

Decision Notice

Decision 13/2024: Bermuda Medical Council

Records related to a medical practitioner

Reference no: 20220420-03

Decision date: 30 April 2024

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Medical Council (**BMC**) for all records relating to misconduct proceedings between 1 January 2013 and 27 May 2021 and records relating to a medical practitioner. In its internal review decision, the BMC decided that the PATI Act did not apply to some of the records pursuant to section 4(1)(a) and that the other records were exempt under sections 23(1), 25(1)(d), 26(1)(a), 35(1) and 36(a).

The Information Commissioner has upheld the BMC's reliance on section 35(1) to deny access to one record and varied the BMC's denial of access to the remaining records, in whole or in part, on the basis that either the PATI Act does not apply to them by virtue of section 4(1)(a) or they were exempt under section 23 (personal information).

The Information Commissioner does not require the BMC to take any further action with respect to this Decision.

Relevant statutory provisions

Public Access to Information Act 2010: section 4 (application of the Act), section 21 (public interest test), section 23 (personal information), section 24 (definition of personal information), section 35(1) (legal professional privilege).

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

Background

1. As background, the Bermuda Medical Council (**BMC**) is established by the Medical Practitioners Act 1950 and is responsible for registering and regulating medical practitioners in Bermuda. When a complaint about a medical practitioner is received by the BMC, they will consider whether it should be referred to the Medical Practitioners Professional Conduct Committee (**PCC**) for investigation. If, pursuant to that investigation, the PCC determines that the matter should be placed before the BMC pursuant to section 13 of the Medical Practitioners Act, the BMC is required to conduct an inquiry into the complaints and has disciplinary powers including the power to suspend a medical practitioner from practice or strike them off the register.
2. All medical practitioners are required to be registered with the BMC to practice medicine in Bermuda and must adhere to the Medical Practitioners Act and the Standards of Practice for Medical Practitioners 2013.

3. On 27 May 2021, the Applicant made a PATI request to the BMC for all records relating to misconduct proceedings (1 January 2013 to the date of the request) (**item 1**) and all records relating to a named medical practitioner (**item 2**).
4. On 3 June 2021, the BMC informed the Applicant that the Information Officer for the Ministry of Health Headquarters (**Ministry Headquarters**) had been asked to deal with the PATI request.¹
5. On 8 July 2021, prior to issuing its initial decision, the BMC wrote to the Applicant informing them that the period of responding to the request had been extended for six weeks under section 15(1)(a) of the Act because the BMC required additional time to complete required consultations with regard to granting access to the information requested.
6. On 20 August 2021, the BMC issued an initial decision granting partial access to the responsive records. The BMC also provided the Applicant with a Log of Records identified as responsive to the request (and the basis for their denial for disclosure) as well as records that could be disclosed under the PATI Act.² In its decision, the BMC cited section 4(1)(a) as the basis for refusing disclosure of the withheld records. However, in the Log of Records provided to the Applicant, the BMC cited various exemptions (some in the alternative to section 4(1)(a)) to withhold the records. These included sections 23(1) (personal information), 25(1)(d) (contractual negotiations), 26(1)(a) (information given in confidence), 35(1) (legal professional privilege) and 36(a) (contempt of court).
7. On 30 September 2021, the Applicant asked for an internal review.³ The BMC issued an internal review decision on 23 March 2022⁴ upholding the initial decision.

¹ Ordinarily, the Chief Medical Officer acts as the Information Officer for the BMC.

² The records and parts of records disclosed by the BMC are not considered in this review.

³ The process for seeking an internal review in this case was complicated by the fact that the Applicant and the BMC were not clear about who the appropriate head of authority was. Pursuant to a 'failure to decide' review, an internal review decision was issued by the Permanent Secretary for the Ministry Headquarters on 12 November 2021. In [Decision 08/2022](#), the Information Commissioner explained that the Schedule to the PATI Act designates the Chairperson as the head of the authority for the BMC. The Information Commissioner also recognised that the Applicant had emailed the Information Officer assigned to the request about their wish to seek an internal review. The Applicant was informed, in error, that the request should be made to the Acting Permanent Secretary. That Decision also treated the Applicant's email of 1 September 2021 to the Information Officer as a valid request for an internal review.

⁴ The internal review decision was issued as per the Information Commissioner's [Decision 08/2022](#), which ordered the BMC to issue a decision.

8. On 20 April 2022, the Applicant made a timely application for an independent review by the Information Commissioner.

Investigation

9. The ICO accepted the application as valid on 11 May 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. During validation, the Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application because examining the withheld records was required to evaluate the public authority's reliance on the provisions.
11. The ICO notified the BMC of the valid application on 13 May 2022 and asked for the responsive records. On 15 June 2022, the BMC provided the ICO with some of the records but did not provide the ICO with records that had been withheld under section 4(1)(a).⁵ Because the Information Commissioner could not access the withheld records in question, further progress of this review was paused pending the Court of Appeal decision in [Information Commissioner v The Attorney General](#) [2023] CA (Bda) 6 Civ, issued on 24 March 2023.
12. On 27 September 2023, further to the Court of Appeal's decision, the BMC agreed to provide the section 4 records. However, due to a cybersecurity attack against the Government of Bermuda, the BMC only had access to the hard copy file, which had been reorganised and did not align with the Log of Records originally provided to the Applicant.
13. On 28 September 2023, the Information Officer provided the Investigator with the hard copy file and the Investigator scanned and reorganised the records with a new Schedule

⁵ This was prior to the Court of Appeal decision, [Information Commissioner v The Attorney General](#) [2023] CA (Bda) 6 Civ issued on 24 March 2023. In that decision, the Court of Appeal held that the Information Commissioner's power to examine 'any record to which the Act Applies' should "in context, be treated as including any record in relation to which a question arises as to whether section 4 of the Act applies to it, in the sense that the Act applies to such a record because it is a function of the Commissioner to decide whether or not the requester is entitled to have access to it under the Act or whether it is excluded from the operation thereof" (see paragraph 76).

of Records.⁶ The Investigator noted that the records provided only related to item 2 of the PATI request.

14. On 30 October 2023, the BMC acknowledged that the internal review decision had only addressed item 2 of the PATI request. During this review, the BMC consulted with the Applicant regarding item 1 of the PATI request and on 20 December 2023, the BMC issued a new initial decision on item 1, granting access and partial access to the responsive records, which included a complaints summary from 2011-2015 and a complaints summary from 2016-2023, with personal information redacted. In light of this, the Applicant withdrew their challenge to the BMC's response to item 1 of the PATI request in this review. This review, therefore, only considers records responsive to item 2 of the PATI request.
15. 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 BMC was invited to make submissions and did so on 13 December 2023. The ICO did not receive submissions from the Applicant.

Information Commissioner's analysis and findings

16. 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.
17. This review considers the denial of access to records 2-49, 51 and 52 in full and parts of records 1, 50 and 53-57.

Applicability of the PATI Act – section 4(1)(a)

18. Justice Subair Williams explained in [Attorney General v Information Commissioner](#), paragraph 24, that the “scope of the application of the PATI Act may be determined by section 4 which lists the classes of material to which the legislation does not apply”. Under section 4(1)(a), the PATI Act does not apply to “records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person”.

⁶ Due to vague descriptions used in the original Log of Records provided to the Applicant, some of the records were difficult to reconcile or identify due to the rearranging of the hard copy file. None of the hard copy records had been numbered to correspond with the original Log of Records. There were also a number of duplicates that were removed from the Schedule and some records (pre-2013) which would have been considered outside of the scope of the PATI request.

19. For section 4(1)(a) to apply, the relevant court, tribunal or other body or person must be exercising a judicial or quasi-judicial function. The terms “judicial” and “quasi-judicial” are not statutorily defined in the PATI Act or the Interpretation Act 1951. The Supreme Court of Bermuda, however, has considered the meaning of “quasi-judicial”, adopting the test set out by the Court of Appeal of England and Wales, as follows:⁷
 - a. Whether the body is recognised by law;
 - b. Whether the issue is akin to that of a civil or criminal issue in the courts;
 - c. Whether its procedures are akin to those in civil or criminal courts; and
 - d. Whether the result of its procedures leads to a binding determination of the civil rights of a party or parties.
20. It should be noted that Lord Diplock in the Court of Appeal of England and Wales stressed that no one characteristic is decisive, but rather the effect of the similarities is cumulative. The Information Commissioner has adopted this test for the purposes of considering whether a body is exercising a judicial or quasi-judicial function under section 4(1)(a) of the PATI Act.
21. For section 4(1)(a) to apply, the records must also ‘relate to’ the exercise of the judicial or quasi-judicial function of the relevant court, tribunal or other body or person. ‘Related to’ is not defined in the PATI Act or the Interpretation Act. Having regard to the context and purpose of the PATI Act,⁸ which is to grant a right to access information “to the greatest extent possible” and to “eliminate unnecessary secrecy”, exceptions to the application of the PATI Act in section 4(1)(a) ought to be interpreted strictly. Section 4(1)(a) should only be held to apply insofar as its application is supported by the purposes of the PATI Act which it advances.⁹
22. Section 4(1)(a) serves three purposes: to ensure that the Court is in control of its procedures, to protect the independent authority of the Court, and to prevent records

⁷ See [Darrell v Board of Inquiry](#) [2013] SC (Bda) 73 Civ (17 October 2013), where the Supreme Court of Bermuda had to determine whether a Board of Inquiry appointed under the Human Rights Act 1981 to inquire into a complaint of discrimination was carrying out a judicial function. Justice Hellman applied the considerations of Lord Diplock in [Trapp v Mackie](#) [1979] 1 WLR 377, as cited by Lord Justice Auld in the Court of Appeal of England and Wales in [Heath v Commission of Police of the Metropolis](#) [2004] EWCA Civ 943.

⁸ See [Pickering v Liverpool Daily Post](#) [1991] 2 AC 370, 422B – 423G.

⁹ The importance of having regards to purpose was re-affirmed in footnote 3 of [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ.

filed with the Court from being disclosed and short-circuiting the applicable Court procedures for disclosure. Together, these protect the integrity of the independent judicial function.

23. With these purposes in mind, records “relating to the exercise of judicial functions” in section 4(1)(a) clearly includes two categories of records. First, it includes records that were produced by a court or quasi-judicial body in the context of a particular proceeding before it. Second, it also includes records that were created or obtained or held by a public authority only for the purposes of actual or potential proceedings, such as witness statements and pleadings.
24. Notably, however, it does not include a third category of records. These are records that were not created or obtained for the purposes of carrying out a judicial function or held only for the purposes of litigation. Instead, the third category are records that were created during the normal course of business that get caught up in the litigation. This might include, for example, records created during the normal course of business that are annexed to an affidavit or submitted to Court as an exhibit. It is difficult to say that a record that predates a proceeding, and which was created and held by a public authority to fulfil its own statutory functions, instead is related to an exercise of judicial functions because it was subsequently disclosed to a court or other quasi-judicial body.¹⁰ A contrary reading of section 4(1)(a) for this third category record would create far too broad an exception to the PATI Act’s applicability and would be inconsistent with the purposes section out in section 2.
25. The provision in section 4(1)(a) does not mean that the public does not have the right to ask for records relating to the exercise of a tribunal’s quasi-judicial functions. 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.¹¹ A public authority is justified

¹⁰ Note that unlike a public authority that created a record for purposes of its own functions, a public authority (or Court) that receives a copy of the record for purposes of a proceeding would only hold the document for purposes of the litigation. It can be said that in their hand, the record does relate to the exercise of judicial function and the recipient public authority or Court could properly rely on section 4(1)(a) to exclude the record in response to receiving a PATI request.

¹¹ 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.

to deny public access to those records if it can show that the records fall under the category prescribed in section 4(1)(a).

26. Section 4(2) provides that records relating to the court's general administration 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 37, 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.¹²
27. In sum, for a record to be excluded from the scope of the PATI Act by virtue of section 4(1)(a), the following must be considered:
 - [1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?
 - [2] Are the functions of that court, tribunal or other body or person of a judicial or quasi-judicial nature?
 - [3] Do the records relate to the exercise of the judicial or quasi-judicial functions of that court, tribunal or other body or person?
 - [4] Does the record relate to the general administration of the court, tribunal or other body or person and come within the scope of the PATI Act by virtue of section 4(2)(a)?
28. Given that section 4(1)(a) goes to the application of the PATI Act, the Information Commissioner may consider section 4(1)(a) on her own accord and without the provision being relied upon by any of the parties.

Public authority's submissions

29. For records 3, 5-6, 8-10, 12, 14-16, 18-31, 35-37, 40-42, 45-46, 48-49, 51 and 52, the BMC submitted that the records related to the functions of the BMC in conducting disciplinary proceedings (an inquiry under section 13A of the Medical Practitioners Act) as a quasi-judicial body. The BMC submitted that the disciplinary proceedings of the BMC, following

¹² 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. See also [Decision 09/2021, Human Rights Commission](#), at paragraph 17; [Decision 05/2020, Human Rights Commission](#), at paragraph 15; [Decision 19/2019, Internal Audit Department](#), at paragraph 19; and [Decision 21/2022, Office of the Governor](#), at paragraph 13.

recommendations from the PCC, could lead to suspension or revocation of a physician's registration and such decisions by the BMC are subject to judicial review in the Supreme Court. The BMC submitted that the records do not relate to the general administration of the BMC.

30. For records 38a and 38b, the BMC confirmed that the records related to the judicial functions of the Supreme Court and therefore were not subject to the PATI Act under section 4(1)(a). These records included the Court Order, Notice of Motion, Affidavits and Exhibits that were served on the BMC in relation to judicial review proceedings involving the relevant medical practitioner.

Applicant's submissions

31. The ICO did not receive submissions from the Applicant.

Discussion

[1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?

32. The BMC has made submissions with respect to two different types of records—one which relates to the functions of the BMC and the other that relates to the functions of the Supreme Court. These are considered separately below.

Misconduct inquiry by BMC

33. The BMC is the relevant body whose functions are being considered for records 3, 5-6, 8-10, 12, 14-16, 18-31, 35-37, 40-42, 45-46, 48-49, 51 and 52.

Supreme Court civil case

34. The Supreme Court of Bermuda is the relevant court whose functions are being considered for records 32, 38a, 38b, 40, 41 and 45 and parts of records 16 and 19. Although the BMC did not rely on section 4(1)(a) to deny access to records 32, 40, 41 and 45, as well as part of records 16 and 19, the Information Commissioner invokes it on her own accord in this review.

[2] Are the functions of that court, tribunal or other body or person of a judicial or quasi-judicial nature?

Misconduct inquiry by BMC

35. The BMC has submitted that its functions with respect to conducting disciplinary proceedings are of a quasi-judicial nature.

36. Applying the test for a quasi-judicial body, the BMC is a body recognised by law as it is established under section 5(1) of the Medical Practitioners Act.¹³ The issues that are placed before the BMC in the context of disciplinary proceedings are akin to those in civil courts. Where a complaint about a registered person¹⁴ is received under the Medical Practitioners Act, it is first subject to an investigation by the PCC pursuant to section 12AA(2). At this stage, no quasi-judicial process has been initiated and any records, such as documentation supporting the complaints, are received in the ordinary course of business of the BMC. As per section 12A(8), following its investigation, the PCC may refer a matter to the BMC for decision.
37. It is only when the PCC places the matter before the BMC pursuant to section 13(1), that the BMC is required to inquire into the matter and render a decision. Once a proceeding before the BMC has been initiated under section 13, such proceedings are akin to those in civil courts as there is, normally, a complainant alleging wrongdoing by a medical practitioner, i.e., that they have breached the Medical Practitioners Act or the Standards of Practice for Medical Practitioners 2013, which reflect both legislative requirements and guidelines. The BMC is then required to determine whether such a breach has occurred and, as such, whether the registered person should be registered to practice. This is akin to a civil issue between adversarial parties before the courts.¹⁵
38. As per section 13(2) of the Medical Practitioners Act, the BMC's procedures when conducting an inquiry are akin to those in civil courts. The BMC may take evidence from witnesses on oath or affirmation, it has the power to summons the appearance of a person to provide information or documentation that appears to be relevant to a matter, it must give the parties a right to appear before the BMC, to be represented by a lawyer, to call or cross-examine witnesses and generally to make a full defence or explanation in the matter of the complaint. For purposes of perjury offenses, the BMC investigation is

¹³ Section 5(1) states that "There shall be established a body called 'the Bermuda Medical Council', whose general function shall be to secure high standards of professional competence and conduct in the practice of medicine and surgery in Bermuda, and who shall have such other functions as may be assigned to the [BMC] by this Act or any other statutory provision."

¹⁴ The Medical Practitioners Act applies to medical practitioners as well as others. Therefore, 'registered person' is defined under section 1 of the Medical Practitioners Act as "an exempted medical practitioner, a medical officer of the armed forces, a registered medical practitioner, a specialist, a Government medical officer, an authorized visiting practitioner, a locum tenens, a house officer, or any other person declared by the Minister by notice published in the Gazette to be a registered person".

¹⁵ See the UK Employment Appeal Tribunal decision in [Ahari v Birmingham Heartlands and Solihull Hospitals NHS Trust](#) dated 1 April 2008 (UKEAT/0355/07) where the court held that the Fitness to Practise Panel of the General Medical Council (a body with the power to determine whether a medical practitioner is fit to practice medicine) was a quasi-judicial body according to the criteria identified by Lord Diplock in *Trapp v Mackie* [1979] 1 WLR 377.

deemed to be judicial proceedings by virtue of section 13(9) of the Medical Practitioners Act. Further, the BMC must also decide whether the complaint is proved and must provide reasons for its decision. The Information Commissioner is satisfied that the BMC's procedures are akin to those in civil courts.

39. Lastly, the BMC's inquiry process leads to a binding determination of the rights of a registered person subject to the complaint. Where the BMC decides that a complaint about a medical practitioner is proved, it must record a finding to that effect and may make any order of a disciplinary nature as it sees fit. This includes, among other things, an order suspending a registered person from practice, striking the name of the registered person off the register, imposing conditions, or limitations with regard to the registered person's practice as a medical practitioner, and imposing a fine of up to \$2,000.¹⁶ Such an order is binding on the medical practitioner, and only subject to appeal to the Supreme Court.
40. The Information Commissioner is therefore satisfied that the BMC's functions as they relate to misconduct inquiries under section 13 of the Medical Practitioners Act are of a quasi-judicial nature for the purposes of section 4(1)(a) of the PATI Act.

Supreme Court civil case

41. The Information Commissioner is satisfied that the functions of the Supreme Court are of a judicial nature.

[3] Do the records relate to the exercise of the judicial or quasi-judicial functions of that court, tribunal or other body or person?

Misconduct inquiry by BMC

42. The BMC has relied on section 4(1)(a) to deny access to records 3, 5-6, 8-10, 12, 14-16, 18-31, 35-37, 40-42, 45-46, 48-49 and 52.
43. Records 35-37, 42, 46 and 52 relate to the BMC's quasi-judicial functions under section 13 of the Medical Practitioners Act to inquire into the professional misconduct of a medical practitioner. These are records that the BMC sent to the relevant practitioner to inform them of the PCC's decision to refer the matter to the BMC for an inquiry. The letter constituted notice that the inquiry would be taking place and outlined the steps in that process. They are records that were generated for the purposes of the BMC's inquiry

¹⁶ See section 13(6) of the Medical Practitioners Act as well as sections 14, 15, 17, 18 and 18A for details regarding the disciplinary powers of the BMC.

and which BMC only holds for the purposes of that inquiry, rather than for purposes of the previous complaint handling by the PCC.

44. For the remainder of the records, the Information Commissioner is not satisfied that they related to the BMC's quasi-judicial functions under section 13 of the Medical Practitioners Act to inquire into the professional misconduct of a medical practitioner.
45. Records 3, 5-6, 9-10, 12, 14-16, 18-19, 20-31, 48-49 and 51 contain records related to the original complaints and the handling of them, as well as supporting information, including individuals' medical records. They were created or received as part of the BMC's fulfilment of its other statutory functions, prior to and outside of the context of any misconduct inquiry by BMC under section 13 of the Medical Practitioners Act. They were not generated for the purposes of the BMC's inquiry and the BMC would hold those records irrespective of whether they led to an inquiry by the BMC under section 13 (for example, if a complaint was never referred to the PCC or if an investigation by the PCC determined that the matter should not be referred to the BMC for an inquiry).
46. Record 8 is an email from the Office of the Chief Medical Officer to the relevant medical practitioner. Although this is a record that may have been submitted to the BMC as evidence in any inquiry process, it is a record that the BMC would have held irrespective of any inquiry through its regular course of business.
47. Supreme Court civil case
48. The Information Commissioner is satisfied that records 32, 38a, 38b, 40, 41 and 45 and part of records 16 and 19 related to the judicial functions of the Supreme Court.
49. For record 32, this was the full judgment in relation to a civil case. In the judgment available to the public on the Government website, it is a redacted judgment that states at paragraph 1, "The full judgment will be made public at a later date." As the full judgment does not appear to have been published by the Court, this record falls under section 4(1)(a).
50. For records 38a, 38b and 45, these were records that were served on the BMC by the medical practitioner, including a Supreme Court Order, the Notice of Motion, Affidavits and Exhibits.
51. Records 40 and 41 are letters to the medical practitioner's legal counsel regarding a court application for leave to apply for judicial review, but which was ultimately dismissed. The Information Commissioner is of the view that these records would 'relate to' the functions of the Supreme Court as the records were generated for the purposes of

litigation in the Supreme Court and the BMC only holds the records for the purposes of the litigation.

52. For the attachment to record 16, this is an Amended Defence and Counterclaim that was filed with the Supreme Court in a civil matter between the medical practitioner and one of the complainants. This clearly related to the functions of the Supreme Court and was generated for the purposes of that litigation.
53. For certain parts of record 19, these are letters between the medical practitioner's lawyer and one of the complainant's lawyers in relation to a civil matter in the Supreme Court. These letters 'relate to' the functions of the Supreme Court as they were generated for the purposes of that litigation.

[4] Does the record relate to the general administration of the court, tribunal or other body or person and come within the scope of the PATI Act by virtue of section 4(2)(a)?

54. The Information Commissioner is satisfied that the records did not relate to the general administration of the BMC or the Supreme Court.

Conclusion

55. The Information Commissioner is satisfied that records 35-37, 42, 46 and 52 fell outside the scope of the PATI Act by virtue of section 4(1)(a), as they were records relating to the exercise of the BMC's quasi-judicial functions to carry out a misconduct inquiry under the Medical Practitioners Act.
56. The Information Commissioner is further satisfied that records 32, 38a, 38b, 40, 41 and 45 in whole and part of records 16 and 19 fell outside the scope of the PATI Act by virtue of section 4(1)(a), as they were records relating to the exercise of the Supreme Court's judicial function.
57. Finally, the Information Commissioner is not satisfied that records 3, 5-6, 8-10, 12, 14, 15, 18, 20-31, 40-41, 45, 48-49 and 51 were excluded from the application of the PATI Act by virtue of section 4(1)(a) because they did not relate to the BMC's quasi-judicial function.

Personal information – section 23

58. 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.

59. 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.
60. 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)).
61. 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:¹⁷
- 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.
62. If the information is ‘sensitive’ personal information, the fairness concerns surrounding disclosure may be heightened. Under section 7(1) of the Personal Information Protection Act 2016, ‘sensitive personal information’ means “any personal information relating to

¹⁷ [Decision 02/2019](#), [Office of the Governor](#), paragraph 51.

an individual's place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information".

63. The disclosure of the personal information must also be necessary. The Information Commissioner will consider whether the public interest concerns can be met by disclosure of other information in the records that interferes less with an individual's right to privacy. If so, the public interest concerns in favour of disclosure may be given less weight in the balance than the individual's privacy rights and freedoms.
64. 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 exemption¹⁸:

[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?

65. 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

66. The BMC did not make full submissions on section 23 as the Investigator had provided a preliminary view that section 23 of the PATI Act applied to part of the records.

Applicant's submissions

67. The ICO has not received submissions from the Applicant in this review.

¹⁸ [Decision 02/2019, Office of the Governor](#), paragraph 56.

Discussion

68. Section 23(1) is considered for all of the records that did not fall under section 4(1)(a) above, i.e., records 1, 16, 19, 50 and 53-57 in part, and records 2-15, 18, 20-31, 33, 34, 39, 43, 44, 48, 49 and 51 in whole.

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

69. With respect to records 1 and 50, the medical practitioner's birth date and contact information were redacted under section 23(1). This is information about an identifiable individual—information relating to the age of the individual (section 24(1)(a)) and address of the individual (section 24(1)(d)).
70. With respect to records containing information about the medical practitioner, the records consist of information about an identifiable individual, including information relating to the employment history of the individual (section 24(1)(b)), correspondence sent to a public authority by the individual that is explicitly or implicitly of a private or confidential nature (section 24(1)(f)), and the views or opinions of any other person about the individual (section 24(1)(g)).
71. With respect to records containing information about the complainants, the records consist of information about an identifiable individual, including the medical history of the individual (section 24(1)(b)) and correspondence sent to a public authority by the individual that is explicitly or implicitly of a private or confidential nature (section 24(1)(f)). Most of the information relating to the complainants is sensitive personal information as it contains information relating to the individuals' physical or mental health.
72. The Information Commissioner acknowledges that interspersed within some of the records there may be information that is already in the public domain or non-personal information, but the Information Commissioner is of the view that this information is so intertwined with the personal information that it is not possible to apply section 18 and consider a partial redaction of the records.

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

73. None of the exclusions to the definition of personal information in section 24(2) apply to the information identified as personal information.

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

74. None of the exceptions to the exemption apply to the information about identifiable individuals.

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

75. It is necessary to balance the legitimate interests in disclosure against the public interest in maintaining an individual's expectation of privacy.
76. As per regulation 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. There is a broad public interest in ensuring that a statutory disciplinary body such as the BMC is fulfilling its role and applying fair procedures in its regulation of medical professionals in Bermuda and safeguarding the public.
77. In this case, although the BMC does not routinely make their decisions regarding professional misconduct public,¹⁹ when the BMC has decided that a registered medical practitioner should be struck off the register,²⁰ the Registrar is required to publish a notice in the Gazette of the striking off.²¹ Similarly, when a medical practitioner has been suspended by the BMC, the Registrar is required to enter in the register a "note of the commencement or termination of the suspension from practice of a registered medical practitioner".²² There are statutory requirements in place, therefore, to inform the public that a medical practitioner is not fit to practice as a means of safeguarding the public.
78. In its initial disclosures, the BMC has shown that its statutory process was followed in this case and there is nothing in the records to indicate that there has been maladministration or wrongdoing by the public authority. The disclosed records indicate that the inquiry was suspended because the medical practitioner was no longer practicing medicine in Bermuda or living on the island. The Information Commissioner is

¹⁹ Compare, for example, the [UK Medical Practitioners Tribunal Service](#), which the Applicant highlighted in their request for an internal review.

²⁰ Pursuant to section 6(1) of the Medical Practitioners Act, the Registrar is required to keep and maintain a register of medical practitioners entitled to be registered under section 7 or 7A of the Act.

²¹ See section 14(4)(b)(iii) of the Medical Practitioners Act.

²² See section 6(3)(f) of the Medical Practitioners Act.

of the view, therefore, that no public interest would be furthered by the disclosure of the personal information contained in the records.

79. In any event, the Information Commissioner is satisfied that disclosure of the records would not be fair to the individuals whose personal information (some of which is sensitive personal information) is contained in the records.

Conclusion

80. The Information Commissioner is satisfied that section 23 is engaged with regard to records 1, 16, 19, 50 and 53-57 in part, and records 2-15, 18, 20-31, 33, 34, 39, 43, 44, 48, 49 and 51 in whole and no public interest would be furthered by disclosure.

Legal professional privilege – section 35(1)

81. 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.
82. 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.
83. 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.²³
84. If the record, or part of a record, falls within the definition of legal advice, it can only be withheld under this exemption if it has not lost its confidentiality as a result of prior disclosures to the world at large, which would mean “the information can no longer be considered to be confidential”.²⁴

²³ See, for example, the UK’s leading judgment of Lord Scott of Foscote in [Three Rivers District Council and others v Governor and Company of the Bank of England](#) [2004] UKHL 48, at paragraph 38.

²⁴ UK Information Commissioner’s Office, [Legal Professional Privilege \(section 42\)](#).

85. 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.
86. In sum, to appropriately rely on section 35(1), a public authority must consider the following²⁵:
- [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?
87. 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

88. For record 47, the Investigator provided a preliminary view that the record contained communications that would be protected by legal advice privilege under section 35(1). The BMC submitted that privilege had not been waived, even though part of the legal advice had been disclosed as part of the meeting minutes disclosed to the Applicant in response to the PATI request.
89. On the public interest test, the BMC submitted that the record should not be made public as doing so could make it difficult for there to be a fair and unbiased hearing on the matter.

Applicant's submissions

90. The ICO has not received submissions from the Applicant in this review.

²⁵ [Decision 31/2022](#), [Bermuda Gaming Commission](#), paragraph 18.

Discussion

91. Section 35(1) is considered for record 47 only.

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

92. There was a written communication between a lawyer from a Bermuda law firm and their client, the Chief Medical Officer, on behalf of the BMC.

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

93. It is clear, on the face of the record, that the communication was connected to obtaining legal advice regarding the misconduct inquiry.

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

94. The confidentiality or privilege of the record has not been waived by the Chief Medical Officer or the BMC, 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?

95. In accordance with regulation 2 of the PATI Regulations, there may be a public interest in promoting greater public understanding of the process or decisions of public authorities, promoting accountability of the BMC, and deterring or revealing wrongdoing where a misconduct inquiry has been carried out with regard to a person registered to practice medicine in Bermuda.

96. On the other hand, where a record is protected by legal professional privilege, a strong public interest always exists 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.²⁶

97. In this case, a strong public interest favours maintaining legal professional privilege and the ability of the BMC to seek and obtain good quality legal advice when conducting a professional misconduct inquiry. Without this, there would be a negative impact on the

²⁶ See [Decision 05/2024, Cabinet Office](#) at paragraph 44 and [Decision 07/2024, Bermuda Police Service](#).

BMC's decision making and statutory function to administer and enforce the Medical Practitioners Act and the Professional Standards for Medical Practitioners.

98. In this case, where no evidence of maladministration exists and the BMC has disclosed information related to its process under the Medical Practitioners Act, the Information Commissioner is satisfied that the BMC was correct to determine that the balance of the public interest fell in favour of non-disclosure of the record.

Conclusion

99. The Information Commissioner is satisfied that the BMC was justified in relying on the exemption in section 35(1) because record 47 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 records.
100. Because the Information Commissioner has found that the BMC was justified to deny access to the records by virtue of section 4(1)(a) or section 23(1), the BMC's reliance on the exemptions in section 25(1)(d), 26(1)(a) and 36(a) of the PATI Act is not considered.

Conclusions

101. The Information Commissioner finds that the BMC properly relied upon section 35(1) to withhold record 47 based on section 35(1). The Information Commissioner further finds that the PATI Act did not apply to records 32, 35-37, 38a, 38b, 40-42, 45-46 and 52 in whole and records 16 and 19 in part, by virtue of section 4(1)(a). Finally, the Information Commissioner finds that section 23(1) applies to deny access to records 1, 16, 19, 50 and 53-57 in part, and records 2-15, 18, 20-31, 33, 34, 39, 43, 44, 48, 49 and 51 in whole.

Decision

The Information Commissioner finds that the Bermuda Medical Council (**BMC**) was justified in relying on section 4(1)(a) of the Public Access to Information (**PATI**) Act 2010 to deny access to some of the records because the PATI Act did not apply to them, to deny access to one record because it was exempt under section 35(1) of the PATI Act, and to deny access to the remaining records because they contained personal information exempt under section 23(1) of the PATI Act.

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

- upholds the internal review decision by the BMC to deny access to record 47 on the basis of section 35(1);
- varies the internal review decision to deny access to records 32, 35-37, 38a, 38b, 40-42, 45-46 and 52 in whole and records 16 and 19 in part on the basis that the PATI Act does not apply to them by virtue of section 4(1)(a);
- varies the internal review decision to deny access to the remaining records (1, 16, 19, 50 and 53-57 in part, and records 2-15, 18, 20-31, 33, 34, 39, 43, 44, 48, 49 and 51 in whole) on the basis that they were exempt under section 23 as personal information.

The Information Commissioner does not require the BMC to take any further action with respect to this Decision.

Judicial Review

The Applicant, the Bermuda Medical Council, 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
30 April 2024

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Application

- 4 (1) Subject to subsection (2), this Act does not apply to—
- (a) records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person; or
 - ...
- (2) The reference to records in subsection (1) does not include records relating to the general administration of—
- (a) any court, tribunal or other body or person referred to in subsection (1)(a);
 - ...

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.
- (2) Subsection (1) does not apply if—
- ...
- (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.

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.

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