

Decision Notice

Decision 17/2023: Office of the Governor

Misconduct claims report

Reference no: 20220420-01

Decision date: 5 July 2023

Summary

The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Office of the Governor (**Government House**), asking for the report submitted to Government House by Andrew Bermingham on misconduct claims against the former Commissioner of Police. In its internal review decision, Government House relied on the exemption in section 30(1)(a) (prejudice to investigations), among other exemptions, to refuse access to the responsive record, an interim report. Government House reasoned that disclosure could reasonably prejudice the effectiveness of the procedures used in the Bermuda Police Service's disciplinary investigations, and that the balance of the public interest favoured maintaining the exemption.

The Information Commissioner has found that Government House was justified in denying access to the interim report under section 30(1)(a) of the PATI Act.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); section 30(1)(a) (prejudice to investigations).

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

Background

1. On 5 January 2022, the Applicant made a Public Access to Information (**PATI**) request to the Office of the Governor (**Government House**), seeking a report by Andrew Bermingham on misconduct claims against the former Commissioner of Police (**interim report**).
2. On 9 February 2022, Government House issued an initial decision denying access to the record in accordance with sections 30(1)(a) (prejudice to investigations) and 33(1)(a) (Governor's responsibilities) of the PATI Act. The Applicant requested an internal review on the same date.
3. On 18 March 2022, Government House issued its internal review decision denying access to the responsive record in accordance with sections 30(1)(a) and (b), section 33(1)(a) and sections 34(1)(a) and (c).

4. On 20 April 2022, the Applicant made a timely application for an independent review by the Information Commissioner of Government House’s internal review decision.

Investigation

5. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. 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 Government House to determine whether its reliance on the exemptions was justified.
7. On 29 April 2022, the Information Commissioner’s Office (**ICO**) notified Government House of the Applicant’s valid application and asked for a copy of the withheld record, which was provided.
8. 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 Government House and the Applicant were invited to make submissions during this review. The ICO received submissions from both parties.

Information Commissioner’s analysis and findings

9. In coming to this Decision, the Information Commissioner considered all the relevant submissions, or parts of submissions, from Government House and the Applicant. She is satisfied that no matter of relevance has been overlooked.
10. 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 record. 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)

11. 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.

12. In the absence of a definition of ‘investigation’ or ‘procedures’ in the PATI Act and the Interpretation Act 1951, these terms are to be read in their 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”.¹ ‘Procedures’ is defined as “an established or official way of doing something” or “a series of actions conducted in a certain order or manner”.²
13. The exemption may apply to either ongoing or future investigations, as well as the procedures or methods used to conduct the relevant investigation. The relevant investigation must be conducted by or on behalf of the public authority concerned.
14. 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 the investigation. Public authorities must be able to show that the effect caused by disclosure would be negative or detrimental in a way that undermines the effectiveness of the investigation.
15. 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.
16. 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.
17. 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.
18. In sum, to appropriately withhold a record under section 30(1)(a), a public authority must ask:³

¹ See Oxford Dictionary of English (3rd ed. 2010).

² See Oxford Dictionary of English (3rd ed. 2010).

³ See [Decision 27/2019](#), Bermuda Health Council.

[1] What is the relevant investigation or the procedures or methods employed to conduct it?

[2] How can disclosure cause prejudice to the effectiveness of the relevant investigation, or the procedures or methods used to conduct it, describing the circumstances or events that can lead to the prejudice?

[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?

19. 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 record.

Public authority's submissions

20. Government House explained that the relevant investigation was launched under the Police (Conduct) Orders 2016 (**Conduct Orders**) into an allegation of misconduct/gross misconduct against the then-Commissioner of Police, Stephen Corbishley. The investigation was ongoing when the former Commissioner of Police resigned. Following the former Commissioner of Police's resignation, the investigation was discontinued in accordance with Order 19 of the Conduct Orders.
21. In its submissions, Government House further clarified the status of the investigation at the time of the internal review decision. At that time, Investigator Bermingham had not completed a report of the investigation as required under Order 17 of the Conduct Orders. Government House described the 'report' provided by Investigator Bermingham as only an update to the appropriate authority, and not a report of the completed investigation as required under Order 17 of the Conduct Orders. Government House maintained that, in essence, any comments by the Investigator were preliminary in nature and a summary of unproven allegations yet to be properly investigated.
22. As a result, the appropriate authority, i.e., the Governor, had not received an Order 17 report and had not subsequently decided under Order 18 of the Conduct Orders what action to take in respect of the matters dealt with in the report. As Government House stated, the matter was closed due to the former Commissioner of Police's resignation before the misconduct process generally, and before the investigation stage in particular, was advanced to the point where the Governor could determine whether there was a case to answer.

23. In considering the harm from disclosure, Government House reasoned that disclosure of the interim report would prejudice this specific investigation because the former Commissioner of Police had not yet had an opportunity to respond to the allegations, which remained unproven at the time of the internal review decision. Government House explained that, from an administrative law perspective, there was no point in continuing the investigation after the resignation because any continuance would be irrational and therefore unlawful. This was because the resignation of the former Commissioner of Police meant that the Governor no longer had power to take any further action at the conclusion of an investigation, if one was to continue.⁴
24. Government House also determined that disclosure would prejudice the effectiveness of any of its investigations of this type more generally, as well as the procedures or methods used by investigators under the Conduct Orders.
25. It explained that the Conduct Orders outline a process for disclosure of information to the person concerned. This process may require consideration of a list of specific harms in Order 4 of the Conduct Orders, which may occur from disclosure to the person concerned. Order 4(g) specifically states that information should not be supplied if it is not in the public interest to do so. Government House explained that, under the circumstances, no disclosure would have occurred when an investigation had not reached a conclusion and where the appropriate authority had not decided whether there was a case to answer. Disclosing information at the time of the internal review decision would not have been consistent with the process under Order 4.
26. Government House argued that, consequently, any disclosure of a withheld record in a future investigation could reasonably be expected to undermine the authority granted by the Conduct Orders to the appropriate authority and investigator to make decisions on withholding or providing certain information. Disclosure under the PATI Act would circumvent the procedures and decision making authority in the Conduct Orders and render them less effective.
27. According to Government House, the procedures employed to conduct disciplinary hearings are set out in the Conduct Order, which provide that officers subject to disciplinary proceedings have the right to be provided with certain documents and information at particular times. Government House maintained that, as part of the procedures for disciplinary investigations, the Conduct Orders afford the appropriate authority and the investigator the discretion to determine whether certain information

⁴ The Royal Gazette, '[Governor drops inquiry into gross misconduct allegations against former Police Commissioner](#)' (13 January 2022).

or documents should not be provided to an officer subject to a disciplinary investigation. This was evidenced by the fact that the investigator is not required to provide an officer with an Order 14 Notice if its provision might prejudice the investigation, or any other investigation. Any public disclosure of preliminary information in response to a PATI request during an investigation would circumvent this process.

28. Government House argued that there were obvious dangers in sharing any preliminary statements which may have been made during an unfinished investigation, but which may not have survived the completion of the investigation.
29. Further, Government House asserted that releasing a record in circumstances where the summary of allegations put to an investigator had not been properly investigated could impede an investigation in several ways, including that, if information shared with an investigator could not be held in confidence at that stage in the process, complainants could be disincentivised to raise concerns or to engage openly. The risk of premature disclosure of preliminary information or updates could also inhibit individuals from being forthright, or having a reluctance to express comments, sometimes highly critical, about individuals with the same frankness if the chance of public disclosure of their comments was heightened. This, in turn, could also lead to an unwillingness to cooperate with such investigations in the future or to express frank opinions or to voice suspicions. Finally, this could result in the public release of a document never seen by the individual subject to the investigation. Such unfairness to the individual would taint the investigation procedures, risk a detrimental impact on the professional reputation of the individual subject to the investigation in the absence of a final determination, and undermine the careful balance of fairness in the process under the Conduct Orders.
30. In weighing the balance of the public interest, Government House found that it was important to maintain the exemption to safeguard the public interest in the integrity of investigations under the Conduct Orders and the necessary natural justice principles that protect an individual under investigation. Government House gave these factors great weight.
31. Government House acknowledged in its submissions that the public interest factors favouring disclosure included ensuring that the Police were acting in accordance with professional conduct standards and transparency; that persons in high positions were held accountable for their actions; that investigations are seen to be carried out appropriately; and a strengthening of public confidence in the extent to which the most senior public officers are held accountable.

Applicant's submissions

32. The Applicant submitted that they could not see how section 30(1)(a) was applicable in this review, as the head of the public authority had abandoned the investigation into the former Commissioner of Police. The Applicant questioned how disclosure could prejudice the effectiveness of an inquiry that had already been dropped.
33. The Applicant asked the Information Commissioner to consider the significant public interest in this matter. The Applicant submitted that the former Commissioner of Police left Bermuda under a cloud, while under investigation for alleged gross misconduct and still had almost two years left under his contract.
34. The Applicant further submitted that the investigation and the settlement received by the former Commissioner of Police were publicly funded, yet the public has not been told the results of the inquiry.
35. Finally, the Applicant submitted that the inquiry was ordered by the Governor because of allegations of wrongdoing by Bermuda's most senior police officer. Disclosing the report could help shed light on the surrounding circumstances, including whether the public servant's and the public authority's conduct was proper.

Discussion

[1] What is the relevant investigation or the procedures or methods employed to conduct it?

36. The relevant investigation was the investigation of the allegations against the former Commissioner of Police under the Conduct Orders. Order 5(1) of the Conduct Orders stipulates that:

These Orders apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct.
37. Order 25(1) of the Conduct Orders specifies that "where the police officer concerned is...the Commissioner, the misconduct proceedings must be conducted by a panel of persons specified in paragraph (2), appointed by the appropriate authority". The Governor is the appropriate authority for a disciplinary investigation of a Police Commissioner or Deputy Police Commissioner.
38. Order 13 also sets out the purposes of an investigation under the Conduct Orders, to "gather evidence to establish the facts and circumstances of the alleged misconduct or gross misconduct" and "assist the appropriate authority to establish whether there is a

case to answer in respect of misconduct or gross misconduct or whether there is no case to answer”.

39. The procedures for such an investigation are set forth in Parts 2 and 3 of the Conduct Orders.
40. The Information Commissioner accepts that the relevant investigation was the discontinued investigation of the former Commissioner of Police.
41. The Information Commissioner also accepts that the relevant procedures for the conduct of any such investigations were those set out in the Conduct Orders.

[2] How can disclosure cause prejudice to the effectiveness of the relevant investigation, or the procedures or methods used to conduct it, describing the circumstances or events that can lead to the prejudice?

Prejudice to the effectiveness of the investigation of the former Commissioner of Police

42. The Information Commissioner carefully considers the prejudice to the effectiveness of the investigation of the former Commissioner of Police. The Information Commissioner agrees with the Applicant that, once this investigation was discontinued, no prejudice to its effectiveness could occur because the process had concluded, albeit without an investigation report pursuant to Order 17 or a determination by the appropriate authority.
43. As stated by Government House, this investigation was discontinued before it advanced to the point where a decision could be made or considered on the allegations. Disclosure of the requested record after the investigation had concluded could, therefore, have no impact on the effectiveness of the investigation to achieve its purposes set forth in Order 13, as referred to above in paragraph 38. The outcome of the investigation—that it was discontinued and no further action taken—could not be altered by a subsequent disclosure.
44. This exemption is not considered further for any prejudice to the effectiveness of the investigation of the former Commissioner of Police.

Prejudice to the effectiveness of the procedures under the Conduct Orders

45. The above analysis, however, does not apply to the effectiveness of the procedures and processes set forth in the Conduct Orders when used for conducting such investigations.
46. Although the present review involves a withdrawn investigation under Order 19 and no completed report under Order 17 the Information Commissioner notes that, for completed investigations, Part 3 of the Conduct Orders establishes a careful process for

noticing the officer concerned, gathering evidence and providing information. Once a final report is issued by the investigator to the appropriate authority pursuant to Order 17, the Conduct Orders outline the process to be undertaken by the appropriate authority. Should the matter proceed to a disciplinary proceeding, the Conduct Orders dictate when and how exceptional factors should be considered for a hearing to be conducted in public, e.g., Order 30. Importantly, Order 35(6) of the Conduct Orders also establishes the appropriate authority's authority to decide whether to publish the outcome of the hearing, and the appropriate authority must consider a harm test set out in Order 4.

47. Overall, the procedures for information sharing in the Conduct Orders carefully balance fact-finding with administrative fairness, as well as establish the appropriate authority's decision making authority over the extent of information that should be shared.⁵
48. Within this procedural framework, the Information Commissioner considers the impact of the disclosure of an update from the investigator to the appropriate authority when an investigation is discontinued pursuant to Order 19. In contrast, much of Government House's submissions discussed the impact of disclosure upon an investigation that was ongoing or completed by the investigator.
49. When an investigation is withdrawn under Order 19, the Conduct Orders only address circumstances when an investigator has completed a report under Order 17. Specifically, Order 19(2)(b)(ii) requires that the appropriate authority consider whether to disclose a completed report, or the relevant part of a completed report, to the individual concerned if it is requested. This is also subject to the appropriate authority's determination of the harm test set out in Order 4. At issue here, however, is the impact upon the effectiveness of the procedures of the disclosure of an update provided by the investigator when no investigation report has been completed.
50. The Information Commissioner agrees with Government House that, when no completed investigation report is provided, the disclosure of an update that was given to the appropriate authority would undermine the authority granted by the Conduct Orders to the appropriate authority and investigator to withhold certain information. A disclosure under the PATI Act to the public of an update containing unproven and preliminary

⁵ See, for example, Order 14 (setting out what the notice to the officer involved must contain, e.g., among other things, a description of the conduct that is the subject matter of the allegation, and providing a specific timeline for updates on the progress of the investigation); Order 19(2)(b)(ii) (outlining circumstances when the investigation report is provided to the officer involved if an investigation is withdrawn); and Orders 20(1)(a) and (c) (setting out the requirements for a written notice of the referral to a misconduct proceeding).

information circumvents the careful procedures under the Conduct Orders for information sharing and renders them ineffective.

51. Further, the Information Commissioner also recognises that the Conduct Orders outline a careful process, which safeguards the complainant, witnesses and the officer subject to the disciplinary hearing by ensuring that information is received, considered and tested prior to the submission of a final report to the appropriate authority pursuant to Order 17 and any potential public disclosure under Order 35 at the conclusion of a proceeding. The Information Commissioner agrees with Government House's concerns in paragraph 29 above that public disclosure of updates—which may contain unproven allegations, references to confidential documents, untested witness statements, and so on—may inhibit individuals from coming forward, have a chilling effect on information that is shared by interviewees, risk unfairly maligning individuals, and lead to distraction or misinformation that detracts from the orderly administration of the process established under the Conduct Orders. This would, in turn, undermine the effectiveness of the investigation procedures in Parts 2 and 3 of the Conduct Orders in achieving their purposes set out in Order 13.

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

52. The effectiveness of the procedures described above are dependent upon the orderly administration of the process under the Conduct Orders. A disclosure of an update provided to the appropriate authority when an investigation is incomplete and withdrawn is highly likely to circumvent the provisions of the Conduct Orders.
53. Such disclosures would undermine the authority the Conduct Orders affords to the appropriate authority and investigator to make decisions about information sharing.
54. The Information Commissioner also agrees that disclosure of preliminary comments, witness lists, unproven allegations and similar information that might be in an update could reasonably be expected to cause the harms to the effectiveness of the procedures described in paragraph 29, above.

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

55. The procedures in the Conduct Orders balance the need for a fair process with Government House's need to protect other interests outlined in the Orders, such as safeguarding other pending disciplinary or criminal investigations or other public interests. Inherent in the procedures under the Conduct Orders is the need to balance various public interests, e.g., as seen in the harm test in Order 4.

56. As the Applicant argued, though, the exemption in section 30(1)(a) is not absolute. The balance of the public interest must be assessed under the circumstances of each request. If the balance of the public interest would be better served by disclosure rather than non-disclosure, the responsive record should be released even if it could prejudice the procedures set forth in the Conduct Orders.
57. Government House acknowledged the public interests in favour of disclosure, including ensuring that the Police are acting in accordance with professional standards and transparency; that persons in high positions are held accountable for their actions; that investigations are perceived as being conducted fairly and appropriately; and that public confidence is strengthened in how senior police officers are held accountable.
58. The Applicant raised compelling arguments that the balance of the public interest favoured disclosure. The Applicant pointed to the status of the former Commissioner of Police as Bermuda's most senior police officer who was under investigation for allegations of gross misconduct that suggested an abuse of authority. Such allegations raised significant concerns of whether the very officer vested with a constitutional mandate to uphold the law had personally engaged in gross misconduct. As the Applicant stated, the only information about the outcome of the investigation that is known was that it was discontinued. The reason given for the discontinuation was the impact of the former Commissioner of Police's resignation and the futility of continuing an investigation under the circumstances.
59. While the Applicant's arguments are compelling, they were premised on beliefs that what has been withheld was an investigation report completed by Mr. Bermingham and provided to Government House pursuant to Order 17, and that the record would shed light on the former Commissioner of Police's conduct and further accountability. That is not the case.
60. The 'investigation report' was not actually a report as described under Order 17. Had it been, the outcome of this review might have been different. Having carefully reviewed the record, the Information Commissioner agrees that it was only an update provided to the appropriate authority at an early stage in the investigation. It did not, for example, contain factual findings or other information that would indicate whether the allegations against the former Commissioner of Police were unfounded. The public interests identified by the Applicant and Government House would not have been furthered by disclosure of the update.
61. Under these circumstances, several public interest factors favoured maintaining the exemption. Most compelling was the fact that it would be unfair and an invasion of personal privacy to disclose unfounded allegations and other preliminary details of a

gross misconduct investigation that was never concluded. Such disclosure would likely fuel speculation and rumour. It also could result in unwarranted attention being directed towards the former Commissioner of Police, those who made accusations against him, and other individuals related to the investigation. The public has a strong interest in maintaining the fairness of administrative processes and avoiding unjust harm to individuals.

62. The public also has a strong interest in the orderly administration of administrative processes under the Conduct Orders. The disclosure of updates provided to the appropriate authority undermines this interest. Having carefully reviewed the withheld record, the Information Commissioner also notes that it did not in any way suggest or reveal any wrong-doing or maladministration related to the conduct of the investigation or the decision to discontinue the investigation under Order 19 following the former Commissioner of Police's resignation.
63. Finally, the public does have a strong interest in transparency around decision making processes. Here, Government House has clarified an important misunderstanding concerning the decision that was made in this matter. Specifically, Government House explained that what has been referred to as an 'investigation report' by Mr. Bermingham was not a report at all, but only an update that was provided to the appropriate authority early in the investigation. The public can now understand that, as a result of the former Commissioner of Police's resignation, the gross misconduct investigation was discontinued without any resolution of the allegations against him.
64. The Information Commissioner is satisfied that the balance of the public interest did not require disclosure of the responsive record.

Conclusion

65. The Information Commissioner is satisfied that Government House was justified in finding that the exemption in section 30(1)(a) was engaged for the record in full and that the public interest did not require its disclosure.
66. Because the Information Commissioner finds that Government House's reliance on section 30(1)(a) was justified to withhold the record, its alternative reliance on sections 30(1)(b), 33(1)(a), 34(1)(a) and 34(1)(c) is not considered in this Decision.

Decision

The Information Commissioner finds that the Office of the Governor (**Government House**) was justified in denying access to the responsive record under section 30(1)(a) of the Public Access to Information (**PATI**) Act 2010.

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

- affirms Government House's internal review decision to withhold the responsive record under section 30(1)(a).

The Information Commissioner does not require Government House to take any further steps in relation to this Decision.

Judicial Review

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



Gitanjali S. Gutierrez
Information Commissioner
5 July 2023

Public Access to Information Act 2010

Public interest test

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

Operations of public authorities

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

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