

## Decision Notice

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### Decision 12/2024: Ministry of Health Headquarters

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#### **Records on Molecular Diagnostic Laboratory and payments to resPartner**

**Reference no: 20220308-02**

**Decision date: 27 March 2024**

## Summary

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The Applicant made a request under the Public Access to Information Act 2010 to the Ministry of Health Headquarters (**Ministry Headquarters**) for records on the Government of Bermuda's Molecular Diagnostic Laboratory and payments to resQwest and resPartner. The Ministry Headquarters decided certain records were exempt under sections 23(1) (personal information), 25(1)(c) (commercial interests), 26(1)(a) (information received in confidence) and 27(1) (Cabinet documents) of the PATI Act. The Ministry Headquarters also withheld certain records under section 37(1), because it believed that their disclosure was prohibited by section 18(1) of the Bermuda Health Council Act 2004.

The Information Commissioner has upheld, either in part or in full, the Ministry Headquarters' reliance on sections 23(1), 27(1)(a), 27(1)(c), 27(1)(d) and 37(1) to deny access to certain records or parts of records. She has also found that the PATI Act did not apply to certain responsive records. The Information Commissioner has ordered the Ministry Headquarters to disclose certain records, in part, in accordance with this Decision and the accompanying Confidential Annex and Order.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 4 (application), section 21 (public interest test), section 23 (personal information), section 24 (definition of personal information), section 25(1)(c) (commercial interests), section 27 (Cabinet documents), section 37 (disclosure prohibited by other legislation).

Bermuda Health Council Act 2004: section 18 (confidentiality).

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

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

## Background

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1. In March 2020, the Government of Bermuda (**Government**) commenced on-island testing for COVID-19.<sup>1</sup> This was followed by the official launch of the Government's Molecular Diagnostic Laboratory (**MDL**) to test COVID-19 samples in April 2020.<sup>2</sup> To facilitate the booking of COVID-19 tests and the application for travel authorization during the pandemic, on 15 March and 23 June 2020, the Government entered into a contract with resPartner Ltd. (**resPartner**).<sup>3</sup> ResPartner operates resQwest, which offers scheduling and check-in solutions.
2. On 5 October 2021, the Applicant made a PATI request to the Ministry Headquarters, asking for:
  - a. Records on the Government MDL being formed. This would include, but not be limited, communications about its formation and showing its status within the Government (**item 1**).
  - b. Financial statements for MDL since its inception (**item 2**).
  - c. Records showing which ministry or department the MDL falls under, how it is funded and which cost centre it comes under in the Budget book (**item 3**).
  - d. Records showing the number of employees at MDL and whether these employees are civil servants paid directly by the Government (**item 4**).
  - e. Records showing payments between the Government and MDL since MDL was formed and what the payments were for (**item 5**).
  - f. Records showing any request for proposals or tender documents for the Government's testing programme (**item 6**).
  - g. Records showing payments between the Government and resQwest and what the payments were for (**item 7**).
  - h. Records showing payments between the Government and resPartner and what the payments were for (**item 8**).

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<sup>1</sup> 'Premier David Burt COVID-19 update – 20 March 2020', 19 March 2020.

<sup>2</sup> 'MDL is one!', 19 April 2021.

<sup>3</sup> Office of the Auditor General, 'Government of Bermuda's Response to COVID-19: Travel Authorization', page 11.

3. On 31 October 2021, the Ministry Headquarters transferred items 1-6 to the Cabinet Office.
4. Because they did not receive an initial decision within the statutory timeline, on 18 November 2021 the Applicant asked for an internal review.
5. On 5 January 2022, the Ministry Headquarters informed the Applicant that a number of responsive records would be disclosed, while others were exempt from disclosure. The Ministry Headquarters also informed the Applicant that multiple third parties had to be notified about potential disclosure.
6. On 24 January 2022, the Ministry Headquarters issued an internal review decision which informed the Applicant that access would be granted in part. The Ministry Headquarters indicated that some records had been disclosed to the Applicant on 21 January 2022 and that additional records would be disclosed on 27 January 2022. The Ministry Headquarters withheld the rest of the responsive records because they were exempt, though did not specify the relevant provisions in the PATI Act. The internal review decision further informed the Applicant that the Ministry Headquarters was awaiting submissions from the third parties on the potential disclosure of other records.
7. On 27 January 2022, the Ministry Headquarters disclosed a number of records responsive to item 8 and informed the Applicant that records responsive to item 7 did not exist, because all the payments were made to resPartner. This was never disputed by the Applicant.
8. On 8 March 2022, the Applicant made an application for an independent review by the Information Commissioner, challenging the Ministry Headquarters' internal review decision. The Information Commissioner exercised her discretion under section 45(2) to accept the late application as the application was made only a day late.

## **Investigation**

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9. The Application was accepted as valid on 22 March 2022 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.
10. 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 Ministry Headquarters' submissions were required.

11. The ICO notified the Ministry Headquarters of the valid application on 24 March 2022 and asked for the responsive records. On 2 May 2022, the Ministry Headquarters provided the ICO with records 91-148 which, upon examination, were found to be responsive to items 1 and 8 of the PATI request.
12. During the review, the Ministry Headquarters disclosed an extensive number of records to the Applicant, including records 82 and 89 which were redacted in part under the personal information exemption in section 23. The Ministry Headquarters also informed the Applicant that it relied on the exemptions in sections 25(1)(c) (commercial interests), 26(1)(a) (information received in confidence), 27 (Cabinet documents) and 37(1) (disclosure prohibited by other legislation). The Ministry Headquarters believed that disclosure of certain records was prohibited by section 18(1) of the Bermuda Health Council Act 2004 (**BHeC Act**).
13. Further, during the review, the ICO removed duplicates and non-responsive records in the set of records submitted by the Ministry Headquarters. Because parts of records 82 and 89 were redacted, the Investigator added the redacted parts of these records to this review. This review therefore considers the Ministry Headquarters' decision to withhold records 91-98, 100-108, 111-120, 122-128, 132-134 and 141-148 in full as well as parts of records 82 and 89.
14. 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 Ministry Headquarters, the Applicant, and resPartner, as a concerned third party (**Third Party**), were invited to make submissions. The Third Party confirmed that it did not object to the disclosure of records 97, 98 and 104-107. The ICO did not receive submissions from the Ministry Headquarters and the Applicant.

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

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15. 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.
16. 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 records. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

*Application – section 4(1)(b)(vi)*

17. Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#), paragraph 18, that the “PATI Act excludes from its operation the records of a substantial number of public bodies to which the Legislature has decided that it shall not apply so long as such records do not relate to the general administration of the relevant body”. Among these are records that were obtained or created by the Attorney-General’s Chambers (**AG’s Chambers**) in the course of carrying out its functions, as set out in section 4(1)(b)(vi) of the PATI Act.
18. The provision in section 4(1)(b)(vi) does not mean that the public does not have the right to ask for records obtained or created by the AG’s Chambers. The public can make a PATI request for those records, and public authorities must respond to their requests in accordance with the provisions of the PATI Act.<sup>4</sup> A public authority is justified to deny public access to those records if it can show that the records fall under the category prescribed in section 4(1)(b)(vi).
19. Section 4(2) provides that records relating to the general administration of the AG’s Chambers continue to fall within the scope of the PATI Act. In interpreting the scope of section 4(2), Justice Subair Williams in [Attorney General v Information Commissioner](#), paragraph 40, adopted the definition of ‘general administration’ set out by the Irish Information Commissioner, i.e., records relating to personnel, pay matters, recruitment, accounts, information, technology, accommodation, internal organisation, office procedures and the like.<sup>5</sup>
20. To determine whether a record falls outside the scope of the PATI Act by virtue of section 4(1)(b)(vi), the following must be considered:

[1] Was the record obtained or created by the AG’s Chambers?

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<sup>4</sup> Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ, at paragraph 75: “I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act...they cannot be treated as so excluded. Accordingly, [the PATI requester] was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the [Head of Authority] in respect of the records which she sought, and the Commissioner was entitled to commence a review of the matter” under section 47.

<sup>5</sup> Although the Court of Appeal overturned Justice Subair Williams’s ruling regarding the Information Commissioner’s power to examine records that public authorities claim to fall outside the scope of the PATI Act under section 4(1), the Court of Appeal did not disturb Justice Subair Williams’s findings on the meaning of records relating to general administration and their distinction with records related to the functions of those public authorities, bodies and persons listed in section 4. In [Decision 02/2019, Office of the Governor](#), paragraph 20, the Information Commissioner adopted this definition of ‘general administration’ as applied by the Irish Information Commissioner.

[2] Was the record obtained or created by the AG's Chambers in the course of carrying out its functions?

[3] Does the record relate to the AG's Chambers' general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

21. Because section 4(1) addresses the application of the PATI Act, the Information Commissioner may consider this provision on her own accord when the parties do not raise it.

*Discussion*

22. The applicability of section 4(1)(b)(vi) is considered for records 103 and 107 as well as parts of record 105.

[1] Was the record obtained or created by the AG's Chambers?

23. Record 103 was a proposed contract drafted by the AG's Chambers and record 107 was a draft contract sent to the AG's Chambers for its feedback. The relevant parts of record 105 were correspondence involving the AG's Chambers. They were therefore obtained or created by the AG's Chambers.

[2] Was the record obtained or created by the AG's Chambers in the course of carrying out its functions?

24. Records 103 and 107 as well as the relevant parts of record 105 were obtained or created by the AG's Chambers in the course of performing its functions as the Government's legal advisor.

[3] Does the record relate to the AG's Chambers' general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

25. Because records 103 and 107 as well as the relevant parts of record 105 contained information that relates to legal advice given by the AG's Chambers, they did not relate to the AG's Chambers' general administration.

*Conclusion*

26. The Information Commissioner is satisfied that the PATI Act did not apply to records 103 and 107 as well as certain parts of record 105 by virtue of section 4(1)(b)(vi), because they were obtained or created by the AG's Chambers in the course of carrying out its functions.

27. Because records 103 and 107 as well as certain parts of record 105 fell outside the scope of the PATI Act, the Information Commissioner does not need to consider the Ministry Headquarters' reliance on exemptions in section 25(1)(c) and 26(1)(a) to justify the non-disclosure of records 103 and 107 or the relevant parts of record 105.

***Disclosure prohibited by other legislation – section 37(1)***

28. Section 37(1) of the PATI Act allows public authorities to refuse a PATI request if disclosure of the responsive records is prohibited by 'any statutory provision' that is not the PATI Act.
29. The exemption in section 37(1) is absolute, which means that it is not subject to the public interest test.
30. As set out by the Information Commissioner in [Decision 05/2017, Bermuda Monetary Authority](#) and [Decision 12/2018, Ministry of Finance Headquarters](#), to rely appropriately on the exemption in section 37(1) of the PATI Act, a public authority must ask:
  - [1] What was the statutory provision creating the mandatory prohibition on disclosure?
  - [2] Did the record fall within this statutory provision?
  - [3] Did the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?
31. The mandatory prohibition on disclosure in a provision may be indicated by the use of the word 'shall' and an accompanying provision setting out penalties for unauthorised disclosures.
32. If the relevant statutory prohibitions only apply when particular functions or duties of a public authority have been engaged, the public authority must identify these functions or duties and explain how the records fall within the prohibition.
33. Finally, the burden is on the public authority to satisfy the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying an exemption.

***Public authority's submissions***

34. The Ministry Headquarters did not make a submission but was of the view that disclosure of records 108, 111-120, 122-128, 132-134 and 141-148 was prohibited by section 18(1) of the BHeC Act.



*Applicant's submissions*

35. The Applicant did not make a submission.

*Discussion*

36. The Investigator considers the Ministry Headquarters' reliance on section 37(1) to withhold records 108, 111-120, 122-128, 132-134 and 141-148.

[1] What was the statutory provision creating the mandatory prohibition on disclosure?

37. In line with the Information Commissioner's previous decisions,<sup>6</sup> section 18(1) of the BHeC Act creates a mandatory prohibition on disclosure.

[2] Did the record fall within this statutory provision?

38. For a record to fall under section 18(1) of the BHeC Act, it has to: (a) be a matter relating to the affairs of the Bermuda Health Council (**Health Council**) or of any person, and (b) have come to the Health Council's knowledge in the course of its duties.

39. The duties of the Health Council are derived from its functions as set out in the BHeC Act as well as the Public Health (Clinical Laboratories) Regulations 2022. Relevant to this review are the Health Council's functions to:

- a. exercise regulatory responsibilities with respect to health services (section 5(b)),
- b. regulate health professionals by monitoring licensing, certification, standards and code of practice (section 5(d)),
- c. license health service providers (section 5(g)),
- d. advise the Minister on any matter related to health services (section 5(k)), and
- e. receive, consider, refuse and approve applications for clinical laboratory registrations as well as to grant provisional registrations (regulations 5 and 6).

40. Having carefully examined the records, the Information Commissioner is satisfied that records 108, 111-118, 120, 122-128, 132, 134 and 141-148 as well as part of record 133 related to the Health Council's affairs that came to its knowledge in the course of its statutory duties outlined above. In contrast, the correspondence in record 119 and the

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<sup>6</sup> See, for example, [Decision 27/2019](#), [Bermuda Health Council](#), paragraphs 46-50.

other part of record 133 did not come to the Health Council's knowledge in the course of its duties.

41. The correspondence in record 119 simply described the Health Council's continued authority to provide registration to healthcare professionals during the public health state of emergency. It did not contain or touch on information received by the Health Council while exercising this authority or any other function. Part of record 133 was the Ministry Headquarters' internal correspondence which did not include the Health Council and therefore did not come to the Health Council's knowledge. The Ministry Headquarters' reliance on section 37(1) to withhold record 119 and these specific parts of record 133 need not be considered further.

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

42. The Investigator considers this question for records 108, 111-118, 120, 122-128, 132, 134 and 141-148 as well as certain parts of record 133 only.
43. Section 18(3) of the BHeC Act does not preclude disclosure of information that is or has been available to the public "from other sources".<sup>7</sup> Having carefully examined the relevant records or parts of the records, the Information Commissioner is satisfied that none of the information in the records was or has been made available to the public "from other sources".

#### *Conclusion*

44. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 37(1) to withhold records 108, 111-118, 120, 122-128, 132, 134 and 141-148 as well as parts of record 133. But the Ministry Headquarters has not justified its reliance on the same exemption for record 119 and the other parts of record 133.

#### ***Records submitted for Cabinet's consideration – section 27(1)(a)***

45. Section 27(1)(a) entitles public authorities to deny public access to a record that has been submitted to the Cabinet for its consideration or is proposed by a Minister of Government to be so submitted. The exemptions in section 27(1) for various Cabinet records are grounded in a constitutional convention to safeguard the proper functioning

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<sup>7</sup> The section also does not preclude disclosure of information for the purpose of enabling or assisting the Minister to exercise relevant functions, which is not relevant in this review.

of the Cabinet and enable Ministers to exchange views and deliberate, while at the same time enabling the disclosure of the outcomes of the Cabinet's deliberations.

46. The exemption in section 27(1)(a) specifically protects records brought into existence for the purpose of submission for the Cabinet's consideration. This requires public authorities to determine the purpose of the document's creation. Section 27(1)(a) does not apply to a record if the sole or dominant purpose for creating the record was not to submit it for the Cabinet's consideration.
47. The exemption's application is limited to records actually submitted, or proposed to be submitted, by a Minister. Further, the submission (or proposed submission) must be for 'consideration' by the Cabinet. This means that the submitted records will more likely require some action by or on behalf of the Cabinet, such as its discussion or decision. This aligns with the exemption's purpose to safeguard the integrity of the Cabinet process.
48. By virtue of the exceptions set out in section 27(2), the exemptions in section 27(1) do not apply to a record, or part of a record, that contains purely statistical, technical or scientific material. The exemptions still apply, however, if its disclosure would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet. This may occur because the information consists of selective material or facts, or because it is so inextricably intertwined with the Cabinet's deliberative thinking that it will reveal deliberations, e.g., what options, advice or recommendations are considered.
49. The Information Commissioner has consistently interpreted 'deliberation' in the PATI Act as the consideration or evaluation of competing arguments, information and facts with a view to making a decision.<sup>8</sup>
50. 'Would' means that there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring. 'Could reasonably be expected to' is a lesser likelihood of the adverse effect occurring. It would still require a public authority to distinguish between what is merely speculative,

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<sup>8</sup> [Decision 02/2019, Office of the Governor](#), paragraph 168. See also [Decision 18/2022, Ministry of Health Headquarters](#), paragraphs 74-75.

irrational or absurd, and expectations that are likely, plausible or possible based on real and substantial facts.<sup>9</sup>

51. Where the decision of the Cabinet has been made public already, releasing information is unlikely to ‘disclose’ the Cabinet’s decision or deliberation.<sup>10</sup>
52. In accordance with section 3 of the Interpretation Act 1951 (**Interpretation Act**), the ‘Cabinet’ means the Cabinet for Bermuda constituted in accordance with section 57 of the Constitution, i.e., the Premier and Ministers appointed under section 58 of the Constitution. As set out in section 27(3), the Cabinet also includes any committee of the Cabinet.
53. Neither the PATI Act nor the Interpretation Act define ‘statistical, technical or scientific material’. These phrases should be read in their ordinary meaning:<sup>11</sup>
  - a. Statistical means “relating to the use of statistics”. Statistics are defined as the “practice or science of collecting and analysing numerical data in large quantities, especially for the purpose of inferring proportions in a whole from those in a representative sample”.
  - b. Technical means “relating to a particular subject, art, or craft, or its techniques”.
  - c. Scientific means “based on or characterised by the methods and principles of science”.
54. ‘Purely’ in section 27(2) distinguishes information that is objectively factual, on the one hand, from information that reflects the Cabinet’s deliberations because it consists of selective material or is so inextricably intertwined with deliberative thinking that it will reveal deliberations (e.g., what options, advice, recommendations were considered). A record containing opinions and analysis in relation to policy issues is not “purely statistical, technical or scientific material”.<sup>12</sup>

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<sup>9</sup> [Decision 12/2018](#), [Ministry of Finance Headquarters](#), paragraphs 71-72.

<sup>10</sup> [Decision 18/2022](#), [Ministry of Health Headquarters](#), paragraph 77.

<sup>11</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

<sup>12</sup> [Decision 18/2022](#), [Ministry of Health Headquarters](#), paragraph 81.

55. The Cabinet document exemptions in section 27(1) are absolute exemptions, meaning that none of them are subject to the public interest test.
56. In sum, to appropriately rely on the exemption in section 27(1)(a) in denying public access to a record, public authorities must consider and demonstrate<sup>13</sup>:
- [1] Whether the record has been submitted to the Cabinet for its consideration or whether it was proposed by a Minister to be submitted?
  - [2] Whether the record was brought into existence for the purpose of submission for consideration by the Cabinet?
  - [3] Whether the record, or part of the record, contained purely statistical, technical or scientific material?
  - [4] If so, whether disclosure could reasonably have been expected to involve the disclosure of the Cabinet's deliberation or decision?
57. A 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.

*Public authority's submissions*

58. The Ministry Headquarters did not make a submission but relied on section 27(1)(a) to withhold records 91-98 and 100-102.

*Applicant's submissions*

59. The Applicant did not make a submission.

*Discussion*

60. The Investigator considers the Ministry Headquarters' reliance on section 27(1)(a) for records 91-98 and 100-102 only.

[1] Whether the record has been submitted to the Cabinet for its consideration or whether it was proposed by a Minister to be submitted?

61. Records 93, 95 and 101 were draft Cabinet Memorandums that were never submitted or proposed by a Minister to be so submitted in their draft form. Records 92, 94, 96 and 102 were emails that were neither submitted nor proposed to be submitted to the

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<sup>13</sup> [Decision 18/2022, Ministry of Health Headquarters](#), paragraph 83.

Cabinet. The Information Commissioner is not satisfied that the Ministry Headquarters' reliance on section 27(1)(a) to withhold these records was justified.

62. Records 91, 97 and 98 were attachments to Cabinet Memorandums and record 100 was a copy of a Cabinet Memorandum. They were therefore submitted to the Cabinet for its consideration, or at least were proposed by a Minister to be submitted.

[2] Whether the record was brought into existence for the purpose of submission for consideration by the Cabinet?

63. This question is considered for records 91, 97, 98 and 100 only.
64. Given record 100 was a Cabinet Memorandum, it was clearly created for the purpose of submission for consideration by the Cabinet. Similarly, records 91 and 98 were created for the sole or dominant purpose of the Cabinet's consideration. The calculation in these records dictated the figures which the Cabinet was asked to deliberate on and approve.
65. Record 97 was a document submitted to Cabinet for its retroactive approval of the Government's contract with resPartner that was given in January 2021.<sup>14</sup>

[3] Whether the record, or part of the record, contained purely statistical, technical or scientific material? [4] If so, whether disclosure could reasonably have been expected to involve the disclosure of the Cabinet's deliberation or decision?

66. Record 100 contains some factual information, but not statistical, technical or scientific material. Records 91, 97 and 98 contained technical information about the Ministry Headquarters' COVID-19 budget, estimate cost for the contract with resPartner for a certain time period and the development of the lab testing platform and applications. But disclosure of these records could reasonably disclose the Cabinet's deliberation, as it would reveal the information considered by the Cabinet Office.

### *Conclusion*

67. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 27(1)(a) to withhold records 91, 97, 98 and 100, but not records 92-96, 101 and 102.

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<sup>14</sup> Cabinet approved the contract with resPartner retroactively on 19 January 2021. See Office of the Auditor General, 'Government of Bermuda's Response to COVID-19: Travel Authorization', page 12.

*Draft of Cabinet document – section 27(1)(c)*

68. Section 27(1)(c) entitles public authorities to deny public access to a record if it is a draft or copy of, or an extract from, a record referred to in subsection (a) or (b). Subsection (a) refers to records submitted for the Cabinet’s consideration or those that are proposed by a Minister to be submitted. Subsection (b) refers to an official record of any deliberation or decision of the Cabinet.
69. A ‘copy’ is a reproduction or duplicate of the document, for example, a photocopy or printed copy. A ‘draft’ is a preliminary version of the document. It should be the actual document, preferably marked as a draft. An ‘extract’ usually contains a reproduction of part of the text or material such as a quote, paraphrase or summary. Simply referring to a Cabinet document is not sufficient.<sup>15</sup>
70. The exemption is not engaged if the exception in section 27(2) applies, as described in paragraphs 48-49 above.
71. The exemption in section 27(1)(c) is an absolute one, in that it is not subject to the public interest test.
72. In sum, to appropriately rely on the exemption in section 27(1)(c) in denying public access to a record, public authorities must consider and demonstrate:
- [1] Whether the record was a draft of, copy of, or extract from a record referred to in section 27(1)(a) or (b)?
  - [2] Whether the record contained purely statistical, technical or scientific material?
  - [3] If so, whether the disclosure could reasonably be expected to involve the disclosure of the Cabinet’s deliberation or decision?
73. A 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.

*Public authority’s submissions*

74. The Ministry Headquarters did not make a submission but relied on section 27(1)(c) to withhold records 93, 95, 101 and 104.

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<sup>15</sup> [Decision 18/2022](#), [Ministry of Health Headquarters](#), paragraph 97, citing the Exemption Practice Note 1 of the Victorian Information Commissioner’s Office.

*Applicant's submissions*

75. The Applicant did not make a submission.

*Discussion*

76. The Ministry Headquarters' reliance on section 27(1)(c) is considered for records 93, 95, 101 and 104 only.

[1] Whether the record was a draft of, copy of, or extract from a record referred to in section 27(1)(a) or (b)?

77. As explained above, records 93, 95 and 101 were draft Cabinet Memorandums. The final version of these Cabinet Memorandums fell under section 27(1)(a), because they were submitted to the Cabinet and were created for the purpose of the Cabinet's consideration.

78. Record 104 was a draft of record 98, which in paragraph 67 was found to be exempt under section 27(1)(a).

[2] Whether the record contained purely statistical, technical or scientific material?

[3] If so, whether the disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

79. Records 93, 95, 101 and 104 contained some technical material about the COVID-19 pandemic and the Ministry Headquarters' or the Government's response to it. Their disclosure would, however, involve the disclosure of the Cabinet's deliberation in that it would reveal the arguments that were advanced to obtain the Cabinet's approvals for specific matters.

*Conclusion*

80. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 27(1)(c) to withhold records 93, 95, 101 and 104.

***Records disclosing Cabinet's deliberation or decision – section 27(1)(d)***

81. Section 27(1)(d) allows public authorities to deny public access to a record if its disclosure would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet. What amounts to 'deliberation' of the Cabinet, and disclosure of such deliberation, is discussed above, paragraphs 48-49.



82. The exemption in section 27(1)(d) does not apply to a record by which a decision of the Cabinet is officially published. The exemption is also not engaged if the exception in section 27(2) applies, as described in paragraph 48.
83. An officially published deliberation or decision must be written or issued as a function of the person or body responsible for publishing it, and publishing must make the decision or deliberation generally known.<sup>16</sup> This could occur, for example, through the Throne Speech, an official press release, an official speech by the relevant Minister or a Ministerial statement in Parliament. Disclosure of the deliberations or decision to a smaller group, with the expectation of confidentiality, is not considered an official publication.
84. The exemption in section 27(1)(d) is not subject to the public interest test.
85. In sum, when relying on section 27(1)(d), a public authority must consider:
- [1] What was the deliberation or decision of the Cabinet?
  - [2] How could disclosure of the record involve disclosure of the identified deliberation or decision of the Cabinet?
  - [3] Could that harm reasonably be expected to occur?
  - [4] Was the record one by which a decision of the Cabinet is officially published?
  - [5] If the record contained purely statistical, technical or scientific material, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?
86. A 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.

*Public authority's submissions*

87. The Ministry Headquarters did not make a submission but relied on section 27(1)(d) to withhold record 106 and parts of record 96.

*Applicant's submissions*

88. The Applicant did not make a submission.

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<sup>16</sup> [Decision 18/2022, Ministry of Health Headquarters](#), para. 112.

### *Discussion*

89. The Investigator considers the Ministry Headquarters' reliance on section 27(1)(d) for record 106 and certain parts of record 96.

[1] What was the deliberation or decision of the Cabinet?

90. Record 96 related to the Cabinet's deliberation on the MDL. Record 106 related to the Cabinet's deliberation about the Government's contract with resPartner.

[2] How could disclosure of the record involve disclosure of the identified deliberation or decision of the Cabinet? [3] Could that harm reasonably be expected to occur?

91. Because record 106 and the relevant parts of record 96 made references to the specific contents of a Cabinet Memorandum, their disclosure would likely reveal the Cabinet's deliberation.

[4] Was the record one by which a decision of the Cabinet is officially published?

92. Records 96 and 106 were not decisions of the Cabinet that were officially published.

[5] If the record contained purely statistical, technical or scientific material, whether disclosure could reasonably be expected to involve the disclosure of the Cabinet's deliberation or decision?

93. Record 107 and the relevant parts of record 96 did not contain purely statistical, technical or scientific material.

### *Conclusion*

94. The Investigator has concluded that the Ministry Headquarters was justified in relying on section 27(1)(d) to withhold record 106 and parts of record 96.

### ***Adverse effect on commercial interests – section 25(1)(c)***

95. A public authority, or a third party asserting its rights, may rely on section 25(1)(c) to deny access to a public record whose disclosure would, or could reasonably be expected to, have an adverse effect on the commercial interests of any person to whom the information relates. This commercial interest exemption is subject to exceptions in section 25(2), which set out circumstances when the exemption cannot apply, including where the person to whom the information relates consents in writing to its disclosure.

96. As explained in [Decision 09/2019, Department of Public Lands and Buildings](#), a public authority, or third party, must consider these questions when seeking to justify the exemption for information with commercial value:<sup>17</sup>

[1] Did any of the exceptions in section 25(2) apply?

[2] Who was the person to whom the information relates?

[3] What were the commercial interests of this person that are of concern?

[4] What adverse effect could disclosure cause?

[5] How likely was this to occur?

[6] If the exemption was engaged, did the balance of the public interest still require disclosure?

97. A public authority, or third party asserting its right under section 25(1)(c), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.

*Public authority's submissions*

98. The Ministry Headquarters did not make a submission but relied on section 25(1)(c) to withhold parts of record 105.

*Applicant's submissions*

99. The Applicant did not make a submission.

*Third party's submissions*

100. The Third Party confirmed no objection to the public disclosure of record 105.

*Discussion*

101. The Information Commissioner considers the Ministry Headquarters' reliance on section 25(1)(c) for the parts of record 105 which she did not find to fall outside the scope of the PATI Act (see paragraphs 26-27).

[1] Did any of the exceptions in section 25(2) apply?

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<sup>17</sup> See [Decision 09/2019, Department of Public Lands and Buildings](#), at paragraphs 170-174.

102. Information in the relevant parts of record 105 related to resPartner. Because resPartner confirmed that it has no objection to the disclosure of the record, the exception in section 25(2)(a) applied. The Ministry Headquarters' reliance on section 25(1)(c) to deny public access to parts of record 105 was thus not justified.

#### *Conclusion*

103. The Information Commissioner is satisfied that the Ministry Headquarters was not justified in relying on section 25(1)(c) to deny public access to parts of record 105.

#### ***Personal information – section 23(1)***

104. 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.

105. Certain information about identifiable individuals is excluded from the definition of 'personal information' in the PATI Act, in accordance with section 24(2). For example, section 24(2) excludes certain information about contractors performing services for a public authority, or information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority.

106. The exemption in section 23(1) also does not apply to the limited circumstances set out in subsection (2). It does not apply, for example, if the information in the requested records relates to the PATI requester (see subsection (2)(a)). It also does not apply to "the information that was given to the public authority concerned by the individual to whom it relates and the individual was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public" (see subsection (2)(d)).

107. 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 consideration<sup>18</sup>:

- a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations.

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<sup>18</sup> [Decision 02/2019](#), [Office of the Governor](#), paragraph 51.

- 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.

108. 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 exemption<sup>19</sup>:

- [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?

109. 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.

*Public authority's submissions*

110. The Ministry Headquarters did not make a submission but relied on section 23(1) to redact parts of records 82 and 89.

*Applicant's submissions*

111. The Applicant did not make a submission.

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<sup>19</sup> [Decision 02/2019, Office of the Governor](#), paragraph 56.

*Third party's submissions*

112. The Third Party, ResPartner, confirmed no objection to the public disclosure of certain records, but did not comment on public disclosure of information relating to its employees.

*Discussion*

113. The Information Commissioner considers the Ministry Headquarters' reliance on section 23(1) to justify redactions in records 82 and 89. She also invoked section 23(1) on her own accord and considers parts of records 92, 94, 96, 102, 105, 119 and 133.

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

114. The Information Commissioner is satisfied that the redactions in records 82 and 89 and that parts of records 92, 94, 96, 102, 105, 119 and 133 consisted of information about identifiable individuals, including individuals associated with resPartner, officers or employees of public authorities and elected politicians.

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

115. The Investigator is satisfied that none of the exclusions in section 24(2) were applicable to the information about individuals identified above. While some of these individuals were officers or employees of public authorities, the information in the records related to the performance of their functions and roles, rather than the position or function itself, and therefore the exclusion in section 24(2)(a) did not apply. The exclusion in section 24(2)(b) did not apply to the names of the individuals employed by resPartner, because the contract that the Government had was with resPartner and not with these individuals.

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

116. None of the exceptions to the exemption in section 23(2) applied. Specifically, the individuals to whom the information relates have not consented in writing to disclosure of their personal information.

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

117. There is a public interest in the public knowing which individuals were involved in the decision making process around the Government's contracts with resPartner. Due to the

unique circumstances during the COVID-19 pandemic, particularly in the early days, the Government took extraordinary steps which did not follow the regular protocols.<sup>20</sup> Further disclosure around the irregular procurement process, including the individuals who were involved, would therefore promote transparency and accountability, which are important public interest factors.

118. With respect to the fairness of disclosure to the individuals, senior public officers and elected politicians who were involved in the decision making process would have known that their names, positions and involvement in matters related to their work would be disclosed to the public. Similarly, because resPartner entered into a contract with the Government and received money from the public purse, the individual who represented and held a senior position in the company should have known that their name and position would be disclosed to the public. Disclosure of these individuals' names, positions and any information that shows their involvement in the work relating to contracts with resPartner in response to the COVID-19 pandemic would therefore be fair. Disclosure would also be necessary to promote transparency as identified above.
119. The public interest, however, would not require disclosure of other personal information in the records, including the contact details of these senior public officers and resPartner's representative as well as the details of public officers who provided assistance and were not involved in the decision making process. Disclosure of these details would not be fair, as these individuals would have objectively had a reasonable expectation that they would not be made public without their consent.

### *Conclusion*

120. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 23(1) to withhold parts of records 82 and 89. She is also satisfied that the exemption applies to parts of records 92, 94, 96, 102, 105, 119 and 133, but the public interest requires disclosure of limited personal information.

### *Conclusions*

121. The Information Commissioner finds that:

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<sup>20</sup> The Auditor General's report highlighted, for example, that the procurement process for the electronic Travel Authorization services was not done in accordance with the Government's Code of Practice for Project Management and Procurement. See Office of the Auditor General, '[Government of Bermuda's Response to COVID-19: Travel Authorization](#)', pages 8-9.

- a. The PATI Act did not apply to records 103 and 107 as well as parts of record 105 by virtue of section 4(1)(b)(vi),
- b. Section 23(1) applies to parts of records 92, 94, 96, 102, 105, 119 and 133, but the public interest requires disclosure of limited personal information.
- c. The Ministry Headquarters properly relied on the exemptions in:
  - i. section 37(1) to withhold records 108, 111-118, 120, 122-128, 132, 134 and 141-148 as well as parts of record 133,
  - ii. section 27(1)(a) to withhold records 91, 97, 98 and 100,
  - iii. section 27(1)(c) to withhold records 93, 95, 101 and 104,
  - iv. section 27(1)(d) to withhold record 106 and parts of record 96, and
  - v. section 23(1) to withhold parts of records 82 and 89.
- d. The Ministry Headquarters did not justify its reliance on:
  - i. section 37(1) to withhold record 119 and the remainder of record 133,
  - ii. section 27(1)(a) to withhold records 92-96, 101 and 102, and
  - iii. section 25(1)(c) to deny public access to the remainder of record 105.



## Decision

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The Information Commissioner finds that the PATI Act did not apply to records 103 and 107 as well as parts of record 105, by virtue of section 4(1)(b)(vi).

She further finds that the Ministry of Health Headquarters (**Ministry Headquarters**) properly engaged the following exemptions to deny public access: section 37(1) for records 108, 111-118, 120, 122-128, 132, 134 and 141-148 as well as parts of record 133; section 27(1)(a) for records 91, 97, 98 and 100; section 27(1)(c) for records 93, 95, 101 and 104; section 27(1)(d) for record 106 and parts of record 96; and section 23(1) for parts of records 82 and 89.

The Information Commissioner finds that the Ministry Headquarters did not properly engage the following exemptions to deny public access: section 37(1) for record 119 and the remainder of record 133; section 27(1)(a) for records 92-96, 101 and 102; and section 25(1)(c) for the remainder of record 105.

Finally, the Information Commissioner finds that section 23(1) applies to parts of records 92, 94, 96, 102, 105, 119 and 133 and the public interest requires disclosure of certain personal information.

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

- varies the Ministry Headquarters' decision for:
  - records 103 and 107 as well as parts of record 105, by virtue of section 4(1)(b)(vi),
  - certain parts of records 92, 94, 96, 102, 105, 119 and 133 by virtue of section 23(1).
- affirms the Ministry Headquarters' decision to deny public access by relying on the following provisions:
  - section 37(1) for records 108, 111-118, 120, 122-128, 132, 134 and 141-148 as well as parts of record 133,
  - section 27(1)(a) for records 91, 97, 98 and 100,
  - section 27(1)(c) for records 93, 95, 101 and 104,
  - section 27(1)(d) for record 106 and parts of record 96,
  - section 23(1) for parts of records 82 and 89.

- reverses the denial of access to parts of records 92, 94, 96, 102, 105, 119 and 133, and
- orders the Ministry Headquarters to disclose a redacted copy of records 92, 94, 96, 102, 105, 119 and 133, as directed by this Decision and the accompanying Confidential Annex and Order, which form part of this Decision, on or before **Wednesday, 8 May 2024**.

## Judicial Review

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The Applicant, the Ministry of Health Headquarters, 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

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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 Ministry Headquarters 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  
27 March 2024

## Appendix I: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Application

- 4 (1) Subject to subsection (2), this Act does not apply to—
- ...
- (b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
- ...
- (vi) the Attorney General’s Chambers;
- ...
- (2) The reference to records in subsection (1) does not include records relating to the general administration of –
- ...
- (b) any public authority referred to in subsection (1)(b).

#### 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—
- ...

#### Commercial information

- 25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—
- ...

(c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates; or

...

(2) Subsection (1) does not apply if—

...

(b) the person to whom the information relates consents in writing to its disclosure; or

...

(3) A record shall be disclosed if disclosure of it is in the public interest.

### **Cabinet documents**

27 (1) Subject to subsections (2) and (3), a record is exempt if it is—

(a) a record that has been submitted to the Cabinet for its consideration or is proposed by a Minister of Government to be so submitted, being a record that was brought into existence for the purpose of submission for consideration by the Cabinet;

...

(c) a record that is a draft or copy of, or an extract from, a record referred to in paragraph (a) or (b); or

(d) a record, the disclosure of which would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet is officially published.

(2) Subsection (1) does not apply to a record that contains purely statistical, technical or scientific material unless the disclosure of the record would involve, or could reasonably be expected to involve, the disclosure of any deliberation or decision of the Cabinet.

...

### **Disclosure prohibited by other legislation**

37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.

...

## Bermuda Health Council Act 2004

### Confidentiality

18 (1) Except in so far as may be necessary for the due performance of a person's functions under this Act or any other statute and subject to subsections (3), (4) and (5), any person who is a member of the Council shall preserve and aid in preserving confidentiality with regard to all matters relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties.

(2) Any member, officer or servant of the Council who—

(a) communicates any matter relating to the affairs of the Council or of any person, that may come to his knowledge in the course of his duties to any person other than—

(i) the Minister;

(ii) a member of the Council; or

(iii) an officer of the Council authorized in that behalf by the Chief Executive Officer; or

(b) permits any unauthorized person to have access to any books, papers or other records relating to the Council,

commits an offence and is liable on summary conviction, to a fine of \$10,000.00 or to imprisonment for a term of six months or to both such fine and imprisonment and on conviction on indictment to a fine of \$25,000.00 or to imprisonment for a term of two years or to both such fine and imprisonment.

(3) Subsection (1) does not preclude the disclosure of information—

(a) for the purpose of enabling or assisting the Minister to exercise any functions conferred on him by this Act or Regulations made under this Act or in connection with the dealings between the Minister and the Council when the Council is exercising its functions under this Act or any regulations made under this Act;

(b) if the information is or has been available to the public from other sources.

...

## 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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