

Decision Notice

Decision 51/2023: Department of Child and Family Services

Records on disciplinary action

Reference no: 20220210-02

Decision date: 21 December 2023

Summary

The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Child and Family Services (**Department**) for records about any disciplinary action taken against a senior officer of the Department. The Department denied access to the records under the exemptions in sections 23(1) (personal information) and 29(1) (deliberations of public authorities) of the PATI Act.

The Information Commissioner has varied the Department's decision, finding that all of the withheld records were exempt by virtue of section 23(1) of the PATI Act. The Department is not required to take any further steps in relation to this review.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test), section 23 (personal information), section 24 (definition of personal information).

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

Background

1. On 22 September 2021, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Social Development and Seniors asking for records regarding the Child Care Placement Board and records regarding any disciplinary action taken against a specific senior officer of the Department. The latter request was transferred to the Department of Child and Family Services (**Department**) on the same day.
2. On 4 November 2021, the Department extended the time for which it would provide an initial decision. On 16 December 2021, the Department issued an initial decision refusing access to the records because they were exempt from disclosure under sections 23(1) (personal information) and 29(1) (deliberations of public authorities), and the balance of the public interest favoured non-disclosure.
3. On 16 December 2021, the Applicant asked for an internal review. The Head of Authority acknowledged the request on 22 December 2021.
4. The Applicant made an application for an independent review by the Information Commissioner on 28 January 2022 of the Department's failure to decide because the Department had not issued an internal review decision within the six week timeframe.

5. On 4 February 2022, the Department issued an internal review decision to the Applicant, affirming the initial decision to refuse access to the records under sections 23(1) and 29(1) of the PATI Act.
6. On 10 February 2022, the Applicant withdrew their pending application to the Information Commissioner for an independent review of the Department's failure to decide the internal review and, instead, made a new application for an independent review of the Department's internal review decision.

Investigation

7. 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.
8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions were required from the Department to determine whether its reliance on the exemptions was justified.
9. On 21 March 2022, the Information Commissioner's Office (**ICO**) notified the Department of the Applicant's valid application and asked for copies of the withheld records.
10. On 31 October 2022, as part of a series of reassignments, the then-Head of the Public Service announced that as of 2 November 2022, a new senior public servant would be appointed as the Permanent Secretary for the Ministry of Social Development and Seniors. On 7 November 2022, the ICO sent a letter to the new Head of Authority for the Department informing them of pending reviews by the Information Commissioner, including this review.
11. On 17 October 2023, the Department met with the ICO Investigation Officer to review the case file and provided the ICO with the six withheld records, a completed schedule of records and the Department's 'Response Notes' containing the Department's justification for invoking sections 23(1) and 29. According to the Department's submissions and meeting with the ICO, the six withheld records were records contained in the relevant senior officer's personnel file that related to the relevant disciplinary matter.
12. During the October meeting and through a series of correspondence with the ICO, the Department confirmed that the senior officer did not have contact with clients who were

minors during the relevant time period and explained its disciplinary investigation procedures.

13. As required by section 47(4) of the PATI Act, the Information Commissioner afforded the Department and the Applicant a reasonable opportunity to make representations. The relevant senior officer, as a concerned third party (**Third Party**) was also invited to make submissions. The ICO received formal submissions from the Department and the Applicant.

Information Commissioner's analysis and findings

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

Personal information – section 23

15. 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.
16. 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. The definition of personal information includes the information related to public sector employees' individual work performance.¹
17. 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.
18. 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

¹ See [Decision 02/2019](#), [Office of the Governor](#), paragraphs 43-44.

the one hand, against the privacy rights of the individual and any other public interest in favour of confidentiality, on the other.

19. When considering the public interest test for a personal information disclosure, public authorities should take into account the following factors²:

- 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 information³ 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.

20. 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.

21. In sum, to appropriately rely on the personal information exemption in section 23(1), the public authority must consider⁴:

[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) applies to the records?

² See [Decision 02/2019, Office of the Governor](#), at paragraph 51.

³ 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".

⁴ See [Decision 02/2019, Office of the Governor](#), at paragraph 56.

[4] If the exemption on personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure?⁵

22. 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.⁶

Public authority's submissions

23. The Department submitted that information relating to disciplinary matters is not routine or general information that attaches generally to the position or function of that employee. It is specific to the individual and therefore amounts to personal information.
24. On the public interest test, the Department stated that disclosure was likely to have an irreversible impact on the individual's personal, family and professional life and have a negative impact on the Department as a whole.
25. The Department stated that the matter was resolved in the courts and that the individual was acquitted of all charges. The Department also submitted that the matter had already received public attention in the media. The Department provided a statement to the daily paper that personnel matters are not discussed or debated with the media. The then-Head of Public Service also made a statement that he would not discuss internal personnel matters publicly.
26. The Department submitted that the existing press statements, media coverage and criminal proceedings have already placed sufficient information into the public sphere. Here, the public interest in protecting personal information and the confidentiality of personnel matters outweighs the public interest in disclosure.

Applicant's submissions

27. The Applicant submitted that records showing whether a senior civil servant was at work and if they had contact with minors who were clients is not personal information. Instead, it is information about a senior civil servant's work schedule and activity to show the public how the Department handled the situation and whether it did so properly. The Applicant submitted that it is about holding the Department to account.

⁵ 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.

⁶ See [Decision 01/2018](#), [Bermuda Tourism Authority](#), at paragraph 27.

28. The Applicant further submitted that records containing information on any disciplinary action taken and any further training required would not amount to personal information because it pertains to the officer's high-ranking and publicly paid role.
29. The Applicant acknowledged that the factors raised in the internal review decision, i.e., that disclosure would be prejudicial to the individual's personal, family and professional life, would be considered as part of the public interest test.
30. The Applicant, however, was not satisfied that the Department considered any of the substantial factors that weighed in favour of disclosure. The Applicant stated that the position of the relevant senior officer is a key role in a very important government department with responsibility for Bermuda's most vulnerable children. The Applicant accepted that certain information was in the public domain by reason of the criminal charges and trial, but that there was no information in the public domain about how the public authority handled the situation and whether it properly applied its own and other rules. The Applicant questioned whether a public authority could be held to account without this information being in the public domain.
31. The Applicant stated that there is evidence that the senior officer worked during a period when they should have been on administrative leave as per the Department's policy, and there are allegations that they dealt with minors during that time. The Applicant submitted that these are allegations about the public authority itself, not about the senior officer.
32. The Applicant cited the public interest factors listed in regulation 2 of the PATI Regulations as being applicable to the records, including that disclosure would promote greater public understanding of public authorities' decision making processes; provide reasons for a decision taken by a public authority; promote accountability of and within the Department; promote accountability for public expenditures and the effective use of public funds; improve the quality of services provided; reveal information related to the public's safety or measures to protect the public's safety; and reveal untrue, incomplete, or misleading information or acts by the Department.

Discussion

33. The Department relied on section 23 to withhold records 1-4 and 6. The Information Commissioner considers the applicability of section 23 to withhold record 5 on her own accord.

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

34. Records 1-6 consisted of identifiable information about a senior officer of the Department, including information about their employment history as defined in section 24(1)(b) of the PATI Act.

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

35. None of the exclusions in section 24(2) were applicable to the records.

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

36. None of the exceptions in section 23(2) applied to records 1-6. Specifically, 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?

37. Several public interest considerations might be furthered by disclosure. The public has a broad interest in ensuring that the proper and appropriate process is followed where a senior public officer may be subject to disciplinary action. As the Applicant argues, no information has been placed in the public domain about how the Department handled the allegations made against the senior officer and whether the Department properly applied its existing disciplinary policies.

Fairness

38. As explained in paragraph 21 above, when balancing the public interest in disclosure of personal information, the Information Commissioner considers whether disclosure would be fair under the circumstances to the relevant individual. This would include consideration of the individual's reasonable expectations of privacy.

39. In this review, an employee would have a firm expectation that disciplinary matters would remain private between themselves and their employer. They would have no expectation that such information would be shared with their peers or disclosed to the wider public.⁷ As has been previously stated by the Information Commissioner, however, "senior public officers carrying out their public duties or responsibilities have a lesser

⁷ See [Rob Waugh v Information Commissioner and Doncaster College](#) (EA/2008/0038, 29 December 2008) that "there is a recognised expectation that the internal disciplinary matters of an individual will be private."

expectation of privacy and should expect some scrutiny of their public lives when required by the public interest in ensuring fair processes”.⁸

40. While senior public officers may expect for their names to be disclosed, for example, in work emails or decision making documents, the disclosure of internal disciplinary information concerning them goes beyond this. A senior public officer—who is not the executive officer with outward facing accountability—has a reasonable expectation that their personnel information related to disciplinary matters will stay between themselves and their supervisor and employer, to whom they are accountable. Further, disclosure of the personal information is reasonably likely to have a significant impact on the well-being of an employee, as submitted by the Department and accepted by the Applicant. Under these circumstances, it would be unfair to the individual to disclose their personal information.

Necessity

41. It is also unnecessary to disclose the personal information in the records to further the identified public interests described above, in paragraph 38. Extensive information is already in the public domain and nothing in the records suggests any irregularity in the disciplinary processes followed.
42. Details concerning the allegations made against the senior officer have already been made public through a criminal trial in the Magistrate’s Court that culminated in the acquittal of the senior officer on all charges. This was made public due to the nature of the allegations and the involvement of the Bermuda Police Service in investigating the allegations.
43. The Information Commissioner acknowledges the Applicant’s argument that disclosure is necessary for transparency concerning whether the Department followed its existing human resources and disciplinary policies. The Department has appropriately not made public any information about the disciplinary processes it followed in relation to the allegations against a specific individual. Its disciplinary procedures are published, and having carefully reviewed the withheld records and the Department’s submissions, nothing suggests that disclosure is necessary to reveal any irregularity or maladministration.
44. The Applicant appears to have questioned whether ‘evidence’ that the relevant senior officer remained at work, during a period when they should have been on administrative

⁸ See [Decision 02/2019](#), [Office of the Governor](#), paragraph 104 citing Phillip Coppel, [Information Rights: Law and Practice](#) (4th ed. 2014) at 786.

leave, meant that they had contact with clients who were minors while the disciplinary investigation was pending. Although the Applicant did not identify what evidence was being referred to, for clarity, under the various policies and procedures governing disciplinary proceedings, supervisors have various options available with respect to employees during the pendency of a disciplinary inquiry.⁹

45. Having considered the above, disclosure is also unnecessary to further the identified public interests.
46. The Information Commissioner is satisfied that the public interest would, on balance, be better served by non-disclosure than by disclosure of records 1-6.

Conclusion

47. The Information Commissioner finds that records 1-6 are exempt from public access under section 23(1) of the PATI Act.

⁹ See the Public Service Commission Regulations 2001, the Bermuda Public Service Union (**BPSU**) Collective Bargaining Agreement 2017 to 2020 (in effect at the relevant time), the Code of Conduct and Conditions of Employment dated 1 November 2001, the Memorandum of Understanding between the Secretary to the Cabinet/Head of the Civil Service and the BPSU dated 9 July 2012, and the Department's Policy on the Investigation of Department Staff.

Decision

The Information Commissioner finds that the Department of Child and Family Services (**Department**) was justified in finding that records 1-4 and 6 were exempt by virtue of section 23(1) of the PATI Act. The Information Commissioner further finds on her own accord that record 5 is exempt by virtue of section 23(1).

In accordance with section 48 of the PATI Act, the Information Commissioner varies the Department's internal review decision to withhold records 1-6 under section 23(1).

Judicial Review

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

Gitanjali S. Gutierrez
Information Commissioner
21 December 2023

Appendix: Relevant statutory provisions

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.

Personal information

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

Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
- ...
- (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- ...
- (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;
- ...

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