



## Decision Notice

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**Decision 05/2024: Cabinet Office**

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**Commission of Inquiry's records on counsel's resignation**

**Reference no: 20210616**

**Decision date: 29 February 2024**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Commission of Inquiry into Historic Land Losses in Bermuda (**COI**) for records on the resignation of the COI's former senior legal counsel. The COI originally refused access to the records based on section 4(1)(a). Following the expiry of the COI, all the COI's records were transferred to the Cabinet Office. During this review, the Cabinet Office and Applicant agreed to narrow the records at issue. The Cabinet Office also changed the basis of its refusal of access to this narrowed set of records, as being exempt under section 35(1) (legal professional privilege).

The Information Commissioner has concluded that the Cabinet Office was justified in relying on section 35(1) to deny access to records 179, 320 and 321 in full and record 323 in part. The Information Commissioner has invoked section 23 on her own accord and has concluded that the public interest requires disclosure of part of record 323.

The Information Commissioner has varied the Cabinet Office's decision to deny access to records 179, 320 and 321 and part of 323 under section 35(1) and ordered the Cabinet Office to grant access to record 323 in part, as directed by this Decision, Confidential Annex and the accompanying Order.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 35(1) (legal professional privilege).

Public Access to Information Regulations 2014: regulation 2 (interpretation).

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

## Background

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1. On 31 October 2019, pursuant to section 1A amendment to the Commissions of Inquiry Act 1935, the Premier of Bermuda appointed a Commission of Inquiry into Historic Land Losses in Bermuda (**COI**). The [Notice in the Official Gazette](#) set out the Terms of Reference for the COI, which included to “[i]nquire into historic losses of citizens’ property in Bermuda through theft of property, dispossession of property, adverse possession claims and/or such other unlawful or irregular means by which land was lost in Bermuda”.

2. To assist the Commissioners appointed to the COI, Senior Counsel was appointed to the COI from January 2020. The [COI's Report 2021](#), page 10, published on 31 July 2021, stated, however, that the former Senior Counsel resigned from the COI in October 2020 for personal reasons.
3. On 15 January 2021, the Applicant made a PATI request to the COI, for records containing correspondence between the COI and the COI's former Senior Counsel.
4. On 26 February 2021, the COI issued an initial decision denying the PATI request because the records requested fell outside the application of the PATI Act by virtue of section 4 of the Act.
5. Due to confusion about the Head of Authority of the COI, the Applicant requested an internal review, out of time, on 18 May 2021. On 2 June 2021 (by letter dated 31 May 2021), the COI's Information Officer sent a letter to the Applicant repeating that the request was denied because the records fell outside the PATI Act by virtue of section 4 and recommended that the Applicant contact the Information Commissioner's Office (**ICO**).
6. On 2 June 2021, the Applicant requested an independent review by the Information Commissioner. The application, however, was deemed to be invalid because the COI's letter dated 31 May 2021 did not constitute an internal review decision. On 15 June 2021, the COI confirmed in writing to the Applicant that the COI's Head of Authority was a part of the decision-making for the initial decision.
7. On 16 June 2021, the Applicant forwarded the COI's response to the ICO.

## Investigation

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8. The Application was accepted as valid on 5 July 2021. Because the COI's decision was made by the Head of Authority, and the intention of the parties was for the Information Commissioner to issue a decision on the matter, the Information Commissioner deemed that a referral of the Applicant's internal review request to her had taken place in accordance with section 44 of the PATI Act. 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 for this application, because the records and submissions were required.

10. The ICO notified the COI of the valid application on 7 July 2021 and asked for all records that were processed as responsive to the PATI request and withheld. On 2 August 2021, the Cabinet Office emailed the ICO to inform the ICO that the COI's appointment expired on 31 July 2021 and that the Cabinet Office had been notified of the outstanding PATI request. As the public authority now responsible for the records previously held by the COI, the Cabinet Office sought an extension of time to provide the withheld records.
11. On 9 September 2021, the Cabinet Office provided over 300 records, which included recordings of virtual meetings. The accompanying schedule of records relied on section 4(1)(a) to refuse the request, along with reference to exemptions in the PATI Act as an alternative basis for denying access to the records. Due to the ICO's backlog of cases and nature of the records, this case was not progressed until 2023.
12. The records provided by the Cabinet Office appeared to include far more records than those actually wanted by the Applicant, and no previous consultation had occurred between the Applicant and the COI concerning what the Applicant was seeking.
13. As a result, through discussions with the Applicant in September and October 2023, the ICO narrowed the records at issue to only records related to the resignation of the COI's former Senior Counsel, and therefore, only records between the COI and Counsel that may have had a bearing on his decision to resign were to be considered responsive.
14. Accordingly, the records responsive to the PATI request were narrowed to four records:
  - a. Record 179: an email exchange in July 2020.
  - b. Record 320: an email exchange in October 2020.
  - c. Record 321: an email in October 2020.
  - d. Record 323: two emails in October 2020.
15. On 18 October 2023, the ICO updated the Cabinet Office on the narrowed scope of the PATI request and queried whether, considering the narrowed scope, additional records were available from the former Chairperson of the COI.
16. In November 2023, the ICO also identified the former Senior Counsel and two other individuals as potential concerned third parties (collectively "**Third Parties**").
17. On 4 January 2024, the Cabinet Office confirmed that it was only relying on section 35(1) to withhold the four responsive records and abandoned any reliance on other provisions of the PATI Act.

18. On 4 January 2024, the ICO also sent a letter to the former Chairperson of the COI to inquire about potential additional records. The ICO did not receive a response and, considering the specific the circumstances in this review, did not consider further records, if any, to be accessible.
19. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any third party concerned a reasonable opportunity to make representations. The Cabinet Office, Applicant, and Third Parties were invited to make submissions. Submissions were received from the Cabinet Office and Applicant. One third party provided comments, without consenting to disclosure of their third party information. The ICO did not receive submissions from the former Senior Counsel or other third party.

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

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20. The Information Commissioner has considered all relevant submissions, or parts of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.

#### ***Legal professional privilege – section 35(1)***

21. Section 35(1) of the PATI Act allows public authorities to refuse access to a record if the record is of such a nature “that it would be exempt from production in legal proceedings on the ground of legal professional privilege”. In legal proceedings, legal professional privilege encompasses both legal advice privilege and litigation privilege. At issue here is legal advice privilege.
22. Legal advice privilege refers to communications between a lawyer and client for the main purpose of giving or receiving legal advice in both the litigation and non-litigation context. Under the common law, for legal advice privilege to attach to all or part of a document, there must be written or oral communication between a lawyer and a client.
23. The communication also must be connected to obtaining legal advice. It could involve legal rights, liabilities, obligations, or remedies. The communication will not qualify if it is about business, financial, operational, strategic, or other non-legal advice.<sup>1</sup>

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<sup>1</sup> See, for example, the UK’s leading judgment of Lord Scott of Foscote in [Three Rivers District Council and other v Governor and Company of the Bank of England](#) [2004] UKHL 48, at paragraph 38.

24. If the record, or part of a record, falls within the definition of legal advice, it can only be withheld under this exemption if it has not lost its confidentiality as a result of prior disclosures to the world at large, which would mean “the information can no longer be considered to be confidential”.<sup>2</sup>
25. The exemption in section 35(1) is subject to the public interest test. If the exemption is engaged, the records or parts of records must still be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.
26. In sum, to appropriately rely on section 35(1) on the basis of legal advice privilege, a public authority must consider the following<sup>3</sup>:
  - [1] Whether there was a written or oral communication between a lawyer and a client?
  - [2] Whether the communication was connected to obtaining legal advice?
  - [3] If so, whether confidentiality or privilege has been waived?
  - [4] If the exemption is engaged, whether the balance of the public interest requires disclosure?
27. Finally, the underlying presumption of the PATI Act is that requests for access to records will be granted, subject only to the exemptions or other administrative restrictions in the PATI Act. For section 35(1), the public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption to deny access to public records.

*Public authority’s submissions*

28. For all of the records, the Cabinet Office submitted that the relevant lawyer-client relationship for the purposes of legal advice privilege was between Senior Counsel (as the lawyer) and the COI (as the client), which would include the COI Secretariat and the Commissioners. The Cabinet Office also submitted that, depending on the context, the client could also include others for limited purposes, e.g. expert witnesses or other persons being relied upon by the COI.
29. The Cabinet Office submitted that all of the records were confidential communications.

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<sup>2</sup> UK Information Commissioner’s Office, [Legal Professional Privilege \(section 42\)](#).

<sup>3</sup> [Decision 31/2022, Bermuda Gaming Commission](#), paragraph 18.

30. For records 320 and 321, the Cabinet Office submitted that the communications were for the purpose of seeking and providing legal advice and for assisting Senior Counsel to provide legal advice to the COI or the Commissioners.
31. For record 179, the Cabinet Office submitted that legal advice privilege can extend, for limited purposes, to situations involving other persons.<sup>4</sup> The Cabinet Office submitted that privilege must still be afforded to material which evidences or reveals the substance of legal advice. The Cabinet Office submitted that it was clear from the communication that it was intended to be confidential and referred to legal advice received by the COI from Senior Counsel.
32. For record 323, the Cabinet Office submitted that the content of the record was inextricably linked to legal advice provided by Senior Counsel and that it was part of a legal consultation or a part of the Commissioners obtaining legal advice. The Cabinet Office stated that while the communication contained information of a personal nature, the dominant purpose of the communication was to convey legal advice concerning certain events.
33. With regard to the public interest test, the Cabinet Office considered factors that may challenge legal advice privilege such as the crime or fraud exception, the prevention of harm to others, and national security concerns. It concluded that these factors were not relevant in the circumstances of the records responsive to the PATI request. The Cabinet Office also considered the public interest in transparency in favour of disclosure but submitted that the deliberative nature of the discourse was personal in nature and would not benefit the public interest.
34. The factors considered against disclosure of the records were the preservation of confidentiality, encouraging legal advice and ensuring fairness in legal proceedings. The Cabinet Office submitted that there remained a public interest in preserving confidentiality to promote open and honest communication between lawyers and clients and to maintain trust in the legal system; that there remained a public interest in protecting privilege to encourage individuals to pursue legal advice without fear that the communications will be disclosed; and that disclosing privileged information could compromise the integrity of the work of a commission of inquiry.

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<sup>4</sup> The Cabinet Office cited [USP Strategies plc v London General Holdings Ltd](#) [2004] EWHC 373 (Ch).

### *Applicant's submissions*

35. The Applicant made submissions on the public interest test stating that the context of the COI and the amount of information presented to the COI demonstrated the general public interest in the COI and its operations. The Applicant stated that it was a matter of public record that the former Senior Counsel had raised concerns about evidence submitted to the COI, quoting an extract from a Royal Gazette article dated 24 October 2020.<sup>5</sup>
36. The Applicant submitted that the importance of the COI's work, combined with the concerns raised by the former Senior Counsel days before his resignation, meant that disclosure of the requested records would better serve the public interest than their non-disclosure. The Applicant further submitted that the public should be sure of the Senior Counsel's reasons for resigning, to have confidence in the work carried out by the COI into a matter of such significance to Bermuda.

### *Third parties' submissions*

37. None of the Third Parties made submissions on the disclosure or non-disclosure of the records.

### *Discussion*

[1] Whether there was a written or oral communication between a lawyer and a client?

38. For records 321 and 323, the Information Commissioner is satisfied that they contain a written communication between a lawyer and a client. For record 321, it is between Senior Counsel and the Commissioners of the COI. For record 323, it is between Senior Counsel and the Chairperson of the COI.
39. For record 320, the record contains a communication between Senior Counsel and the COI's Junior Counsel copying in the COI Secretariat. Although the communication was addressed to the Junior Counsel, it was for the purpose of providing legal advice to the COI Secretariat, as the client. Furthermore, the Information Commissioner is satisfied that legal professional privilege can attach to communications between lawyers<sup>6</sup>.

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<sup>5</sup> The extract referred to by the Applicant included quotes from the former Senior Counsel's comments from the [COI Hearing on 23 October 2020](#), Part 1 starting at page 7, line 18 of the transcript.

<sup>6</sup> See [Calland v Information Commissioner & the Financial Services Authority](#) (EA/2007/0136, 8 August 2008).



40. For record 179, the Information Commissioner accepts the Cabinet Office’s submissions that legal professional privilege attaches to material which evidences or reveals the substance of legal advice.<sup>7</sup> The Information Commissioner accepts that the email evidences a communication between Senior Counsel and the COI. The record is inextricably tied to legal advice received by the COI Secretariat from Senior Counsel.

[2] Whether the communication was connected to obtaining legal advice?

41. The Information Commissioner accepts the Cabinet Office’s submissions that the communications in records 179, 320 and 321 were connected to obtaining and giving legal advice. All of these communications were made for the dominant purpose of providing or obtaining legal advice.

42. For record 323, though, the Information Commissioner agrees that the record contained some personal work information<sup>8</sup> related to an individual that is inextricably linked to legal advice provided to the COI. Part of record 323, however, does not involve communications connected to obtaining legal advice. Specifically, the first two and final two paragraphs of the first email and the second email, in full, made no reference to legal advice provided to the COI. The exemption in section 35(1) is not considered further for these parts of record 323.

[3] If so, whether confidentiality or privilege has been waived?

43. The Information Commissioner accepts the Cabinet Office’s submissions that all of the privileged communications were confidential and that confidentiality and/or privilege have not been waived. The contents of the communications have not been shared with other third parties and have not been disclosed to the public previously.

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

44. The Information Commissioner accepts that the general public interest in the legal professional privilege exemption in section 35(1) will always be strong “due to the importance of the principle behind legal professional privilege: safeguarding opening in

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<sup>7</sup> See paragraph 18 of [USP Strategies plc v London General Holdings Ltd](#) [2004] EWHC 373 (Ch), cited by the Cabinet Office, where it was stated by the England and Wales High Court that “By the end of the nineteenth century it was, therefore, clear that legal advice privilege ... [applied] only to communications passing between [the] client and his solicitor (whether or not through any intermediary) and documents evidencing such communications”.

<sup>8</sup> See paragraphs 43 to 47 of [Decision 02/2019, Office of the Governor](#).

all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice”.<sup>9</sup>

45. Given the above and the amount of information that has already been published by the COI, the Information Commissioner is of the view that the public interest fell in favour of non-disclosure of the privileged communications in the records.

#### *Conclusion*

46. The Information Commissioner is satisfied that the Cabinet Office was justified in relying on the exemption in section 35(1) because the records would be exempt from disclosure in legal proceedings on the ground of legal professional privilege, except for parts of record 323. The Information Commissioner is further satisfied that the balance of the public interest favours non-disclosure of the records, including the parts of record 323 that contained legally privileged communications.
47. The Information Commissioner now considers, on her own accord, whether the parts of record 323 that did not contain legally privileged communications were exempt under section 23.

#### ***Personal information – section 23***

48. 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.
49. 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 and history.<sup>10</sup>
50. 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 individual to whom the information relates has given their written consent for disclosure.

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<sup>9</sup> See UK Information Commissioner’s Office, [Legal Professional Privilege \(section 42\)](#).

<sup>10</sup> See [Decision 02/2019, Office of the Governor](#), paragraphs 43-44.

51. 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.
52. When considering the public interest test for a personal information disclosure, public authorities should take into account the following factors<sup>11</sup>:
- 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 information<sup>12</sup> 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.
53. 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.
54. In sum, to appropriately rely on the personal information exemption in section 23(1), the public authority must consider<sup>13</sup>:
- [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))?

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<sup>11</sup> See [Decision 02/2019, Office of the Governor](#), at paragraph 51.

<sup>12</sup> 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".

<sup>13</sup> See [Decision 02/2019, Office of the Governor](#), at paragraph 56.

[3] Whether any of the exceptions to the exemption in section 23(2) applies 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?<sup>14</sup>

55. 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.<sup>15</sup>

*Public authority's submissions*

56. The Cabinet Office did not make submissions on section 23, but their submissions on the public interest test, noted above, are considered.

*Applicant's submissions*

57. The Applicant did not make submissions on section 23, but their submissions on the public interest test, noted above, are considered.

*Third parties' submissions*

58. The Third Parties did not make submissions.

*Discussion*

59. As stated above, section 23 is an exemption that the Information Commissioner will invoke on her own accord to safeguard the right to privacy. In this review, the Information Commissioner has invoked it for parts of record 323 which she did not find to be exempt under section 35(1) but may contain personal information.

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

60. The relevant parts of record 323 consisted of identifiable information about the former Senior Counsel of the COI, including information about their employment history,<sup>16</sup> and correspondence sent to a public authority that is implicitly of a private or confidential

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<sup>14</sup> 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.

<sup>15</sup> See [Decision 01/2018, Bermuda Tourism Authority](#), at paragraph 27.

<sup>16</sup> See s.24(1)(b) (defining 'personal information' to include information relating to an individual's "employment history").

nature.<sup>17</sup> The relevant parts also include opinions of other people about various individuals associated with the COI<sup>18</sup> and identifiable information about the Chairperson of the COI, such as the individual's personal contact information.

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

61. None of the exclusions in section 24(2) were applicable to the relevant parts of the record.

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

62. None of the exceptions in section 23(2) applied to the relevant parts of the record. Specifically, 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?

63. Disclosure of all but the second to last paragraph of the original email as well as all of the follow up email would not further any identifiable public interests, including the potential public interest factors described in regulation 2 of the PATI Regulations. These parts of records 323 are limited to personal correspondence that provides no insight on the COI decision making process or activities. The same is true for the contact details for the Senior Counsel and the Chairperson. No identified public interest would be furthered by disclosure of this information. The balance of the public interest favours maintaining the personal information exemption for these parts of record 323.

64. The considerations for the second to last paragraph of record 323 are different. These comprise the Senior Counsel's resignation correspondence, isolated from any information that is exempt under section 35(1). Having carefully reviewed this part of the record, several public interest considerations would be furthered by disclosure of this small part of record 323. These include considerations identified in regulation 2,

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<sup>17</sup> See s.24(1)(f) (defining 'personal information' to include correspondence received by a public authority and any replies that are "explicitly or implicitly of a private or confidential nature").

<sup>18</sup> See s.24(1)(g) (defining 'personal information' to include "the views or opinions of any other person about the individual").

specifically promoting accountability regarding the process of the COI and increasing public understanding of the decisions taken by the COI.

65. As the Applicant has submitted, the subject matter of the COI is of great importance to the Bermuda public and very limited information has been placed in the public domain about the resignation of the former Senior Counsel beyond the statement in the [COI's Report 2021](#) that it was for 'personal reasons'. This contrasts with the significant and admirable transparency with which the COI conducted other aspects of its work, broadcasting its public hearings, and ensuring that documentation considered by the COI was published to the greatest extent possible. Considering the importance of the COI's Terms of Reference for the Bermuda public and the critical role played by the Senior Counsel in advising the COI as it fulfilled its mandate, the public has a strong interest in knowing as much as possible about the conclusion of the relationship between the COI and its Senior Counsel prior to the conclusion of the COI's work, and within the bounds of the provisions of the PATI Act.
66. These strong public interests that would be furthered by disclosure of this part of record 323 must now be weighed against the privacy rights of the relevant individuals, including whether disclosure would be fair to the former Senior Counsel and whether disclosure would be necessary to further the identified public interests.

#### Fairness

67. Whether disclosure would be fair to the Senior Counsel under the circumstances requires consideration of the individual's reasonable expectations of privacy. In this review, the Information Commissioner accepts that information such as a resignation letter has a "direct connection to an individual's personal life", even where the individual has been contracted by a public body and is related to their professional life.<sup>19</sup> There is no indication that the former Senior Counsel wrote the entirety of the email in record 323 with the expectation that it would become public.
68. At the same time, the Senior Counsel held a very senior, highly public and unique role to advise Bermuda's COI through its important inquiry into historical land loss. In this role, the Senior Counsel should have a reasonable expectation that a premature resignation would require some limited public explanation. The COI itself stated that the Senior Counsel resigned for 'personal reasons'. The limited information still at issue in record 323 is comparable. The Information Commissioner also emphasises that the

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<sup>19</sup> See the UK Information Commissioner's Office, [Decision Notice FS50671554](#) dated 26 September 2017 at paragraph 20.

limited information at issue does not contain any sensitive personal information<sup>20</sup> (for which the Senior Counsel would continue to have a reasonable expectation of privacy). Nor is it a situation where, for example, a settlement agreement prohibited discussion of the circumstances of the individual's departure and created an expectation that no information concerning the resignation would be shared.<sup>21</sup>

69. Although given the opportunity, the former Senior Counsel did not make submissions arguing that the personal information in the records should not be disclosed because it was exempt personal information. The Information Commissioner also sees no reasonable basis for the Senior Counsel to have an expectation of privacy concerning the limited parts of record 323 considered here. In the absence of submissions from the Senior Counsel asserting a reasonable expectation of privacy, and considering the narrow and limited nature of the remaining information at issue, disclosure would be fair under all of the circumstances.

#### Necessity

70. If disclosure would be fair to the individual, as it would be here, it must also be necessary to further the identified public interests described above, in paragraphs 64-65. The former Senior Counsel held a senior position in the COI and played a significant role as legal advisor to the COI between January and October 2020. As submitted by the Applicant, there is a strong public interest in promoting transparency around the resignation of the former Senior Counsel because it could raise questions about the work of the COI. The COI's statement that the resignation was for "personal reasons" is exceedingly vague. Generally, such an explanation could cover a range of explanations from serious illness to other pressing work commitments and other reasons.
71. Here, to the extent that there are questions about the reasons for the premature resignation, the disclosure of a very limited part of the original resignation correspondence will further inform the public of the general grounds for the resignation, while safeguarding all other personal information the disclosure of which would not further any public interest (nor reveal information exempt under section 35(1)). Such

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<sup>20</sup> Section 7(1) of the Personal Information Protection Act 2016 defines "sensitive personal information" as "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". See also [Decision 02/2019, Office of the Governor](#), paragraph 52.

<sup>21</sup> See [Decision 21/2022, Office of the Governor](#).

disclosure is necessary to promote transparency and accountability for the COI's decisions and processes.

72. The Information Commissioner is satisfied that the balance of the public interest favours maintaining the exemption as it applies to the personal information described in paragraph 63. For the second to last paragraph in record 323, the disclosure of this information would provide greater understanding and accountability for the decisions and activity of the COI and provide access to public records to the greatest extent possible under the provisions of the Act, and therefore the balance of the public interest favours disclosure of the information.

#### *Conclusion*

73. The Information Commissioner is satisfied that the remaining parts of record 323 contain personal information under section 23 but that the public interest requires disclosure of their disclosure in part.

#### *Conclusions*

74. The Information Commissioner is satisfied that the Cabinet Office was justified in relying on section 35(1) to deny access to records 179, 320, and 321 and part of record 323.
75. The Information Commissioner is satisfied that the remaining parts of record 323 contain personal information under section 23 but that the public interest requires disclosure of a limited part of the record.
76. The Information Commissioner also makes a general observation about the original scope of this review and the role that meaningful consultation between a public authority and a requester can play in making the PATI process more efficient. The PATI request was for "any and all" records and the Cabinet Office provided the ICO with hundreds of records and hours of video—essentially the entire COI file after it was disbanded. However, through consultation with the Applicant and the cooperation of the Cabinet Office, the ICO was able to narrow this review from over 300 records to just 4 responsive records that meet the Applicant's information need.
77. As was evident in this review, the Information Commissioner notes that when a requester submits a PATI request for "any and all" records it is often possible to narrow these requests through consulting meaningfully with the requester. This might include public authorities explaining to requesters the types of records that they hold and, broadly, explaining the nature of those records (without disclosing any exempt information). The Information Commissioner continues to encourage public authorities



to engage in meaningful consultation with requesters and for requesters to take advantage of the opportunity to clarify the nature of the records that they are seeking.<sup>22</sup>

78. Finally, the Information Commissioner acknowledged the regrettable delays that arose from circumstances both internal and external to her office in this review and apologises to the Cabinet Office, the Applicant and the public.

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<sup>22</sup> See the notes from the Information Commissioner's Briefing, '[Practical tips for consulting with PATI requesters](#)', held on 7 December 2023.

## Decision

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The Information Commissioner finds that the Cabinet Office was justified in relying on section 35(1) of the Public Access to Information (**PATI**) Act 2010 to refuse access to the records 179, 320 and 321 in full and record 323 in part. The Information Commissioner also finds that section 23(1) applies to the remaining part of record 323 but that the public interest requires disclosure of record 323 in part.

In accordance with section 48 of the PATI Act, the Information Commissioner varies the Cabinet Office's decision to deny access to records 179, 320 and 321 and part of 323 under section 35(1) and orders the Cabinet Office to grant access to record 323 in part, as instructed in the Confidential Annex, which forms part of this Decision.

The Information Commissioner requires the Cabinet Office to disclose the relevant part of record 323, as directed by this Decision and the accompanying Order, on or before **Thursday, 11 April 2024**.

## Judicial Review

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The Applicant, the Cabinet Office, 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

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The Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Cabinet Office 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  
29 February 2024

## Appendix: Relevant statutory provisions

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### 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;
- ...
- (f) correspondence sent to a public authority by the individual that is explicitly or implicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence; or
- (g) the views or opinions of any other person 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;
- ...

#### Legal professional privilege

- 35 (1) Subject to subsection (2), a record is exempt if it is of such a nature that it would be exempt from production in legal proceedings on the ground of legal professional privilege.

(2) Subject to subsection (3), a record shall be disclosed if disclosure of it is in the public interest.

...

## Public Access to Information Regulations 2014

### Interpretation

2 ...

“public interest” means but is not limited to things that may or tend to—

- (a) promote greater public understanding of the process or decisions of public authorities;
- (b) provide reasons for decisions taken by the Government;
- (c) promote accountability of and within the Government;
- (d) promote accountability for the public expenditure or the more effective use of public funds’
- (e) facilitate public participation in decision-making by the Government;
- (f) improve the quality of services provided by the Government and the responsiveness of the Government to the needs of the public or of any section of the public;
- (g) deter or reveal wrong-doing or maladministration;
- (h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (i) reveal untrue, incomplete or misleading information or acts of a public authority.

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