public interest factors. Disclosure would also be unfair because these individuals have reasonable expectations of privacy and have not consented to the release of their information.

### *Conclusion*

207. The Information Commissioner is satisfied that section 23(1) is not properly engaged for parts of records 132 and 145 that were withheld by the Minister Headquarters, because they do not contain information about an identifiable individual and therefore must be released.
208. The Information Commissioner is satisfied that section 23(1) is applicable to deny public access to records 154 and 155 as well as parts of records 2, 5, 38, 51, 54, 55, 57, 61, 63, 72, 78, 81, 113, 116, 123, 132, 133, 138-142, 145, 153, 176, 179-182 and 184, because they contain information about identifiable individuals whose disclosure is not required

by the public interest, for instance, parts of individual's email addresses and certain personal views.

209. The Information Commissioner is not satisfied that section 23(1) properly applies to deny public access for certain personal information of certain individuals (such as senior officers of public authorities, former and current politicians and the Third Party) in the following parts of records: 2, 5, 38, 51, 54, 55, 57, 59, 61, 63, 72, 78, 79, 81, 113, 116 and 138. This is because the exemption is engaged, but the balance of the public interest requires disclosure.

### ***Conclusion***

210. The Information Commissioner finds that:

- a. Records 112 and 117, the remaining withheld part of record 135, part 2 of record 45 as well as certain parts of records 54, 116, 138 and 141 do not fall within the scope of the PATI Act by virtue of section 4(1)(b)(vi), because they were obtained or created by AG's Chambers in the course of carrying out its functions.
- b. The Ministry Headquarters:
  - i. properly engaged the exemption in section 25(1)(c) to deny public access to records 149-152, because their disclosure could reasonably be expected to prejudice the commercial interests of the Brown-Darrell Clinic and Bermuda Healthcare Services as well as the healthcare insurers—except that disclosure of limited parts of the spreadsheets is required by the public interest;
  - ii. properly engaged the exemption in section 27(1)(a) to deny public access to records 42, 43 and 60, because the records were submitted to the Cabinet for its consideration or were proposed by a Minister of Government to be submitted, and were created for the purpose of submission for the Cabinet's consideration;
  - iii. properly engaged the exemption in section 27(1)(c) to deny public access to records 3, 62, 66, 69 and 115 as well as the specified part 3 of record 38 (third paragraph only), the remaining withheld part of record 45's part 1, and the remaining withheld part of record 134's part 1, because they are a copy of, or an extract from, a record that is exempt under section 27(1)(a) or (b);
  - iv. did not properly engage the exemption in section 27(1)(d) to deny public access to records 51, 55, 59 and 72, as well as parts of records 2, 5, 38, 54, 57, 61, 63, 78, 79, 113, 116, 133 and 138, because their disclosure could not

reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision;

- v. properly engaged the exemption in section 27(1)(d) to deny public access to other parts of records 2, 5, 54, 57, 61, 63, 78, 79, 113, 116, and 133, whose disclosure would involve disclosing the Cabinet's deliberation or decision—and by which a decision by the Cabinet was not being officially published;
  - vi. did not properly engage the exemption in section 28(1) to deny public access to the remaining parts of record 79, because their disclosure could not reasonably be expected to undermine individual ministerial responsibility;
  - vii. did not properly engage the exemption in section 30(1)(c) to deny public access to records, or parts of records, 38 and 140-142, because they could not reasonably be expected to disclose positions, plans, procedures, criteria or instructions taken, used or followed, for the purpose of any ongoing negotiations by the Government; and
  - viii. properly engaged the exemption in section 37(1) to withhold records 15, 40, 49 and 118 and parts of records 14, 101 and 144, because section 18(1) of the Health Council Act prohibits their disclosure.
- c. Section 23(1) is properly applied to deny public access to records 154 and 155 as well as parts of records 2, 5, 38, 51, 54, 55, 57, 61, 63, 72, 78, 81, 113, 116, 123, 132, 133, 138-142, 145, 153, 176, 179-182 and 184, because they contain information about identifiable individuals whose disclosure is not in the public interest.
- d. Section 23(1) is not properly applied for certain personal information about certain individuals in records 2, 5, 38, 51, 54, 55, 57, 59, 61, 63, 72, 78, 79, 81, 113, 116 and 138, because while the exemption is engaged for them, the public interest favours their disclosure.
211. Finally, the Information Commissioner apologises to the parties in this review, as well as the public, for the time taken to come to this Decision.

## Decision

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The Information Commissioner finds that by virtue of section 4(1)(b)(vi) of the Public Access to Information (**PATI**) Act 2010, the Act does not apply to records 112 and 117 and parts of records 45, 54, 116, 135, 138 and 141.

Further, the Information Commissioner finds that the Ministry of Health Headquarters (**Ministry Headquarters**) was justified in relying on the following exemptions to deny public access: section 25(1)(c) for records 149-152 in part; section 27(1)(a) for records 42, 43 and 60; section 27(1)(c) for records 3, 62, 66, 69 and 115 as well as certain parts of records 38, 45 and 134; section 27(1)(d) for parts of records 2, 5, 54, 57, 61, 63, 78, 79, 113, 116 and 133; and section 37(1) for records, or parts of records, 14, 15, 40, 49, 101, 118 and 144.

The Information Commissioner finds that the Ministry Headquarters was not justified to deny public access by relying on: section 27(1)(d) for records 51, 55, 59 and 72 as well as parts of records 2, 5, 38, 54, 57, 61, 63, 78, 79, 113, 116, 133 and 138; and sections 28(1) and 30(1)(c) for any record.

Finally, the Information Commissioner finds that denying public access was justified under section 23(1) for records 154 and 155 as well as certain parts of records 2, 5, 38, 51, 54, 55, 57, 61, 63, 72, 78, 81, 113, 116, 123, 132, 133, 138-142, 145, 153, 176, 179-182 and 184. The Ministry Headquarters was not justified in relying on section 23(1) to withhold some personal information about certain individuals.

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

- varies the Ministry Headquarters' refusal for records 112 and 117 and certain parts of records 45, 54, 116, 135, 138 and 141 by virtue of section 4(1)(b)(vi);
- affirms the Ministry Headquarters' decision to deny public access by relying on the following exemptions:
  - section 25(1)(c) for records 149-152, except for identified parts of the spreadsheets whose disclosure is required by the balance of the public interest,
  - section 27(1)(a) for records 42, 43 and 60,
  - section 27(1)(c) for records 3, 62, 66, 69 and 115 as well as certain parts of records 38, 45 and 134,
  - section 27(1)(d) for parts of records 2, 5, 54, 57, 61, 63, 78, 79, 113, 116 and 133, and

- section 37(1) for records 15, 40, 49 and 118 and parts of records 14, 101 and 140;
- varies or affirms the denial of access by virtue of section 23(1) for records 154 and 155 as well as parts of records 2, 5, 38, 51, 54, 55, 57, 61, 63, 72, 78, 81, 113, 116, 123, 132, 133, 138-142, 145, 153, 176, 179-182 and 184;
- reverses the denial of access to record 59 as well as the remaining parts of records 2, 5, 38, 51, 54, 55, 57, 61, 63, 72, 78, 79, 81, 113, 116, 123, 132, 133, 138-142, 145, 149-153, 176, 179-182 and 184; and
- orders the Ministry Headquarters to disclose the records, in whole or in part, as instructed in the Confidential Annex (Appendix 2), which forms part of this Decision.

The Information Commissioner requires the Ministry Headquarters' compliance as directed by this Decision and the accompanying Order, on or before **Wednesday, 14 September 2022**.

## Judicial Review

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The Applicant, the Ministry of Health Headquarters, the Third Party 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

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This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Ministry of Health Headquarters 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  
3 August 2022

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Application

- 4 (1) Subject to subsection (2), this Act does not apply to—
- ...
- (b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
- ...
- (vi) the Attorney General's Chambers;
- ...
- (2) The reference to records in subsection (1) does not include records relating to the general administration of —
- ...
- (b) any public authority referred to in subsection (1)(b).
- ...

#### Public interest test

- 21 For the purposes of this Part, the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure.

#### Personal information

- 23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.
- ...
- (6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

#### Definition of personal information

- 24 (1) Subject to subsection (2), "personal information" means information recorded in any form about an identifiable individual, including—
- ...
- (2) But "personal information" does not include—
- (a) information about an individual ... who is or was an officer or employee of a public authority that relates to the position or functions of the individual;
- ...

### **Commercial information**

25 (1) Subject to subsections (2) or (3), a record that consists of the following information is exempt from disclosure:

...

(c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates;

...

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

### **Cabinet documents**

27 (1) Subject to subsections (2) and (3), a record is an exempt record if it is—

(a) a record that has been submitted to the Cabinet for its consideration or is proposed by a Minister of Government to be so submitted, being a record that was brought into existence for the purpose of submission for consideration by the Cabinet;

(b) an official record of any deliberation or decision of the Cabinet;

...

(c) a record that is a draft or copy of, or an extract from, a record referred to in paragraph (a) or (b);

(d) a record, a disclosure of which would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet is officially published.

(2) Subsection (1) does not apply to a record that contains purely statistical, technical or scientific material unless the disclosure of the record would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet.

### **Ministerial responsibility**

28 (1) Subject to subsection (2), a record is exempt from disclosure if it consists of information, the disclosure of which would undermine, or could reasonably be expected to undermine, individual ministerial responsibility, including free and frank discussion and advice between Ministers, or between Ministers and public officers, in the course of their public duties.

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

### **Operations of public authorities**

30 (1) Subject to subsection (2), a record is exempt if its disclosure could reasonably be expected to –

...

(c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any ongoing negotiations by or on behalf of the Government or a public authority.

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

### **Disclosure prohibited by other legislation**

37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.

...

## **Bermuda Health Council Act 2004**

### **Confidentiality**

18 (1) Except in so far as may be necessary for the due performance of a person's functions under this Act or any other statute and subject to subsections (3), (4) and (5), any person who is a member of the Council or who is acting as an officer, a servant, an agent or an adviser of the Council shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties.

...

(3) Subsection (1) does not preclude the disclosure of information—

(a) for the purpose of enabling or assisting the Minister to exercise any functions conferred on him by this Act or Regulations made under this Act or in connection with the dealings between the Minister and the Council when the Council is exercising its functions under this Act or any regulations made under this Act;

(b) if the information is or has been available to the public from other sources.

...



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