

## Decision Notice

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### Decision 07/2023: Department of Works and Engineering

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#### **Tribe Road records**

**Reference no:** 20220121

**Decision date:** 28 April 2023

## Summary

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The Department of Works and Engineering (**Department**) received a request under the Public Access to Information (**PATI**) Act 2010, asking for inspection and incident reports about a Tribe Road as well as any records of complaints or concerns about the road's condition. In its internal review decision, the Department relied on the 'operations of public authorities' exemption in section 30(1)(a) to refuse the PATI request in full. During the Information Commissioner's review, the Department clarified that it relied on section 30(1)(a) to refuse access to parts of the request only. The Department relied on section 38(1) to refuse informing the Applicant of the existence or non-existence of the other parts of the PATI request.

The Information Commissioner has found that the Department was justified in denying part of the request under section 30(1)(a) of the PATI Act. The Department was further justified in refusing to disclose the existence or non-existence of other records under section 38(1).

## Relevant statutory provisions

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Public Access to Information Act 2010: section 30(1)(a) (prejudice to investigations); section 38 (non-disclosure of the existence of a record).

The Appendix provides the text of the statutory provision and forms part of this Decision.

## Background

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1. On 8 November 2021, the Applicant emailed the Department of Works and Engineering (**Department**) about an incident that happened on a Tribe Road earlier that year (**2021 incident**), which led to an individual having to receive medical treatment. The Applicant asked the Department the following questions:
  - a. Has the Department arranged for an inspection of the Tribe Road, subsequent to the incident? (**item 1**)
  - b. When was the Tribe Road last inspected (prior to the incident)? (**item 2**)
  - c. Were there any remarks noted on that inspection report; and, if so, what were those remarks? (**item 3**)
  - d. What is the frequency of inspection reports of the Tribe Road? (**item 4**)

- e. Has the Department received any complaints or concerns, from members of the public, relating to the condition of the relevant section of the Tribe Road; and, if so, when were they received? **(item 5)**
2. The Department did not consider the Applicant's email of 8 November 2021 a PATI request, though otherwise responded to it, and did not issue an initial decision. The Applicant subsequently asked for an internal review to be conducted by the Head of Authority.
3. The Department issued its internal review decision on 21 January 2022, while acknowledging that there was a "discrepancy on whether [the Applicant's] initial request was indeed made under PATI legislation". The Department denied the PATI request in full under the exemptions in sections 30(1)(a) (prejudice to tests, examinations, etc.) and 31(1) (financial and economic interests).
4. On 24 January 2022, the Applicant made a timely application for an independent review by the Information Commissioner of the Department's internal review decision.

## Investigation

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5. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions were required from the Department to determine whether its reliance on the exemptions was justified.
7. On 10 February 2022, the Information Commissioner's Office (**ICO**) notified the Department of the Applicant's valid application.
8. During the review, the Department clarified both to the ICO and the Applicant that it relied on sections 30(1)(a) and 31(1) to refuse access to the record responsive to item 1 of the PATI request only. The Department provided the ICO with an Incident Report responsive to item 1. The Department refused to inform the Applicant of the existence or non-existence of records that would be responsive to items 2-5 under section 38 (non-disclosure of the existence of a record).
9. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. Both the

Department and the Applicant were invited to make submissions during this review and did so.

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

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10. In coming to this Decision, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Department and the Applicant. She is satisfied that no matter of relevance has been overlooked.
11. 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 and other withheld information. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

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

12. Public authorities are justified to refuse to disclose a record under section 30(1)(a) of the PATI Act if disclosure could reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by, or on behalf of, the public authority, or the procedures or methods used to conduct them.
13. Because the Department claimed that disclosure of the relevant record could prejudice the effectiveness of an investigation, this Decision does not describe those parts of the exemption that relate to tests, examinations, inquiries, audits or the procedures or methods used to conduct them.
14. In the absence of a definition of 'investigation' in the PATI Act and the Interpretation Act 1951, the term is to be read in its plain, ordinary meaning. 'Investigation' is defined as "the action of investigating something or someone", and 'investigate' means "to carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth".<sup>1</sup>
15. The exemption may apply to either ongoing or future investigations. Also, the relevant investigation must be conducted by or on behalf of the public authority concerned.
16. For the purposes of section 30(1)(a), 'prejudice' should be understood as a harm that is actual, real and significant to the effectiveness of investigation. Public authorities must

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<sup>1</sup> See Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

be able to show that the effect caused by disclosure would be negative or detrimental in a way that undermines the effectiveness of the investigation.

17. As the Information Commissioner explained in [Decision 27/2019](#), Bermuda Health Council, 'effectiveness' in section 30(1)(a) refers to the ability of the investigation to produce or lead to a result of some kind. If, after disclosure, the investigation could still be used to achieve its purposes, section 30(1)(a) may not be applicable.
18. To appropriately rely on the exemption in section 30(1)(a), public authorities should also be able to show that disclosure 'could reasonably be expected to' cause the harm. Specifically, a public authority must be able to show that their expectations on the negative impact of disclosure are likely, plausible or possible based on real and substantial facts.
19. The exemption in section 30(1)(a) is subject to the public interest test. This means that if the exemption is engaged, the record must still be disclosed if the balance of the public interest favours disclosure, as set out in section 21 of the PATI Act.
20. In sum, to appropriately withhold a record under section 30(1)(a), a public authority must ask:
  - [1] What is the relevant investigation?
  - [2] How can disclosure cause prejudice to the effectiveness of the relevant investigation?
  - [3] Could the prejudice reasonably be expected to occur under the circumstances?
  - [4] If the exemption is engaged, does the balance of the public interest require disclosure?
21. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 30(1)(a) to deny access to the records.

*Public authority's submissions*

22. The Department relied on the exemption in section 30(1)(a) to deny public access to the Incident Report responsive to item 1.
23. The Department explained that, although there was no pending investigation by the insurance company at the time of the PATI request and internal review decision, both the Department and insurance company were aware of a potential insurance claim. The Department submitted supporting documentation to the ICO, showing that the

individual injured in the 2021 incident had expressed intention to make a claim against the Government.

24. Given the potential claim, the Department identified an investigation by an insurance company about the validity of a claim and the Department's resulting liability, if any, as the relevant investigation whose effectiveness could reasonably have been prejudiced by disclosing the Incident Report. The investigation would be conducted by the insurance company on behalf of its client, the Department, to determine the Department's liability, if any, and, if needed, the scope of its insurance coverage.
25. The Department explained that disclosure of the record could prejudice the outcome of the claim investigation and the insurance company's position. The Department submitted that it had a legal obligation to the insurance company to not repudiate liability, negotiate or make any admission in connection with any occurrence or claim, without the insurance company's consent. Any repudiation of liability, negotiation or admission would be contrary to the obligation and could void the insurance coverage.
26. The Department submitted that, because the Incident Report could reasonably be viewed as relevant to any potential insurance investigation, its disclosure outside of that investigation process could negatively affect the insurance company's determination of liability. The Department also argued that this, in turn, could void any potential insurance coverage, resulting in a net loss to the Government. In the event the insurance coverage were voided, any damages found to be owed to a claimant would not be paid by the insurance company but by the Government.
27. The Department was of the view that disclosure of the Incident Report was not in the public interest, because the circumstances and information in the record involved an individual and was valuable to that individual alone. The Department submitted that there were overwhelming factors in favour of withholding the record, e.g., interference with the claim investigation process and the cancellation of the Government's insurance coverage.
28. The Department's submissions included its correspondence with the insurance company, showing that the company was of the view that the records the Applicant asked for were not 'public' records falling under PATI, and that they were of a private nature between the insured and the insurance company.

#### *Applicant's submissions*

29. The Applicant disagreed with the Department's reliance on section 30(1)(a), because their view was that disclosure could hardly prejudice the effectiveness of the insurance

company's investigation. The Applicant submitted that, since the 2021 incident, the Department had "arbitrarily and completely obliterated the accident site".

30. The Applicant submitted that, given the lapse of time, it would be reasonable to conclude that any investigation on behalf of the public authority would have been carried out, so disclosure would now be appropriate.
31. The Applicant was of the view that disclosure would be in the public interest, in that it could help members of the public with making an informed decision on whether to venture on the relevant part of the Tribe Road. The Applicant highlighted that the relevant part of the Tribe Road served several dwellings. While the Applicant accepted that, although the standard of maintenance for the Tribe Road would fall below that for a main road or any primary artery, they would still expect some form of inspection record and attention be given to repairs, in order to maintain safe pedestrian passage.
32. The Applicant further submitted that disclosure would have a beneficial effect, by minimising the chances of a similar fate befalling others. The Applicant compared this disclosure with the release of records and information relating to the service, operation and maintenance by an airline following a catastrophic airplane accident.

#### *Discussion*

33. The Information Commissioner considers the Department's reliance on section 30(1)(a) to refuse public access to the Incident Report responsive to item 1 of the PATI request.

[1] What is the relevant investigation?

34. The Information Commissioner accepts that the insurance company's potential investigation to determine whether the Department had any liability arising from the 2021 incident and, if so, whether the Department's insurance coverage would cover the claim, is the relevant investigation. Given that any investigation would be a service provided to the Government, the Information Commissioner accepts that an investigation would be conducted on behalf of the Department for purposes of section 30(1)(a).
35. Although no investigation had commenced by the time of the internal review decision, it was reasonable for the Department to conclude that such investigation was likely to occur. The Department's submission about a potential claim was based on a firm statement from the individual who suffered injury from the incident that they intended to file a claim against the Government.
36. The Information Commissioner also considered the Applicant's view that any investigation conducted would have been carried out by now. By the time of the PATI

request, the Department had conducted a visit to the incident site and produced the Incident Report. The insurance company, however, had not begun its formal claim investigation, and the Department had only been informed that an individual intended to file a claim.

[2] How can disclosure cause prejudice to the effectiveness of the investigation?

37. The Information Commissioner accepts that disclosure of the Incident Report, at internal review, would have prejudiced the outcome of the investigation. At the conclusion of any claim investigation, the insurance company makes a decision on liability and coverage for the Government. Any insurance coverage for liability could be void, however, if a client interferes with the insurance company's investigation process by disclosing a record that may repudiate liability, negotiate or make any admission in connection with any occurrence or claim, without the insurance company's consent.
38. Having examined the Incident Report, the Information Commissioner is satisfied that it contained information that could have been relevant to the insurance company's determination of the potential claim. The Information Commissioner makes no comment on whether the Incident Report was relevant to establish or absolve the Department of any liability for the incident, but notes that its disclosure, out of context, could have been interpreted either as a repudiation or admission of liability. The Information Commissioner is thus satisfied that disclosure could reasonably have been expected to prejudice effectiveness of the insurance company's potential investigation.
39. Furthermore, disclosure of the Incident Report could have prejudiced the effectiveness of the investigation because it could have voided the Department's insurance coverage. Disclosure could reasonably have been expected to result in the insurance company refraining from assisting with the claim investigation. Further, it could have resulted in an increase of potential liability of the Government through the loss of insurance coverage. Any of these developments would have undermined the effectiveness of the investigation due to the potential liability and the availability of insurance coverage for any potential liability by altering the outcome of the investigation.

[3] Could the prejudice reasonably be expected to occur under the circumstances?

40. To a certain extent, the effectiveness of the insurance company's claim investigation was incumbent on the Department's adherence to the terms of the policy. Most importantly, it was incumbent on the Department to not repudiate liability, negotiate or make any admission in connection with any occurrence or claim passed onto the insurance company. The Information Commissioner is thus satisfied that disclosure of the Incident



Report could reasonably have been expected to result in a prejudice to the effectiveness of the insurance company's investigation, as explained in paragraphs 37-39.

[4] If the exemption is engaged, does the balance of the public interest require disclosure?

41. Before going through the public interest analysis, the Information Commissioner wishes to address the part of the Department's submissions where the insurance company expressed its view that any information related to this matter was not "'public' as covered under the PATI Act", because it was considered "of a private nature" between the Government as the insured and the insurance company.
42. The PATI Act defines 'record' as a record held by a public authority in any form or medium in which information is recorded.<sup>2</sup> In this case, regardless the nature of the Government's relationship with the insurance company or of its content, the Incident Report was clearly a record that was possessed by and under the control of the Department as a public authority. It is a 'record' for the purpose of the PATI Act.
43. The Information Commissioner agrees with the Applicant that there was a public interest in disclosing information about the condition of a public road. Without making any findings on the condition of the Tribe Road at the time of the incident, the Information Commissioner agrees that transparency around the safety, or lack thereof, of a public road would allow members of the public to make an informed decision on whether they need to seek an alternative access road.
44. The Information Commissioner further accepts that there was also a general public interest in how the Department allocates its resources to maintain and improve public roads as well as its responsiveness to complaints received from the public on the conditions of a public road. Such disclosure would have furthered the purposes set out in section 2 of the PATI Act.
45. In this case though, the public interest factors in favour of disclosing the Incident Report were outweighed by the public interest in ensuring the orderly administration of claims against the Government and for the insurance company to manage the investigation of a claim, on behalf of a public authority. Efficient and effective investigative processes benefit the public in that they allow for fair determination of claims and appropriate compensation where justified. The orderly administration of this process also ensures

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<sup>2</sup> Section 3 of the PATI Act.

that the Government's insurance coverage is applicable when liability is found, which in turn minimises the cost to the public purse of any liability.

### *Conclusion*

46. The Information Commissioner is satisfied that the Department was justified in finding that the exemption in section 30(1)(a) was engaged for the Inspection Report in full and that the public interest did not require its disclosure.
47. Because the Information Commissioner finds that the Department's reliance on section 30(1)(a) was justified, the Department's alternative reliance on section 31(1) is not considered.

### ***Non-disclosure of the existence of a record – section 38***

48. Section 38 allows a public authority to refuse to disclose whether a record responsive to a PATI request exists. To appropriately rely on section 38, a public authority must satisfy two gateway requirements. First, under subsection (1), a public authority must show that the record, if it exists or were to exist, is or would be an exempt record. If a public authority satisfies the first gateway requirement, it must then conduct the public interest test set out in subsection (2).
49. According to section 38(1), a public authority "may refuse to disclose whether a record exists if the record itself, if it exists or were to exist, is or would be an exempt record." Under the PATI Act, 'an exempt record' means a record that is exempt from disclosure under any of the provisions in Part 4.<sup>3</sup> This means to satisfy the requirement in section 38(1), a public authority must identify a relevant exemption and apply the test for the identified exemption, including the public interest test (if applicable).
50. The requirement that the record 'is' or 'would be' exempt is a high standard. In section 38(1), this refers to a high level of certainty and requires a showing that a record that exists is actually exempt or that, if the record were to exist, it would be exempt from public disclosure under the PATI Act.
51. If a public authority satisfies the requirement in section 38(1), it must then consider whether the disclosure of the existence or non-existence of the record is in the public interest.
52. In sum, to justify a reliance on section 38(1) to refuse to disclose the existence or non-existence of a record, a public authority must consider the following questions:

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<sup>3</sup> See section 3 of the PATI Act.

[1] If the record exists or were to exist, is it or would it be exempt from public disclosure by virtue of a provision in Part 4?

[2] If so, is the disclosure of the existence or non-existence of the record in the public interest?

53. The specific circumstances in each case will inform the Information Commissioner's assessment. In this review, the Department asserts that records responsive to items 2-5, if they exist or were to exist, are or would be exempt in full under section 30(1)(a), because their disclosure could have prejudiced the effectiveness of the insurance company's investigation of a potential claim.
54. The requirements that public authorities must meet to appropriately rely on the exemption in section 30(1)(a) were discussed in detail in paragraphs 12-21.
55. Finally, the public authority bears the burden to establish, on the balance of probabilities, that it has justified its reliance on section 38(1) to refuse to confirm the existence or non-existence of any responsive record.

*Public authority's submissions*

56. The Department submitted that, if the records responsive to items 2-5 exist or were to exist, they were or would be exempt under section 30(1)(a).
57. The Department explained that items 2-5 were phrased in such a way as to obtain a response that could have implied either repudiation or admission of liability. The Department's expected response to inform the Applicant of whether records responsive to those items existed could therefore have voided the Government's insurance coverage and prejudiced the effectiveness of the insurance company's investigation.

*Applicant's submissions*

58. The Applicant did not make specific submissions on the Department's reliance on section 38. Where relevant, their submissions summarised in paragraphs 29-32 are considered in the discussion below.

*Discussion*

59. The Information Commissioner considers the Department's reliance on section 38(1) to refuse to disclose the existence or non-existence of records responsive to items 2-5.
60. When section 38(1) is under consideration, the Information Commissioner must ensure that her Decision does not confirm, one way or another, whether any requested record actually exists. This means that she is unable to comment in any detail on the

Department's reliance on the exemption in section 30(1)(a) of the PATI Act, or on any other matters that would have the effect of indicating if responsive records actually exist.

[1] If the record exists or were to exist, is it or would it be exempt from public disclosure under section 30(1)(a)?

61. To justify its application of section 38(1), the Department must first show under subsection (1), on the balance of probabilities, that if records responsive to items 2-5 existed or were to exist, they were or would be exempt under section 30(1)(a). This requires consideration of the analysis for section 30(1)(a) for those items.

[1] What is the relevant investigation?

62. As explained in paragraphs 34-35, the Information Commissioner accepted that the potential claim investigation conducted by the insurance company was an investigation conducted on behalf of the Department and, as such, is relevant here.

[2] How can disclosure cause prejudice to the effectiveness of the investigation?

63. If records responsive to items 2-5 existed or were to exist, the Information Commissioner accepts that their disclosure could have prejudiced the effectiveness of the insurance company's potential claim investigation by prejudicing its outcome. The contents of those records, if they existed or were to exist, could have been relevant to the determination of liability. As in the Incident Report responsive to item 1, the contents of records responsive to items 2-5 could be interpreted either as a repudiation or admission of liability without further context. This could have in turn prevented the insurance company from completing its investigation or the Department's liability coverage may have been voided.

[3] Could the prejudice reasonably be expected to occur under the circumstances?

64. The Information Commissioner accepted that the identified prejudice to the insurance company's investigation could reasonably have been expected to occur, because the effectiveness of the investigation to a certain degree was incumbent on the Department's adherence to the terms of the Government's insurance policy and to refraining from disclosing any information related to the 2021 incident outside the context of the insurance investigation.

[4] If the exemption is engaged, does the balance of the public interest require disclosure?

65. The same public interest considerations discussed in paragraphs 43-45 apply. The Information Commissioner finds that, if records responsive to items 2-5 existed or were to exist, their disclosure was not or would not have been in the public interest.

[2] If so, is the disclosure of the existence or non-existence of the record in the public interest?

66. Because the Department has met the first requirement in section 38(1), the Information Commissioner now considers whether the disclosure of the existence or non-existence of records responsive to items 2-5 was in the public interest, at the time of the Department's internal review decision.
67. The Information Commissioner agreed with the Department that items 2-5 were phrased in a way that invited a response that could have been misleading, regardless what the actual response would have been. Such response could also have been understood as either a repudiation or admission of liability, which could reasonably have impacted the Government's insurance coverage. For the same reasons stated in paragraphs 43-45, the public has an interest in the non-disclosure of the existence or non-existence of records responsive to items 2-5, while the potential investigation of the claim was still pending.

#### *Conclusion*

68. The Information Commissioner is satisfied that the Department has justified its reliance on section 38(1) of the PATI Act, because records responsive to items 2-5, if they existed or were to exist, were or would have been exempt from public disclosure under section 30(1)(a) of the PATI Act. The public interest did not require disclosure of the existence or non-existence of those records, if they existed or were to have existed.

#### *Conclusion*

69. The Information Commissioner is satisfied that the Department properly engaged the exemption in section 30(1)(a) to deny public access to the Incident Report responsive to item 1 of the PATI request.
70. The Information Commissioner is satisfied that the Department has justified its reliance on section 38(1) of the PATI Act to refuse to disclose the existence or non-existence of records responsive to items 2-5 of the PATI request.

## Decision

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The Information Commissioner finds that the Department of Works and Engineering (**Department**) was justified in denying access to the Incident Report under section 30(1)(a) of the Public Access to Information (**PATI**) Act 2010, as well as in refusing to disclose under section 38(1) whether records responsive to items 2-5 of the PATI request existed.

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

- affirms the Department's internal review decision to deny item 1 of the PATI request under section 30(1)(a); and
- varies the Department's internal review decision to deny items 2-5 of the PATI request under section 38(1).

## Judicial Review

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



Gitanjali S. Gutierrez  
Information Commissioner  
28 April 2023

### Public Access to Information Act 2010

#### Operations of public authorities

- 30 (1) Subject to subsection (2), a record is exempt if its disclosure could reasonably be expected to—
- (a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the public authority concerned or the procedures or methods employed for the conduct of those tests, examinations, investigations, inquiries or audits;
  - ...
- (2) A record shall be disclosed if disclosure of it is in the public interest.

#### Non-disclosure of existence of a record

- 38 (1) A public authority may refuse to disclose whether a record exists if the record itself, if it exists or were to exist, is or would be an exempt record.
- (2) The existence or non-existence of a record shall be disclosed if disclosure of it is in the public interest.

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