

Decision Notice

Decision 41/2023: Bermuda Housing Corporation

Records on Laughing Waters

Reference no: 20210901-02

Decision date: 30 November 2023

Summary

The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Housing Corporation (**BHC**) for records on the property Laughing Waters. The BHC's internal review decision upheld its initial decision, which granted the Applicant access to the responsive records, minus the names of individuals, without referring to an exemption.

The Information Commissioner has varied the BHC's decision, finding that the redacted parts of the disclosed records were exempt by virtue of section 23(1) of the PATI Act because they were personal information. The Information Commissioner has also found that the BHC failed to conduct a reasonable search for records responsive to the PATI request.

The Information Commissioner has ordered the BHC to conduct a reasonable search and to issue a new initial decision to the Applicant, as directed by this Decision and accompanying Order.

Relevant statutory provisions

Public Access to Information Act 2010: section 12(2)(b) (access to records); section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information).

Public Access to Information Regulations 2014: regulation 5 (reasonable search).

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

Background

1. On 21 December 2010, the Government of Bermuda through the then-Senate Leader and Minister of National Security informed the public of the conveyance of Laughing Waters to the Bermuda Housing Corporation (**BHC**) at no cost to the Bermudian taxpayers. The \$1.5 million-worth property is located at Southampton Parish. From an unknown point up to the conveyance to the BHC in 2010, the property was owned by

“restricted persons” under the Bermuda Immigration and Protection Act 1956 (**BIPA**)¹. The Senate Leader explained that the conveyance was a result of two years of negotiations and the efforts by the Department of Immigration to end the practice of “fronting”, “where trusts are used to purchase properties for people who otherwise would not be able to do so because of their immigration status.”² As part of the negotiated agreement, the restricted persons who owned the property entered into a lease agreement with the BHC for a term of 5 years (from 1 November 2010 to 31 October 2015) with a monthly rent payment of \$4,500.³ The Senate Leader stated that the rental proceeds will be used to support the BHC’s overall housing plan.

2. The BHC sold the property in 2017.⁴
3. On 9 February 2021, the Applicant made a Public Access to Information (**PATI**) request to the BHC, asking for all records on the property Laughing Waters, including those about its acquisition by the BHC and its subsequent sale.
4. In its initial decision of 23 March 2021, the BHC provided the Applicant with the following records⁵:
 - a. Completion Statement dated 10 April 2017 (**record 1**)
 - b. Letter dated 24 March 2017 attaching a Deed of Conveyance (**record 2**)
 - c. Letter dated 15 September 2016 (**record 3**), and
 - d. Lease of the property dated 19 November 2010 (**record 4**).
5. The BHC disclosed record 1 in full but redacted the names of certain individuals in records 2-4. The Applicant asked for an internal review challenging the redactions in these records. The Applicant also asked the internal review to consider whether the disclosed records constituted all records on Laughing Waters held by the BHC.

¹ Section 72 of the Bermuda Immigration and Protection Act 1956 defines “restricted person” as, among others, an individual who does not possess Bermudian status, an exempted company as defined in the Companies Act 1981, a corporation incorporated outside Bermuda, and any entity or group of persons comprised of, or owned or controlled by, persons who are categorised restricted persons.

² The Senator’s full statement can be accessed on Bernews, ‘[Burch: \\$1.5 Million Home a “Perfect Gift”](#)’, 21 December 2010.

³ As shown in one of the records disclosed by the BHC to the Applicant on 23 March 2021, as part of its initial decision.

⁴ As shown in one of the records disclosed by the BHC to the Applicant on 23 March 2021, as part of its initial decision.

⁵ The BHC provided the Applicant with 5 records, but one of the records was a duplicate, as it was a Schedule captured in record 1.

6. In response to an independent review by the Information Commissioner decided in [Decision 04/2021](#), [Bermuda Housing Corporation](#), the BHC issued an internal review decision to the Applicant. The internal review decision upheld the redactions of the record and informed the Applicant that the disclosed records constituted “all substantive records” held by the BHC regarding Laughing Waters.
7. The Applicant made an application for an independent review by the Information Commissioner on 1 September 2021, which was accepted out of time by the Information Commissioner under section 45(2) of the PATI Act.

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 submissions were required from the BHC to determine whether its reliance on the exemption was justified and whether the search it conducted was reasonable.
10. During the review, it was clarified that the BHC relies on the personal information exemption in section 23(1) to justify the redactions of records 2-4.
11. On 16 November 2021, the Information Commissioner’s Office (**ICO**) notified the BHC of the Applicant’s valid application and asked for an unredacted copy of records 2-4, which were provided by the BHC.
12. As required by section 47(4) of the PATI Act, the Information Commissioner afforded the public authority and the applicant a reasonable opportunity to make representations. The ICO received formal submissions from the Applicant, but not from the BHC. The BHC’s initial and internal review decisions as well as any information provided to the ICO during the Information Commissioner’s review are considered below.

Information Commissioner’s analysis and findings

13. In coming to this Decision, the Information Commissioner has considered all the relevant submissions, or parts of submissions, from the BHC and the Applicant. She is satisfied that no matter of relevance has been overlooked.

Personal information – section 23

14. Section 23(1) allows a public authority to deny public access to a record or part of a record if it consists of personal information. Section 24(1) defines personal information as information about an identifiable individual, subject to exclusions to this definition in section 24(2) which, as discussed below, are not relevant in this review.
15. If the information in the record includes reference to a specific person, it is personal information. A record will also contain personal information if the individual's identity is reasonably ascertainable from the information.
16. The personal information exemption does not apply in certain circumstances set out in section 23(2). The exemption does not apply, for example, if the information relates to the requester or if the individual to whom the information relates has given their written consent for disclosure.
17. The personal information exemption is subject to the public interest test in section 23(6). In the context of personal information, the public interest test requires a balancing of the public interests in favour of publicly knowing an individual's personal information, on the one hand, against the privacy rights of the individual and any other public interest in favour of confidentiality, on the other.
18. When considering the public interest test for a personal information disclosure, public authorities should take into account the following factors⁶:
 - 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, which would include consideration of whether sensitive personal information⁷ was involved, the potential consequences of disclosure on the individual, and the individual's reasonable expectations of privacy; and
 - c. whether disclosure of the personal information is necessary to further the public interests that have been identified.

⁶ See [Decision 02/2019](#), [Office of the Governor](#), at para. 51.

⁷ Under section 7(1) of the [Personal Information Protection Act 2016](#), 'sensitive personal information' means "any personal information relating to an individual's place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information".

19. The Information Commissioner will consider whether the public interest concerns, if any, can be met by disclosure of other information in the records that interferes less with an individual's right to privacy. If so, the public interest concerns in favour of disclosure may be given less weight in the balance than the individual's privacy rights and freedoms.
20. In sum, to appropriately rely on the personal information exemption in section 23(1), the public authority must consider⁸:
 - [1] Whether the record consists of information about an identifiable individual?
 - [2] Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?
 - [3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?
 - [4] If the exemption on personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure?⁹
21. A public authority invoking section 23(1) has the burden to show that, on the balance of probabilities, the exemption is justified. This is also the only exemption the Information Commissioner will invoke on her own accord to safeguard the right to privacy.¹⁰

Public authority's submissions

22. The BHC's initial decision stated that the names of the individuals in the records were redacted, in accordance with instructions received from the relevant individuals' attorneys.

Applicant's submissions

23. The Applicant submitted that they were never informed the reason why the names of the individuals in the records were redacted and that the initial decision only explained that the redactions were made in accordance with the instructions received from the individuals' attorneys. The Applicant explained it learned about the BHC's reliance on the personal information exemption in section 23(1) from the ICO.

⁸ See [Decision 02/2019](#), [Office of the Governor](#), at para. 56.

⁹ Disclosure of records consisting of personal information should also be made if disclosure would benefit the individual, in accordance with section 23(6) of the PATI Act, which is irrelevant in this case.

¹⁰ See [Decision 01/2018](#), [Bermuda Tourism Authority](#), at para. 27.

24. The Applicant submitted that the BHC's internal review decision did not explain why the BHC was of the view that there was no public interest in disclosure of the redacted information. The Applicant queried if the BHC applied the public interest test and, if so, the reasons the BHC concluded that the public interest would be better served by non-disclosure of the information.
25. The Applicant asserted that the PATI request related to the issue of fronting, where a property is illegally purchased using a Bermudian "front". The Applicant submitted that Laughing Waters was such a property and that this was an unusual case because, instead of bringing a criminal prosecution to the relevant individuals, the Government seized the property and took ownership of it. The Applicant also explained that it was reported that the former owners had to pay the Government a \$10,000 deposit plus \$4,500 a month to live in the property after it was seized.
26. The Applicant highlighted that the case of Laughing Waters was used as an example when the Government passed an anti-fronting law.
27. The Applicant expressed that the issue involved is one of keen public interest, since the anti-fronting law was aimed at preventing this illegal activity to ensure Bermudian first-time homeowners should not be forced to compete with other residents or potentially resident groups for the goal of home ownership. The Applicant further submitted that the public was informed that wrongdoing had occurred, but there was no transparency at the time about who was responsible, in terms of the owners or the law firm involved in the purchase. The Applicant highlighted that the seizure appeared to be a one-off occurrence.
28. The Applicant asserted that what happened to Laughing Waters in 2017 was of significant public interest and involved public funds. There were questions on whether it was sold to a Bermudian, when it was sold, how the sale was handled, how the sale price was decided and where the profit from the sale of the property went. There were also questions on how a buyer was found and how was the law firm chosen to deal with the sale.
29. The Applicant submitted that there are several news stories about Laughing Waters and provided a link to one specific news article.

Discussion

30. The Information Commissioner considers the BHC's reliance on section 23(1) to withhold the redacted parts in records 2-4.

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

31. Having examined the unredacted copy of records 2-4, the Information Commissioner is satisfied that the redacted parts are the names of individuals and, therefore, are

information about identifiable individuals. These individuals were the former owners of Laughing Waters who later became the lessees of the property, the individual who purchased the property from the BHC in 2017 (**property buyer**) and a property manager.

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

32. None of the exclusions in section 24(2) is applicable to the redacted parts of the records.

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

33. None of the exceptions in section 23(2) applies to the redacted parts of records 2-4. Specifically, the relevant parts of the records did not relate to the Applicant and the individuals whose information was contained in the records did not consent to disclosure.

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

34. The Applicant has identified two strong public interests in disclosure. First, the Information Commissioner agrees that the issue of fronting and enforcement of the Bermuda Immigration and Protection Amendment Act is of public interest. The 2007 amendments to Part 6 of BIPA, which speak to the protection of land in Bermuda for Bermudians by requiring restricted persons and trustees to have licenses to hold or acquire land in Bermuda, confirms the importance of the issue. Second, the Information Commissioner further acknowledges a public interest in transparency around the Government's decision not to pursue criminal prosecution against individuals alleged to have illegally purchased properties using a Bermudian 'front'.

Fairness

35. As explained in paragraph 18, when balancing the public interest in disclosure of personal information, the Information Commissioner considers whether disclosure would be fair under all of the circumstances to the individuals listed in paragraph 31. This would include consideration of the individuals' reasonable expectations of privacy.

36. In this case, the former owners, the property buyer and the property manager had reasonable expectations of having their identities not disclosed to the public. The Information Commissioner notes that all these individuals are private individuals and their involvement with the BHC and the Government relate to their private lives.

37. Based on the statement made by the then-Senate Leader and Minister of National Security on behalf of the Government, the conveyance of Laughing Waters from the former owners to the BHC resulted from negotiated agreement between the parties. Given the negotiation and agreement, the former owners had a reasonable expectation that their identities would not be made public. The fact that previous statements made by the Government never revealed the identities of the former owners added to this reasonable expectation of privacy. Therefore, disclosure of the identities of the former owners would be unfair under these circumstances.
38. With respect to the privacy expectations of the property buyer and manager, the Information Commissioner is not aware of any circumstances which would cause the property buyer and manager in this case to have a different reasonable expectation of privacy. Nothing in this review suggests that the property buyer and manager had any involvement in the fronting or the conveyance of the property from the former owners to the BHC. Accordingly, disclosure of their names would also be unfair to the property buyer and manager under these circumstances.

Necessity

39. It is also unnecessary to disclose the personal information in the records to further the identified public interests. The then-Senate Leader and Minister of National Security explained that the Government had adopted a specific approach to enforcing the amendments to Part 6 of BIPA by negotiating an 'win-win' for Bermuda that ended the illegal ownership in this instance and provided a substantial benefit to the BHC. He further confirmed the Government's decision that the amendments to BIPA were not intended to be purely punitive. This statement is supported by the Government's policy of setting a deadline for voluntary compliance.
40. The public has an interest in the success of such initiatives and the benefits it may bring. The invitation to settle matters relating to fronting outside of the court setting was also a resource-saving and efficiency measure by the Government. The Government successfully avoided the legal costs associated with lengthy adjudication, whilst also acquiring a high-end property for subsequent benefit to the Bermuda public.
41. Disclosure of the former owners' names is more likely to undermine these public interests by discouraging voluntary compliance and the efficient acquisition of benefits for the Bermuda public. Disclosure of the names of the buyers and the property manager would not further the public interest in enforcement of the amendments because nothing in the records indicate they were involved in evading the legal requirements.

42. The Information Commissioner also acknowledges the Applicant's concerns that transparency is needed if illegality may have occurred, yet no prosecution was made against the wrongdoers. Having carefully reviewed the records, the disclosure of any of the redacted names in the records does not provide an explanation or further clarity about the Government's decision to negotiate, rather than prosecute, the individuals. This is unsurprising because the negotiations appear to have been conducted by the Government, not the BHC.
43. The Information Commissioner also notes that it is unclear whether the decision not to prosecute came about because the Government did not refer the matter to the Bermuda Police Service or Department of Public Prosecution (**DPP**), or, instead, if following such a referral, the DPP decided not to prosecute. Although not an issue in this review, the Information Commissioner highlights that if the decision was made by the DPP, the PATI Act is unlikely to apply to any records related to that decision by virtue of section 4(1)(v) of the PATI Act.
44. Finally, the Information Commissioner acknowledges the Applicant's assertions that the public has a right to know details about how the previous owners were able to illegally purchase property and what allowance were afforded to entities that may have purchased property without adequate knowledge of the law. However, knowledge of the identities of the previous owners, the property buyer or the property manager in the records at issue will not further this interest.
45. The Applicant also queried whether Laughing Waters was subsequently sold by the BHC to a Bermudian and when it was sold. The redacted copy of record 2, disclosed by the BHC at the initial decision, shows that the sale happened in or around March 2017 and provides the details of the financial transaction, apart from the name of the buyer. As to whether the property was sold to a Bermudian, this information could be provided in a manner that is less intrusive to the relevant individual. It could be done, for example, by a simple confirmation from the BHC without disclosure of the name of the property buyer. The Information Commissioner also does not see how disclosure of the name of the property manager could further any public interests identified by the Applicant.
46. Finally, many of the issues identified by the Applicant are not addressed in the redacted parts of the records. The information sought by the Applicant might be captured in other records that had not been located by the BHC or that are held by other public authorities involved in the 2010 voluntary conveyance agreement. The reasonableness of the BHC's search is considered below in this Decision.
47. Having considered the above, the Information Commissioner is satisfied that the public interest would, on balance, be better served by non-disclosure than by disclosure of the

names of the former owners, the property buyer and the property manager in records 2-4.

Conclusion

48. The Information Commissioner is satisfied that the BHC was justified in finding that the exemption in section 23(1) was engaged for the redacted parts of records 2-4.

Reasonable search – section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations

49. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to PATI requests completely and accurately. Regulation 5 of the PATI Regulations requires the public authority to make reasonable efforts to locate records responsive to the request. A public authority is required to document its efforts if it has been unable to locate records. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.
50. In cases where the reasonableness of a public authority's search is in question, the Information Commissioner's task is to assess whether such search was reasonable, in accordance with the provisions of the PATI Act and Regulations. It is not her role to assess whether a public authority should or should not hold a record as a matter of good public administration.
51. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following:
- [1] the quality of the public authority's analysis of the request;
 - [2] the scope of the search that it decided to make on the basis of that analysis; and
 - [3] the rigour and efficiency with which the search was then conducted.
52. The public authority bears the burden to establish that the search they conducted to locate records responsive to a PATI request was reasonable.¹¹

Public authority's submissions

53. The BHC's internal review decision stated that the disclosed records constituted "all substantive records" held by it regarding Laughing Waters.

¹¹ See [Decision 04/2017](#), [Department of Health](#), at para. 49 and [Decision 20/2022](#), [Department of Public Lands and Buildings](#), at para. 17.

Applicant's submissions

54. The Applicant believed that there were likely to be more responsive records held by the BHC, such as those detailing how the Government took possession of the property, the communications it had with the owners and the law firm representing the owners, the transfer to the BHC and the decision to sell when the former owners vacated the premises. The Applicant was certain that there would be paperwork showing the rental payments and how the money was used by the BHC. The Applicant believed that there were more records that could shed light on the questions highlighted in their submission, summarised in paragraph 28 above.

Discussion

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

55. The BHC did not provide a submission on its understanding of the scope of the request. The BHC's internal review decision, however, referred to "all substantive records" regarding Laughing Waters, which raised a question on whether the BHC has unnecessarily limited the scope of the PATI request. The PATI request clearly asked for "all records" on the property, whether substantive or not.
56. Given the BHC's internal review decision and the absence of further submission, the Information Commissioner is not satisfied that the BHC's analysis of the request was adequate. Based on this, she concludes that the BHC did not conduct a reasonable search to locate the records responsive to the PATI request.

Conclusion

57. The Information Commissioner is not satisfied that the BHC conducted a reasonable search, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.

Conclusion

58. The Information Commissioner finds that:
 - a. the BHC properly engaged the exemption in section 23(1) to deny public access to parts of records 2-4, and
 - b. the BHC did not conduct a reasonable search in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.

Decision

The Information Commissioner finds that the Bermuda Housing Corporation (**BHC**) was justified in denying access to parts of records 2-4 under section 23(1) of the Public Access to Information (**PATI**) Act 2010. The BHC did not conduct a reasonable search to locate the responsive records.

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

- varies the BHC's decision to withhold parts of records 2-4 under section 23(1), and
- orders the BHC to conduct a reasonable search and to issue an initial decision.

The Information Commissioner requires the BHC to conduct a reasonable search and to issue an initial decision, as directed by this Decision and the accompanying Order, on or before **Thursday, 18 January 2024**.

Judicial Review

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

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Bermuda Housing Corporation 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
30 November 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

- 12 ...
(2) Public authorities shall make every reasonable effort to—
...
(b) respond to requests completely, accurately and in a timely manner.
...

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—
...
(b) the individual to whom the information relates consents in writing to its disclosure;
...
...
(6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
...
(e) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;
...
(2) But “personal information” does not include—

(a) information about an individual . . . who is or was an officer or employee of a public authority that relates to the position or functions of the individual;

...

Public Access to Information Regulations 2014

Reasonable search

- 5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.
- (2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

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