

Decision Notice

Decision 40/2023: Bermuda Police Service

Correspondence regarding concerns about officer's conduct

Reference no: 20210218

Decision date: 23 November 2023

Summary

The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for records related to a concern raised by a hotel about the Applicant. The BPS's internal review decisions determined that some of the requested records did not exist and the one responsive record was exempt from public disclosure under section 26(1)(a) of the PATI Act as information received in confidence.

The Information Commissioner has found that the BPS was justified in relying on section 16(1)(a) to refuse items 2-4 of the PATI request because it conducted a reasonable search before concluding that records did not exist. The Information Commissioner has also affirmed in part and reversed in part the BPS's decision that the record responsive to item 1 was exempt by virtue of section 26(1)(a) of the PATI Act. Finally, the Information Commissioner has found that the exemption for personal information in section 23(1) applies to parts of the responsive record.

The Information Commissioner has affirmed the BPS's internal review decision to refuse the request for items 2-4 under section 16(1)(a); varied the internal review decision to refuse access to the record, in part, on the grounds of section 26(1)(a) and 23(1); and ordered the BPS to disclose the record, in part.

Relevant statutory provisions

Public Access to Information Act 2010: section 16(1)(a) (record does not exist or cannot be found), section 21 (public interest test), section 23 (personal information), section 24 (definition of personal information), section 26(1)(a) (information received in confidence)

Public Access to Information Regulations 2014: regulation 5 (reasonable search) and regulation 18 (Information Officer duties)

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

Background

1. The Applicant was one of the officers of the Bermuda Police Service (**BPS**) attending an incident at a hotel on a certain date. The Applicant later learned from the then-Deputy

Commissioner of Police (**DCOP**¹) that the hotel had expressed concerns to the DCOP about the Applicant's handling of the matter.

2. On 27 November 2020, the Applicant made a PATI request to the BPS, asking for:
 - a. email of complaint/concerns from the hotel about the Applicant's handling of the matter (**item 1**);
 - b. all follow up emails to the individual at the hotel before and after a meeting about the Applicant on a specific date (**item 2**);
 - c. all diary entries made in the DCOP's official diary during a specific period in relation to the matter (**item 3**);
 - d. all text messages, voice notes or WhatsApp messages in relation to this matter during a specific period, with the Applicant noting that they were aware that the BPS forensically examines phones and is denying that it carries out such a process (**item 4**);
 - e. an official acknowledgment that the BPS carries out forensic examinations of cell phones (**item 5**); and
 - f. a specific internal email about the Digital Forensic Unit (**item 6**).
3. The BPS issued an initial decision on 13 January 2021, which denied the Applicant's access to the email responsive to item 1 of the PATI request under the information received in confidence exemption in section 26(1)(a). The initial decision also informed the Applicant that the BPS did not hold records responsive to items 2-4 of the request. The BPS disclosed, in part, an email responsive to item 6 of the PATI request and relied on the law enforcement exemption in section 34(1)(e) to justify the redaction of part of the email.
4. In response to item 5, the BPS confirmed that it routinely forensically examines phones in relation to criminal investigations. It clarified that it did not, as a matter of course, forensically examine phones in relation to a PATI request. It may do so in exceptional circumstances or "where there is credible reason to believe a record holder holds a relevant record that is being withheld or was deleted after having received a PATI request".

¹ References to the DCOP in this Decision are references to the then-DCOP, unless stated otherwise.

5. The Applicant asked for an internal review on the same day the initial decision was issued. The Applicant specified that an internal review was sought of the BPS's initial decision on items 1-4 only. This means that items 5 and 6 were not subject to the BPS's internal review and are not considered in the Information Commissioner's independent review.
6. The BPS's internal review decision upheld the initial decision on items 1-4 on the same grounds, adding an assessment of the public interest test and finding that the public interest did not require disclosure of the record responsive to item 1.
7. On 18 February 2021, the Applicant made a timely application for an independent review by the Information Commissioner of the BPS's internal review decision.

Investigation

8. 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.
9. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because access to the record was required to determine whether the BPS's reliance on the exemption was justified.
10. On 9 March 2021, the Information Commissioner's Office (**ICO**) notified the BPS of this review and asked for the withheld record responsive to item 1, which the BPS provided.
11. At an early stage of this review, the BPS confirmed that it was also relying on section 16(1)(e) of the PATI request because the then-Commissioner of Police (**COP**²) was of the view that the request was frivolous or vexatious. The BPS later abandoned its reliance on section 16(1)(e) during this review.
12. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any concerned third party a reasonable opportunity to make representations. The BPS and the Applicant were invited to make submissions on the BPS's refusal, in whole or in part, of items 1-4 of the PATI request. The hotel, as a concerned third party, was also invited to make submissions on the decision to withhold

² References to the COP in this Decision are references to the then-COP, unless stated otherwise.

the email responsive to item 1. The BPS and the Applicant made submissions, but the third party did not.

Information Commissioner's analysis and findings

13. In coming to this Decision, the Information Commissioner considered all the relevant submissions, or parts of submissions, from the BPS and the Applicant. She is satisfied that no matter of relevance has been overlooked.
14. Because the record in question relates specifically to the Applicant, this Decision considers its disclosure to the Applicant specifically and not a disclosure to the world at large.
15. 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.

Record does not exist or cannot be found – section 16(1)(a)

16. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it.
17. Regulation 5 of the PATI Regulations 2014 requires public authorities, through their Information Officers, to make reasonable efforts to locate records responsive to a PATI request. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate any record.
18. When a public authority denies a PATI request under section 16(1)(a) because a record does not exist or cannot be found, the Information Commissioner's review does not determine to a point of certainty if a record exists or can no longer be located. Rather, the Information Commissioner is required to assess whether the public authority took all reasonable steps to find a record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration.
19. In determining whether a public authority's search was reasonable, the Information Commissioner considers the following:

[1] the quality of the public authority's analysis of the PATI request;

[2] the scope of the search that it decided to make based on that analysis; and

[3] the rigour and efficiency with which the search was then conducted.

20. The specific circumstances in each case will inform the Information Commissioner's assessment.
21. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.³

Public authority's submissions

22. The BPS explained that it has no documentation on how it interpreted items 2-4 at the time the initial and internal review decisions were prepared. The BPS believed, however, that it would have adopted a literal interpretation of these items.
23. The BPS explained that, because the concern was sent directly to the DCOP, the Information Officer at the time contacted the DCOP to provide the responsive records. The DCOP responded by supplying the record in his possession and indicating that no other records were held. The BPS provided the ICO with the email exchange between the Information Officer and the DCOP at the time to support its assertion. The email exchange reveals that the DCOP was asked to search his records at the initial and internal review stages. It also contained the DCOP's confirmation at both stages that he did not hold any emails responsive to item 2, diary entries responsive to item 3 or other communications via any medium in relation to the matter responsive to item 4. The DCOP also explained that he routinely deleted all social media correspondence.
24. The BPS further explained that no record responsive to item 2 of the request existed because it was the DCOP's understanding that the hotel was not filing a formal complaint and that the hotel did not expect to receive a response from the BPS.

Applicant's submissions

25. The Applicant explained that they asked for an independent review by the Information Commissioner because they believed that the COP as the Head of Authority did not conduct a reasonable search for records responsive to items 2-4 when the Applicant asked for an internal review. According to the Applicant, it appeared that the COP simply

³ See [Decision 04/2017](#), [Department of Health](#), at paras. 37-49, and more recently [Decision 01/2023](#), [Ministry of Legal Affairs and Constitutional Reform Headquarters](#), at paras. 30-35.

looked over what the Information Officer had done and then stated that he did not find any fault.

26. The Applicant submitted that the BPS's Information Officer did not actually search for the records but instead only asked the DCOP to conduct the search. The Applicant further believed that the COP did not search the DCOP's diary or cell phone to locate the responsive records.
27. The Applicant believed that the DCOP at the time shared his opinions about the Applicant with the hotel, which then submitted its own concern by email. The Applicant also expressed concern that the DCOP (now current COP) and others who were in possession of government-issued phones deleted messages to avoid having to turn over the said records. The Applicant submitted that this is contrary to the purpose of the PATI Act, which is to bring to the forefront wrongdoing. The Applicant further claimed that officers like the current COP are actively trying to hide their misdeeds.

Discussion

28. The Information Commissioner considers the BPS's reliance on section 16(1)(a) only for items 2-4 of the PATI request.

[1] the quality of the public authority's analysis of the PATI request

29. While the BPS's submission only stated that it adopted a literal reading of the PATI request, the email exchange between its Information Officer and the DCOP at the time showed that the BPS had an adequate understanding of the subject matter of items 2-4 of the request. The BPS correctly identified the incident referred to in the PATI request and understood that, for item 2, the Applicant was looking for follow up emails to the hotel in relation to the incident. It further understood that item 3 was asking for relevant diary entries. Finally, the BPS appeared to take a broad approach to its reading of item 4, understanding it as referring to any communication via any medium in relation to the incident and made a specific reference to social media messages.

[2] the scope of the search that it decided to make based on that analysis

30. The BPS contacted the DCOP to ask for the records responsive to all items in the PATI request, including items 2-4. The Information Commissioner accepts the BPS's submission that because the DCOP was the one who received the concern, it was reasonable for the BPS to ask the DCOP to conduct the search. Furthermore, the PATI request specifically referred to the DCOP and the records that the Applicant believed to be held by the DCOP.

31. Based on the DCOP's responses to the Information Officer at the initial and internal review stages, the Information Commissioner is satisfied that the DCOP searched his emails, diary and other communications, including social media. The fact that the DCOP identified the email responsive to item 1 supported the assertion that his email was searched.

[3] the rigour and efficiency with which the search was then conducted

32. As the Applicant stated, the BPS Information Officer did not conduct the search themselves but instead asked the DCOP to search his own records.

33. The Information Commissioner is satisfied that the search was conducted by an individual who was familiar with the topic because the DCOP was the one who received the complaint. The fact that the search was not conducted by the Information Officer, on its own, does not lead to the conclusion that the BPS's search was not conducted with adequate rigour and efficiency. Regulation 18(1) of the PATI Regulations 2014 allows Information Officers to delegate any of their functions as necessary or expedient.

34. The fact that the Information Officer contacted the DCOP early during the initial handling of the request and again at the internal review stage supports the conclusion that the BPS's search was conducted with adequate rigour and efficiency. Further, when the DCOP did not respond to the first search request, the Information Officer sent a chaser, albeit after the deadline to issue the initial decision had expired.

35. The Information Commissioner appreciates that it would have been reasonable for the Applicant and members of the public to expect that the BPS would have provided some sort of response to a member of the public providing information on the conduct of a specific police officer. Given the explanation provided by the BPS during this review, however, she is satisfied that it was more probable than not that the BPS did not hold any records responsive to item 2 of the PATI request. The DCOP had reasonable grounds to view the email as raising a concern about, and not a formal complaint against, the Applicant, and to understand that the hotel was not expecting any written response from the BPS.

36. The Applicant alleged that the DCOP as well as other BPS staff who used government-issued phones delete messages to avoid having to turn over those records because of PATI requests. Given the explanations and evidence submitted by the BPS, there is no reason to believe that such a deletion happened with respect to this particular PATI request.

Conclusion

37. The Information Commissioner is satisfied that the BPS was justified in relying on section 16(1)(a) to refuse items 2-4 of the PATI request because it took all reasonable steps to locate the responsive records before concluding that the records did not exist.

Information received in confidence – section 26(1)(a)

38. Section 26(1)(a) allows public authorities to deny access to information that “is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential” and “the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions”.
39. If section 26(1)(a) is properly engaged, the public interest test must be applied. Where the public interest would, on balance, be better served by disclosure than by non-disclosure, then the records must still be disclosed.
40. The exemption in section 26(1)(a) focuses on whether the process or circumstances by which the information was provided indicate that it was given in confidence and with the understanding that it would be treated confidentially. The assessment considers factors related both to how the third party gave the information and how the public authority received or agreed to hold the information.
41. In deciding whether the information was given ‘in confidence’ by a third party, relevant factors may include:
- a. the expectation of the person or entity giving the information to the public authority;
 - b. any assurances sought regarding the confidentiality of the information;
 - c. the purpose for which the information was provided; and
 - d. any other action that the person or entity giving the information may have taken with respect to the information, e.g., the information was given to other parties and under what circumstances.⁴
42. The information must also have been given with the understanding that the public authority would treat the information as confidential. This would include so information

⁴ See [ICO Guidance: Information received in confidence exemptions \(section 26\)](#) (March 2023), para. 41.

that is provided on an ongoing basis. The understanding of confidentiality may be express or implied.

43. When determining how the public authority received the information, the relevant factors may include:

- a. any statement or assurances given at the time the information was provided;
- b. the purpose for which the information was sought or provided;
- c. the practice, procedure, or policy of the public authority with regard to such information generally;
- d. any action which the public authority may be expected to take in relation to the information; and
- e. the nature of the relationship between the provider of the information and the public authority receiving it.⁵

44. Section 26(1)(a) also requires that disclosure of the information in the record 'would be likely' to prevent the authority from receiving further similar information in the future that is required by the public authority to properly fulfil its functions. Speculation is not sufficient to justify the exemption. 'Would be likely' means that some significant, real risk must exist that the public authority would be prevented from receiving such information in the future.

45. As set out in the Interpretation Act 1951, the 'functions' of a public authority should be understood as 'powers conferred, or duties imposed, on the authority or officer by or under any provision of law'.

46. As explained in [Decision 06/2021, Cabinet Office](#) at paragraph 106, a public authority, or third party, must consider five questions when seeking to justify the exemption for information received in confidence:

[1] Whether the information was given by a third party (other than another public authority)?

[2] Whether the information was given in confidence and with the understanding that it would be held confidentially?

⁵ See [ICO Guidance: Information received in confidence exemptions \(section 26\)](#) (March 2023), para. 43.

[3] Whether disclosure would be likely to prevent the public authority from getting such information again in the future?

[4] Whether that information was required for the public authority to fulfil its functions?

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

47. A public authority, or a third party asserting its rights under section 26(1)(a), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.

Public authority's submissions

48. The BPS submitted that when members of the public provide information about the behaviour of police officers (or illegal activity), there is an implied expectation that their identities will remain confidential, where possible. This expectation is supported by the Schedule to the Police Conduct (Orders) 2016 (**Conduct Orders**), which prescribes 'confidentiality' as one of the Standards of Professional Behaviour. The BPS stated that the implied expectation of confidentiality engenders public confidence, which lies at the heart of policing.
49. In this matter, the BPS submitted that the responsive record contained information about the alleged conduct of one of its officers, which may have engaged the disciplinary process under the Conduct Orders. The BPS explained that it relies to a considerable degree on the public to provide information about officers' alleged misconduct for it to fulfil its mandate under the Conduct Orders.
50. The BPS submitted that there was a significant and real risk that the disclosure of the information, which will be in the public domain, would prevent the BPS from receiving similar information in the future that is required for it to fulfil its functions. If members of the public are aware that their complaints about the alleged misconduct of officers may be subject to disclosure to the world, the disciplinary process under the Conduct Orders may be defeated.
51. The BPS also explained that some PATI requests may set a precedent, and disclosure of information in response to one request would make it more difficult to refuse requests for similar information in the future. For this reason, it is appropriate to consider the potential harm that disclosure could cause, i.e., that it could force the BPS to comply with similar requests in the future and undermine its receipt of information from the public.

52. The BPS submitted that the public interest would, on balance, be better served by non-disclosure of the record.

Applicant's submissions

53. The Applicant submitted that BPS officers, where they are the subject of a complaint, have the right to know the identity of the complainants. At the minimum, the content of the complaint (with the name of the complainant redacted) should be released to them.
54. The Applicant claims that in response to the concern received from the hotel, the DCOP at the time started to conduct their own investigation by gaining access to the Applicant's work email. The Applicant believed that this was an irregular practice and was a breach of their privacy. The Applicant appreciated that the BPS owned the rights to its bps.bm email system, but emphasised that procedures must be followed for gaining access to an officer's emails. The Applicant alleged that the DCOP failed to follow these procedures.
55. The Applicant believed that the DCOP shared their opinions with the hotel and did not want the Applicant to see this. The Applicant asserted that this was the reason why the exemption was being relied upon.
56. The Applicant submitted that the complaint was not such that it warranted it being a secret. It was neither a matter of national security nor drug-related information.
57. Finally, the Applicant stated that no formal internal investigation was conducted against them in response to the concerns received from the hotel.

Third party's submissions

58. The hotel, as a concerned third party, did not make submissions.

Discussion

59. The Information Commissioner considers the BPS's reliance on section 26(1)(a) to deny access to an email responsive to item 1 only.

[1] Was the information given by a third party (other than another public authority)?

60. The email was given by a hotel, which meets the definition of a third party under section 3 of the PATI Act.

[2] Was the information given in confidence and with the understanding that it would be held confidentially?

61. A record expressing a concern against a police officer contains two distinct categories of information, namely (i) the information relating to the identity of the individual or individuals reporting the concerns and (ii) the information consisting of the actual content of the concerns.⁶ For purposes of section 26(1)(a), these two categories of information in the record will be considered separately.

Identity of the individual sharing the concern

62. Given the nature of the concerns, the individual sending the email must have had some understanding that the Applicant might learn that it was a hotel staff member that had raised the concern about the Applicant's alleged conduct. However, the hotel staff had a reasonable expectation of not being personally identified to the Applicant.
63. In considering the factors set out in paragraphs 41 and 43 above, the circumstances show that the process for receiving concerns (or complaints) about an officer's conduct creates an expectation that the individual reporting the concern will not be disclosed and that their identity will be kept confidential.
64. Paragraph 7 of the Standards of Professional Behaviour in the Schedule to the Conduct Orders, for example, provides assurances to the public that officers will maintain the confidentiality of the information provided to them.⁷ Both the policy and practice of the BPS maintains the confidentiality of information provided to it by the public.
65. The expectation of confidentiality is reinforced by the formal processes under the Conduct Orders, which set out when disclosures will be made to an accused officer who faces a disciplinary proceeding. Individuals providing information to the BPS about officers' conduct have the opportunity to understand how and when details about concerns or complaints will be provided if the matter escalates to a disciplinary matter under the Conduct Orders.
66. As explained in [Decision 15/2020, Bermuda Police Service](#), the Conduct Orders outline what information will be provided, along with how and when. The expectation is that unless the matter proceeds to a disciplinary proceeding, the confidentiality of the individual making the report will be held in confidence. Even then, if the individual making the report does not have any involvement with the situation giving rise to the

⁶ See the Irish Information Commissioner's decision in [Case 98032](#), Mr. AAK and the Department of Agriculture and Food, which adopted an analogous framing when addressing the corresponding provision of the Ireland Freedom of Information Act 1997.

⁷ Paragraph 7 of the Standards of Professional Behaviour in the Schedule to the Conduct Orders reads: "Police officers treat information with respect and access or disclose it only in the proper course of police duties."

officer's conduct, their name is unlikely to be disclosed to the accused officer. Further, with a communication from a company, the individual sending the concern on behalf of the company may not be the individual who was involved in the conduct leading to the concern or complaint.

67. As noted below, under certain circumstances, the individuals involved in the situation leading to a complaint against an officer may have an expectation that their identity might be disclosed if the matter proceeds to disciplinary proceedings (which the Applicant confirmed did not occur). But these circumstances were not applicable to this case.

The content of the concerns or complaint

68. In contrast, considering the factors in paragraphs 41 and 43 above, information about the actual concerns about an officer's conduct is not information given in confidence and with the understanding that the information will be held in confidence. This can be seen with the BPS's recently launched [portal](#) that allows members of the public to anonymously report "instances of misconduct or inappropriate behaviour" within the BPS. The portal assures members of the public that the identity of the complainant or reporter will be kept anonymous, but no similar assurance was provided for information about the actual content of the allegations.
69. Here, the hotel was aware that, although the email was not intended as a formal complaint, the BPS might take further action against the Applicant, as would any person submitting a concern or complaint about an officer's conduct.
70. The Conduct Orders outline in detail how and when the BPS must share with an accused officer the information about the allegations. The Information Commissioner discussed the disclosure process in a disciplinary proceeding in [Decision 15/2020, Bermuda Police Service](#), paras. 38-48. Under the Conduct Orders, an accused officer may not learn the name of the individual who reported the conduct (because that may be irrelevant to the determination), but the accused officer is entitled to be informed of the nature of the allegations against them.
71. Even in the review at hand, and prior to this PATI request, the BPS had informed the Applicant of the existence of the allegation, although it is accepted that it may not have been as detailed as what was written in the responsive record.
72. The Information Commissioner acknowledges that the ability of the BPS to meet its mandate depends upon receiving information voluntarily from the public about officers' conduct, as well as about potential or committed criminal offenses. The BPS's submissions emphasise the need to protect the confidentiality of the individual making

the report or providing information to the BPS, not the content of the actual concern or allegations.

73. Instead, the information about an officer's conduct is provided for the purpose of potentially conducting a disciplinary proceeding, with the accompanying expectation that some information about the allegations will be disclosed to the relevant officer.
74. When the factors in paragraphs 41 and 43 are considered, the BPS has not shown that the actual concern about the officer's conduct in the email was given in confidence and with the understanding that the BPS would treat the information as confidential on an ongoing basis. No reassurance was provided that the concerns would remain secret, the concern was shared with the BPS for the purposes of assessing whether disciplinary action was required, and any disciplinary action would have involved disclosures about the allegations to the accused pursuant to the process outlined under the Conduct Orders. The BPS's reliance on section 26(1)(a) for this part of the responsive record is not considered further.

[3] How would disclosure be likely to prevent the public authority from getting such information again in the future?

75. The Information Commissioner now considers whether disclosure of the individual's name submitting the concern on behalf of the hotel would be likely to prevent the BPS from receiving concerns from members of the public about BPS officers' conduct in the future. The BPS relies, at least to a certain extent, on members of the public voluntarily reporting on the conduct of police officers.
76. As noted above, the BPS has created processes for members of the public to report concerns about officers' conduct anonymously and in confidence. If the public knew that an officer could learn or confirm the identity of the individual making a report through a PATI request, it would likely prevent the BPS from receiving this information in the future. This concern is particularly heightened in a small community such as Bermuda where it is relatively easy to determine where people live and work if an officer wanted to respond or react to the individual making a report.
77. Reports on concerns about officers' conduct is not the type of information that the BPS can compel members of the public to report. Disclosure of the identity of a complainant would be likely to deter members of the public to report on behaviour which they believe to be inappropriate or amount to misconduct because it could potentially put them at risk for reprisal.

[4] Was the information required for the public authority to fulfil its functions?

78. The functions identified by the BPS include maintaining disciplinary control over the police force⁸ to support the COP's fulfilment of the BPS's mandate under section 1(1) of the Police Act 1974⁹ (**Police Act**) and Order 2 of the Conduct Orders¹⁰.
79. The information obtained through the confidential process for receiving concerns about officers' conduct is necessary for the BPS to fulfil these functions. Without such reports from members of the public, the BPS would be unaware of potential misconduct or other inappropriate behaviour known only to the public. The BPS would be unable to investigate or take corrective actions in accordance with the Police Act or Conduct Orders, if needed.

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

80. The public interest analysis is considered only for the information identifying the hotel employee sending the concern on behalf of the hotel, because the exemption in section 26(1)(a) is engaged for this specific part of the record.
81. There is a public interest in transparency around the BPS's handling of information received from members of the public about the conduct of its officers. This might include information such as transparency around the outcomes of any reports or the process determining how to assess them. Disclosure of the name of the individual submitting the report, however, does not further this interest.
82. The Information Commissioner agrees with the Applicant that, in some circumstances, disclosure of the identity of a person making allegations against an officer may be fair and justified. It might be required, for example, to allow the relevant officer to understand the context of the allegations and to defend themselves during a disciplinary proceeding.

⁸ Section 82 of the Bermuda Constitution empowers the Governor to exercise disciplinary control over all public officers, while section 82(3) empowers Parliament to regulate disciplinary proceedings in respect of police officers. The Governor has delegated all powers in respect of police officers of the rank of sergeant and below to the COP under the Public Service (Delegation of Powers) Regulations 2001.

⁹ Section 1(1) of the Police Act 1974 set out that the 'appropriate authority' "in relation to a member" of the BPS is "the person with power to make appointments ... and to remove or exercise disciplinary control over such member in accordance with the Constitution or any regulations made thereunder".

¹⁰ Order 2 of the Conduct Orders assigned the COP as the 'appropriate authority' for the BPS, though the COP is allowed under Order 2(5) to delegate any of his functions under the Conduct Orders to a member of the BPS of at least the rank of chief inspector, or a human resources professional who is of at least a similar level of seniority to a chief inspector.

83. This does not necessarily mean that the disclosure should occur through the PATI Act. As noted above, if a disciplinary proceeding is initiated, the procedures under the Conduct Orders establish a careful framework for disclosure of such information to the accused officer, when needed to ensure fairness. The public has an interest in the efficient and proper administration of the process under the Conduct Orders. Disclosures under the PATI Act that undermine that process are not in the public interest, as the Information Commissioner previously explained in paragraph 57 of [Decision 15/2020, Bermuda Police Service](#).
84. Finally, the Applicant raised maladministration concerns that could be considered in evaluating whether the public interest favours disclosures, as elaborated in regulation 2 of the PATI Regulations. Specifically, the Applicant alleged that in response to the concerns raised by the hotel, the DCOP gained access to the Applicant's work email and investigated the allegations. The Applicant further alleged that the DCOP did so without following proper procedures.
85. The Information Commissioner agrees with the Applicant that when records show that a public authority did not follow its internal procedures, or otherwise engaged in maladministration, the balance of the public interest may require disclosure of a record. Although the Applicant has made these allegations, nothing in the responsive record relates to the BPS's procedure or maladministration. As noted above, the Information Commissioner has found that the BPS was justified in concluding that no additional records exist. The public interest factors raised by the Applicant are not relevant to the one withheld record.
86. The balance of the public interest favours maintaining the exemption for any information identifying the individual submitting the concerns.

Conclusion

87. The Information Commissioner is satisfied that the BPS was justified in relying on the exemption in section 26(1)(a) to deny the Applicant's access to information in the record that identified the employee submitting concerns on behalf of the hotel. Disclosure of this information is not in the public interest. The Information Commissioner is not satisfied that the BPS was justified in relying on section 26(1)(a) to deny the Applicant access to the remainder of the withheld record.

Personal information – section 23

88. Under section 23(1) of the PATI Act, public authorities are entitled to deny public access to records which consist of personal information. Section 24(1) broadly defines 'personal information' as information recorded in any form about an identifiable individual.

89. Certain information about identifiable individuals is excluded from the definition of ‘personal information’ in the PATI Act, in accordance with section 24(2). For example, certain information about contractors performing services for a public authority, or information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority.
90. The exemption in section 23(1) does not apply to the limited circumstances set out in subsection (2). It does not apply, for example, if the information in the requested records relates to the PATI requester (see subsection (2)(a)). It also does not apply to “the information that was given to the public authority concerned by the individual to whom it relates and the individual was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public” (see subsection (2)(d)).
91. The personal information exemption is subject to the public interest test. This means records which are found to be exempt under section 23(1) would still have to be disclosed, if the public interest would, on balance, be better served by disclosure instead of non-disclosure. In considering the public interest test for disclosure of personal information, the following factors must be taken into consideration¹¹:
 - a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations;
 - b. Whether disclosure would be fair to the individual under all of the circumstances. Evaluating the fairness of any disclosure may include consideration of the following:
 - i. Whether sensitive personal information was involved?
 - ii. What would be the consequences upon the individual of disclosure?
 - iii. What are the reasonable expectations of privacy of a person in the individual’s position?
 - c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.

¹¹ [Decision 02/2019](#), [Office of the Governor](#), para. 51.

92. In sum, as the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), public authorities must consider the following questions before denying public access to records under the personal information exemption¹²:

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

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

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

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

93. The Information Commissioner will consider the personal information exemption on her own accord, to safeguard the right to privacy¹³, as she does in this case.

Discussion

94. The Information Commissioner considers the exemption for personal information for the following specific information in part of the withheld record responsive to item 1:

a. Information about specific patrons of the hotel;

b. Information about the DCOP;

c. Information about the Applicant; and

d. Information about others that is inextricably intertwined with the Applicant's (**mixed personal information**)

95. The Information Commissioner does not consider this exemption for information relating to the hotel staff, as she already concluded that the same was exempt under the exemption in section 26(1)(a).

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

96. The relevant part of the record contained information about the individuals identified in paragraph 94.

¹² See [Decision 02/2019, Office of the Governor](#), para. 56.

¹³ See [Decision 01/2018, Bermuda Tourism Authority](#), at para. 27.

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

97. None of the information about individuals in the relevant parts of the record falls within any of the exclusions in section 24(2). The information about the DCOP and the Applicant related to their individual performance of their positions or functions, rather than to the position or function itself.

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

98. The email related to a concern about the Applicant's handling of the incident that happened at the hotel. This means that the information about the Applicant in part of the record (the Applicant's name, concerns about the Applicant's conduct and other information related to the Applicant) comes within the exception to the exemption for personal information found in section 23(2)(a). As noted above, the exception in section 23(2)(a) applies when the information relates to the PATI requester and such information cannot be withheld as personal information.
99. The information about the hotel's patrons and information about the DCOP is third party personal information and none of the exceptions in section 23(2) apply to this information.
100. Some information within the record is mixed personal information, in that it is information about others that is inextricably intertwined with the Applicant's. This mixed personal information does not fall within the exceptions in section 23(2).

[4] Whether the balance of the public interest requires disclosure?

101. The Information Commissioner considers the public interest test in section 23(6) in relation to the personal information about the hotel's patrons, the DCOP and the mixed personal information referred to in paragraph 100.
102. The public has an interest in transparency around the BPS's handling of information received from members of the public about the conduct of its officers. The public interest factors favouring disclosure considered in relation to section 26(1)(a) above, paragraphs 81-85, are equally relevant here.
103. With respect to the fairness of disclosure of the hotel patrons' personal information, such disclosure is more likely than not to be unfair. Given the circumstances in this case, the hotel patrons as private citizens have a reasonable expectation of privacy around their personal information. Disclosure of their information in the record would be an unnecessary invasion of their privacy.

104. Moreover, the Information Commissioner concludes that there is no public interest that would be furthered by the disclosure of the hotel patrons' names and other information to the Applicant.¹⁴ Disclosure is unnecessary to further any identified public interest (such as fair process concerns) primarily because the names of the hotel patrons are already known to the Applicant.
105. After careful consideration, the Information Commissioner is further satisfied the public interest would, on balance, be better served by non-disclosure of the mixed personal information.
106. In contrast, the disclosure of information about the DCOP would be both fair and necessary to further the public interests identified. The DCOP holds the second most senior position with the BPS and has less expectation of privacy with respect to the performance of his functions. The information in the record is not sensitive personal information about the DCOP. Instead, it is minimal personal work information. Further, it is necessary to ensure transparency around the DCOP's receipt of concerns from the public about an officer's conduct and accountability for how those concerns or complaints are then handled.

Conclusion

107. The Information Commissioner is satisfied that section 23(1) does not apply to information related to the Applicant because this part of the record is excepted from the exemption by virtue of section 23(2)(a). The Information Commissioner is also satisfied that the identifying information about the hotel patrons as well as the mixed personal information is properly withheld under section 23(1) and that the balance of the public interest requires disclosure of information about the DCOP by virtue of section 23(6).

Conclusion

108. The Information Commissioner finds that the BPS was justified in relying on section 16(1)(a) to refuse items 2-4 of the PATI request. The Information Commissioner also finds that the BPS was justified in relying on section 26(1)(a) to deny access, in part, to the record that is responsive to item 1.
109. The Information Commissioner also finds that the exemption for personal information in section 23(1) applies to parts of the record responsive to item 1.

¹⁴ Compare with [Decision 14/2021, Office of the Governor](#), para. 58. The Information Commissioner found that, although the records being sought relate to complaints filed by the Applicant, the public interest would be better served by disclosure of parts of a certain record that raised broader questions about the procedures in the Judicial Complaints Protocol for Bermuda.

Decision

The Information Commissioner finds that the Bermuda Police Service (**BPS**) was justified in refusing items 2-4 of the request under section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010. The Information Commissioner also finds that the BPS was justified, in part, in relying on section 26(1)(a) to refuse the Applicant's access to the record responsive to item 1. The Information Commissioner also finds that certain information in the record is exempt personal information under section 23(1).

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

- affirms the BPS's internal review decision to refuse the request for items 2-4 under section 16(1)(a);
- varies the internal review decision to refuse access to the record, in part, on the grounds of section 26(1)(a) and 23(1); and
- orders the BPS to disclose the record, in part, as directed in the Confidential Annex (Appendix II), which forms part of this Decision.

The Information Commissioner requires that the BPS grant access to the responsive record, in part, as directed by this Decision and the accompanying Order, on or before **Thursday, 4 January 2024**.

Judicial Review

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

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the Public Access to Information Act 2010. If the Bermuda Police Service 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
23 November 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Refusal of request on administrative grounds

- 16 (1) A public authority may refuse to grant a request if—
- (a) the record requested does not exist or cannot be found after all reasonable steps have been taken to find it;
 - ...

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.
- (2) Subsection (1) does not apply if –
- (a) subject to subsection (3), the information concerned relates to the requester;
 - ...
 - (d) the information was given to the public authority concerned by the individual to whom it relates and the individual was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public; or
 - ...
- (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—
- ...

Information received in confidence

26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—

(a) information—

(i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and

(ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or

...

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

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