

## Decision Notice

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**Decision 05/2021: Ministry of Legal Affairs and Constitutional Reform**

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**Report related to allegations of misconduct**

**Reference no: 20190625**

**Decision date: 23 July 2021**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Legal Affairs and Constitutional Reform Headquarters (**Ministry**) for reports on allegations of misconduct against the Director of Child and Family Services (**DCFS**). The Ministry relied on section 38 of the PATI Act to refuse to inform the Applicant of the existence or non-existence of any responsive record.

The Information Commissioner has annulled the Ministry's decisions relying on section 38 because the public interest requires the disclosure of the existence or non-existence of any responsive record. The Ministry is required to issue a new initial decision for item 1 of the PATI request.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 4 (application); section 21 (public interest test); and section 38 (non-disclosure of existence of a record).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

## Background

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1. On or around 10 August 2018, an advocate wrote to the then Minister of Social Development and Sports about allegations of misconduct against the staff members of the Department of Child and Family Services (**DCFS**)<sup>1</sup>. It was reported that the advocate's letter claimed that the Director of the DCFS (**Director**) failed to protect children in DCFS's care from allegedly abusive and negligent staff and unlawfully obstructed an independent social worker representing one of the youngsters in the role of a litigation guardian<sup>2</sup>. In the same month, the Internal Audit Department (**Internal Audit**) received a letter from the former Permanent Secretary of the Ministry of Social Development and Sports Headquarters outlining the allegations against the Director<sup>3</sup>. The Ministry of

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<sup>1</sup> Politica, 'Government goes silent on DCFS child abuse probe,' (30 September 2018), available at <https://politica.think.bm/2018/09/government-silent-child-abuse-probe/>.

<sup>2</sup> Royal Gazette, 'Maybury to be sued by clients,' (9 September 2018) available at [www.royalgazette.com/other/news/article/20180917/maybury-to-be-sued-by-clients/](http://www.royalgazette.com/other/news/article/20180917/maybury-to-be-sued-by-clients/).

<sup>3</sup> Decision 19/2019, *Department of Internal Audit*, para. 22.

Social Development and Sports Headquarters referred the matter under section 11(1) of the Internal Audit Act 2010 (**Internal Audit Act**)<sup>4</sup>.

2. On 23 August 2018, the Ministry of Social Development and Sports Headquarters (which was responsible for DCFS at the time) placed the Director on paid administrative leave, in response to the complaint<sup>5</sup>.
3. In September 2018, Internal Audit and the Permanent Secretary agreed to a Special Terms of Reference for Internal Audit's investigation<sup>6</sup>.
4. In November 2018, the Ministry of Social Development and Sports was disbanded. The Ministry of Legal Affairs and Constitutional Reform (**Ministry**, then known as the Ministry of Legal Affairs) assumed responsibility over DCFS<sup>7</sup>.
5. Internal Audit completed its investigation and issued a report on 14 December 2018 to the Permanent Secretary for the Ministry as well as the Head of the Public Service and the Secretary to the Cabinet<sup>8</sup>.
6. On 25 January 2019 the Ministry announced that, after an investigation, it was concluded that the allegations that the Director had not performed his role in accordance with the Ministry's policies and procedures on the care and safety of children in Residential Treatment Services and that the Director did not follow Financial Instructions were not substantiated. The Director returned to his post on 28 January 2019<sup>9</sup>.
7. On 30 January 2019, the Applicant filed a PATI request to the Ministry for a number of records relating to the Director and DCFS's acting appointments while the Director was on administrative leave. Relevant to this review is item 1 of the PATI request asking for a full report on allegations of misconduct against the Director "which was conducted by" the Ministry and Internal Audit<sup>10</sup>.

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<sup>4</sup> Decision 19/2019, Department of Internal Audit, para. 23.

<sup>5</sup> Government of Bermuda, Media Statement, 'Director of the Department of Child and Family Services Returns to Duty', (25 January 2019), available at [www.gov.bm/articles/director-department-child-and-family-services-returns-duty](http://www.gov.bm/articles/director-department-child-and-family-services-returns-duty).

<sup>6</sup> Decision 19/2019, Department of Internal Audit, para. 22.

<sup>7</sup> See Official Gazette Notice GN/0019/2018, available at [www.gov.bm/theofficialgazette/notices/gn00192018](http://www.gov.bm/theofficialgazette/notices/gn00192018).

<sup>8</sup> Decision 19/2019, Department of Internal Audit, para. 24.

<sup>9</sup> See note 5.

<sup>10</sup> Other parts of the PATI request asked for the Director's public service pay grade (item 2), the numbers of acting appointments made (item 3a) and the amount of money spent on the acting appointments while the substantive Director was on administrative leave (item 3b). The Applicant was satisfied with the Ministry's response to item 2. The Ministry transferred items 3a and 3b to the DCFS and the Applicant did not challenge the transfer decision.

8. The Ministry transferred 'a part of' item 1 to Internal Audit.
9. On 13 March 2019, the Ministry issued an initial decision on the remaining part of item 1, i.e., a "full report on allegations of misconduct against Alfred Maybury which was conducted by the Ministry". It relied on section 38 of the PATI Act and refused to disclose to the Applicant the existence or non-existence of any responsive record. The initial decision also referred to the exemptions in sections 26 (information received in confidence), 30 (operations of public authorities) and 34 (law enforcement).
10. Upon the Applicant's request, the Ministry conducted an internal review and issued a decision on 21 June 2019, upholding its initial decision refusing to disclose the existence or non-existence of any record responsive to item 1<sup>11</sup>.
11. The Applicant made a timely application for an independent review by the Information Commissioner.

## Investigation

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12. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
13. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Ministry to determine whether its reliance on section 38 was justified.
14. The Information Commissioner notified the Ministry of the Applicant's valid application on 8 July 2019.
15. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. The Ministry and Applicant were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The Ministry was further asked specific questions to justify its reliance on section 38 of the PATI Act. The Ministry and the Applicant both made submissions. The Information Commissioner also considered the submissions made by the Applicant in Decision 19/2019, Department of Internal Audit, where relevant.

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<sup>11</sup> The internal review decision was issued in response to the Information Commissioner's review no. 20190604, which was discussed in Decision 16/2019, Ministry of Legal Affairs.

16. In addition to arguing that the responsive record is or would be exempt under section 26, 30 and 34, the Ministry asserted in its submissions that the record falls, or would fall, outside the scope of the PATI Act, in accordance with section 4(1)(b)(vii).

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

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17. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the public authority and the Applicant. She is satisfied that no matter of relevance has been overlooked.

### ***Preliminary issue – section 4(1)(b)(vii)***

18. The PATI Act offers a framework that balances the need for confidentiality with the need to avoid unnecessary secrecy and provide access to the public to the greatest extent possible. This includes setting out categories of records that do not fall within the scope of the PATI Act (section 4(1)) and the grounds for exemption from public access in Part 4 of the PATI Act.
19. If a public authority considers that a record responsive to a PATI request falls within any provision in section 4(1) (and thus is outside the scope of the PATI Act), it need not consider whether the record is exempt under any provision in Part 4, which includes the provision on non-disclosure of a record's existence in section 38. A public authority needs to consider exemptions only if it is of the view that the record falls within the scope of the PATI Act.
20. In its submissions in this case, the Ministry referred to both sections 4 and 38 of the PATI Act. Specifically, the Ministry argued that a record responsive to item 1 does not, or would not, fall within the scope of the PATI Act. However, this assertion does not follow the framework provided in the PATI Act, as section 38 can only be applied to records held by the public authority, which, if they exist, would fall within the scope of the Act in the first place.
21. Adherence to the framework under the PATI Act is not simply a pedantic exercise. Section 12(2)(b) of the PATI Act requires public authorities to provide an accurate response to a PATI request, regardless of whether the requested records fall within or outside of the scope of the PATI Act. This requirement allows a requester and the public to obtain at least some information about the requested record (e.g., if it exists or is exempt) or the public authority (e.g., if it ordinarily holds the record), even when access to the content of the record itself cannot be provided. This is consistent with the

purpose of the PATI Act to give the public the right to obtain access to information held by public authorities to the greatest extent possible within the provisions of the Act.

22. In this case, the Ministry's failure to follow the PATI Act framework resulted in not only an inaccurate but also a confusing and somewhat ambiguous response. Its approach has resulted in an internal review decision that neither provides further clarity to the public about its process in addressing the allegations against the Director, nor avails the Ministry of the straightforward provisions of the PATI Act which ensure that certain records remain appropriately beyond the scope of the PATI Act or otherwise confidential.
23. In Decision 19/2019, Department of Internal Audit, the Information Commissioner has found that Internal Audit's report on the investigation falls outside the scope of the PATI Act by virtue of section 4(1)(b)(vii).
24. Given the above, when discussing the Ministry's reliance on section 38 below, this Decision does not consider the Ministry's assertion that the responsive record falls, or would fall, under section 4(1)(b) and therefore is, or would be, outside the reach of the PATI Act.

#### ***Non-disclosure of the existence of a record – section 38***

25. Public authorities are required to issue decisions in response to a PATI request. If the decisions deny access to the requested records, public authorities should give reasons for the refusal. Implied in these requirements is the public authorities' obligation to inform a requester whether the requested records exist or do not exist.
26. Section 38 of the PATI Act, however, allows public authorities not to disclose the existence or non-existence of a requested record. Public authorities should consider the following questions before appropriately relying on this provision<sup>12</sup>:
  - [1] If the record exists or were to exist, would it fall under any of the exemptions in Part 4 of the PATI Act?
  - [2] If so, is disclosure of the existence or non-existence of the record in the public interest?
27. Public authorities have the burden to show the Information Commissioner that, on the balance of probabilities, their reliance on section 38 is justified.

#### ***Public authority's submissions***

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<sup>12</sup> Decision 08/2020, Bermuda Monetary Authority, para. 39.

28. Given the Ministry's reliance on section 38(1), the summary of the Ministry's submissions in this Decision is curtailed to avoid any prejudice to its position that the existence or non-existence of a responsive record should not be disclosed.
29. The Ministry submitted that the requested record is or would be exempt under sections 26, 30(1) and 34(1)(a)-(d) of the PATI Act.
30. The Ministry referred to documentation held by it with respect to the investigation and findings records conducted by Internal Audit which, by their nature, were subsequently affirmed as excluded from the PATI Act by the Information Commissioner's Decision 19/2019, Department of Internal Audit.
31. While it did not cite the specific exemption in section 26 being relied upon, the Ministry's initial decision used the language in the exemption in section 26(1)(a). The Ministry's submission to the ICO referred to the language in the two exemptions in section 26(1). The Ministry also stated that records obtained or created by the Ministry in response to a review by Internal Audit are highly confidential or secret in nature. Disclosure would therefore breach the duty of confidentiality in section 13 of the Internal Audit Act. Disclosure would also undermine the confidentiality of Internal Audit's functions, as it would undermine Internal Audit's ability to obtain support for its investigations by auditees in the future and the full candid disclosure by persons needing to provide evidentiary information to support its functions.
32. The Ministry also submitted that disclosure would prejudice the effectiveness of investigations, inquiries or audits conducted by it or on its behalf. It therefore submitted, albeit without citing the specific provision in the PATI Act, that a record responsive to item 1 would be exempt under section 30(1)(a). The responsive record exists, or would exist, only to reply to and support the statutory functions of Internal Audit. Disclosure would undermine the effectiveness of investigations, inquiries and audits informing an Internal Audit investigation or audit.
33. The Ministry did not cite section 30(1)(b), but asserted that disclosure would make the Ministry unable to effectively manage public officers, because the subject of the request relates to allegations into the conduct of a public officer in the performance of their public functions.
34. The Ministry did not explain why it considers the responsive record falls, or would fall, under any exemption in sections 34(1)(a)-(d).
35. The Ministry submitted there is no public interest in disclosure of a record which is created in support of the exclusive statutory functions of Internal Audit. It submitted

that the curiosity of the public or the media does not outweigh the integrity of the Internal Audit regime.

36. The Ministry also asserted that to reveal the existence or non-existence of any responsive record, on its own, would add unnecessary confusion to misinformation which is already present in the media and public domain. The Ministry added that there has been misinformation and assertions made by members of the public and others about the underlying action taken by the Ministry on this matter and, consequently, what records the Ministry might have created or hold. In its internal review decision, the Ministry asserted that the media statements to which the Applicant was referring did not confirm the existence of the requested record.

#### *Applicant's submissions*

37. The Applicant pointed to various statements by the Government referring to the investigations launched into DCFS in 2018, including a statement by the Premier to the Parliament on 14 December 2018 that “investigations into various matters at DCFS are ongoing” and “there are two separate lines – one with [Internal Audit] and one with the ministry itself”<sup>13</sup>.
38. The Applicant also referred to an explanation from a Ministry spokesperson (dated 26 February 2019, after the PATI request), shared by the Department of Communications, stating that a part of the investigation on the complaints against the Director was carried out by Internal Audit, while the other part of the investigation was carried out by the Permanent Secretary responsible for the DCFS. The explanation further stated that the Permanent Secretary is the only recipient of Internal Audit’s report. The Applicant explained they provided the ICO with a copy of the relevant statement from the Department of Communications to add some clarity on the issue of the number of inquiries that took place within the Government regarding the Director.
39. The Applicant argued that it is in the public interest to clear up any misinformation or confusion in the public domain or media about the significant investigation into the head of Bermuda’s child protection unit. A confirmation that a report was produced by the Ministry would certainly help to give the public confidence that allegations of wrongdoing within the civil service are thoroughly and properly investigated, particularly in circumstances where the welfare of children is involved.
40. The Applicant also explained their expectation that the Information Commissioner’s review would help to clarify that records held by public authorities cannot be excluded

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<sup>13</sup> Official Hansard Report, 14 December 2018, page 431, available at <http://parliament.bm/admin/uploads/hansards/eaf0f1f9cea5d1166fd8901ab8d7a2dc.pdf>.



from the PATI Act simply because they were passed to Internal Audit and subsumed into a report compiled by Internal Audit.

41. The Applicant provided the ICO with two statements (dated 6 September 2018<sup>14</sup> and 25 January 2019<sup>15</sup>), in which the Government appeared to acknowledge the existence of an investigation by the Ministry.

### *Discussion*

42. When section 38(1) is under consideration, the Information Commissioner must ensure that her decision does not confirm one way or another whether the requested records actually exist. This means that she is unable to comment in any detail on the Ministry's reliance on the exemptions or on any other matters which would have the effect of indicating whether the requested records actually exist. Accordingly, the extent of the analysis which can be given is severely limited.
43. Public authorities relying on section 38(1) or most of the exemptions in Part 4 of the PATI Act have the burden to show that, on the balance of probabilities, their reliance on the provision is justified. In this case, the Information Commissioner has carefully considered the Ministry's arguments and is not persuaded by its explanations to support its assertion that the record is or would be exempt in its entirety under sections 26, 30 or 34(1)(a)-(d). Even if this assertion were accepted, the public interest would be better served, on balance, by disclosure of the existence or non-existence of the record instead of non-disclosure.
44. In relation to the public interest, the Ministry was correct to state that the public interest test in the PATI Act is not guided by the curiosity of the public or the media. The Information Commissioner disagrees, however, with the view that disclosure of the existence or non-existence of the record in question would only benefit the curiosity of the public or the media. There are strong factors present in support of the position that disclosure of the existence or non-existence of the record would serve the public interest better than non-disclosure.
45. Item 1 of the PATI request seeks a report on the investigation conducted about allegations against the Director, who is the most senior public officer within the DCFS. The Director is entrusted by law with important responsibilities relating to the welfare of children, one of the most vulnerable populations, in Bermuda. These responsibilities include arranging the investigation of a child's need for protection, care or supervision;

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<sup>14</sup> Email from Ministry of Social Development to Applicant, dated 6 September 2018, on file.

<sup>15</sup> See note 5.

arranging the delivery of physical and psychosocial assistance to children falling within certain categories, such as those who might be victims of sexual violence; and advising the Minister on matters relating to child care<sup>16</sup>.

46. The Ministry asserted there has been misinformation in the public on the underlying actions it took in relation to the allegations made against the Director. Despite this, the Ministry has not specified, either during or outside this review, what the misinformation was. Neither has the Ministry provided any clarification to correct the misinformation, even though this PATI request presented the Ministry with an opportunity to clarify the misinformation, if any, as well as to explain its general process when receiving complaints from members of the public about a senior department staff such as the Director.
47. The then Minister of Social Development and Sports' interview with the media revealed that the Ministry was conducting an investigation to prove or disprove the allegations against the DCFS's staff members, including the Director. The then Minister suggested that the Ministry was looking for an independent person to conduct the investigation.
48. In its response to the Applicant's query outside the PATI process on 6 September 2018, the Ministry confirmed that an investigation had been launched to investigate the allegations. Similarly, separate to the PATI process, the Ministry informed the Applicant on 27 February 2019 (after the PATI request was made) that a part of the investigation against the Director was done by Internal Audit and the other part was done by the Ministry.
49. This statement repeated what the Premier stated in the Parliament on 14 December 2018, as pointed out by the Applicant in paragraph 37 above.
50. These public statements appear to be in conflict with the Ministry's submission to the ICO that a review into allegations of misconduct was not a part of any separate disciplinary process at the Ministry. The Ministry's 25 January 2019 statement is particularly confusing because it refers to "the investigation" and does not acknowledge the different investigations and their separate processes. Similarly, in her statement in the Senate on 12 June 2019, the Minister for Legal Affairs seemed to refer to a single report, i.e., "*the report* pertaining to the investigation into" DCFS<sup>17</sup>. These references to a single investigation and report seem to conflate the outcomes of a number of separate

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<sup>16</sup> Section 9 of the Children Act 1998.

<sup>17</sup> Official Hansard Report, 12 June 2019, page 527, available at <http://parliament.bm/admin/uploads/hansards/75772339d304e5eaf04433c9707f4457.pdf>.

investigations. There may well be an explanation for the apparent confusion; there is a public interest in clearing the matter up.

51. At the time of the request on 30 January 2019, the public was already aware of the general subject of the allegations made against the Director<sup>18</sup>. Given they were related to the wellbeing of children as a vulnerable population and were made against the senior officer responsible for their wellbeing, the allegations should not be taken lightly. The allegations were also serious in nature, as they were reported to include concerns about doctored documents, incomplete files and failures to report child abuse and negligence complaints to the courts or the police<sup>19</sup>.
52. The Information Commissioner agrees with the Applicant that there is a value in confirming whether the responsive report exists. While disclosure of the existence or non-existence of the report, on its own, does not necessarily inform the public whether the allegations were thoroughly and properly investigated, it would, at the minimum, inform the public of whether the Ministry's action (if any) in response to the allegations was concluded and whether the outcome was documented. Keeping the existence or non-existence of the report confidential from the public does not allow the public to hold the Ministry accountable. Without knowing the existence or non-existence of the report, the public is unable to verify whether the Ministry conducted an investigation as the Premier and the then Minister of Social Development and Sports initially claimed.
53. Similarly, if the report does not exist, disclosure of its non-existence would not necessarily mean that the Ministry did not take any action in response to the allegations. There might be a reasonable explanation as to why no report on the Director was produced, despite the Ministry's actions. But this was never publicly explained, leaving the Applicant and the public with a limited understanding of the process and decisions of the Ministry on the relevant matter.
54. Apart from potential confusion, the Ministry has not identified what harms, if any, would be caused by disclosure of the existence or non-existence the report.
55. Further, potential confusion on its own is not a sufficient justification to withhold information from the public, as it is always open to public authorities to give additional explanation to provide context and clarity. Disclosure of the existence or non-existence of the report will go some way towards providing this and will give the Ministry an opportunity to inform the public about its process. The question of

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<sup>18</sup> See note 5.

<sup>19</sup> Dismont, Saul, 'Lost in the Triangle', *Family Affairs* (Spring 2019), p. 56, available at [www.law.bm/saul-dismonts-article-in-family-affairs-spring-2019/](http://www.law.bm/saul-dismonts-article-in-family-affairs-spring-2019/).

whether all or parts of the content of any report are exempt from release is an entirely separate matter for the Ministry.

56. Given the factors outlined above, the Information Commissioner is not satisfied that the Ministry's reliance on section 38 of the PATI Act was justified. The public interest requires the Ministry to disclose the existence or non-existence of the record responsive to item 1 of the PATI request.

### ***Conclusion***

57. The Information Commissioner finds that the Ministry's reliance on section 38(1) to refuse to disclose the existence or non-existence of the requested record was not justified.

## Decision

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The Information Commissioner finds that the Ministry of Legal Affairs and Constitutional Reform Headquarters (**Ministry**) was not justified in refusing to disclose the existence or non-existence of any record responsive to item 1 of the PATI request.

In accordance with section 48 of the PATI Act, the Information Commissioner annuls the decisions by the Ministry for item 1 of the PATI request and requires the Ministry to issue a new initial decision to item 1 in accordance with the provisions of the PATI Act, as directed by this Decision and the accompanying Order on or before **Friday, 3 September 2021**.

## Judicial Review

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The Applicant, the Ministry of Legal Affairs and Constitutional Reform Headquarters or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

## Enforcement

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This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Ministry of Legal Affairs and Constitutional Reform Headquarters fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez  
Information Commissioner  
23 July 2021

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Application

4 (1) Subject to subsection (2), the Act does not apply to—

...

(b) records obtained or created by any of the following public authorities in the course of carrying out their functions:

...

(vii) the Department of Audit.

...

(2) The reference to records in subsection (1) does not include records relating to the general administration of—

...

(b) any public authority referred to in subsection (1)(b).

...

#### Public interest test

21 For the purposes of [Part 4], 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.

#### Non-disclosure of existence of a record

38 (1) A public authority may refuse to disclose whether a record exists if the record itself, if it exists or were to exist, is or would be an exempt record.

(2) The existence or non-existence of a record shall be disclosed if disclosure of it is in the public interest.

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