

Decision Notice

Decision 02/2019: Office of the Governor

DPP recruitment and appointment records

Reference no: 23022016

Decision date: 24 January 2019

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to Government House for records related to the recruitment and appointment of the Director of Public Prosecutions (**DPP**) in 2013 and 2015. Government House's initial decision denied the request in reliance on the exemptions in section 23(1) (personal information) and section 26(1) (information received in confidence). Government House's internal review decision provided access to some of the records and otherwise upheld the initial decision on the same grounds for the remainder of the records. The review addressed the application of the exemptions to deny access to the records, including exemptions Government House invoked during this review.

The Information Commissioner has found that the PATI Act did not apply to certain records in accordance with section 4(1)(b) of the Act. The Information Commissioner has also found that Government House justified its reliance on the exemptions in section 23(1) (personal information), section 29(1) (deliberations of public authorities) and section 33(1)(b) (Governor's communications) to deny public access to some of the records, or part of the records.

Finally, the Information Commissioner has found that Government House did not justify its reliance on the exemptions in section 23(1), section 26(1)(a) (information given in confidence), section 29(1), section 33(1)(a) (Governor's responsibilities) or section 33(1)(b) to deny access to the remainder of the records or part of the records.

The Information Commissioner requires Government House to disclose some of the records or parts of the records in accordance with this Decision.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 4 (application); section 21 (public interest test); section 23(1) and (6) (personal information); section 24 (definition of personal information); section 26(1)(a) (information received in confidence); section 28 (ministerial responsibility); section 29 (deliberations of public authorities) and section 33 (Governor's responsibilities and communications with United Kingdom).

The full text of each statutory provision cited above is reproduced in Appendix 2 to this Decision. The Appendix forms part of this Decision.

Background

1. On 10 December 2015, the Applicant made a Public Access to Information (**PATI**) request to the Office of the Governor, referred to as Government House, for records related to the 2013 and 2015 recruitment and appointment of the Director of Public Prosecutions (**DPP**). Specifically, the Applicant requested “all information and documentation on the selection process for the appointment of the Director of Public Prosecutions in 2013 and January 2015, including the number of candidates who applied for the role and the number who met the required criteria for the position”.
2. On 25 January 2016, Government House issued its initial decision denying access to the records under section 23(1) (personal information) and section 26(1) (information received in confidence), without specifying the exemption provision under 26(1).
3. On 26 January 2016, the Applicant sought an internal review.
4. On 1 February 2016, Government House issued an internal review decision, disclosing some of the records and withholding the remainder under sections 23(1) and 26(1). It also informed the Applicant that in 2013 one candidate for the DPP position met the criteria and that in 2015 four candidates, including the incumbent, met the criteria for the position.
5. The Applicant requested an independent review by the Information Commissioner on 23 February 2016.

Investigation

6. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for consideration because the Information Commissioner required submissions from Government House to determine whether its reliance on the exemptions was justified.
8. On 29 April 2016, the Information Commissioner’s Office (**ICO**) notified Government House of the valid application.

9. Government House provided withheld records 1-79 to the ICO. In the schedule of records, Government House clarified that it had relied on the exemption in section 26(1)(a) for information given to a public authority in confidence.
10. During the Information Commissioner's investigation, Government House also informed the ICO of new exemptions it sought to rely upon. The new exemptions were sections 28(1) (ministerial responsibility), 29(1) (deliberations of public authorities), 32(1)(b) (national security, defence and international relations), 33(1)(a) (Governor's responsibilities) and 33(1)(b) (Governor's communications). Government House later clarified that it no longer relied on section 32(1)(b). The Information Commissioner accepted the late reliance on new exemptions. The Applicant was notified of the new exemptions.
11. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review a reasonable opportunity to make representations. The ICO invited the Applicant and Government House to comment on this application, including the new exemptions grounds, and to make submissions to the Information Commissioner for consideration in this review. Government House was also asked specific questions to justify its reliance on the exemptions in sections 23(1), 26(1)(a), 28(1), 29(1), 33(1)(a) and 33(1)(b).
12. Both the Applicant and Government House made submissions in 2016 and 2018.
13. During the ICO's investigation, Government House disclosed records 2, 26, 29, 46, 49, 51, 54, 57, 71, 73 and 79. This Decision Notice does not address these records.

Information Commissioner's analysis and findings

14. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Applicant and Government House. She is satisfied that no matter of relevance has been overlooked.
15. 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. This Decision Notice also has a Confidential Annex with additional arguments to support the Information Commissioner's conclusions. The Confidential Annex has been provided only to Government House.

Preliminary issues – Applicability of the PATI Act – section 4(1)(b)

16. Inherent in Government House’s internal review decision is a determination that the PATI Act applies to records 30, 55 and 56. These are records obtained or created by one of the public authorities listed in section 4(1)(b) of the Act while carrying out its functions.
17. Section 4 of the PATI Act defines the scope of the records to which the PATI Act applies. Section 4(1)(b) states that the PATI Act does not apply to “records obtained or created by any of the following public authorities in the course of carrying out their functions” and lists the named authorities. Section 4(2) explains that 4(1) “does not include records relating to the general administration” of these authorities.
18. The framework of section 4 brings every public authority within the requirements of the PATI Act to ensure public accountability, and then removes certain records from the Act’s application related to the functions of these specific public authorities.
19. The PATI Act and Regulations do not define ‘functions’ or ‘general administration’. Section 7 of the Interpretation Act 1951, however, defines ‘function’ as “the power conferred or duties imposed on the authority or officer by or under any provisions of law”.
20. ‘General administration’ has been defined by the Irish Information Commissioner’s Office (with respect to a similar provision in its Freedom of Information Act 2014) as “records which have to do with the management of [a public authority] such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organization, office procedures and the like”.¹ The Information Commissioner adopts this understanding of general administration documents.
21. Section 4 of the PATI Act, thus, makes a distinction between those functions and duties that are specific to the mandate of a particular public authority, and the general administrative duties that many public authorities share.
22. When a public authority receives a PATI request, it must determine whether the PATI Act applies to the records that fall within the request. For some records, this involves an implied or express decision by a public authority on whether the records are excluded from the scope of the PATI Act under section 4. For all PATI requests, public authorities must issue a decision on the request in accordance with section 14 of the Act.
23. The Information Commissioner may conduct a review in accordance with section 45 of the Act of any decision made by the head of an authority on internal review under the PATI Act.

¹ See Case 160447, Right to Know CLG and Office of the Data Protection Commissioner, 28 February 2017, available at www.oic.ie/decisions/d160447-Right-to-Know-CLG-and-Offic/.

Again, this would include a review of any decision by the public authority that a record is excluded from the scope of the PATI Act under section 4.

24. Accordingly, the Information Commissioner reviews any decision by a public authority that section 4 does or does not apply to a record at issue. Because section 4 goes to the scope and applicability of the PATI Act, the Information Commissioner may address it even if the parties do not raise the issue, as is the case here.
25. The Information Commissioner has reviewed records 30, 55 and 56.
26. The Information Commissioner is satisfied that records 30, 55 and 56 fall within section 4(1)(b). The Information Commissioner includes additional reasoning in support of this position in the Confidential Annex.
27. Accordingly, the Information Commissioner is satisfied that the PATI Act does not apply to records 30, 55 and 56.

Preliminary issues – late reliance on new exemptions

28. During the course of this investigation, Government House sought to invoke new exemptions to justify withholding some of the responsive records. Specifically, Government House sought to rely on sections 28(1) (ministerial responsibility), 29(1) (deliberations of public authorities), 32(1)(b) (national security, defence and international relations), 33(1)(a) (Governor's responsibilities) and 33(1)(b) (Governor's communications). Government House later clarified that it no longer relied on section 32(1)(b).
29. As set out in Decision 01/2018, Bermuda Tourism Authority, paragraphs 22-23, the PATI Act requires a public authority to fully inform an Applicant of the grounds for withholding access to responsive records, including any applicable exemptions, in its initial and internal review decisions. This allows the Applicant to make an informed decision about seeking an independent review by the Information Commissioner.
30. During a review, the Information Commissioner must determine whether the public authority's decisions under the PATI Act were justified. The Information Commissioner's decision is not a fresh consideration of whether the records should be disclosed or withheld. A public authority's assertions of additional exemptions during the Information Commissioner's review goes beyond the public authority's earlier decisions. Newly asserted exemptions will not be considered unless it is fair to do so under the circumstances and keeping in mind the fundamental purpose of the PATI Act to provide access to public records to the greatest extent possible.

31. In cases where the Information Commissioner agrees to consider the public authority's assertion of a late exemption, the Applicant will be notified of the new grounds and provided an opportunity to respond.
32. Here, Government House invoked new exemptions when it submitted the withheld materials to the ICO. The Information Commissioner accepted the late assertion of the exemptions because this was one of the first PATI requests received by Government House and the PATI Act was new. Further, the Applicant was provided with an opportunity to make submissions on the late exemptions and did not object to their consideration.
33. The issues in this review were revised to include consideration of the new exemptions.

Personal information – section 23

34. Section 23(1) allows public authorities to withhold records containing personal information, subject to exceptions in section 23(2) that are not applicable in this case.
35. The personal information exemption in section 23(1) is one of the only exemptions the Information Commissioner will consider on her own initiative. See Decision 01/2018 Bermuda Tourism Authority, at paragraph 27.

Definition of 'personal information' – section 24

36. Personal information is defined in section 24(1) as "information recorded in any form about an identifiable individual". Section 24(1) also provides a non-exhaustive list of categories of personal information, such as race, religion, medical or employment history and education.
37. 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. This means that the individual's identity can be determined by comparing the information with other public information, e.g., the woman who was the first female premier of Bermuda.
38. The information in the public record does not need to be true for it to be personal information within the meaning of the PATI Act.
39. The definition of personal information is very broad: information about an identifiable individual. This includes information such as a person's name, address, phone number, or home or work email address; a person's salary or bank account information; allegations of wrongdoing against a person; details about landownership; the fact that a person is a member, or leader, of an association; opinions given as part of a person's employment; a person's name appearing in a work document; and the fact that a person authored a report.

Exclusions from the definition of personal information – section 24(2)

40. Section 24(2) excludes specific categories of information from the broad definition of ‘personal information’ in section 24(1). Relevant in this case, section 24(2)(a) states that the definition of personal information does not include “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” (emphasis added).
41. For purposes of section 24(2)(a), a position is understood in its plain meaning as a job.² A function refers to the power conferred or duties imposed upon the authority or officer by or under any provision of law.³ A job description or salary scale attached to a particular post are examples of information that relate to an individual’s position or functions that would normally be excluded from the definition of personal information under the PATI Act.
42. Section 24(2)(a) means that information, which attaches generally to a position or function regardless of the individual in that position or function, is not personal information for purposes of section 24(1). In that situation a public authority cannot rely on the exemption for personal information in section 23(1) to withhold the information.

Routine personal work information of public employees

43. Reading sections 24(1) and (2) together means that the definition of personal information still includes the routine personal work information of public sector employees⁴. The routine personal work information refers to information that relates only to the routine day-to-day work duties and responsibilities of public sector employees. This includes information such as:
- A work email address
 - A work phone number
 - The fact of authorship of a work document
 - A professional opinion given wholly in a professional capacity, e.g., that winds and currents are expected to be at a certain strength tomorrow

² Decision 01/2018 Bermuda Tourism Authority, para. 32.

³ Decision 01/2018, Bermuda Tourism Authority, para. 33.

⁴ See, e.g., Requests for personal data about public authority employees, UK ICO (2018), available at https://ico.org.uk/media/1187/section_40_requests_for_personal_data_about_employees.pdf; Right to Information and Privacy Guidelines, Interpreting the Legislation – Right to Information Act 2009 and Information Privacy Act 2009, Office of the Information Commissioner Queensland (2014), available at <https://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/processing-applications/routine-personal-work-information-of-public-sector-employees>.

- A work responsibility, i.e., that the individual officer is the contact if a member of the public has a complaint or query, or has responsibility for making decisions about granting licenses

44. Routine personal work information falls within the definition of ‘personal information’ in section 24(1) of the PATI Act, but this does not mean that it is automatically exempt. The balance of the public interest considerations determines whether routine personal work information of public sector employees is disclosed under the PATI Act, as discussed below.

Personal information of elected officials and other public officials

45. The definition of personal information also includes the personal work information of elected officials and other public officials. A public authority may come to hold the personal work information of an elected official in a number of ways. For example, an elected official may send an email or other correspondence to a public authority, or sign an official document held by a public authority⁵.

46. The personal work information of these officials refers to information that is related only to their public duties and public life. This includes information such as:

- Their political affiliation
- Their attendance at official meetings or events
- Their name associated with reports or other documents
- Their views or opinions related to their public duties or responsibilities

47. Personal work information of elected officials and other public officials falls within the definition of ‘personal information’ in section 24(1) of the PATI Act, but this does not mean that it is automatically exempt. The balance of the public interest considerations determines whether personal work information of elected officials or other public officials is disclosed by the PATI Act, as discussed below.

Public interest test for the personal information exemption

48. If the personal information exemption in section 23(1) is engaged, the public authority must then consider whether the public interest test in section 21 nonetheless requires the information to be disclosed. Section 23(6) of the PATI Act will still require disclosure if the public interest favouring disclosure outweighs the public interest in maintaining the

⁵ For an illustrative discussion of the treatment of correspondence between Members of Parliament and public authorities in the UK, see Freedom of Information and Members’ correspondence with Public Authorities, House of Commons (2010), available at <https://www.parliament.uk/documents/foi/foimemberscorrespondence.pdf>.

confidentiality of the information. Section 23(6) also permits disclosure under other circumstances not relevant in this case.

49. 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.

50. When weighing the privacy rights of individuals, the Information Commissioner draws upon well-established principles that govern the disclosure of personal information under many privacy laws. The presumptions in the PATI Act versus privacy laws are different with respect to the balancing of interests⁶. Further, the Information Commissioner notes that the Personal Information Protection Act 2016 was passed after the PATI request was submitted, and it has not fully come into force. Nonetheless, the Information Commissioner views these privacy principles as appropriate factors for weighing an individual's privacy rights and freedoms when balancing the public interests under the PATI Act.

51. With this in mind, the Information Commissioner will consider the following factors when balancing the public interests when personal information is involved:

- a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the Public Access to Information Regulations (**PAIR**) that may:
 - i. Promote greater public understanding of the process or decisions of public authorities;
 - ii. Provide reasons for decisions taken by the Government;
 - iii. Promote accountability of and within the Government;
 - iv. Facilitate public participation in decision-making by the Government;
 - v. 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;
 - vi. Deter or reveal wrong-doing or maladministration; or

⁶ Under the PATI Act, if the balance of public interests are equal, the information must be disclosed. See ICO Guidance: the public interest test – section 21, available at https://docs.wixstatic.com/ugd/5803dc_0789d401790c43979d9d3026f9476d7a.pdf. Generally, the presumption in privacy legislation is the opposite and will favour the confidentiality of personal information.

- vii. Reveal untrue, incomplete, misleading information or acts of a public authority.
 - 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.
52. If the information is 'sensitive' personal information, the fairness concerns surrounding disclosure may be heightened. Section 7(1) of the Personal Information Protection Act 2016 defines 'sensitive personal information' as "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".
53. Note also that for public employees, elected officials and other public officials, an individual's reasonable expectations of privacy are based upon an objective assessment. It takes into account whether the information relates to their public or private life, the seniority of the individual, information that is already in the public domain and whether they are in a public facing role.
54. For example, if an individual is an elected official, their name and political affiliation is 'information about an identifiable individual'. From a technical perspective, this information qualifies as personal information under the PATI Act (section 24(1)). From a practical perspective, however, such individuals have a lesser expectation, or in some instances no expectation, of protection of their personal information related to how they perform their public functions and conduct their public life. These considerations arise during the balancing of the public interests.
55. Finally, the disclosure of the personal information must 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.

56. In sum, to invoke the personal information exemption, a public authority must ask:

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

[2] Whether the information falls within any of the exclusions to the definition of person 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 for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure, or whether disclosure would benefit the individual?

57. Balancing the public interests requires consideration of the public interests factors in favour of disclosing an individual's personal information, on the one hand, against the individual's privacy rights and freedoms, along with any other public interest in favour of confidentiality, on the other. The factors in favour of disclosure include those listed in regulation 2 of PAIR.

58. An individual's privacy rights and freedom involve consideration of whether it would be fair to disclose the information under all of the circumstances. This includes whether sensitive personal information is involved, the consequences to the individual of disclosure, and the individual's reasonable expectations of privacy concerning the information. It also involves assessing whether disclosure of the personal information is necessary to further the public interests in favour of disclosure.

59. Finally, 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.

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.

Public authority's submissions

64. Government House relies on the personal information exemption to withhold records 1, 3-23, 47-48, 50, 53, 61-65, 67-69, 72 and 75-77. Government House also invoked the personal information exemption for records 52 and 60, which are withheld in full on other grounds and the applicability of section 23(1) to records 52 and 60 is not considered here.
65. Government House submitted that the information in these records falls within various provisions in section 24(1).
66. In its submissions to the ICO, Government House also discussed various public interest factors. It acknowledged that there may be a public interest in knowing that the DPP recruitment and appointment process was carried out properly. Government House noted that disclosure of the records would provide further transparency about this process.
67. Government House concluded, however, that this interest is significantly outweighed by the privacy interests of the individuals involved. It also emphasised that some of the people to whom the information relates had an expectation that the information would not be made public. This includes the candidates for DPP, as well as some of the individuals involved in the recruitment or interview process.

Applicant's submissions

68. The Applicant emphasised that the personal information exemption, and other exemptions invoked, are subject to the public interest test.
69. In support of disclosure, the Applicant's public interest factors relate to three considerations. First, the Applicant referred to the overarching public interest in transparency and accountability, which is furthered by public scrutiny of a public authority's decision-making.
70. Second, the Applicant raised specific concerns about the transparency and fairness of the process by which the Governor appoints the DPP, noting the particularly important role of the Prosecutor in serving the public.
71. Third, the Applicant argued that the appointment process raised public interest concerns about the abilities or qualifications of the candidates for DPP in 2013 and 2015 who were currently serving as public officers. The Applicant noted that the media reported that the candidates included a deputy director in the Department of Public Prosecution.
72. The Applicant further submitted that public officers in public roles have less expectations of privacy and confidentiality compared to an external candidate regarding their candidacy for a senior post, such as the DPP. The Applicant reasoned that the public had an interest in knowing why, despite a well-publicised succession plan to ensure appointment of a Bermudian, the candidate was deemed not able to take on the DPP role. The Applicant urged that transparency is crucial regarding the abilities of those who are paid by the public to perform the important civic role of the Prosecutor.
73. The Applicant also pointed out that Government House failed to show how or whether it balanced the public interests before it made its initial and internal review decisions.

Discussion

74. In addition to the records listed in paragraph 64, the Information Commissioner has reviewed all of the withheld records to determine whether they contain additional personal information. The Information Commissioner also considers the application of this exemption to records 24, 27-28, 39, 58, 70 and 78.

[1] Whether the withheld records consist of information about identifiable individuals?

75. The Information Commissioner has carefully reviewed records 1, 3-24, 27-28, 39, 47-48, 50, 53, 58, 61-65, 67-70, 72 and 75-78, and concluded that much of the information in these records is about identifiable individuals.

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

76. The Information Commissioner next considers the exclusion in section 24(2)(a) when the information in the records is about an individual who is or was an officer or employee of a public authority and relates to the position or functions of the individual.
77. During the course of this investigation, Government House released some records that relate to the position or functions of individuals. These include records such as the DPP job description, salary, and the pre-interview person specifications for candidates in record 2. This information relates to any individual who is in the post of the DPP.
78. Other information in the records listed in paragraph 75 relates to how officers or employees of public authorities have performed their functions, such as the manner in which the former Governor exercised his discretionary authority under sections 71A, 82(4), and 86(1) of the Bermuda Constitution Order 1968 (**Constitution**) to appoint the DPP in 2013 and 2015. The information about the performance of this function continues to relate to the identifiable individual (i.e., former Governor George Ferguson), and not generally to the position or function.
79. The Information Commissioner notes that information about an individual's performance of their public position or functions continues to be 'identifiable information' about that individual within the definition of personal information in section 24(1). This does not lead to the conclusion, however, that this information is properly withheld under the exemption for personal information in section 23(1). The balance of the public interests will require disclosure of some parts of these records because of the nature of the information and its relationship to the public functions of the individual rather than their private life.
80. The Information Commissioner is satisfied that the information about identifiable individuals in records 1, 3-24, 27-28, 39, 47-48, 50, 53, 58, 61-65, 67-70, 72 and 75-78 does not fall within the exception to the definition of personal information in section 24(2)(a).

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

81. The exceptions in section 23(2), which prohibit the application of the personal information exemption are not applicable in this case. Specifically, the information concerned does not relate to the Applicant and the individuals to whom the information relates have not provided written consent to its disclosure.

82. The Information Commissioner is satisfied that the exemption for personal information in section 23(1) is engaged and the public interest test must be considered for records 1, 3-24, 27-28, 39, 47-48, 50, 53, 58, 61-65, 67-70, 72 and 75-78.

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

83. The Information Commissioner agrees with the Applicant that Government House failed to consider the public interest test in its decision. During the ICO investigation, both Government House and the Applicant raised a number of public interest factors, described above in paragraphs 66-72, which the Information Commissioner has carefully considered.

84. In considering the balance of the public interests, the Information Commissioner agrees, to some extent, with the public interest arguments submitted by both the Applicant and Government House. Both correctly emphasised that the public has a strong interest in transparency and accountability for the recruitment and appointment process for the DPP.

85. The Information Commissioner recognises that compelling public interest considerations favour the disclosure of the personal information. The records would provide the public with insight into the controversial process for the recruitment and reappointment process for the DPP in 2013 and 2015. Apart from questions about the individual candidates, a number of concerns arose about the process itself. In response to questions from the public and Government following the 2013 and 2015 appointments, Government House provided some information about the process the former Governor used to make the appointment.

86. The Information Commissioner emphasises that these questions about the decision-making process are separate from the details of the applications of individual candidates. Rather, the Information Commissioner agrees with the Applicant's argument that the public has a strong interest in understanding how the former Governor exercised his discretionary constitutional authority to appoint the DPP.

87. This involves neutral information about the procedural steps the former Governor took, not the content or substance of what occurred during those steps. The Information Commissioner accepts that the appointment process for constitutional officers such as the DPP should be transparent.⁷

⁷ For an illustration of the transparency of recruitment processes, see the standards of the UK Civil Service Commission, available at <https://civilservicecommission.independent.gov.uk/civil-service-recruitment-2/>. The Commissioners chair and oversee the competition for the Director of Public Prosecution and make a recommendation to the Attorney General, who, similar to the Bermuda Governor, has final decision-making authority for the appointment.

88. The Information Commissioner is of the view that the public has an important interest in understanding how the DPP appointment process was carried out. Disclosure of the personal information in the withheld records would further the public's understanding of this decision-making process; provide reasons for the decision; and promote accountability of and within Government.
89. The Information Commissioner must now weigh these important public interest factors favouring disclosure against the individuals' privacy rights and freedoms, and any other public interest factors in favour of maintaining the exemption.
90. The Information Commissioner considers the fairness to the individuals and necessity of disclosure of their personal information by assessing the different broad categories of personal information in the records, i.e., information about an identifiable individual. Government House has already released records concerning the DPP appointment process and Members of the House of Assembly made numerous statements about the appointment during debate on 6 December 2013, 14 February 2014, and 28 November 2015. The Information Commissioner notes that the following general descriptions do not reveal any withheld information, and are to assist the public in understanding the Information Commissioner's reasoning.
91. The Information Commissioner considers the following categories of personal information:
- personal information related to the individuals under consideration for the DPP post in 2013 and 2015;⁸
 - personal information related to individuals' performance of their public functions or responsibilities associated with the recruitment and appointment process; and
 - personal information related to other individuals.

⁸ Government House has released records showing that the incumbent DPP Rory Fields notified the former Governor in mid-2013 that he would like to be reappointed for a full term, prior to the formal recruitment process. The former Governor responded that he wanted to provide Bermudian candidates an opportunity to compete for the DPP post. The personal information in this category, therefore, includes information related to candidates interviewed by the 2013 and 2015 committees, as well as information related to the incumbent DPP who had made clear his interest in reappointment in 2013 and who was reappointed in 2013 and 2015.

Personal information related to the individuals under consideration for the DPP post in 2013 and 2015

Fairness

92. The Information Commissioner first considers whether it would be fair to disclose the personal information related to individuals under consideration for appointment for the DPP post. The Information Commissioner is of the view that this category includes numerous types of personal information listed in section 24(1), as well as sensitive personal information as defined in section 7(1) of PIPA. The sensitive personal information deserves heightened privacy protections.
93. The Information Commissioner agrees with Government House that disclosure of the regular and sensitive personal information of these individuals would be an unwarranted, and unnecessary, invasion of privacy.
94. The individuals considered for the DPP post in 2013 and 2015 had a reasonable expectation of privacy concerning their applications and the assessment of their candidacies. The Information Commissioner is of the view that whether they are working in the private or public sector at the time, individuals who submit candidate applications or express a desire for reappointment, do so in their personal capacity,⁹ and not as a function of their post.
95. Against this weighty consideration in support of maintaining the exemption, the Applicant argued that public officers should enjoy less privacy protections when it comes to their public roles. This is true with respect to their public functions, as discussed below. Here, however, the personal information is not routine personal work information, but remains the individual's personal information related to their private life.
96. Further, the Information Commissioner does not agree with the Applicant's argument that disclosure of personal information of any candidates for DPP who are also public officers (if there were any, in addition to the incumbent) will provide the public with insight into the abilities and qualifications of any individual public officers to perform duties of their current roles.

Necessary

97. Even if it would be fair to disclose the personal information of individuals under consideration for the DPP post, it is not necessary.

⁹ See, e.g., Phillip Coppel, *Information Rights: Law and Practice*, (4th ed. 2014), at 787 (citing cases).

98. The strong public interest is in understanding the process by which the former Governor appointed the DPP in 2013 and 2015. As discussed below, the disclosure of other information will adequately further the public's understanding of the general process and create less interference with these individuals' privacy rights and freedoms. Disclosure of the personal information, and sensitive personal information, of the individuals under consideration will not aid this understanding sufficiently enough to justify the weighty invasion of their privacy that would follow.
99. In this case, the entire recruitment process—from application to interviews to selection—involves personal information of the candidates, some of it sensitive personal information, to which the public is not entitled.

Personal information related to individuals' performance of their public functions

100. This personal information involves information about identifiable individuals related to the performance of their public functions or public role. It includes routine personal work information, such as emails or names on routine records.
101. It also includes personal work information related to elected and public officials' personal information in the records that is wholly related to the appointment process and unrelated to their private lives.

Fairness

102. The Information Commissioner next considers whether it would be fair to the individuals to disclose this category of personal information, none of which is sensitive personal information.
103. The Information Commissioner is also of the view that the consequences upon the individuals of disclosure of this information is reasonably expected to be minimal. This information involves public figures, many of whom have made their views on the DPP appointment processes well known through press releases, media interviews, and during public debate. Some of the personal information related to these individuals is personal information in its most technical sense only.
104. These individuals also have little to no reasonable expectation of privacy concerning this personal information related to their public lives and responsibilities. Elected officials, constitutional officers, and senior public officers carrying out their public duties or

responsibilities have a lesser expectation of privacy and should expect some scrutiny of their public lives when required by the public interest in ensuring fair processes.¹⁰

105. This information also includes the personal information of individuals who served on the ad hoc interview committee in 2013 and the 2015 Judicial and Legal Services Committee. In considering whether disclosure would be fair to these individuals, the Information Commissioner notes that Government House did not provide any support for its claim that the individuals on the 2013 committee had an expectation that the fact of their involvement in the interviews would be confidential, such as a terms of reference. Further, Government House announced the members of the 2015 Judicial and Legal Services Committees in a press release.

106. The disclosure of their identifying information in the records, such as their names, does not intrude upon their reasonable expectations of privacy around their involvement in an official appointment process. This reasoning does not extend to personal information about any committee members that does not provide insight into the process for the appointments and, instead, involves their private life.

107. To the extent that disclosure of this information enhances the public's understanding of the process for appointing the DPP in 2013 and 2015, the Information Commissioner is satisfied that disclosure in the public interest would be fair to the individuals.

Necessary

108. The Information Commissioner also finds that disclosure of this personal information is necessary to further the public interest concerns discussed above. This information does not create an unwarranted intrusion into the privacy rights and freedoms of the individuals.

109. Instead, it will afford the public a fuller understanding of the DPP appointment and recruitment processes, including which individuals had correspondence and communications, and at what point during the process.

110. The Information Commissioner acknowledges that the content of the communications between the elected officials, constitutional officers and other public officers must largely be withheld as it contains the personal information of the individuals under consideration. The existence of the communications, though, will further the public's understanding of the steps taken in the process and the involvement of the former Governor, the two advisory committees, and elected officials related to the process.

¹⁰ See, e.g., Coppel, at 786.

111. The Information Commissioner is satisfied that the balance of the public interest requires disclosure of this category of personal information to the extent that it furthers the public's understanding of the process for appointing the DPP in 2013 and 2015.

Personal information about other individuals

112. Finally, the records contain personal information about other individuals.

Fairness

113. In assessing the fairness to the individuals of the disclosure of this information, the Information Commissioner has carefully reviewed the withheld records, none of which contain sensitive personal information.
114. The Information Commissioner is of the view that disclosure of this information would have adverse consequences on the individuals to whom it relates. The Information Commissioner is further satisfied that the individuals had a reasonable expectation under the circumstances that their personal information would be held confidentially.
115. The Information Commissioner is satisfied that under all of the circumstances, it would not be fair to the individuals in this category to disclose their personal information.

Conclusion

116. The Confidential Annex provides further arguments in support of the Information Commissioner's position.
117. In considering the balance of the public interest arguments above and as detailed in the Confidential Annex, the Information Commissioner attaches significant, and decisive, weight to two factors: the importance of transparency concerning the process for the DPP appointment and the heightened confidentiality of the personal information of individuals under consideration for DPP, including sensitive personal information.
118. In conclusion, the Information Commissioner is satisfied that the balance of the public interest favours maintaining the exemption as it applies to the personal information in the records related to the individuals considered for the DPP appointment and to the personal information of other individuals.
119. For other personal information that will provide greater understanding of the steps taken in the appointment process, the balance of the public interest favours disclosure of the information that has been withheld under this exemption. The Information Commissioner is of the view that the disclosure of the redacted records will increase transparency and accountability by providing additional information to the public

concerning the DPP appointment processes. The Information Commissioner notes, however, that the vast majority of public interest disclosures are relatively narrow disclosures that reveal the names and other identifiable information for individuals holding elected or constitutional offices, or others with public responsibilities, that have little to no expectation of privacy concerning their roles.

120. Applying these conclusions, the Information Commissioner is satisfied that the personal information exemption applies to records 1, 3-24, 27-28, 39, 47-48, 50, 53, 58, 61-65, 67-70, 72, 75-76 and 78.

121. The Information Commissioner is satisfied that the balance of the public interest favours disclosure of some of the personal information in parts of records 1, 3-24, 27-28, 39, 47-48, 50, 53, 58, 61-65, 67-70, 72, 75-76 and 78

122. Finally, the Information Commissioner is also satisfied that the personal information exemption applies to record 77 in full and the balance of the public interest does not favour disclosure of this record.

Information received in confidence – section 26(1)(a)

123. Section 26(1)(a) allows a public authority to deny access to information that “is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential” and “the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions”.

124. The public authority has the burden to show, on the balance of probabilities, that the exemption is justified.

Information communicated in confidence

125. Information is communicated in confidence if it was received under an express or implied understanding that the information would be kept confidential. The agreement does not need to be formal. It could arise from a general understanding that communications of a particular nature will be kept confidential.

126. The question is not whether the information is so sensitive that it is confidential, but whether it was communicated in a manner or through a process that shows an expectation that it would be treated confidentially, such as a call to a confidential hotline. The fact that information is of a sensitive nature may be one of the factors relied upon to decide that there was an implied understanding that the information would be kept confidential.

Would be likely to prevent

127. A public authority must also show that disclosure 'would be likely to' prevent the public authority from receiving the information in the future. Speculation is not sufficient to justify the exemption. 'Would be likely' means that some significant, real risk must exist that the public authority would be prevented from receiving such information in the future, even if the likelihood does not amount to being more probable than not.
128. The public authority must also show how the information is necessary for it to fulfil one of its functions. As noted earlier, at paragraphs 19-21, the functions of a public authority are generally those identified by the Constitution, statute, or other provision of law.

Public interest test

129. The exemption for information received in confidence is a qualified exemption subject to the public interest test. If the exemption in section 26(1)(a) is engaged, the public interest test must be considered.
130. Paragraph 51.a, above, discusses the public interest test set out in section 21 of the PATI Act and the factors listed in regulation 2 of the PATI Regulations.
131. In sum, to invoke the exemption for information received in confidence, a public authority must ask:

- [1] Whether the information was given by a third party (other than another public authority)?
- [2] Whether the information was given in confidence and with the understanding that it would be held confidentially?
- [3] Whether disclosure would be likely to prevent the public authority from getting such information again in the future?
- [4] Whether that information is required for the public authority to fulfil its functions?
- [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?

132. Finally, 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

133. Government House relied upon section 26(1)(a) to deny access to records 9-16, 50, 53 and 72.
134. Government House asserted generally that the information received was required to fulfil the Governor's functions under section 71A of the Constitution to appoint the DPP. If information of this nature was publicly disclosed it may hamper Government House's ability to receive such information for future appointments of the DPP.
135. More broadly, Government House asserted a public interest in ensuring that the Governor receives such information to supplement any official information when exercising his functions. If individuals are not confident that Government House will hold their information confidential, individuals will no longer be forthcoming.

Applicant's submissions

136. The Applicant did not provide submissions specifically addressing whether the exemption was engaged. Instead, the Applicant's submissions discussed the public interest in disclosure and urged that the public interest test required disclosure, as set out above in paragraphs 68-72.

Discussion

137. The Information Commissioner has found that the personal information exemption applies to justify withholding parts of records 9-16, 50, 53 and 72. The applicability of section 26(1)(a) to these parts of the records is not considered.
138. The Information Commissioner considers whether Government House has justified the application of section 26(1)(a) to the remaining parts of records 9-16, 50, 53 and 72.

[1] Whether the information was given by a third party (other than another public authority)?

139. The Information Commissioner has reviewed the withheld records. The majority of the information contained in records 9-16 is redacted under section 23(1). The remaining portion does not include any information that was given to a public authority in confidence.
140. The remaining part of record 50 contains information that Government House sent to a third party, not information that Government House received.
141. Record 72 is an email string. Except for the latest email, Government House has already disclosed the email string. The only withheld portion of the record consists solely of an

internal Government House communication with no reference to information given by a third party.

142. Record 53 is the only record that contains some information given by a third party. It is an internal Government House email communication. Within this communication, there is a short reference to information given by a third party.

143. The Information Commissioner is satisfied that a part of record 53 contains information given by a third party. The Information Commissioner is not satisfied that the parts of records 9-16, 50 or 72 at issue contain information given by a third party to Government House.

[2] Whether the information was given in confidence and with the understanding that it would be held confidentially?

144. Government House stated that the information in these records, including record 53, was confidential advice given to the Governor, but much of that information is withheld under section 23(1).

145. The information received from the third party in record 53 does not suggest that it was provided in confidence. Nor does it appear to consist of confidential advice given to the Governor.

146. The Information Commissioner does not accept that the information given by a third party in record 53 was provided in confidence and with the understanding that it would be held confidentially.

Conclusion

147. The Information Commissioner is satisfied that, after redacting the personal information, the remaining information in records 9-16, 50 and 72 do not contain information received in confidence by Government House from a third party. The Information Commissioner is also satisfied that the information received from a third party in record 53 was not provided in confidence.

148. Because Government House has not satisfied its burden with respect to the first two questions for the application of section 26(1)(a), the Information Commissioner does not consider this exemption any further.

Ministerial responsibility – section 28(1)

149. Section 28(1) allows public authorities to deny access to records that consist of information, which if disclosed, could reasonably be expected to undermine individual

ministerial responsibility, including free and frank discussion and advice between Ministers, or between Ministers and public officers, in the course of their public duties.

150. The exemption in section 28(1) is a qualified exemption subject to the public interest test. If the exemption in section 28(1) is engaged, the public interest test must be considered.

151. The public authority has the burden to show, on the balance of probabilities, that the exemption is justified.

Ministerial responsibility

152. Section 28(1) safeguards the doctrine of individual ministerial responsibility that is central to our system of Government. Individual ministerial responsibility is the doctrine that “ministers are responsible to Parliament for all that happens in their departments, though they will only be regarded as culpable in respect of their own decisions or failures”.¹¹

153. With this understanding of individual ministerial responsibility in mind, section 28(1) prevents disclosure of records that could reasonably be expected to undermine the principle that a Minister is responsible to account for, and to be held accountable for, the policies, decisions and actions of his or her Ministry.

Would or could reasonably be expected to

154. At a minimum, section 28(1) requires that disclosure “could reasonably be expected to” undermine ministerial responsibility. This means that disclosure must create an objectively reasonable expectation that ministerial responsibility will be undermined. The expectation must be plausible or possible based on real and substantial factual grounds. Mere speculation is not sufficient to sustain the exemption.

¹¹ See Dawn Oliver, ‘Reforming the United Kingdom in Parliament’, cited in Le Sueur and Sunkin in Public Law Text, Cases, and Materials (2nd ed 2013), at 257. Section A.1. of the Bermuda Ministerial Code of Conduct 2015 reflects this doctrine:

...

iii. As the political head of a Ministry, the Minister is responsible for all of its acts and omissions, and must bear the consequence of any defect of administration or any aspect of policy which may be criticised in the Legislature (hereinafter ‘Parliament’), whether personally responsible or not.

iv. Ministers have a duty to Parliament to account for, and to be held accountable, for the policies, decisions and actions of their Ministries.

Public authority's submissions

155. Government House has relied on section 28(1) to withhold records 9-10, 24-25, 27-28 and 70.¹²

156. The Information Commissioner found that parts of records 9-10, 24, 27-28 and 70 consist of personal information. For these records, the Information Commissioner considers the application of section 28(1) only to the remainder of the record.

Applicant's submissions

157. The Applicant did not provide specific submissions on the applicability of section 28(1) to the withheld records, but argued that the public interest supported disclosure, as set out above in paragraphs 68-72.

Discussion

158. The Information Commissioner has reviewed the records to which Government House has applied the individual ministerial responsibility exemption.

159. As an initial matter, Government House has not explained how the individual ministerial responsibility doctrine applies to the Governor, who is not a Minister, and the exercise of his independent, constitutional authority to appoint the DPP. The Information Commissioner adopts a narrow reading of the exemptions to further the purpose of the PATI Act in section 2 to provide the public with access to public information to the greatest extent possible within the provisions of the Act.

160. Further, Government House has not explained how disclosure of the records could reasonably be expected to undermine individual ministerial responsibility.

161. The Information Commissioner is satisfied that Government House has not met its burden to justify the exemption for individual ministerial responsibility.

162. The Information Commissioner has provided further arguments in the Confidential Annex to this Decision.

Deliberations of public authorities – section 29(1)

163. Section 29(1) allows public authorities to deny access to a record if it consists of information, which if disclosed could reasonably be expected to undermine the deliberative

¹² Government House also relied on section 28(1) to deny access to records 55 and 56, but the Information Commissioner found that the PATI Act is not applicable to those records, in accordance with section 4(1)(b). See paragraph 27 above.

process of a public authority, including free and frank discussion and provision of advice in the course of that process.

164. Exceptions to the exemption are set out in section 29(2). Relevant here, the deliberative process exemption does not apply to information that is factual or statistical.

165. The exemption in section 29(1) is a qualified exemption subject to the public interest test. If the exemption in section 29(1) is engaged, the public interest test must be considered.

166. The public authority has the burden to show, on the balance of probabilities, that the exemption is justified.

Meaning of deliberative process

167. In its plain meaning, deliberative means “relating to or intended for consideration or discussion”.¹³ The Irish Freedom of Information Act 2014 has a statutory provision similar to section 29(1) of the PATI Act. The Irish Information Commissioner understands a deliberative process as:

a thinking process which informs decision making in [public authorities]. It involves the gathering of information from a variety of sources and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice. Thus, it involves the consideration of various matters with a view to making a decision on a particular matter.¹⁴

168. The Information Commissioner adopts this understanding of deliberative process as referring to the consideration or evaluation of competing arguments, information, and facts with a view to making a decision.

169. Prior to making a decision, public authorities can receive and weigh various competing ideas, information and options. If necessary, public authorities can invoke section 29(1) to

¹³ Oxford Dictionary of English (3rd ed. 2010).

¹⁴ Irish ICO Guidance Note Freedom of Information Act 2014 Section 29 - Deliberations of FOI Bodies, para. 2.2.2, available at <https://www.oic.ie/guidance-and-resources/guidance-notes/1-Section-29-Guidance-Note.pdf>. This is similar to the meaning applied by the Information Commissioner’s in the UK and Cayman Islands. See UK ICO Guidance: Prejudice to the effective conduct of public affairs (section 36), available at, https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf and Decision 28-02112 (Cayman Islands Information Commissioner), paras. 26-27, available at https://ombudsman.ky/images/pdf/decisions/FOI_Decision_28.pdf.

deny access to those records. Safeguarding this process supports public authorities' engagement in an open and thorough exchange of views before committing to a decision.

Could reasonably be expected

170. For the exemption to apply, a public authority must show that disclosure could reasonably be expected to undermine the deliberative process. The likelihood of 'could reasonably be expected' is discussed above at paragraph 154.

Public authority's submissions

171. Government House invoked section 29(1) to withhold records 50, 53, 58, 60 and 72. It submitted that these records contain exchanges between officials whom the Governor uses to receive feedback on his proposed course of action or his proposed public statements. Through these exchanges, the Governor sought honest feedback and engaged in free and frank discussion during his decision making process.
172. Government House explained that it was not always possible to engage in verbal consultations. If the content of written exchanges were disclosed, it would have the effect of limiting the full and frank consultation and would lead to less well-reasoned conclusions.

Applicant's submissions

173. The Applicant did not provide specific submissions on the applicability of section 29(1) to the records. The Applicant provided submissions on the public interest in disclosure, which are set out above at paragraphs 68-72.

Discussion

174. The Information Commissioner has reviewed all of the records withheld under section 29(1).
175. Some information in parts of records 50, 53, 58 and 72 is personal information that falls within section 23(1). The Information Commissioner considers the application of section 29(1) to the remainder of these records.

[1] Does any of the information fall within the exception listed in section 29(2)(a)?

176. The Information Commissioner first considers whether any of the information in the records is factual or statistical information, and thus cannot be withheld under the deliberative process exemption.

177. Records 50 and 72 contain some factual information that cannot be withheld under section 29(1).

[2] Could disclosure of the record reasonably be expected to undermine the public authority's deliberative process?

178. It is reasonable to expect that officers and employees of public authorities will provide impartial and robust advice when fulfilling their day-to-day functions and public duties. In these professional capacities, it is also reasonable to expect that officers and employees will not be easily deterred from expressing their views by the possibility of future disclosure.¹⁵

179. When the information, however, is sensitive in that it involves a high-level appointment or controversy, it is reasonable to expect that the officers and employees in public authority may be inhibited in providing honest and frank advice if there is a risk of public disclosure of their individual views or advice.

180. Here, some of the information in the records is typical of the minor advice and views communicated between senior officers as part of their day-to-day functions and decisions (records 53 and 72). Disclosure of this information is not reasonably likely to inhibit the deliberative processes ongoing in these records.

181. In contrast, some of the information in records 50, 58 and 60 concern views that are highly sensitive or are advice and information involving high-level decisions with a broad impact. The nature of the records indicate that the individuals shared free and frank advice to encourage honest discussion.

182. The Information Commissioner accepts Government House's argument that if this more sensitive information was disclosed, it is reasonably likely to discourage free and frank advice from officers, or honest and robust discussion. The Information Commissioner is satisfied that this would undermine the deliberative process with respect to the Governor's decision-making for future constitutional independent appointments.

[3] Does the public interest test require disclosure?

183. In balancing the public interest, the Information Commissioner considers similar factors in favour of disclosure as those relevant for the personal information exemption, discussed above in paragraphs 83-88. Since the Information Commissioner finds that records 53 and

¹⁵ See, for example, the UK Information Tribunal in Guardian Newspapers Ltd and Heather Brooke v IC and BBC, EA/2006/0011, 8 January 2007, at para. 115 (noting that "assertions of inhibition [of free and frank advice] should perhaps not be too readily accepted"). See also Coppel, at pp. 744-47.

72 are not exempt under section 29(1), she only considers the public interest test for records 50, 58 and 60.

184. The Information Commissioner accepts that the general public interest in transparency and in the promotion of greater public understanding of public authorities' decision-making will always support the public interest in disclosure. The Applicant emphasised these public interests, and cited the Department of Public Prosecutions' public statements on the importance of transparency regarding the ability of public officers to perform the functions of the Prosecutor.

185. As discussed above, paragraphs 83-88, the Information Commissioner shares the Applicant's view that the public also has an interest in knowing more about the specific procedures for the DPP appointment and the Governor's decision-making process.

186. Against these considerations in favour of disclosure, the Information Commissioner weighs the public interest factors supporting withholding the information. A strong public interest exists in ensuring that decision-makers maintain the integrity of free and frank discussion and the provision of advice. This is particularly strong with decision-making that goes beyond officers' day-to-day minor decisions and involves decisions with a significant impact upon their work or the public.

187. In conclusion, the Information Commissioner is satisfied that disclosure of some parts of records 50 and 58 will serve the public interest in furthering the transparency and accountability for the DPP appointment process. The Information Commissioner is also satisfied that the balance of the public interest warrants withholding the remaining parts of records 50 and 58, and record 60 in its entirety. Disclosure of this sensitive information would only provide limited benefit to the public and would not address the public interest concerns raised by the Applicant related to the procedures for the DPP appointment.

Conclusion

188. The Information Commissioner is satisfied that records 50 and 72 are not exempt under section 29(1), because they contain information that is factual and only relates to day-to-day decisions for which free and frank discussion could not reasonably be inhibited by disclosure.

189. The Information Commissioner is also satisfied that the balance of the public interest requires the advice and consultation involving highly sensitive matters in records 50, 58 and 60 to remain confidential. This results in record 60 being withheld in full and records 50 and 58 being withheld in part.

Governor's responsibilities – section 33(1)(a)

190. Section 33(1)(a) allows public authorities to withhold a record if “it contains information that relates to the responsibilities of the Governor under section 62 of the Bermuda Constitution Order 1968”, which if disclosed “would prejudice, or could reasonably be expected to prejudice, the effective conduct of public affairs”.

191. The exemption in section 33(1)(a) is a qualified exemption subject to the public interest test. If the exemption in section 33(1)(a) is engaged, the public interest test must be considered.

192. The public authority has the burden to show, on the balance of probabilities, that the exemption is justified.

Responsibilities of the Governor under section 62 of the Constitution

193. Section 62(1) of the Bermuda Constitution Order sets out the “Governor’s special responsibilities”, acting in his discretion, as the following: external affairs, defence, including armed forces, internal security and the police.

194. Neither the PATI Act nor the Constitution define ‘external affairs’. The Governor’s responsibility for ‘external affairs’ in the context of Bermuda’s Constitution (consistent with the constitutions of other overseas territories, including the British Virgin Islands and Cayman Islands) has been understood as its relations with other countries under international law.¹⁶ This would include the implementation of treaties, agreements and conventions with other countries, and representation in international organisations.

Would prejudice, or could reasonably be expected to prejudice

195. Prejudice is not defined in the PATI Act. It is understood in its plain meaning as a harm that is actual, real and significant to the conduct of effective public affairs. Prejudice also implies that the disclosure would not just have an effect, but that the effect would be negative or detrimental in some way.

196. At a minimum, the public authority must show that disclosure ‘could reasonably be expected to cause the harm’, as discussed above in paragraph 154.

¹⁶ See R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57, available at: <https://www.bailii.org/uk/cases/UKHL/2005/57.html>.

Conduct of public affairs

197. The PATI Act does not define ‘public affairs’. In the UK and Cayman Islands, the access to information laws exempt information that would have an adverse effect on free and frank discussions, or otherwise have an adverse effect on the conduct of public affairs.¹⁷ Consistent with these jurisdictions, the Information Commissioner adopts an understanding of ‘public affairs’ in the PATI Act as referring to free and frank advice and exchange of views, as well as a public authority’s ability to provide services to the public, or the ability of a public authority to meet its objectives or purposes.

Public authority’s submissions

198. Government House relies on section 33(1)(a) to deny access to records 74 and 78.¹⁸

199. Government House’s submissions did not identify which of the Governor’s responsibilities under section 62 of the Bermuda Constitution are at issue in records 74 and 78.

200. The Confidential Annex to this Decision discusses Government House’s submissions in more detail.

Applicant’s submissions

201. The Applicant did not provide specific submissions on the applicability of section 33(1)(a) to the withheld records. The Applicant provided submissions on the public interest in disclosure, which are set out above, paragraphs 68-72.

Discussion

202. The Information Commissioner found that part of record 78 is exempt in accordance with section 23(1) because it is personal information. For record 78, the Information Commissioner considers the application of section 33(1)(a) only to the remainder of the record.

[1] Do the records relate to the Governor’s special responsibilities under section 62 of the Bermuda Constitution?

203. Government House has the burden to show that it can justify the application of the exemption for the Governor’s responsibilities. Here, Government House has not explained

¹⁷ See section 36 of the UK Freedom of Information Act 2000 and section 20(1) of the Cayman Islands Freedom of Information Law 2018 Revision.

¹⁸ Government House also relied on section 33(1)(a) to deny access to record 30, but the Information Commissioner found that the PATI Act is not applicable to record 30, in accordance with section 4(1)(b). See paragraph 27 above.

how the Governor's constitutional authority to appoint the DPP, as set out in sections 71A, 82(4) and 86(1) of the Bermuda Constitution, relate to the special responsibilities of the Governor as set out in section 62 of the Bermuda Constitution.

204. The Information Commissioner provides additional reasoning in the Confidential Annex.

205. The Information Commissioner is satisfied that records 74 and 78 do not relate to the Governor's special responsibilities under section 62 of the Bermuda Constitution.

206. The Information Commissioner does not consider the remaining questions for applying the exemption for the Governor's responsibilities.

Governor's communications – section 33(1)(b)

207. Section 33(1)(b) allows a public authority to withhold a record if "it consists of communications between the Office of the Governor and departments of the Government of the UK relating to business of the Office of the Governor, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the effective conduct of public affairs".

208. Like the previous exemption, the exemptions for the Governor's communications require that the disclosure 'could reasonably be expected to prejudice' the 'effective conduct of public affairs', see paragraphs 154 and 195-97, above.

209. The exemption in section 33(1)(b) is a qualified exemption subject to the public interest test. If the exemption in section 33(1)(b) is engaged, the public interest test must be considered.

210. 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 an exemption.

Public authority's submissions

211. Government House relied on the exemption for the Governor's communications to withhold records 31-45, 52, 59 and 66.

Applicant's submissions

212. The Applicant did not provide specific submissions on the applicability of section 33(1)(b) to the responsive records. The Applicant made submissions on the public interest in disclosure, set out in above in paragraphs 68-72.

Discussion

213. The Information Commissioner found that part of record 39 is exempt in accordance with section 23(1) because it is personal information. The Information Commissioner considers the application of section 33(1)(b) only to the remainder of the record.

[1] Does the record consist of communications between the Office of the Governor and a UK government department?

214. The Information Commissioner has reviewed each of the withheld records. The Information Commissioner is satisfied that records 31-38, 40-45, 52, 59, 66 and part of record 39 consist of communications between the Office of the Governor and a UK ministerial department.

[2] Do the communications relate to the business of the Office of the Governor?

215. Sections 71A, 82(4) and 86(1) of the Constitution provide the Governor with the authority to appoint the DPP. The Information Commissioner is satisfied that the records listed in paragraph 214 above, relate to the business of the Office of the Governor to fulfil this constitutional function.

[3] Could disclosure reasonably be expected to prejudice the conduct of public affairs?

216. The Information Commissioner accepts that the content and nature of the information make clear that the records did not involve routine communications about the day-to-day duties of the Office of the Governor. Routine communications could be unlikely to prejudice the conduct of public affairs if disclosed.

217. Here, the Information Commissioner is satisfied that disclosure of the records listed in paragraph 214, above, would prejudice the conduct of public affairs by impeding the ability of the Governor to obtain free and frank advice and to engage in candid discussion with the UK ministerial department.

218. The Information Commissioner provides additional reasoning in the Confidential Annex.

[4] Does the public interest test require disclosure?

219. In considering the balance of the public interest, the Information Commissioner accepts the Applicant's arguments concerning the general public interest in transparency and the promotion of greater public understanding of the process or decisions of public authorities.

220. It is essential, however, that public officials, have the ability to seek free and frank advice prior to making their decisions. The Information Commissioner also notes that,

where appropriate, the final decision and reasoning of the former Governor resulting from the communications has been published.

221. The balance of the public interest weighs in favour of maintaining the exemption with respect to records 31-38, 40-45, 52, 59 and 66, as well as part of record 39.

Conclusion

222. The Information Commissioner is satisfied that Government House has shown that disclosure of records 31-38, 40-45, 52, 59 and 66, as well as part of record 39, could reasonably be expected to prejudice the conduct of public affairs. The Information Commissioner is further satisfied that the balance of the public interest does not require disclosure of these records.

Conclusion

223. The Information Commissioner finds that the PATI Act does not apply to records 30, 55 and 56 in accordance with section 4(1)(b).
224. The Information Commissioner also finds that Government House has justified application of the exemptions for personal information in section 23(1), deliberations of public authorities in section 29(1), and the Governor's communications in section 33(1)(b) to withhold part or all of the information in the records, as listed in Appendix 1 of this Decision.
225. Finally, the Information Commissioner finds that Government House has not justified its reliance on the exemption for information received in confidence in section 26(1)(a), ministerial responsibility in section 28(1), or the Governor's responsibilities in section 33(1)(a) to deny access to all or part of the records.
226. Further to the Information Commissioner's Decision and accompanying Order, the Information Commissioner requires Government House to disclose the records, redacted as indicated in the Confidential Annex to this Decision.

Decision

The Information Commissioner finds that Government House complied in part, and failed to comply in part, with Part 3 of the Public Access to Information (**PATI**) Act 2010 in responding to the Applicant's PATI request. Specifically, Government House justified its reliance on sections 23(1), 29(1) and 33(1)(b) to deny the public access to some of the records, or parts of records, related to the recruitment and appointment of the Director of Public Prosecutions. Government House failed to justify its denial of public access to the remainder of the records, or parts of the records, in accordance with exemptions in sections 23(1), 26(1)(a), 28(1), 29(1), 33(1)(a) and 33(1)(b). Finally, Government House applied provisions of the PATI Act to records to which the Act does not apply.

In accordance with section 48(1)(a) of the PATI Act, the Information Commissioner varies Government House's decision in this case as follows:

- The Information Commissioner annuls the decision with respect to records 30, 55 and 56 on the basis that the PATI Act does not apply to these records, in accordance with section 4(1)(b) of the PATI Act;
- The Information Commissioner affirms the decision to deny access to the records in whole or in part on the basis that the records are exempt in accordance with sections 23(1), 29(1) and 33(1)(b), only with respect to the records as listed in Appendix 1 and the Confidential Annex, which both form part of this Decision;
- The Information Commissioner reverses the decision to deny access to the remainder of the records, or part of the records, as listed in Appendix 1 and the Confidential Annex; and

The Information Commissioner requires that Government House grant access to the records in full or in part as directed in Appendix 1 and the Confidential Annex to this Decision and the accompanying Order **on or before 7 March 2019**.

Judicial Review

Should the Applicant, Government House, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez
Information Commissioner
24 January 2019

Appendix 1: Summary of Exemptions and Disclosure Decision

Record	Exemption applied	Disclosure Decision
1	23(1)	Disclose in part
2	Disclosed during review	
3	23(1)	Disclose in part
4	23(1)	Disclose in part
5	23(1)	Disclose in part
6	23(1)	Disclose in part
7	23(1)	Disclose in part
8	23(1)	Disclose in part
9	23(1)	Disclose in part
10	23(1)	Disclose in part
11	23(1)	Disclose in part
12	23(1)	Disclose in part
13	23(1)	Disclose in part
14	23(1)	Disclose in part
15	23(1)	Disclose in part
16	23(1)	Disclose in part
17	23(1)	Disclose in part
18	23(1)	Disclose in part
19	23(1)	Disclose in part
20	23(1)	Disclose in part
21	23(1)	Disclose in part
22	23(1)	Disclose in part
23	23(1)	Disclose in part
24	23(1)	Disclose in part
25	None	Disclose in full
26	Disclosed during review	
27	23(1)	Disclose in part
28	23(1)	Disclose in part
29	Disclosed during review	
30	4(1)(b)	PATI Act does not apply
31	33(1)(b)	Access denied in full
32	33(1)(b)	Access denied in full
33	33(1)(b)	Access denied in full
34	33(1)(b)	Access denied in full
35	33(1)(b)	Access denied in full
36	33(1)(b)	Access denied in full
37	33(1)(b)	Access denied in full

38	33(1)(b)	Access denied in full
39	33(1)(b) and 23(1)	Disclose in part
40	33(1)(b)	Access denied in full
41	33(1)(b)	Access denied in full
42	33(1)(b)	Access denied in full
43	33(1)(b)	Access denied in full
44	33(1)(b)	Access denied in full
45	33(1)(b)	Access denied in full
46	Disclosed during review	
47	23(1)	Disclose in part
48	23(1)	Disclose in part
49	Disclosed during review	
50	23(1) and s29(1)	Disclose in part
51	Disclosed during review	
52	33(1)(b)	Access denied in full
53	None	Disclose in full
54	Disclosed during review	
55	4(1)(b)	PATI Act does not apply
56	4(1)(b)	PATI Act does not apply
57	Disclosed during review	
58	23(1) and 29(1)	Disclose in part
59	33(1)(b)	Access denied in full
60	29(1)	Access denied in full
61	23(1)	Disclose in part
62	23(1)	Disclose in part
63	23(1)	Disclose in part
64	23(1)	Disclose in part
65	23(1)	Disclose in part
66	33(1)(b)	Access denied in full
67	23(1)	Disclose in part
68	23(1)	Disclose in part
69	23(1)	Disclose in part
70	23(1)	Disclose in part
71	Disclosed during review	
72	23(1)	Disclose in part
73	Disclosed during review	
74	None	Disclose in full
75	23(1)	Disclose in part
76	23(1)	Disclose in part
77	23(1)	Access denied in full
78	23(1)	Disclose in part
79	Disclosed during review	

Appendix 2: 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
 - (b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
 - (i) the Office of the Auditor General;
 - (ii) the Human Rights Commission;
 - (iii) the Office of the Information Commissioner;
 - (iv) the Office of the Ombudsman;
 - (v) the Department of Public Prosecutions . . . ;
 - (vi) the Attorney General’s Chambers;
 - (vii) the Department of Internal Audit.
- (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); or
 - (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—
- . . .
- (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. . . .

Information received in confidence

26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—

(a) information—

(i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and

(ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or

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

Ministerial responsibility

28 (1) Subject to subsection (2), a record is exempt from disclosure if it consists of information, the disclosure of which would undermine, or could reasonably be expected to undermine, individual ministerial responsibility, including free and frank discussion and advice between Ministers, or between Ministers and public officers, in the course of their public duties.

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

Deliberations of public authorities

29 (1) Subject to subsections (2) and (3), a record is exempt from disclosure if it consists of information, the disclosure of which would undermine, or could reasonably be expected to undermine, the deliberative process of a public authority, including free and frank discussion and provision of advice in the course of that process.

(2) Subsection (1) does not apply to information contained in a record that is—

(a) factual or statistical information;

(b) information resulting from an investigation or analysis of the performance, efficiency or effectiveness of a public authority in relation to its functions;

(c) information in the nature of a report, study or analysis of a scientific or technical expert; or

(d) information in the nature of the reasons of a public authority for making a particular decision.

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

Governor's responsibilities and communications with the United Kingdom

33 (1) Subject to subsection (2), a record is exempt from disclosure if—

(a) it contains information that relates to the responsibilities of the Governor under section 62 of the Bermuda Constitution Order 1968, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the effective conduct of public affairs; or

(b) it consists of communications between the Office of the Governor and departments of the Government of the United Kingdom relating to business of the Office of the Governor,

the disclosure of which would prejudice, or could reasonably be expected to prejudice, the effective conduct of public affairs.

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

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