

Decision Notice

Decision 07/2024: Bermuda Police Service

Legal advice report

Reference no: 2021049

Decision date: 1 March 2024

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for a legal advice report obtained as part of an internal police conduct investigation. The BPS refused access to the record on the basis that the record was exempt from disclosure under section 35(1) due to legal professional privilege.

The Information Commissioner has concluded that the BPS was justified in relying on section 35(1) to deny access to the record.

The Information Commissioner has upheld the BPS's decision to deny access to the record. No further action is required by the BPS.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); 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

1. On 17 July 2023, the Applicant made a PATI request to the Bermuda Police Service (**BPS**), asking for a legal advice report obtained as part of an internal police conduct investigation. The request specifically sought:

"the report that [the Assistant Commissioner of Police (**ACOP**)] received from the lawyer in the [United Kingdom (**U.K.**)] surrounding his investigation report in relation to [a named police officer]. It is my understanding that the report was sent back to [the ACOP] from the lawyer in the U.K. sometime in July 2023."

2. On 29 August 2023, the BPS issued an initial decision. It explained that access to the record was refused on the basis that it was exempt under section 30(1)(a) (operations of public authorities), and, in the alternative, sections 35 (legal professional privilege) and 37 (disclosure prohibited by other legislation). In the initial decision, the BPS explained that the Information Officer had had sight of the record and that the record holder was willing to discuss the contents of the report with the Applicant.

3. On 30 August 2023, the Applicant asked for an internal review. In addition to challenging the exemptions invoked to withhold the record, the Applicant specifically challenged the BPS's offer to discuss the content of the record with the record holder, stating that this was inappropriate under the PATI Act and would be a potential breach of section 12(4). The Applicant argued that the record should have been given to the Information Officer.
4. On 31 August 2023, the BPS issued an internal review decision upholding the exemptions claimed in the initial decision. The BPS also stated that "in view of the exemptions claimed, the holder of the responsive record [was] not obligated to provide access to the record". The BPS claimed that the offer to discuss the content of the record with the record holder was made in accordance with section 17 of the PATI Act which allows a public authority to give access to a record under the PATI Act by providing the requester with the information in an alternative form or manner as appropriate.
5. The BPS invited the Applicant to contact the record holder about his invitation to discuss the content of the record with the Applicant.
6. On 19 September 2023, the Applicant made a timely application for an independent review by the Information Commissioner.

Investigation

7. The Application was accepted as valid on 21 September 2023. The Information Commissioner confirmed that the Applicant made a valid request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues that the Applicant wanted her to review.
8. 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 from the BPS to determine whether its reliance on the exemptions was justified.
9. The Information Commissioner's Office (**ICO**) notified the BPS of the valid application on 9 October 2023 and asked for the responsive record. The BPS provided the ICO with a copy of the legal advice that the ACOP had received from a UK lawyer dated 10 July 2023.¹

¹ The BPS also submitted the email exchanges that led to the provision of the legal advice, but these are not responsive to the PATI request and therefore are not considered in this review.

10. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. The BPS and the Applicant were invited to make submissions. Submissions were received from the BPS and the Applicant.

Information Commissioner's analysis and findings

11. In coming to a decision on this matter, 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.
12. The Information Commissioner observes that the BPS relied primarily on section 30(1)(a) to withhold the record. However, the Information Commissioner considers that, given the nature of the record, the basis for exemption under the PATI Act is stronger under section 35(1). Therefore, the Information Commissioner has considered section 35(1) as the primary exemption being invoked and will only consider the other exemptions if section 35(1) does not apply.

Legal professional privilege – section 35(1)

13. 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.
14. 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.
15. 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.²
16. 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

² 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.

disclosures to the world at large, which would mean “the information can no longer be considered to be confidential”.³

17. 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.
18. In sum, to appropriately rely on section 35(1), a public authority must consider the following⁴:

[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?

19. 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

20. In its initial decision, the BPS asserted that the record was received when the ACOP obtained legal advice from a lawyer for his investigation into a conduct matter under the Police (Conduct) Orders 2016 (**Conduct Orders**). The BPS further submitted that neither confidentiality nor legal professional privilege had been waived because the content of the record had not been shared with the Applicant or otherwise.
21. The BPS also made submissions on the public interest test. The BPS acknowledged that the public interest in disclosure would be to promote transparency. However, the BPS submitted that the public interest factors in favour of non-disclosure of the record included safeguarding the integrity of ongoing investigations under the Conduct Orders and upholding the confidentiality of legal advice essential for the fair administration of

³ UK Information Commissioner’s Office, [Legal Professional Privilege \(section 42\)](#).

⁴ [Decision 31/2022, Bermuda Gaming Commission](#), paragraph 18.

justice. The BPS also submitted that the disclosure of the record would impact the fairness of the pending disciplinary matters if they are referred to a Misconduct Hearing under the Conduct Orders. The BPS asserted that the public interest in refusing access to the record outweighed the public interest in disclosure.

Applicant's submissions

22. The Applicant submitted that the BPS's reliance on section 35(1) should not be relied upon because the record was created by a lawyer in the U.K., "who is not employed by either the Attorney General for Bermuda or the Director of Public Prosecutions, which provides for possible disclosure of the record in accordance with the Act."
23. The Applicant also made submissions on the public interest stating that the record relates to wrongdoing by a senior member of the BPS in regard to obtaining search warrants via the courts to search private residences. The Applicant submitted that the public has a right to know if members of the BPS have, or are capable of, unlawfully or unethically obtaining search warrants and breaching the BPS's Code of Conduct or any other law to do so.

Discussion

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

24. The legal advice was a written communication between a lawyer, instructed by their client, the ACOP.
25. The Information Commissioner notes the Applicant's submissions regarding section 35(3) of the PATI Act. It appears that the Applicant has read section 35(3) as limiting the exemption in section 35(1) to legal advice obtained by the Attorney General or the Director of Public Prosecutions.
26. Given the language in section 35(3), which is prefaced by "For the avoidance of doubt", the Information Commissioner does not view this subsection as limiting the exemption in subsection (1). Legal professional privilege protected by the exemption in section 35(1) applies to communications between any lawyer and client and is not limited to legal advice from the Attorney General or the Director of Public Prosecutions. Section 35(1) is applicable to legal advice from any lawyer to any client.

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

27. The communication to the ACOP was legal advice obtained from a lawyer for the investigation of a conduct matter under the Conduct Orders. This is evident from the legal advice itself as well as the instructions from the ACOP to the lawyer.

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

28. The confidentiality or privilege of the record has not been waived by the ACOP because the BPS has submitted, and the Information Commissioner is satisfied, that the content of the legal advice has not been shared with the public or any third parties.

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

29. In accordance with regulation 2 of the PATI Regulations, there is a public interest in disclosure of the record as it would promote greater public understanding of the process or decisions of public authorities, promote accountability of the BPS and its officers, and deter or reveal wrong-doing where a conduct complaint has been made against an officer, particularly where it is a senior member of the BPS, as submitted by the Applicant.
30. On the other hand, where a record is protected by legal professional privilege, there is always going to be a strong public interest in maintaining the exemption because of the long standing, important principle of legal professional privilege and the clear and important need for all (not just the public sector) to have access to free, frank, and candid legal advice.⁵
31. In this case, there is a strong public interest in favour of maintaining legal professional privilege and the ability of an investigator under the BPS Conduct Orders being able to seek and obtain good quality legal advice when needed. Without this, there would be a negative impact on the BPS's decision making in conduct cases and ultimately on the BPS's statutory function to enforce the Conduct Orders and decide whether a complaint should be referred to a misconduct hearing, as well as for deciding on the outcome of a misconduct hearing.
32. The Information Commissioner is satisfied that the BPS was correct to determine that the balance of the public interest fell in favour of non-disclosure of the record.

⁵ See Decision 05/2024, Cabinet Office at paragraph 44.

Conclusion

33. The Information Commissioner is satisfied that the BPS was justified in relying on the exemption in section 35(1) because the record would be exempt from disclosure in legal proceedings on the ground of legal professional privilege. The Information Commissioner is further satisfied that the balance of the public interest favours non-disclosure of the record.
34. Given the Information Commissioner's findings on section 35(1), it is not necessary to consider the BPS's submissions on the other exemptions invoked by the BPS to withhold the record.

Conclusions

35. The Information Commissioner is satisfied that the BPS was justified in relying on section 35(1) to deny access to the record.
36. The Information Commissioner notes that both the Applicant and the BPS made submissions on section 17 of the PATI Act. Section 17 states:

(1) A public authority shall give access to a record under this Act by providing the requester with the information in the record in any of the following forms or manners that it considers appropriate—

(a) a reasonable opportunity to inspect the record;

...

(2) Where a public authority decides to grant a request and the request is for access to a record in a particular form or manner, access shall be given in that form or manner unless the authority is satisfied that—

(a) ...

(b) the giving of access in the form or manner requested would—

...

(iii) conflict with a legal duty or obligation of the public authority concerned; or

(iv) affect the protection of an exempt record from disclosure.

...

37. However, in circumstances where a record is fully exempt from disclosure, such as in this case, the manner or form of access to a record under section 17 does not arise. Access to the record was correctly denied in full under the PATI Act and therefore it was inappropriate, under the PATI Act, to offer access to the record in an alternative form or manner under section 17.
38. In any event, the Information Commissioner notes the Applicant's concerns about section 12(4) when a public authority seeks to rely on section 17 to enable a person (other than the Information Officer or the Head of Authority) to provide access to the Applicant to a record. Specifically, section 12(4) requires that "the identity of a requester shall be kept confidential and, except with the consent of the requester, may not be disclosed to any person other than a person who is required to deal with the request under this Act". The Applicant questioned whether it would violate section 12(4) for a requester's identity to be revealed to a record holder when an alternative form of access is provided under section 17.
39. This will be a question, to be decided on the facts of each case, about whether the record holder is considered a person "required to deal with the request" as per section 12(4). Given the conclusion above that the record was exempt from disclosure in full under the PATI Act, this does not fall to be decided in this case.

Decision

The Information Commissioner finds that the Bermuda Police Service (**BPS**) was justified in relying on section 35(1) of the Public Access to Information (**PATI**) Act 2010 to refuse access to the record in full.

In accordance with section 48 of the PATI Act, the Information Commissioner upholds the BPS's decision to deny access to the record under section 35(1). The Information Commissioner does not require the BPS to take any further action.

Judicial Review

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

Gitanjali S. Gutierrez
Information Commissioner
1 March 2024

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.

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.
- (3) For the avoidance of doubt a record held by the Attorney General or the Director of Public Prosecutions, that is the subject of legal professional privilege, shall be an exempt record and shall not be subject to public disclosure of any kind.

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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