

Decision Notice

Decision 34/2024: Ministry of Health Headquarters

Records on BPMS, InnoFund, i3 and Fastpass

Reference no: 2021024

Decision date: 29 November 2024

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Health Headquarters (**Ministry Headquarters**) for records related to certain technology companies and a specific project. The Ministry Headquarters denied access to the responsive records on the basis that they were exempt under sections 25(1)(d) (prejudice to negotiations) and 34(1)(c) (prejudice to fair trial or impartial adjudication) of the PATI Act.

The Information Commissioner has concluded that the Ministry Headquarters was justified to refuse access to certain records or parts of records under the exemption in section 25(1)(d), but that the Ministry Headquarters was not justified to refuse access to the remainder of the records or parts of records under section 34(1)(c). On her own accord, the Information Commissioner has also found that certain parts of the records were exempt as personal information under section 23(1).

The Information Commissioner has ordered the Ministry Headquarters to disclose certain records, in full or in part, in accordance with this Decision on or before **Friday, 17 January 2025**.

Relevant statutory provisions

Public Access to Information Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 25(1)(d) (prejudice to negotiations); section 34(1)(c) (prejudice to fair trial or impartial adjudication).

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

Background

1. In 2021, the Government of Bermuda (**Government**) initiated a private-public partnership with InnoFund Limited (**InnoFund**) to enable the Government to digitalise its various services as well as attract and support start-ups as they tested their products on island. To fund this initiative, on 18 June 2021, the Government provided a letter of comfort to Clarien Bank on behalf of InnoFund supporting a \$2.5 million term loan facility. Sometime in December 2022, the Government paid \$2,418,943 to Clarien Bank in settlement of the balance that was outstanding on the loan facility, as a result of InnoFund's default on the loan. An additional \$3,228 in late payment penalties was paid

to the bank in January 2023, to fully absolve the Government's responsibility as the guarantor on the loan facility.¹

2. On 16 December 2022, the Applicant made a PATI request to the Ministry of Health Headquarters (**Ministry Headquarters**), asking for the Ministry Headquarters' correspondence, from 2019 to that date, that related to InnoFund, InnoFund Innovation Incubator Limited (**i3**), Bermuda Portal Mobile Software Limited (**BPMS**), and a port-of-entry software called Fastpass. The request further stated that the correspondence should include, but not be limited to, e-mails, faxes, WhatsApp messages, letters, as well as minutes of meetings—in-person or virtual—and of telephone calls. The PATI request also asked for copies of any documents, such as memoranda of understanding (**MoUs**) and agreements, as they related to BPMS, InnoFund, i3 and Fastpass.
3. On 10 March 2023, the Ministry Headquarters issued an initial decision, after it extended the statutory timeline to respond to the PATI request. It explained that the PATI request was denied in full under section 4(1)(a) of the PATI Act, because the records related to the exercise of judicial or quasi-judicial functions of the court.
4. On 23 March 2023, the Applicant asked for an internal review. On 31 July 2023, the Ministry Headquarters issued an internal review decision, denying access to the records but varying the grounds for denial to sections 25(1)(d) (prejudice to negotiations) and 34(1)(c) (prejudice to fair trial or impartial adjudication).
5. On 9 August 2023, the Applicant made a timely application for an independent review by the Information Commissioner, challenging the Ministry Headquarters' reliance on sections 25(1)(d) and 34(1)(c).

Investigation

6. The Information Commissioner's Office (**ICO**) accepted the application as valid on 14 June 2023, on the basis that the Applicant had made a PATI request to a public authority and had asked that public authority for an internal review. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review.

¹ See Government of Bermuda, [Financial Statements of the Consolidated Fund March 31, 2023](#), page 60, as tabled in the House of Assembly on 15 March 2024 ([Official Hansard Report](#), page 1077).

7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application because examining the withheld records was required to evaluate the public authority's reliance on the exemptions.
8. The ICO notified the Ministry Headquarters of the valid application on 21 August 2023 and asked for the responsive records. The Ministry Headquarters submitted its records to the ICO on 6 September 2023. After duplicates were removed and the responsive records were reorganised and numbered, there were 98 records in total for the Information Commissioner to consider in this Decision, being records 2, 14-19, 21-26, 28-31, 33-35, 43, 44, 49-52, 54, 56, 58, 62-66, 68, 76-78, 81-84, 86, 91, 98, 100, 105, 107-109, 114, 115, 119, 124, 125, 130, 131, 135, 137, 141, 145, 147, 150, 162, 166, 168, 173-176, 181 and 186 as well as parts of records² 1, 4, 5, 7, 12, 57, 70, 110, 116, 120, 122, 126, 128, 133, 134, 138, 144, 148, 153, 157, 159, 163, 165, 169, 171 and 182.
9. As required by section 47(4) of the PATI Act, the ICO invited the parties to make representations before the Information Commissioner moved to a decision. The Ministry Headquarters confirmed on 21 May 2024 that it did not intend to make submissions, relying on its initial and internal review decisions. The Applicant confirmed that they relied on their submissions made in related review no. 2021020, which has been decided in Decision 33/2024, Information and Digital Technologies Department. ResPartner and an employee, as two of the Third Parties, confirmed that they had no objection to disclosure of records containing their information. BPMS, as another Third Party, also confirmed on 27 June 2024 that it had no objection to disclosure of information related to it in the records considered in this Decision. Finally, an individual Third Party objected to disclosure of any information in the records related to them as being exempt personal information under section 23 of the PATI Act.

Information Commissioner's analysis and findings

10. The Information Commissioner has considered all relevant evidence, being satisfied that no matter of relevance has been overlooked.
11. 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

² These records contained information that was not responsive to the PATI request and thus removed from the final copy of records being assessed by the Information Commissioner in this Decision.

discussion of the withheld records. As a result, the analysis below cannot be as detailed as otherwise preferred.

Prejudice to fair trial or impartial adjudication – section 34(1)(c)

12. A public authority may rely on section 34(1)(c) to deny access to a public record where disclosure would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case. This exemption aims to prevent the release of records that could result in unfairness in the conduct of a trial or adjudication. It safeguards the integrity of the court, or other adjudicating body, and protects a person's right to a fair trial.
13. As explained in [Decision 28/2022, Cabinet Office](#), a public authority applying section 34(1)(c) must first establish that the record relates to the trial of a person or adjudication of a particular case, which is either a current legal proceeding or one contemplated in future.³ When identifying the trial or adjudication, the public authority may need to specify the parties to the proceeding, the offence or cause of action as well as the relevance of the record to the proceeding. The public authority also must indicate the proceeding's status at the time of the PATI request (or internal review), e.g., whether the trial or adjudication was ongoing, concluded or anticipated.
14. The PATI Act and the Interpretation Act do not define 'fair trial' or 'impartial adjudication'. However, the Bermuda Court has accepted that section 6(1) of the Bermuda Constitution derives from Article 6(1) of the European Convention on Human Rights.⁴ In the context of civil proceedings, fair trial encompasses a wide range of both institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning of judicial decisions.⁵
15. The Bermuda Constitution requires any court prescribed by law to determine the existence or extent of any civil right or obligation, or of any criminal charges, to be independent and impartial. Citing a UK Court judgment, Justice Subair Williams stated:

All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear

³ See [Decision 28/2022, Cabinet Office](#), at paragraph 55.

⁴ See [Tafari Wilson v Fiona Miller](#) [2018] SC (Bda) 6 App (23 January 2018), at paragraph 16.

⁵ See European Court of Human Rights, [Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#) (31 August 2022).

or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.⁶

16. A public authority relying on section 34(1)(c) must show how disclosure could cause prejudice to a fair trial of a person or impartial adjudication of a case. The likelihood of harm required is that prejudicing the proceeding's fairness or the impartial adjudication 'could reasonably be expected to' occur. This is a lesser likelihood of harm compared to 'would', which means a high probability that the harm will occur. The mere fact that the records may relate to the proceeding does not, of itself, establish a link between disclosure and prejudice to the fairness or impartiality of the trial or adjudication.
17. The exceptions and public interest test that apply to section 34 differ from all other harm-based exemptions in the PATI Act. A public authority must consider the public interest test only when a record falls within a category listed in section 34(2)(a) as an exception. If the record does not fall within a section 34(2)(a) exception, the public interest test does not apply.
18. Where disclosure of a record falling within section 34(2)(a) would be in the public interest, the exemption does not apply. Unless another exemption applies, the record thus must be disclosed as it properly falls within an exception to section 34. If, however, the public authority decides the public interest weighs against disclosing a record falling within section 34(2)(a), the exception no longer applies, and the exemption may justify withholding the record.
19. In sum, when applying the exemption in section 34(1)(c), a public authority must ask:⁷
 - [1] What is the relevant trial or adjudication?
 - [2] How can disclosure prejudice the fairness of the trial or impartiality of the adjudication?
 - [3] Can this prejudice reasonably be expected to occur?

⁶ See [Locabail \(UK\) Ltd v Bayfield Properties Ltd](#) [1999] EWCA Civ 3004 (17 November 1999), at paragraph 2, as quoted in [Ewart Frederick Winslow Brown v Director of Public Prosecutions, Attorney General, Deputy Governor](#) [2021] SC (Bda) 74 Civ (10 September 2021), at paragraph 69.

⁷ See [Decision 28/2022, Cabinet Office](#), at paragraph 66.

[4] Does the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?

20. 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 its reliance on section 34(1)(c) to deny access to the records.

Public authority's submissions

21. The Ministry Headquarters did not make a submission to the ICO. Its initial and internal review decisions informed the Applicant that the withheld responsive records were related to an ongoing legal action between BPMS, InnoFund, i3 and the Government.

Applicant's submissions

22. The Applicant submitted that, because the legal proceedings referenced by the Ministry Headquarters were civil proceedings, no 'fair trial of a person' existed for consideration. The Applicant submitted the writ relevant to the legal proceedings, dated 6 December 2022, to the ICO. The Applicant asserted that the Ministry Headquarters could therefore only rely on the exemption on the basis that disclosure could have led to the impartial adjudication of a particular case. The Applicant asserted that because the civil proceedings would involve a judge sitting alone (i.e., there was no jury) and judges were considered beyond influence, disclosure could not have reasonably been expected to result in the improper adjudication of the case.
23. The Applicant accepted that they were unable to say what evidence would be presented by the parties at any hearing, though maintained it was fair to assume that the parties could have relied on information at their disposal, which would include correspondence responsive to their PATI request. The Applicant believed that, at a minimum, the parties could have presented information for the judge to decide on whether it may be submitted as evidence. The Applicant submitted the writ relevant to the legal proceedings to the ICO.
24. The Applicant pointed out that section 34(2) states that the exemption would not apply to a record if its disclosure was in the public interest. The Applicant submitted that the balance of the public interest required disclosure. They explained that the companies referred to in their PATI request had an agreement with the Government, which included a \$2.5 million guarantee by the Government of a loan on behalf of InnoFund. The Government later had to repay the loan. The Applicant also highlighted that the dispute between BPMS and the Government led to the suspension of operations at i3, an innovation incubator, which was designed to help young businesses flourish. The

Applicant believed that this was arguably a welcome boost to Bermuda’s offerings and economic activity. The Applicant maintained that, given the guarantee was used to repay the company’s loan and the loss of the technology incubator for start-ups, the public interest was balanced in favour of disclosure. The Applicant also referred to a news article with more background information.

Discussion

25. The Information Commissioner considers the Ministry Headquarters’ reliance on section 34(1)(c) to withhold the records.

[1] What was the relevant trial or adjudication?

26. Based on the writ submitted by the Applicant, the relevant trial or adjudication was Civil Jurisdiction 2022: No. 381, between BPMS, InnoFund and i3 as the plaintiffs and the Government as the defendant.

[2] How could disclosure have prejudiced the fairness of the trial or impartiality of the adjudication?

27. Before addressing this question, the Information Commissioner turns to the Applicant’s submission that, because the proceedings between the parties were civil proceedings, part of the exemption addressing the “fair trial of a person” was inapplicable. As decided in [Decision 23/2023, Office of the Tax Commissioner](#), fair trial requirements also apply to civil proceedings; this “encompasses a wide range of both institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning of judicial decisions.”⁸ Further, in accordance with section 7 of the [Interpretation Act 1951](#), the Government as the defendant in the identified adjudication was a legal “person”. Thus, the potential prejudice caused by disclosure both to the fairness of the proceedings and the impartiality of the adjudication is considered.

28. The following records or parts of records were created by BPMS, InnoFund or i3, were already received by them, or contained information that was known to one of those entities or publicly available:

a. records 2, 15, 28, 30, 44, 49-51, 56, 62, 65, 66, 68, 82-84, 86, 108, 131 and 186; and

⁸ See European Court of Human Rights, [Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#) (31 August 2022) as cited in [Decision 23/2023, Office of the Tax Commissioner](#), paragraph 22.

- b. parts of records 1, 7, 12, 14, 19, 21, 23, 33, 43, 58, 64, 70, 76-78, 81, 98, 105, 110, 114, 119, 120, 128, 147 and 157.
29. In the absence of further explanation from the Ministry Headquarters on how public disclosure of information already known to the parties could have prejudiced the fairness or impartiality of the proceedings, section 34(1)(c) is not considered further for these records or parts of records.
30. Some of the records or parts of records also could not have prejudiced the fair trial or impartiality of the adjudication because they contained information that was innocuous and administrative in nature only. The Ministry Headquarters' reliance on the exemption for parts of records 1, 4, 7, 12, 14, 17, 23, 26, 57, 58, 70, 76, 77, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169, 171 and 182 is not considered further for this reason.
31. The remaining withheld records consisted of internal government correspondence related to BPMS and Fastpass with information that was more than likely unknown to BPMS and InnoFund. This would not necessarily mean, however, that the disclosure of the records could have prejudiced the fairness or impartiality of the legal proceedings. The content of each record must be considered against the nature of and issues or claims involved in the proceeding.
32. According to the writ of summons, the legal proceedings were brought by BPMS, InnoFund and i3, who maintained that the Government was in material breach of their service agreement for specific reasons as detailed in the writ.
33. The Ministry Headquarters has not explained to the ICO how disclosure of the internal government correspondence could have prejudiced the fairness of the trial or impartiality of the adjudication. It is not the role of the Information Commissioner to make such arguments on behalf of a public authority. In the absence of explanation from the Ministry Headquarters, it has not justified withholding under section 34(1)(c) the remaining records or parts of records. Section 34(1)(c) is not considered further.

Conclusion

34. The Information Commissioner is not satisfied that the Ministry Headquarters was justified in relying on section 34(1)(c) for any records listed at paragraph 8.

Prejudice to negotiations – section 25(1)(d)

35. Section 25(1)(d) allows public authority to refuse access to a record when disclosure would prejudice, or could reasonably be expected to prejudice, the conduct or outcome

of contractual or other negotiations of any person to whom the information relates. This exemption is subject to exceptions in section 25(2), which set out circumstances when the exemption cannot apply, including where the person to whom the information relates consents in writing to its disclosure.

36. The exemption in section 25(1)(d) generally applies to ongoing negotiations. If the negotiations are finished, the responsive records should be disclosed unless there is a real and significant risk to identifiable future negotiations.
37. Prejudice in this exemption should be understood as an actual, real and significant harm. It implies a negative or detrimental effect. It cannot be a speculative or hypothetical harm.
38. The prejudice required for this exemption is 'would prejudice' or 'could reasonably be expected to prejudice'. 'Would' prejudice means there is a high probability that the harm anticipated can occur. 'Could reasonably be expected to' prejudice is a lesser likelihood of harm. Reasonable refers to what a reasonable person would expect considering all the circumstances of the case.
39. In sum, when applying the exemption in section 25(1)(d), a public authority must ask:
 - [1] Does any of the exceptions in section 25(2) apply?
 - [2] Who is the person to whom the information relates?
 - [3] What are the negotiations of this person that are of concern?
 - [4] What is the specific prejudice to either the conduct or outcome that is of concern?
 - [5] How can disclosure cause that prejudice, describing the circumstances or events that can lead to the prejudice and ensuring that these are not speculative?
 - [6] Can it be demonstrated that the prejudice could reasonably be expected to occur under the circumstances?
 - [7] If the exemption was engaged, did the balance of the public interest still require disclosure?
40. Finally, a public authority or third party bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 25(1)(d) to deny access to the records.

Public authority's submissions

41. The Ministry Headquarters did not make a separate submission during the Information Commissioner's review. Its internal review decision explained that the records related to an ongoing litigation matter arising from a dispute between the named parties and the Government.

Applicant's submissions

42. The Applicant's public interest submission has been set out in paragraph 24.

Discussion

43. The Information Commissioner considers the Ministry Headquarters' reliance on section 25(1)(d) to withhold the records.

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

44. Most of the records in paragraph 8 contained information about BPMS, and some included information about resPartner. Both companies have consented in writing to the ICO to the disclosure of their information in the relevant records. Their information in most of those records, however, was inextricably intertwined with the Ministry Headquarters' information. The exception in section 25(2)(b) was inapplicable to the intertwined information.
45. Thus, section 25(2)(b) only applied to BPMS's information in records 2, 44, 66, 68 and 186 as well as parts of records 1, 84, 86, 98 and 147, which could be separated. The Ministry Headquarters' reliance on section 25(1)(d) is not considered further for these records or parts of records.
46. No other exception in section 25(2) was relevant.

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

47. This question is considered for the remaining records 14-19, 21-26, 28-31, 33-35, 43, 49, 50-52, 54, 56, 58, 62-65, 76-78, 81-83, 91, 100, 105, 107-109, 114, 115, 119, 124, 125, 130, 131, 135, 137, 141, 145, 150, 162, 166, 168, 173-176, 181 and 182 as well as parts of records 1, 4, 5, 7, 12, 57, 70, 84, 86, 98, 110, 116, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 159, 157, 159, 163, 165, 169 and 171.
48. The information in the remaining records or parts of records was about various entities, but mainly the Ministry Headquarters, BPMS and resPartner.

[3] What were the negotiations of this person that were of concern?

49. At the time of the internal review decision, the dispute between the parties was ongoing—and it remains pending today. The Information Commissioner takes note of the details of specific negotiations related to the dispute.

[4] What was the specific prejudice to either the conduct or outcome that was of concern?

50. Section 53(2) of the PATI Act prevents detailed discussion of the prejudice that could have occurred, as stated in paragraph 11 above. Having considered in detail the nature of the negotiations, the interests of the various parties and the impact of disclosures, the prejudice to the conduct or outcome of the negotiations would have had a negative impact on the efficiency by which the negotiations were being conducted or a negative impact on the outcome for one or more of the parties.

[5] How could disclosure have caused that prejudice?

[6] Can it be demonstrated that the prejudice could reasonably have been expected to occur under the circumstances?

51. Having carefully reviewed the withheld records and assessed them in light of the nature and circumstances of the negotiations, the Information Commissioner is satisfied that disclosure of the following records could reasonably have been expected to result in the identified prejudice and was not speculative: records 5, 16, 18, 22, 24, 25, 29, 31, 34, 35, 52, 54, 63, 64, 91, 100, 107, 109, 115, 124, 125, 135, 137, 141, 145, 150, 162, 166, 168, 173-176 and 181 as well as parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 78, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171.

52. In contrast, the following records contained information already known to all the parties or that was innocuous or administrative in nature. The disclosure of this information could not reasonably have been expected to prejudice the outcome or conduct of the identified negotiations: records 15, 28, 30, 49, 50, 51, 56, 62, 65, 76, 77, 81, 82, 83, 131 and 182 as well as parts of records 1, 4, 7, 12, 14, 17, 21, 23, 26, 33, 43, 57, 58, 70, 78, 84, 86, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 131, 133, 134, 138, 144, 148, 153, 157, 159, 163, 165, 169, 171 and 182. Section 25(1)(d) is not considered further for these records or parts of records.

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

53. In favour of disclosure, the Applicant correctly pointed out that limited information has been made available by the Government to the public on Fastpass, how this project started, how the Government entered into MoUs and agreements related to BPMS, InnoFund and i3, why Fastpass had not been implemented, and why BPMS, InnoFund and i3 were pursuing legal action against the Government. The Information Commissioner agrees with the Applicant that, given the \$2.5 million guarantee that was repaid using money from the public purse and given the impact of the incubator programme being discontinued, a strong public interest existed in greater transparency.
54. Further, parts of record 4 provided some insight into a decision that was subject to public speculation, but for which the reasoning has not been provided. Disclosure of part of this record will provide the public with a greater understanding of the reasons that a particular conclusion was reached.
55. At the same time, apart from disclosure of parts of record 4, countervailing public interests favoured maintaining the exemption for all other records at that specific time. The public has a strong interest in the efficient resolution of disputes between private entities and public authorities, including resolution that lessens the negative impact upon the public purse. Although this is a compelling public interest under the present circumstances, this public interest concern may not persist once the pending dispute is resolved. Further, the public interest in greater transparency concerning the Fastpass project and BPMS may be satisfied by future proactive disclosures or new PATI requests once the time-sensitive public interest surrounding effective resolutions has ceased.
56. Accordingly, the balance of the public interest favoured maintaining the exemption for records 5, 16, 18, 22, 24, 25, 29, 31, 34, 35, 52, 54, 63, 64, 91, 100, 107, 109, 115, 124, 125, 130, 135, 137, 141, 145, 150, 162, 166, 168, 173-176 and 181 as well as the relevant parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 78, 81, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171, but favoured the disclosure of parts of record 4.

Conclusion

57. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 25(1)(d) to withhold records 5, 16, 18, 22, 24, 25, 29, 31, 34, 35, 52, 54, 63, 64, 91, 100, 107, 109, 115, 124, 125, 130, 135, 137, 141, 145, 150, 162, 166, 168, 173-176 and 181 as well as some or all of the remaining parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 78, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126,

128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171. The Ministry Headquarters was not justified in doing so for records 2, 15, 28, 30, 44, 49, 50, 51, 56, 62, 65, 66, 68, 76, 77, 81-84, 86, 131, 182 and 186 as well as the remaining parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 78, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171. Where the Ministry Headquarters' decision has not been justified, the Information Commissioner applies the personal information exemption as appropriate.

Personal information – section 23

58. Under section 23(1) of the PATI Act, public authorities may deny public access to records or parts of records which consist of personal information. Section 24(1) broadly defines 'personal information' as information recorded in any form about an identifiable individual.
59. Certain information about identifiable individuals is excluded from the definition of 'personal information' in the PATI Act, in accordance with section 24(2). For example, section 24(2) excludes certain information about contractors performing services for a public authority, or information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority.
60. The exemption in section 23(1) also does not apply to the limited circumstances set out in subsection (2). It does not apply, for example, if "the information that was given to the public authority concerned by the individual to whom it relates and the individual was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public" (see subsection (2)(d)).
61. The personal information exemption is subject to the public interest test. Records which are found to be exempt under section 23(1) would still have to be disclosed, if the public interest would, on balance, be better served by disclosure instead of non-disclosure. In considering the public interest test for disclosure of personal information, the following factors have to be taken into consideration⁹:
 - a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations.

⁹ [Decision 02/2019](#), [Office of the Governor](#), paragraph 51.

- b. Whether disclosure would be fair to the individual under all of the circumstances. Evaluating the fairness of any disclosure may include consideration of the following:
 - i. Whether sensitive personal information was involved?
 - ii. What would be the consequences upon the individual of disclosure?
 - iii. What are the reasonable expectations of privacy of a person in the individual's position?
 - c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.
62. In sum, as the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), public authorities must consider the following questions before denying public access to records under the personal information exemption¹⁰:
- [1] Whether the records consisted of information about an identifiable individual?
 - [2] Whether the information fell within any of the exclusions to the definition of personal information (section 24(2))?
 - [3] Whether any of the exceptions to the exemption in section 23(2) applied to the records?
 - [4] If the exemption for personal information in section 23(1) was engaged, whether the balance of the public interest required disclosure?

63. Given the importance of the protection of personal information and privacy, particularly in a small jurisdiction such as Bermuda, the Information Commissioner may consider the personal information exemption on her own accord, such as in this case.

Third party's submissions

64. One Third Party, ResQuest's employee, Denis Pitcher, specifically made submissions requesting that records concerning him or his companies be disclosed. This was express, written consent to disclose his personal information in the remaining records.
65. Mr. Pitcher submitted that he was made out to be a villain in the public eye through rampant speculation that he had abused his position as an advisor to the Premier to secure and maintain a lucrative contract. He explained that due to contractual

¹⁰ [Decision 02/2019, Office of the Governor](#), paragraph 56.

obligations, he has been unable to defend his character and welcomed records being disclosed eventually through PATI requests. In his view, this would allow individuals to make informed judgments based on the actual records of his conduct rather than on speculation.

66. Mr. Pitcher hoped that disclosure of specific records relating to him and his companies would show that he operated with integrity, was keenly aware of his potential conflicts of interests, and tried to take a measured and balanced approach to helping guide the Government through a crisis, as opposed to the public speculation that elements like the travel authorisation existed and were kept in place only for his benefit.
67. Another individual Third Party objected to the disclosure of any information about them in the records and provided specific reasons to the ICO for their objections.

Discussion

68. The Information Commissioner considers the personal information exemption for information about individuals in records 15, 28, 30, 49, 50, 51, 56, 62, 65, 66, 76, 77, 81, 82, 83, 84, 86 and 182 as well as parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 78, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171.

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

69. Relevant identifiable individuals were elected officials, officers or employees of public authorities, and those associated with private entities like BPMS and InnoFund. Their personal information consisted of their names, employment history, views and contact details.

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

70. The exclusion in section 24(2)(b) applied to a part of record 14, where a consultant with a public authority was referred to by name and with a brief description of a project they were point-person for. The exemption in section 23(1), therefore, could not be engaged to withhold that consultant's identifying information in record 14.
71. For all other identifying information of individuals throughout the records, the exclusions in section 24(2) did not apply. While some of the individuals were officers or employees of public authorities, the relevant information did not relate to their positions or functions but, instead, related to the performance of their positions or functions. The Information Commissioner has consistently found that this type of information does not

fall within the exclusion in section 24(2)(a). Also, the exclusion in section 24(2)(b) did not apply to the names of the individuals employed by vendors who were identified in the withheld records, because they had not entered into a contract with the Government as individuals.¹¹

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

72. As discussed above, one individual, Mr. Pitcher, expressly consented in writing to the disclosure of his personal information in all the records. The exception in section 23(2)(b) thus applied to information relating to Mr. Pitcher in the remaining records or parts of records in paragraph 68 above.
73. The Information Commissioner notes that, although Mr. Pitcher consented to disclosure, some of the specific records that Mr. Pitcher referenced in his submissions have been found to be properly withheld, in full or in part, under section 25(1)(d) based on the Ministry Headquarters' submissions, as noted in paragraph 57 above. Consequently, section 23 is not considered for those records or parts of records.
74. None of the exceptions in section 23(2) applied to information about other individuals in the records.

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

75. Disclosure of the names and positions of the individuals involved in the decision-making process around the Government's contract with BPMS would promote the general public interest in transparency and accountability around public spending as well as furthering the public's understanding of the public authorities' decisions and activities. In this case, these public interest factors were amplified given the significant amount of public money spent on the matter. Given that the relevant information under review amounted to personal information, however, these public interest factors must be balanced against the fairness to the individuals concerned and then the necessity of disclosure to further these public interests. This included for the individual Third Party who objected to their emails being disclosed in one record at issue in this Decision.
76. With respect to the fairness of disclosure to the individuals, executive public officers with outward facing roles and elected politicians who were involved in the high-level

¹¹ See, most recently, [Decision 12/2024](#), [Ministry of Health Headquarters](#), paragraph 115.

discussion around the Fastpass project objectively should have had expectations that their names, positions and involvement in matters related to their work could be disclosed to the public, for transparency and accountability purposes. This included individuals who were acting in executive positions at certain times. Further, the individual Third Party who objected to disclosure had sent an email that related to their personal advocacy before the Government on behalf of the private entities from their public authority work account. Under these circumstances, the individual should have had a reasonable expectation that the email from their public authority work account could be publicly disclosed. Disclosure of this category of information would have been fair.

77. In contrast, the public interest would not have required disclosure of other personal information in the records, including the contact details of these same executive public officers, as well as the personal information of individuals in the private sector or public officers who assisted and were not involved in the decision-making process. These individuals had a reasonable expectation that information relating to the performance of their work would not be made public, unless a strong public interest factor compelled releasing it. Such strong factors were absent in this case. The personal information exemption was justified for this information.
78. For the personal information of elected officials, executive public officers and a certain other individual identified in paragraph 67, disclosure would have been necessary to further the identified public interests. Disclosure would enable the public to have a better understanding of which individuals made which decisions concerning Fastpass and BPMS. This, in turn, furthers the public's understanding of the Government's activities and promotes accountability for elected officials and executive officers.

Conclusion

79. The personal information exemption in section 23(1) applied to parts of records 1, 4, 7, 12, 14, 15, 17, 19, 21, 23, 26, 28, 30, 33, 43, 49, 50, 51, 56, 57, 58, 62, 65, 66, 70, 76, 77, 78, 81, 82, 83, 84, 86, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169, 171 and 182, and the public interest required disclosure of the names and positions of elected officials and executive public officers but not of other personal information.

Conclusions

80. In sum, the Information Commissioner is not satisfied that the Ministry Headquarters had justified its reliance on section 34(1)(c) to withhold any records. The Ministry Headquarters was justified, however, in relying on section 25(1)(d) to withhold records 5, 16, 18, 22, 24, 25, 29, 31, 34, 35, 52, 54, 63, 64, 91, 100, 107, 109, 115, 124, 125, 130, 135, 137, 141, 145, 150, 162, 166, 168, 173, 174, 175, 176 and 181 as well as parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 78, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171, though it was not for records 2, 15, 28, 30, 44, 49, 50, 51, 56, 62, 65, 66, 68, 77, 81, 82, 83, 84, 86, 131, 182 and 186 nor for the remaining parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 76, 78, 81, 98, 105, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171.
81. Finally, the Information Commissioner is satisfied that most information about identifiable individuals was exempt personal information in parts of records 1, 4, 7, 12, 14, 15, 17, 19, 21, 23, 26, 28, 30, 33, 43, 49, 50, 51, 56, 57, 58, 62, 65, 66, 70, 76, 77, 78, 81, 82, 83, 84, 86, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169, 171 and 182, except where the public interest has required that the names and positions of elected officials and executive public officers be disclosed in records 1, 7, 12, 14, 15, 17, 19, 21, 23, 49, 57, 58, 65, 70, 76, 77, 86, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169, 171 and 182.

Decision

The Information Commissioner finds that the Ministry of Health Headquarters (**Ministry Headquarters**) was justified in relying on section 25(1)(d) of the Public Access to Information (**PATI**) Act 2010 to deny public access to some records or parts of records, while it was not justified in relying on that provision or section 34(1)(c) to deny public access to the remaining responsive records or parts of records. On her own accord, the Information Commissioner finds that parts of certain records were exempt under section 23(1), although the balance of the public interest required disclosure of some personal information in these records.

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

- upholds the Ministry Headquarters' reliance on section 25(1)(d) for records 5, 16, 18, 22, 24, 25, 29, 31, 34, 35, 52, 54, 63, 64, 91, 100, 107, 109, 115, 124, 125, 130, 135, 137, 141, 145, 150, 162, 166, 168, 173, 174, 175, 176 and 181 as well as parts of records 1, 4, 7, 12, 14, 17, 19, 21, 23, 26, 33, 43, 57, 58, 70, 78, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169 and 171;
- reverses the Ministry Headquarters' decision to deny public access by relying on section 25(1)(d) or 34(1)(c) for the remaining records or parts of records;
- varies the Ministry Headquarters' decision to deny public access to parts of records 1, 4, 7, 12, 14, 15, 17, 19, 21, 23, 26, 28, 30, 33, 43, 49, 50, 51, 56, 57, 58, 62, 65, 66, 70, 76, 77, 78, 81, 82, 83, 84, 86, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169, 171 and 182 by virtue of section 23(1); and
- orders the Ministry Headquarters to disclose records 2, 44, 68, 131 and 186 in full as well as parts of records 1, 4, 7, 12, 14, 15, 17, 19, 21, 23, 28, 30, 33, 43, 49, 50, 51, 56, 57, 58, 62, 65, 66, 70, 76, 77, 78, 81, 82, 83, 84, 86, 98, 105, 108, 110, 114, 116, 119, 120, 122, 126, 128, 133, 134, 138, 144, 147, 148, 153, 157, 159, 163, 165, 169, 171 and 182, with exempt and non-responsive information removed, as directed by this Decision Notice and the accompanying Confidential Annex and Order, which form part of this Decision, on or before **Friday, 17 January 2025**.

Judicial Review

The Applicant, the Ministry of Health 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

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Ministry of Health 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
29 November 2024

Appendix I: Relevant statutory provisions

Public Access to Information Act 2010

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 . . .

Commercial information

- 25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—
- ...
- (d) information, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates.
- (2) Subsection (1) does not apply if—
- (a) the information concerned related to the requester;
- (b) the person to whom the information related consents in writing to its disclosure; or
- (c) the information was given to the public authority concerned by the person to whom it relates and the person was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public.
- (3) A record shall be disclosed if disclosure of it is in the public interest.

Law enforcement

34 (1) Subject to subsection (2), a record is exempt if its disclosure would, or could reasonably be expected to—

...

(c) prejudice the fair trial of a person or the impartial adjudication of a particular case;

...

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