

## Decision Notice

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**Decision 34/2022: Office of the Governor**

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**Correspondence with the Commissioner of Police**

**Reference no: 20220413**

**Decision date: 30 December 2022**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Office of the Governor (**Government House**) for its correspondence with the Commissioner of Police within a certain time period. Government House provided limited disclosure, but denied access to the remaining responsive records under the personal information exemption in section 23(1) of the PATI Act.

The Information Commissioner has found that Government House's reliance on section 23(1) was justified and affirmed Government House's internal review decision.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 21 (public interest test), section 23(1) (personal information), section 24 (definition of personal information).

Appendix 1 provides the text of these statutory provisions and forms part of this Decision.

## Background

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1. This PATI request arises in the context of the resignation of the former Commissioner of Police with immediate effect, announced on 1 October 2021<sup>1</sup>. On 13 January 2022, the Applicant sent a Public Access to Information (**PATI**) request to the Office of the Governor (**Government House**) asking them to provide all correspondence or communications between the Commissioner of Police and the Governor, Deputy Governor, or any other employee of Government House, between 1 September and 31 October 2021.
2. In its initial decision of 10 February 2022, Government House granted access to three records responsive to the PATI request, but refused access to other responsive records under the personal information exemption in section 23(1) of the PATI Act 2010.
3. In response to the Applicant's request for an internal review by the head of authority, Government House issued an internal review decision on 18 March 2022, which upheld its initial decision.

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<sup>1</sup> See [Statement from Her Excellency the Governor, Ms Rena Lalgie](#), 1 October 2021.

4. On 13 April 2022, the Applicant made a timely application for an independent review by the Information Commissioner of Government House's internal review decision.

## **Investigation**

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5. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issue the Applicant wanted her to review.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine whether its reliance on the exemption was justified.
7. On 14 April 2022, the Information Commissioner's Office (**ICO**) notified Government House of the valid review application and requested Government House to submit a copy of the records responsive to the PATI request.
8. On 27 April 2022, Government House provided the ICO with unredacted copies of five responsive records. After duplicates are removed, only two records are considered in this review, namely, records 2 and 5.
9. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority, the applicant and any third party concerned a reasonable opportunity to make representations. Government House, the Applicant and a Third Party were invited to comment on this application. Government House was further asked specific questions to justify its reliance on the exemption in section 23(1) of the PATI Act.
10. Government House provided submissions. The Third Party expressed objections to the potential disclosure of the responsive records and relied on the exemptions in section 23(1) and 26(1)(information received in confidence). The Applicant did not make submissions, though the absence of their submissions is not considered as a factor against disclosure of the records.

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

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11. In coming to this Decision, the Information Commissioner considered all of the relevant information in the ICO's communications with the parties and publicly available information. She is satisfied that no matter of relevance has been overlooked.

12. 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.

### *Personal information – section 23*

13. Section 23(1) allows public authorities to deny public access to a record if it consists of personal information. Section 24(1) defines personal information as information about an identifiable individual, subject to exclusions to this definition in section 24(2) that are not relevant in this review.
14. If the information in the record includes reference to a specific person, it is personal information. A record will also contain personal information if the individual's identity is reasonably ascertainable from the information.
15. As the Information Commissioner explained in her [Decision 02/2019, Office of the Governor](#), routine personal work information of elected officials and public employees still falls within the definition of personal information. This does not mean their personal information will always have to be withheld. Rather, the disclosure of their personal information should be based on the consideration of the public interest test.
16. The personal information exemption does not apply in certain circumstances set out in section 23(2). The exemption does not apply, for example, if the information relates to the requester or if the individual to whom the information relates has given their written consent for disclosure.
17. The personal information exemption is subject to the public interest test. In the context of personal information, the public interest test requires a balancing of the public interests in favour of knowing an individual's personal information, on the one hand, against the privacy rights of the individual and any other public interest in favour of confidentiality, on the other.
18. When considering the public interest test against and in favour of a personal information disclosure, public authorities should take into account the following factors<sup>2</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>2</sup> [Decision 02/2019, Office of the Governor](#), para. 51.

- b. Whether disclosure would be fair to the individual under all of the circumstances, which would include consideration of whether sensitive personal information was involved, the potential consequences of disclosure on the individual, and the individual's reasonable expectations of privacy; and
  - c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.
- 19. 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 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".
- 20. 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.
- 21. In sum, to appropriately rely on the personal information exemption in section 23(1), public authorities must consider<sup>3</sup>:
  - [1] Whether the record consists of information about an identifiable individual?
  - [2] Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?
  - [3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?
  - [4] If the exemption on personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure?<sup>4</sup>
- 22. A public authority invoking section 23(1) has the burden to show that, on the balance of probabilities, the exemption is justified.

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<sup>3</sup> [Decision 02/2019](#), [Office of the Governor](#), para. 56.

<sup>4</sup> Disclosure of records consisting of personal information should also be made if disclosure would benefit the individual, in accordance with section 23(6) of the PATI Act, which is irrelevant in this case.

*Public authority's submission*

23. Government House submitted that the information in the records falls within the definition of personal information in section 24(1)(b).
24. Government House acknowledged that there is a public interest in disclosure of the records, in that the public had a right to accountability and transparency of exchanges that relate to members of the Bermuda Police Service (**BPS**) and how decisions are made within the BPS.
25. Government House concluded, however, that on balance the public interest would not be better served by granting access to the requested records, due to the personal nature of the information contained in them.

*Applicant's submission*

26. The Applicant did not make submission.

*Third Party's submission*

27. The Third Party provided an explanation as to why they object to the disclosure of the records. Given the confidential and sensitive nature of the information provided by the Third Party, the Information Commissioner is unable to summarise the Third Party's submission.

*Discussion*

28. The Information Commissioner considers Government House's reliance on the personal information exemption in section 23(1) in relation to the records 2 and 5.

[1] Whether the records contain information about an identifiable individual?

29. The Information Commissioner is satisfied that records 2 and 5 contain information about an identifiable individual, namely, the then-Commissioner of Police. The records also contain information about the Governor and the Deputy Governor.

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

30. None of the exclusions to the definition of personal information in section 24(2) is applicable to the information about individuals identified above. Section 24(2)(a) does not apply to the information about these individuals in records 2 and 5, because the information is attached to them as individuals and does not relate to their positions or functions within their respective public authorities, i.e., the BPS or Government House.

The Information Commissioner is satisfied that the identified information falls within the definition of 'personal information' for the purposes of the PATI Act.

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

31. The Information Commissioner is satisfied that none of the exceptions to the exemption in section 23(2) applies to records 2 and 5. Specifically, the individuals to whom the information relates have not provided written consent to disclosure.

[4] Whether the balance of the public interest requires disclosure?

32. The Information Commissioner acknowledges that the public has a strong interest in better understanding the reasons for the resignation of the former Commissioner of Police, the most senior individual within the police service. The announcement of the resignation was both abrupt and prior to the end of the former Commissioner's employment contract.
33. The events prior to his resignation also raised questions about the former Police Commissioner's conduct and accountability. In March 2021, the Governor had launched an inquiry into complaints made by a suspended officer about the conduct of the former Commissioner of Police<sup>5</sup>. As a result of the former Commissioner of Police's resignation, the Governor dropped the inquiry into the allegations of gross misconduct against him. The Governor explained that "in law, one of two consequences flow from [the resignation]: either the Police (Conduct) Orders 2016 no longer apply so that there is no longer any power to continue an investigation or, at the very least, that there is now no power to take any further action at the conclusion of an investigation"<sup>6</sup>.
34. To date, the public has not been provided with the circumstances or reasons for the former Commissioner of Police's resignation, including whether it was related to or arose from the pending inquiry launched by the Governor. In light of the history above, the Information Commissioner cannot ignore the strong public interest in greater transparency surrounding the resignation, and the conduct of the former Commissioner of Police.

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<sup>5</sup> The Royal Gazette, [Governor launches inquiry into complaint against Police Commissioner](#), 19 March 2021.

<sup>6</sup> The Royal Gazette, [Governor drops inquiry into gross misconduct allegations against former Police Commissioner](#), 13 January 2022.

35. At the same time, weighty interests also support maintaining the exemption when questions arise concerning the privacy rights of individuals. At times, the public may think it knows the reason for the personal decision made by a public official, based on hearsay and conjecture, rather than on official statements. As the Information Commissioner explained in [Decision 02/2019](#), Office of the Governor, paragraphs 60-63, a disclosure under the PATI act is of a very different nature than unofficial rumours:

*The significance of PATI Act disclosures*

60. Where much public attention has been given to the issues, it is still the role of the Information Commissioner (and public authorities) to carefully ensure that identifiable information about individuals is appropriately redacted to safeguard their privacy, except in circumstances when the balance of the public interest warrants disclosure.

61. Very often, people informally or unofficially know about information or events relating to individuals in the public sector or in public life, or people are confident in thinking that they know. This is particularly true in light of social media and the amount of personal information (about one's self and others) that is shared with the community. Yet, unofficial social media communications, news articles based on 'leaks', unsubstantiated stories and widespread speculation all risk giving the public a partial understanding of the official reasons for a decision or the process by which the decision was made.

62. An official disclosure through the PATI Act is of a different nature. In the personal information context, a disclosure signifies an official record contemporaneously memorialising information about an individual. PATI disclosures may reveal previously unknown information or provide more detailed information about a decision making process. It reflects the difference between the most popular theory behind why a decision was made and the actual reasons recorded by a public authority for that decision.

63. For these reasons, the Information Commissioner places great emphasis upon the PATI Act's protection of personal information in section 23(1) because an official disclosure has a far greater impact than social media commentary upon an individual's personal and professional life. The Information Commissioner carefully applies the definition of personal information in section 24(1) to all information about identifiable individuals.

36. In this case, disclosure of records 2 and 5 would be unfair to the former Commissioner of Police, nor necessary to further public interest concerns as discussed above. Although



the role of Commission of Police inherently carries a lower expectation of privacy by nature of its official publicly facing duties, the decision to resign remains a highly personal matter specific to an individual. Persons, even in those high-ranking positions, continue to hold a reasonable expectation of privacy concerning their private lives.

37. Disclosure of records 2 and 5 would not satisfy the weighty public interests of accountability and transparency. Government House has already provided official statements concerning the facts of the resignation and has explained that the resignation resulted in the Governor dropping the inquiry. As unsatisfying as this outcome may be for some members of the public the decision by the Governor by no means justifies an intrusion into the dignity and privacy of an individual who has made a personal choice to resign. The former Commissioner of Police's submissions in this regard are acknowledged, and the Information Commissioner agrees that disclosure is unwarranted.
38. Considering these factors, the Information Commission is satisfied that the balance of the public interest favours nondisclosure of records 2 and 5.

### *Conclusion*

39. The Information Commissioner is satisfied that Government House has justified its reliance on section 23(1) for withholding records 2 and 5 in full, for which the public interest did not require disclosure.
40. Because she concludes that Government House's reliance on section 23(1) to withhold records 2 and 5 in full was justified, she need not consider the Third Party's reliance on section 26(1) to object to the disclosure of the records.

## Decision

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The Information Commissioner finds that the Office of the Governor (**Government House**) has justified its reliance on the personal information exemption in section 23(1) of the PATI Act in denying access to records 2 and 5. In accordance with section 48 of the PATI Act, the Information Commissioner affirms Government House's internal review decision of 18 March 2022.

## Judicial Review

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The Applicant, the Office of the Governor, 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.



Gitanjali S. Gutierrez  
Information Commissioner  
30 December 2022

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Public interest test

- 21 For the purpose 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 –
- (a) Subject to subsection (3), the information concerned relates to the requester;
  - ...
  - (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—
- ...
  - (2) But “personal information” does not include—
    - (a) Information about an individual ... who is or was an officer or employee of a public authority that relates to the position or functions of the individual;

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