

Decision Notice

Decision 10/2024: Bermuda Police Service

Correspondence between Commissioner of Police and the Governor

Reference no: 2021053

Decision date: 25 March 2024

Summary

The Applicant made a request under the Public Access to Information Act 2010 to the Bermuda Police Service (**BPS**) for emails between the Commissioner of Police and the Governor of Bermuda. In its internal review decision, the BPS decided that the record was exempt under section 29 because its disclosure would undermine the deliberative process of public authorities. In its submissions to the Information Commissioner's Office, the BPS abandoned its reliance on section 29 and relied solely on section 23(1) (personal information) to withhold part of the record.

The Information Commissioner has varied the BPS's internal review decision to deny access to part of the record under section 23(1), and ordered the BPS to partially disclose the record, in accordance with this Decision and the accompanying Confidential Annexes (Appendices II and III) and Order.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 53(2) (obligation to maintain secrecy).

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 12 July 2023, the Applicant made a PATI request to the BPS, asking for emails between the Commissioner of Police (**COP**) and the Governor of Bermuda (**the Governor**). The Applicant sought:
 - a. "All email communications received by [the COP] official police email from the [Governor] on 6th October 2021 and any emails [the COP] sent in reply surrounding or referencing [the Applicant]" and
 - b. "Any other emails received by [the COP] from the Governor or emails sent to the Governor from [the COP] between 1st October 2021 and 31st October 2021 in relation to [the Applicant]."
2. The BPS did not issue an initial decision.

3. On 25 August 2023, the Applicant asked for an internal review. The BPS did not issue an internal review decision within the statutory timeframe and on 11 October 2023, the Applicant sought an independent review by the Information Commissioner of the BPS's failure to decide.¹ In the course of that review, on 1 November 2023, the BPS issued an internal review decision, refusing access to the record on the basis of section 29.
4. On 6 November 2023, the Applicant made a timely application for an independent review by the Information Commissioner, challenging the BPS's reliance on section 29.

Investigation

5. The Application was accepted as valid on 10 November 2023. on the basis that the Applicant had made a PATI request to a public authority and had asked that public authority for an internal review. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application, because the records and the BPS's submissions were required.
7. The ICO notified the BPS of the valid application on 15 November 2023 and asked for the responsive records. The BPS provided the ICO with the responsive record on 23 November 2023 as follows:
 - a. An email from the then-Deputy COP to the Governor dated 1 October 2021 (forwarding an email received from the Applicant on 29 August 2021 and acknowledged by the then-Deputy COP on 30 August 2021) and the Governor's response to the then-Deputy COP dated 4 October 2021.
8. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any concerned third party a reasonable opportunity to make representations. The BPS, the Applicant, and an individual, as a concerned third party (**Third Party**), were invited to make submissions. Submissions were received from the BPS, the Applicant and the Third Party.

¹ See [Decision 39/2023](#), [Bermuda Police Service](#) (FTD), issued on 3 November 2023.

Information Commissioner's analysis and findings

9. 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.
10. In its submissions, the BPS abandoned its reliance on section 29 of the PATI Act to withhold the record and confirmed that it only relied on section 23 to refuse disclosure of part of the record. This Decision, therefore, does not consider BPS's reliance on section 29.
11. The Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld record. As a result, the analysis below cannot be as detailed as would otherwise be preferred with respect to the conclusion that part of the record should be disclosed. Where indicated below, further details of the reasoning are included in the Confidential Annex (Appendix II) for the BPS, which forms part of this Decision.

Personal information – section 23(1)

12. Under section 23(1) of the PATI Act, public authorities may deny public access to records or parts of records which consist of personal information. Section 24(1) broadly defines 'personal information' as information recorded in any form about an identifiable individual.
13. Certain information about identifiable individuals is excluded from the definition of 'personal information' in the PATI Act, in accordance with section 24(2), which are not relevant in this review
14. The exemption in section 23(1) also does not apply to the limited circumstances set out in subsection (2). Relevant here is subsection 23(2)(a), which provides that the exemption does not apply if the information in the requested records relates to the PATI requester.
15. The personal information exemption is subject to the public interest test. Records which are found to be exempt under section 23(1) would still have to be disclosed, if the public interest would, on balance, be better served by disclosure instead of non-disclosure. In

considering the public interest test for disclosure of personal information, the following factors have to be taken into consideration²:

- a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations.
- b. Whether disclosure would be fair to the individual under all of the circumstances. Evaluating the fairness of any disclosure may include consideration of the following:
 - i. Whether sensitive personal information was involved?
 - ii. What would be the consequences upon the individual of disclosure?
 - iii. What are the reasonable expectations of privacy of a person in the individual's position?
- c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.

16. In sum, as the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), public authorities must consider the following questions before denying public access to records under the personal information exemption³:

- [1] Whether the records consisted of information about an identifiable individual?
- [2] Whether the information fell 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) applied to the records?
- [4] If the exemption for personal information in section 23(1) was engaged, whether the balance of the public interest required disclosure, or whether disclosure would benefit the individual?

17. Given the importance of the protection of personal information and privacy, particularly in a small jurisdiction such as Bermuda, the Information Commissioner may consider the personal information exemption on her own accord and without the provision being relied upon by any of the parties.

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

³ [Decision 02/2019, Office of the Governor](#), paragraph 56.

Public authority's submissions

18. The BPS made submissions on the public interest test. The BPS submitted that it considered the following factors in favour of disclosure of the personal information: disclosure would promote transparency, accountability and enhance public confidence in the BPS's processes.
19. The BPS listed a number of factors in favour of non-disclosure of the personal information, which are not included here. Further details from the BPS's submissions are included in the Confidential Annex (Appendix II).
20. The BPS submitted that in considering the overall balance of the public interest, it was the position of the BPS that the public interest weighed in favour of non-disclosure of the personal information contained in the record.

Applicant's submissions

21. The Applicant made submissions on the public interest test stating that disclosure of the record would promote accountability and transparency and reveal wrongdoing. Fulsome details from the Applicant's submissions are included in the Confidential Annex (Appendix II).
22. The Applicant asked that if the Information Commissioner is not minded to disclose the record in full, that the Information Commissioner order the BPS to disclose a redacted copy of the record.

Third Party's submissions

23. The Third Party objected to the disclosure of the record but did not request to receive a copy of the withheld record or further description of it prior to making submissions. They submitted that they were unaware of the communication and, furthermore, that disclosure of the fact of the communication as well as the details would cause a harm to their professional reputation. Further details from the Third Party's submissions are included in the Confidential Annex (Appendix II).

Discussion

- [1] Whether the record consists of information about an identifiable individual?
24. The Information Commissioner is satisfied that part of the record consists of information about identifiable individuals, including their names and contact information,

employment history, the names of individuals with other personal information relating to them, and views or opinions of any other person about those individuals.⁴

25. The Information Commissioner is of the view that the name of the Applicant is also information about an identifiable individual but that it falls within one of the exceptions to the exemption in section 23(2), discussed below.

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

26. 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) apply to the records?

27. The personal information of the Applicant, including the Applicant's name and contact information falls within the exception in section 23(2)(a) and the exemption for personal information is not considered further for this information.

28. None of the other exceptions in section 23(2) applied to the relevant parts of the record.

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

29. The exemption is engaged for the remaining personal information. Where a record contains personal information, it is necessary to balance the legitimate public interests in disclosure against the public interest in maintaining an individual's expectation of privacy.

30. As per section 2 of the PATI Regulations 2014, 'public interest' should be interpreted to include things that may or would tend to promote accountability of and within the Government, and to reveal wrongdoing or maladministration. Here, disclosure of the names and some limited personal information of individuals holding senior positions within the BPS and Government House would promote accountability and transparency concerning the BPS's decision making processes. These individuals are decision makers

⁴ See section 24(1)(b) (defining 'personal information' to include information relating to an individual's "employment history"); section 24(1)(e) (defining 'personal information' to include "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"); and section 24(1)(g) (defining 'personal information' to include "the views or opinions of any other person about the individual").

who are outwardly accountable to the public. Further details regarding the public interest in disclosure are included in the Confidential Annex (Appendix II).

31. With respect to the personal information of any other individuals who did not hold senior posts, the disclosure of their information would not further any public interest in accountability or transparency. Such individuals are not in roles where they are publicly accountable for the decision making or conduct of the BPS. The exemption for personal information is applicable to withhold their names and any other personal information in the record.

Fairness

32. Whether disclosure would be fair under the circumstances to the relevant individuals referred to in paragraph 30 above requires consideration of the individuals' reasonable expectations of privacy. Given the senior public posts held by the individuals within the BPS as well as Government House, among other factors discussed in the Confidential Annex (Appendix II), the Information Commissioner is satisfied that it would be fair to disclose a limited amount of information related to these individuals, including their names, the fact of the communications and the timing of the communications. Additional reasoning supporting the fairness of the disclosure of this information is discussed in the Confidential Annex (Appendix II).
33. Having carefully reviewed the withheld record, the Information Commissioner also concludes that disclosure of more detailed information in the communications would be an unfair invasion of privacy of an individual holding a senior post. With respect to the detailed content, the individual retains a reasonable expectation that the details will remain confidential. The exemption for personal information is justified for withholding these details.

Necessity

34. Having carefully reviewed the withheld records in this case, the Information Commissioner is of the view that disclosure of limited personal information described in paragraph 32 above is necessary to further the public interest in transparency and accountability. The Information Commissioner's reasoning is explained more fully in the Confidential Annex (Appendix II).

Conclusion

35. The Information Commissioner is satisfied that the BPS was justified in relying on section 23(1) to deny access to part of the withheld record. The Information

Commissioner is further satisfied that for the remaining part of the record, it either does not fall under section 23(1) or the balance of the public interest requires its disclosure.

36. Note that although the Information Commissioner has found at paragraph 27 above that the exception in section 23(2)(a) applies to the personal information of the Applicant, the Applicant's personal information should only be provided to the Applicant. If other individuals ask for a copy of the records ordered to be disclosed, the Applicant's personal information must be redacted by virtue of section 23(1). Therefore, if the withheld record is to be provided to the Third Party by the BPS or disclosed to the public at large, the personal information of the Applicant should be withheld under section 23(1).

Decision

The Information Commissioner finds that the Bermuda Police Service (**BPS**) was justified in relying on section 23 to deny access to part of the record. The Information Commissioner further finds that the BPS was not justified in relying on section 23 to deny access to the remaining parts of the record.

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

- varies the internal review decision by the BPS to deny access to part of the record under section 23(1);
- reverses the internal review decision by the BPS to withhold the remaining part of the record; and
- orders the BPS to disclose a redacted copy of the record, as directed by this Decision and the accompanying Confidential Annexes (Appendices II and III) and Order.

The Information Commissioner requires the BPS's compliance, as directed by this Decision and the accompanying Order no later than on or before **Monday, 6 May 2024**.

Judicial Review

The Applicant, the Bermuda Police Service, 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.

Enforcement

The Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Bermuda Police Service fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.

Gitanjali S. Gutierrez
Information Commissioner
25 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.

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;
- ...

Obligation to maintain secrecy

- 53 (2) Information or documents obtained by the Commissioner or any person appointed or engaged under section 52 in the exercise of their functions shall not be disclosed except for the purpose of this Act.

Public Access to Information Regulations 2014

Interpretation

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...
“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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