

## Decision Notice

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**Decision 25/2019: Bermuda Police Service**

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**Records related to policing of 2 December 2016 protest**

**Reference no: 20042017**

**Decision date: 31 October 2019**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for various records related to the deployment of the Police Support Unit during the 2 December 2016 protest at the House of Assembly. The BPS refused part of the request on the basis that it does not hold the responsive records. The BPS also disclosed, in part, its Operational Order. The BPS relied on the exemptions in section 22(1) (health or safety) and section 34(1)(e) (law enforcement methods and procedures) to deny access to other information in the Operational Order.

The Information Commissioner has found that the BPS did not conduct a reasonable search in accordance with section 12(2)(b) of the PATI Act and Regulation 5 of the Public Access to Information Regulations 2014 (**PAIR**) before refusing parts of the request on the basis that it did not hold records responsive to the PATI request. The Information Commissioner has also found that the BPS was justified, in part, in relying on sections 22(1) and 34(1)(e) of the PATI Act to deny access to information in the Operational Order.

The Information Commissioner has varied the BPS's internal review decision. The Information Commissioner has required the BPS to conduct a reasonable search for records responsive to items 1, 3 and 4 of the PATI request in accordance with section 12(2)(b) of the Act, regulation 5 of PAIR, and this Decision, and if responsive records are found, to issue a new initial decision in accordance with the PATI Act. The Information Commissioner has further required the BPS to disclose additional parts of the Operational Order that are not exempt from public access under section 22(1) or section 34(1)(e) of the PATI Act and in accordance with this Decision.

## Relevant Statutory provisions

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Public Access to Information (**PATI**) Act 2010: section 12(2)(b) (reasonable search); section 21 (public interest); section 22 (health and safety); and section 34(1)(e) (law enforcement methods and procedures).

Public Access to Information Regulations 2014 (**PAIR**): regulation 5 (reasonable search).

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. This review relates to a gathering and protest against the redevelopment of the L. F. Wade International Airport, which took place on 2 December 2016 outside the House of Assembly (**2 December 2016 protest**). During the protest, the Bermuda Police Service (**BPS**) deployed its Police Support Unit (**PSU**) and used captor spray, commonly known as ‘pepper spray’, against some of the protestors.
2. Following the protest, the Governor and the Commissioner of Police announced their agreement on 11 January 2017 to have the policing of the protest independently reviewed by the UK National Police Coordination Centre (**NPoCC**). The Police Complaints Authority (**PCA**) also received twenty-six separate complaints concerning the PSU’s use of pepper spray during the protest. A Parliamentary Joint Select Committee (**JSC**) was also approved in December 2017 to investigate the policing of the event.
3. The NPoCC, the PCA and the JSC issued public reports on their investigations on 28 March 2017<sup>1</sup>, 10 August 2017<sup>2</sup> and 5 July 2019<sup>3</sup>, respectively.
4. On 6 December 2016, the Applicant made a Public Access to Information (**PATI**) request to the BPS for records related to the policing of the 2 December 2016 protest. Specifically, the Applicant requested:
  - records showing how and when the decision was taken on 2 December 2016 to deploy the PSU to the grounds of the Sessions House, and by whom it was taken (**item 1**);
  - the Operational Order, its accompanying signature and any accompanying policing plan (**item 2**);
  - any correspondence between the BPS and any individual outside the BPS regarding the decision to deploy the PSU, prior to the decision being enacted (**item 3**);

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<sup>1</sup> The NPoCC Report is available at <http://cloudfront.bernews.com/wp-content/uploads/2017/03/Peer-Review-on-House-of-Assembly-protests.pdf>.

<sup>2</sup> The PCA Decision is available at <http://cloudfront.bernews.com/wp-content/uploads/2017/08/Decision-on-House-of-Assembly-Complaints-against-Officers-of-BPS.pdf>.

<sup>3</sup> The Report of the Parliamentary Joint Select Committee Examining the Events of the December 2<sup>nd</sup> 2016 Incident at the House of Assembly, Bermuda, May 2019, is available at <http://parliament.bm/report/view/2019/377>.

- any correspondence dated 2 December 2016 between the BPS and the Speaker of the House of Assembly (**item 4**);
  - BPS's policy on pepper spray use (**item 5**); and
  - records showing the number of alleged assaults at the protest (**item 6**).
5. The BPS issued an initial decision on 18 January 2017 informing the Applicant that it did not hold records of correspondence responsive to items 3 and 4 of the PATI request. The BPS refused access to the records responsive to item 6, but provided the Applicant with the number of alleged assaults at the protest. The Applicant was satisfied with the information provided for item 6 and it is not considered in this review.
  6. The BPS's initial decision also granted the Applicant access in part to the Operational Order entitled 'Public Protest House of Assembly' (**Operational Order**), which the BPS considered responsive to items 1 and 2. The BPS redacted parts of the Operational Order as exempt from public access under sections 22(1) (health and safety) and 34(1)(e) (law enforcement methods and procedures).
  7. Separately, the BPS provided the Applicant with a record responsive to item 5 and this item is not considered in this review.
  8. On 22 February 2017, the Applicant sought an internal review.
  9. On 4 April 2017, the BPS issued its internal review decision, upholding the initial decision on the same grounds.
  10. By email on 20 April 2017, the Applicant submitted a request for an independent review by the Information Commissioner, challenging the BPS's internal review decision.

## Investigation

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11. 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.
12. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the BPS to determine whether its reliance on the exemptions in section 22(1) and section 34(1)(e) was justified.

13. On 9 May 2017, the Information Commissioner's Office (**ICO**) notified the BPS that the Applicant had made a valid application. The BPS provided the ICO with an unredacted copy of the Operational Order.
14. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and applicant a reasonable opportunity to make representations. The BPS and the Applicant were invited to comment on this application and make submissions to the Information Commissioner for consideration during this review. The BPS was further asked specific questions to justify its reliance on the exemptions and to show the reasonableness of the search it conducted.
15. Both the BPS and Applicant provided submissions.
16. At the ICO's request, the BPS also provided the notes on the meetings that took place on 2 December 2016 taken by a scribe and referred to in paragraph 2.12 of the NPoCC report (**meeting notes**) and the Public Order Tactical Advisors Log dated 2 December 2016, referred to as a 'formal policy log' in paragraph 2.12 of the NPoCC report (**Tactical Advisors Log**). The BPS also provided the ICO with additional internal email records.
17. In July 2019, the BPS confirmed that its position in this review remained the same regardless of the publication of the various reports on the 2 December 2016 events.

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

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18. 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 the BPS. She is satisfied that no matter of relevance has been overlooked.

#### ***Reasonable search – section 12(2)(b) and regulation 5***

19. Section 12(2)(b) of the PATI Act and regulation 5(1) of the Public Access to Information Regulations (**PAIR**) require a public authority to conduct a reasonable search for records held by a public authority, in support of the right to access public records set out in section 12(1).
20. In determining whether a public authority has conducted a reasonable search, the Information Commissioner considers the following, as set out in Decision 04/2017, Department of Health:

[1] the quality of the public authority's analysis of the request;

[2] the scope of the search that it decided to make on the basis of that analysis; and

[3] the rigour and efficiency with which the search was then conducted.

21. The circumstances of each case will inform the assessment of whether a reasonable search has been conducted.

22. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has conducted a reasonable search for records.

*Public authority's submissions*

23. The BPS explained that items 3 and 4 the Applicant's PATI request were asking for 'correspondence', which in its strict meaning refers to 'communication by exchange of letters'. Despite this, the BPS read the request as asking for all records as defined in the PATI Act, e.g., records in any form or medium in which information is recorded.

24. In response to the PATI request, the BPS sent a written request to its supervisory officers involved in policing the 2 December 2016 protest as well as the person in charge of its IT department to search for records responsive to the PATI request. The BPS also sent five follow up emails. A total of 59 emails were exchanged to elicit information and properly identify responsive records before the BPS issued its initial decision.

25. The BPS has no reason to conclude that any records have not been identified or were not located. In support of its submissions, the BPS provided copies of its email communications related to its search for records. The BPS also provided copies of the Tactical Advisors Log and meeting notes.

26. The BPS also explained that it is aware of the former Premier Michael Dunkley's statement in the House of Assembly on 10 February 2017 mentioning that he had conversation with the Commissioner of Police at various times on 2 December 2016. The BPS explained that these conversations did not relate to the decision to deploy the PSU. In any event, no records were created to document these conversations. The BPS submitted that it only holds telephone records to confirm the times that calls were made.

27. The BPS confirmed that its members, including the former Commissioner of Police, spoke to the Speaker of the House by telephone on 2 December 2016 on a few occasions. The BPS explained that there were no records made of any of these conversations.

### *Applicant's submissions*

28. The Applicant clarified that what was sought were records on any communications which took place, e.g., emails, phone calls, texts, and so on. The Applicant, however, accepted that parts of the PATI request were framed narrowly because of the use of the word 'correspondence' instead of 'communications'.

### *Discussion*

29. The Information Commissioner's considers the reasonableness of BPS's search for records responsive to items 1, 3, and 4.

#### *[1] Quality of the public authority's analysis of the request*

30. In its emails to its officers to assist with the search for records, the BPS broadly described item 1 as seeking "any records which show how, when and by whom a decision was made to deploy PSU officers to the grounds of the session house, the public order options to be used, equipment to be carried and rules of engagement".
31. Similarly, the BPS's documentation of its search for items 3 and 4 establishes that it asked its officer for "any records" related to "any communications to persons outside of the BPS regarding the decision to deploy PSU, the public order options to be used, equipment to be carried and rules of engagement". It also asked officers to search for "any records" of "communications" between the BPS and the Speaker of the House on 2 December 2016.
32. The Information Commissioner is satisfied that the BPS applied a broad interpretation of the scope of items 1, 3, and 4, and that the BPS's analysis of these items was adequate.

#### *[2] The scope of the public authority's search based on its analysis of the request*

33. Emails provided to the ICO show that the BPS conducted searches to locate responsive records in any form or medium. Upon receiving the PATI request, the BPS contacted the relevant officers to ask them to locate any records responsive to all items of the PATI request. The BPS also sent numerous follow up emails and ensured that it included additional officers as needed who were not included on the original email.
34. At the internal review stage, the BPS contacted senior officers again to specifically search for records responsive to items 3 and 4.

35. The BPS appropriately identified all officers who could reasonably be expected to hold records, if any, responsive to the PATI request based upon their roles in the policing of the event as well as their positions within the BPS. The BPS further applied a broad interpretation to the scope of the request as seeking all communications or records. The Information Commissioner is satisfied that the scope of the BPS's search was adequate.

[3] *The rigour and efficiency with which the search was conducted*

36. Although its analysis of the PATI request and the scope of its search were adequate, the BPS did not conduct the search with the necessary rigour and efficiency. Based upon the submissions by the BPS, only a limited number of officers actually responded to the BPS's request confirming that they searched their files for records falling within this PATI request. This occurred despite numerous follow up emails to the BPS officers reminding them of the need to locate the records for processing under the PATI Act. When officers fail to reply to a requirement to search their files for records responsive to a PATI request, it may result in a public authority being unable to locate records that it must process in accordance with the PATI Act.

37. The BPS did not provide the ICO with any documentation of the search for responsive records that were held by the former Commissioner of Police, the Gold and Silver Commanders, or the officer assigned as scribe by the Gold Commander on the day of the protest. In the absence of documentation of searches conducted of the records held by these officers, including emails, the Information Commissioner is not satisfied that the BPS conducted the search with adequate rigor and efficiency.

38. Further, based on the searches it conducted, the BPS informed the Applicant that it does not hold records responsive to items 3 and 4 of the PATI request. It also submitted to the ICO that, apart from the Operational Order, it does not hold any additional records showing "how and when the decision was taken to deploy a police support unit".

39. As noted above, paragraphs 16 and 25, however, the BPS provided the ICO with copies of the meeting notes and Tactical Advisors Log (referred to in the NPoCC report). The Information Commissioner is satisfied that these are responsive to item 1 of the PATI request. The Information Commissioner is also satisfied that the meeting notes are responsive to item 4 because it created a summary of the telephone conversation the former Commissioner of Police had with the former Speaker of the House. The existence of these records further substantiates the conclusion that despite the adequate analysis of the PATI request and scope of the search, it is more likely than not that the BPS's search lacked the required rigour and efficiency to locate records responsive to the request.



40. The Information Commissioner is not satisfied that the BPS conducted its search with the required rigour and efficiency.

### *Conclusion*

41. The Information Commissioner is not satisfied that, on the balance of probabilities, the BPS has taken reasonable steps to locate records responsive to items 1, 3 and 4 of the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of PAIR, before concluding that it does not hold further responsive records.

### ***Health and safety – section 22(1)***

42. Section 22(1) allows a public authority to deny access to records, which if disclosed, would or would be likely to endanger the health or safety of an individual or group of individuals.
43. Public authorities must identify the individual or group of individuals at risk.
44. ‘Endanger’ in section 22(1) requires that public authorities must show that disclosure would or would be likely to have a detrimental effect on an individual’s health or safety. The effect must be more than trivial or insignificant.
45. Section 22(1) protects both physical and mental health. Endangering physical health will usually refer to an adverse physical impact and involve medical matters. Endangerment to physical health could mean endangering someone as a result of physical injury, illness or disease. Endangering mental health will usually imply that the disclosure would, or would be likely to, cause or aggravate a psychological disorder or mental illness. The effect must be greater than stress or worry.
46. ‘Safety’ should be read in its plain meaning, i.e., the condition of being protected from harm. Safety can be understood as referring to an individual’s risk of accidents or of harm to their security. Although the risk should be viewed objectively, some people or groups of society are particularly vulnerable and their safety may be more easily endangered than that of others. This may include individuals or groups involved in controversial work<sup>4</sup>.
47. A public authority must also explain or describe the circumstances or events arising from disclosure that can cause the harm. It cannot be a remote or hypothetical possibility. In circumstances where a pre-existing risk is present, for example, the health and safety

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<sup>4</sup> See UK ICO [Guidance on Health and safety \(section 38\)](https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf), para. 19, available at <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>.

exemption will be engaged if disclosure of the withheld information will increase the risk of endangerment<sup>5</sup>.

48. The public authority must also show that disclosure 'would or would be likely to' cause the harm. 'Would' means that it is more probable than not that the harm anticipated can occur. There must be a more than 50% chance of the disclosure causing the harm. 'Would be likely' means that some significant, real risk must exist that health or safety would be endangered, even if it does not amount to being more probable than not. 'Likely' refers to a very significant and weighty chance that the identified harm will occur. It has also been described as a risk that there 'may very well' be harm to the identified interests, even when the risk falls short of being more probable than not. It must, however, be substantially more than a remote possibility.
49. Public authorities may need to show objective evidence to support the likelihood of the anticipated danger. A subjective fear held by the affected individual that is not supported by external facts may not be sufficient to sustain the health and safety exemption.
50. If a record falls within the exemption in section 22(1) for health and safety, it must still be disclosed if the balance of the public interest favours disclosure. In accordance with section 21 of the PATI Act, the test for whether disclosure of a record is in the public interest is 'whether the public interest would, on balance, be better served by disclosure rather than by non-disclosure'.
51. Regulation 2 of PAIR provides a non-exhaustive list of public interest factors to be considered, including but not limited to, things that may or would tend to promote greater public understanding of the processes or decisions of public authorities; provide reasons for decisions taken by Government; promote accountability of and within the Government; promote accountability for public expenditures or the more effective use of public funds; and to reveal information relating to measure to protect heritage sites.
52. The decision of whether endangerment 'would' occur or 'would be likely to' occur is relevant to the public interest test. The greater likelihood that the endangerment would occur, the stronger the public interest is in not disclosing the information and vice versa.
53. In sum, to rely upon section 22(1) of the Act to deny access to a record, a public authority must ask:

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<sup>5</sup> See, e.g., People for the Ethical Treatment of Animals Europe v Information Commissioner, UK Information Tribunal, EA/2009/0076, para. 34.

- [1] Who is the individual, or group of individuals, who are at risk from the disclosure?
- [2] Is the endangerment to the individual's physical or mental health, to their physical or mental safety, or to a combination of these?
- [3] How can disclosure cause the endangerment claimed?
- [4] Whether this endangerment would be likely to occur?
- [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?

54. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, they have provided sufficient support to justify applying the exemption.

*Public authority's submissions*

55. The BPS relies on section 22(1) to withhold part of the Operational Order that relates to the identities of the officers involved in policing the 2 December 2016 protest, as well as the hours and locations that they worked. The BPS also relies on section 22(1) to withhold access to sections 1 and 2 on page 27 of the Operational Order.

56. The BPS submitted that releasing sections 1 and 2 on page 27 of the Operational Order will likely assist in identifying the source of the information (**source**) and would be likely to endanger the physical and mental health, as well as the safety, of the source.

57. With respect to its officers, the BPS claimed that it can provide evidence of historical occasions when officers have been assaulted while on duty and persons are routinely convicted in the courts for this. Injuries sustained by officers have ranged from common assault to death. The BPS further claimed that during and after the 2 December 2016 protest, a number of police officers were assaulted and threatened. On that day, 14 officers were assaulted and one of them was struck a number of times and injured. An individual was subsequently convicted and sentenced to a term of 12 months of imprisonment for this offence.

58. The BPS provided accounts from two of its officers to support its assertions on the applicability of section 22(1).

59. The BPS acknowledged that some of the officers listed in the Operational order have been publicly identified. It emphasised, however, that the officers were summoned to attend judicial hearings and had a lawful obligation to attend.
60. The BPS accepts that the public has a right to expect transparency and accountability from the BPS. It also accepts that its officers are often required to place their own personal safety at risk in protecting the public. It asserts, however, that police officers should be able to protect themselves in circumstances where their personal safety is threatened. In these circumstances, the officers' identity must also be protected. The BPS claimed that it is a long standing and accepted practice in Bermuda for photographs to be published in the media of armed officers wearing balaclavas to cover their faces, or for the media itself to obscure the faces of officers to protect their identity.

#### *Applicant's submissions*

61. The Applicant submitted that the exemptions cited by the BPS are subject to the public interest test. Given the time lapse, the Applicant does not believe that the exemptions are still relevant.
62. The BPS leadership was criticised in a report issued by the PCA on the handling of the protest. The Applicant urges that the public has a right to know which police leaders were the decision makers that day and to obscure this prevents true accountability. The 2 December 2016 protest forced the police to consider the manner in which it handles large-scale protests of that nature.

#### *Discussion*

63. The parts of the Operational Order that are withheld under section 22(1) are as follows:
- a. The identities of all BPS officers and details of their work hours and locations (**BPS officers' identities**); and
  - b. Sections 1 and 2 of page 27

#### BPS officers' identities

[1] *Who is the individual, or group of individuals, who are at risk from the disclosure?*

64. The BPS identified all of the officers involved in the policing of the 2 December 2016 and named in the Operational Order as the individuals who are at risk from disclosure.

[2] *Is the endangerment to the individual's physical or mental health, to their physical or mental safety, or to a combination of these?*

65. The BPS explained that its officers' physical health and safety was at risk, as well as officers' mental health and safety.

[3] *How can disclosure cause the endangerment claimed?*

*Physical health and safety*

66. The BPS did not provide evidence for its statements concerning the general and historical risks of physical harm to its officers. Therefore, the Information Commissioner does not consider these submissions.

67. The BPS provided specific explanations related directly to the 2 December 2016 protest. This includes records related to the 14 reported assaults against police officers during the protest, along with information from the BPS officers who stated that they were threatened and intimidated following the protest<sup>6</sup>. The Information Commissioner also considered witness statements of two officers that were attached to the Parliamentary Joint Select Committee report (**JSC report**) on the policing of the protest and that described threats that were directed at them during the protest<sup>7</sup>.

68. The Information Commissioner notes that the JSC report made extensive documentation available to the public, including unredacted witness statements by some, but not all, of the officers involved in the policing of the 2 December 2016 protest. Even the officers were legally required to provide the witness statements, in effect, the JSC report has revealed the identity of a number of officers and provided varying amounts of information about these officers' role in policing the 2 December 2016 protest.

69. The public disclosures in the JSC report are not, however, identical to the parts of the Operational Order that withheld officers' names. Apart from the Gold and Silver Commanders, the disclosure of officers' identities in the Operational Order would provide additional information or details about their role in policing the 2 December 2016 protest. The BPS has offered sufficient submissions to show that such a disclosure can result in an increase to the risk of harm to the officers' physical health by drawing the public's attention to their role and providing an opportunity for individuals to make ongoing threats against

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<sup>6</sup> Note that the information was requested from and provided by the officers to the BPS Information Officer only at the point of the Information Commissioner's review.

<sup>7</sup> See the [Report of the Parliamentary Joint Select Committee Examining the Events of the December 2<sup>nd</sup> 2016 Incident at the House of Assembly, Bermuda](#), pages 90 and 109.

them. The Information Commissioner is of the view, however, that the submissions by BPS are just barely sufficient to establish how disclosure could cause an endangerment to the physical safety of the officers.

*Mental health and safety*

70. Despite claiming that disclosure would be likely to endanger its officers' individual mental health or safety, the BPS did not provide any evidence to show how this could occur. The BPS did not show how disclosure could cause or aggravate a psychological disorder or mental illness, and not merely create stress or worry. Without such support, the Information Commissioner cannot accept that disclosure would cause an endangerment to officers' mental health or safety and does not consider this argument further.

[4] *Whether this endangerment would be likely to occur?*

71. The Information Commissioner is of the view that, except for the Gold and Silver Commanders, the officers involved in the 2 December 2016 protest would be likely to be harassed, intimidated, and targeted for violence in a manner that endangers their physical health and safety if their identities or additional information about their role in policing the 2 December 2016 protest were disclosed. The likelihood of this occurring is supported by the controversy surrounding the policing of the 2 December 2016 protest, as well as the assaults and threats already received by the officers related to the protest.
72. With respect to the Gold and Silver Commander, their identities are well known to the public at this stage of the inquiry into the events of 2 December 2016. It is difficult to understand how disclosure of their identities under the PATI Act would be likely to cause endangerment to their physical safety. In any event, as noted below, the balance of the public interest requires disclosure of the identities of the Gold and Silver Commanders.
73. The Information Commissioner is satisfied that the exemption in section 22(1) is engaged with respect to the information about the BPS officers' identities, except for the Gold and Silver Commanders.

[5] *If the exemption is engaged, whether the balance of the public interest requires disclosure?*

74. The Information Commissioner recognises that there is a public interest in promoting greater public understanding of the process or decisions made by the BPS in relation to the policing of the protest on 2 December 2016, which was a significant event in Bermuda's history. The Applicant was correct to point out that the public has the right to know which

police leaders were the decision makers that day and that the BPS leadership has been the subject of criticism by the PCA and the NPoCC on its handling of the protest. As the Applicant notes, preventing disclosure of the decision makers' identities weakens full accountability.

75. Weighed against these interests in accountability, is the public interest in protecting the safety of individual officers who lawfully exercise their duties and who have acted within their organisation's policies and procedures. This is a particularly strong factor for officers in the field, who may not have the authority to influence the policies and procedures of the BPS.
76. With respect to the identity of the Gold and Silver Commanders, the accountability factors in favour of disclosure are significant enough to outweigh any factors supporting the nondisclosure<sup>8</sup>. The Gold Commander set the strategic plan for the management of the policing, established the strategic intentions and the outcomes to be achieved, and placed them in one of three categories: preferred, acceptable, and unacceptable. The Gold Commander also approved the tactical plans, which were established by the Silver Commander<sup>9</sup>.
77. The Information Commissioner also notes that the Gold and Silver Commanders hold senior roles within the BPS and were aware of their significant decision making role regarding the policing of the 2 December 2016 protest.
78. These factors in favour of disclosure are not, however, strong enough to outweigh the factors supporting nondisclosure of the remaining officers' identities who are listed in the Operational Order. The remaining officers were not responsible for deciding strategic plans, intentions, or outcomes. Disclosure of their identities or additional information about their roles on 2 December 2016 would neither promote accountability nor facilitate a greater understanding of the process or decisions made by the BPS during the policing of the protest.
79. Although the appendices to the JSC Report provide the identities of additional officers, a disclosure in the context of this PATI request would reveal something new. Therefore, the Information Commissioner is satisfied that, except for the Gold and Silver Commanders,

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<sup>8</sup> The NPoCC Report, para. 3.9 states that "the Gold and Silver Commander need to remain cognisant that [they] have the most senior command roles for the operation and should not perceive any support provided as being an instruction."

<sup>9</sup> JSC Report, page 17.

the public interest in disclosure of the identities of the officers in the Operational Order does not outweigh the public interest in nondisclosure.

Sections 1 and 2 of page 27

[1] *Who is the individual, or individuals, who are at risk from the disclosure?*

80. The BPS explained that disclosure of these specific parts of the Operational Order would place the source of the information at risk, without specifying the identity of the source.

[2] *Is the endangerment to the individual's physical or mental health, to their physical or mental safety, or to a combination of these?*

81. The BPS submitted that disclosure would endanger the source's physical and mental health and safety.

[3] *How can disclosure cause the endangerment claimed?*

82. The BPS provided no explanation on how the disclosure of the information on page 27 could assist in identifying the source of the information. In light of the content of the withheld sections, the Information Commissioner is not satisfied that disclosure could assist anyone in identifying the source of the information.

83. The Information Commissioner is not satisfied that disclosure of sections 1 or 2 on page 27 would be likely to endanger the physical health or safety of any individual. The Information Commissioner does not consider this argument further.

Conclusion

84. The Information Commissioner is satisfied that section 22(1) is engaged for the BPS officers' identity and that, except for the identity of the Gold and Silver Commanders, the balance of the public interest does not require disclosure. The disclosure of the identity of the Gold and Silver Commanders is in the public interest.

85. The Information Commissioner is not satisfied that sections 1 and 2 on page 27 of the Operational Order fall within the exemption in section 22(1).

***Prejudice to law enforcement methods or procedures – section 34(1)(e)***

86. Section 34(1)(e) allows public authorities to refuse access to a record if disclosure would, or could reasonably be expected to, disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the



law (**law enforcement methods or procedures**), and the disclosure would prejudice or could reasonably be expected to prejudice the effectiveness of those methods or procedures.

87. The exemption for law enforcement methods or procedures requires a public authority to establish two elements. First, the disclosure must reveal a law enforcement method or procedure. Second, disclosure must create a reasonable expectation or a real risk of prejudice to the effectiveness of that method or procedure.
88. Consistent with the purposes set out in section 2 of the PATI Act, including to give the public access to information to the greatest extent possible within the Act's provisions, the exemption in section 34(1)(e) is read narrowly. If the only result of disclosure is to reveal law enforcement methods or procedures that are already well known to the public, then it is not reasonable to expect that the methods or procedures will be prejudiced<sup>10</sup>.
89. Section 34(1)(e) is further narrowed by the requirement that the law enforcement methods and procedures are specifically for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law.
90. 'Method' and 'procedures' are not defined in the PATI Act, nor in the Bermuda Interpretation Act 1951. The plain meaning of 'method' is 'a particular procedure for accomplishing or approaching something, especially a systemic or established one'.<sup>11</sup> The plain meaning of 'procedure' is 'an established or official way of doing something' or 'a series of actions conducted in a certain order or manner'<sup>12</sup>.

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<sup>10</sup> This is consistent with the Australian Information Commissioner's approach to a similar provision under the Australian Freedom of Information (FOI) Act 1982. See FOI Guidelines, [Office of the Australian Information Commissioner, Part 5 – Exemptions](#), para. 5.111. The provision in section 37(2)(b) of the Australian FOI Act is equivalent to section 34(1)(e) of the PATI Act. Section 37(2)(b) of the Australian FOI Act reads: "A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to ... disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures". See also Freedom of Information What you need to know, by Damien Cremean, para. 1.4.79, LexisNexis Australia 2015: "Under s 37(2)(b) ... it is not a question of whether a document merely identifies a method or procedure, but whether the document discloses one which would or could reasonably be likely to have the prejudicial effect."

Under the equivalent exemption to section 34(1)(e) of the PATI Act in the Australia FOI Act, the exemption is inapplicable to routine law enforcement techniques and procedures that are already well known to the public or to documents containing general information. See FOI Guidelines of the Office of the Australian Information Commissioner, Part 5 – Exemptions, para. 5.112.

<sup>11</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

<sup>12</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

91. 'Would' means there is a high probability that the harm anticipated can occur. It has also been described as a significant and weighty chance of the harm occurring. 'Could reasonably be expected to' is the lesser likelihood of harm. It requires public authorities to distinguish between unreasonable expectations of harm and reasonable expectations of harm in light of all of the circumstances. Reasonable refers to what a reasonable person would expect considering all the circumstances of the case. The expectations have to be likely, plausible, or possible based on real and substantial factual grounds.
92. Section 34(2)(b) requires consideration of the public interest test only for certain categories of records listed in section 34(2)(a). These categories include any record that consists of a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law, as set out in section 34(2)(a)(ii). If a record falls within one of the categories in section 34(2)(a), it must be disclosed if the balance of the public interest favours disclosure.
93. In sum, to rely upon the exemption in section 34(1)(e), a public authority must ask:
- [1] What are the breaches or evasions of the law that are being prevented, detected, investigated, or dealt with?
  - [2] What are the methods or procedures for preventing, detecting, investigating or dealing with matters arising out of those breaches or evasions of the law?
  - [3] How can disclosure reveal these methods or procedures?
  - [4] How can disclosure prejudice the effectiveness of those identified methods or procedures?
  - [5] Whether this prejudice could reasonably be expected to occur?
  - [6] If the exemption is engaged, whether the record falls with a category of information listed in section 34(2)(a) and the balance of the public interest requires disclosure?
94. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, they have provided sufficient support to justify applying the exemption.

*Public authority's submissions*

95. The BPS relies upon section 34(1)(e) to withhold the following parts of the Operational Order: sections 2.8.2, 3.1.5 to 3.1.7, 6.1, 6.2, page 30, and parts of Appendix C of the Operational Order.
96. The BPS is of the view that some actions taken by the protestors on 2 December 2016 were breaches of the law. Included in the list of potential offences in the Operational Order are interfere with or disturbance of Legislature in contravention of section 12 and 13 of the Parliament Act 1957; causing unreasonable noise in contravention of section 7 of the Summary Offences Act 1926; and breaching the provisions in section 3, 4 and 20 of the Public Order Act 1963.
97. If the redacted parts of the Operational Order were to be revealed in detail, the BPS argued, that information would likely be used for future breaches of the law and would prejudice, or could reasonably be expected to prejudice, the effectiveness of methods and procedures. In support, the BPS pointed to the discussion concerning some of the tactical options that were considered and evaluated. The BPS stated that these tactical options were likely to be considered as options for any similar event in the future. If this information were disclosed, it could reasonably be expected that individuals would develop strategies to circumvent the tactic and, therefore, reduce the effectiveness of this law enforcement method.
98. The BPS believes that this expectation was reasonable. Subsequent to the police investigation, the Director of Public Prosecutions directed that a number of persons were to be charged with various offences, some of which directly relate to the disruption of the legislative process.
99. Acknowledging the report issued by the NPoCC, the BPS argued that the report does not reveal all of the information contained within the redacted sections of the Operational Order. It only discusses some of the information contained in the redacted portions of the Operational Order. The BPS further explained that although the NPoCC report summarises some of the content of the Operational Order, it has not revealed the actual language in the Operational Order.
100. The BPS submitted that the categories of exceptions in section 34(2)(a) are not applicable. Specifically, section 34(2)(a)(ii) is not applicable because the Operational Order was created to provide instructions for the policing of a specific event and much of the wording is detailed in relation to the tactics and procedures. The BPS submitted that the

examples of 'general outlines' referred to in section 34(2)(a)(ii) would be the BPS Annual Policing Plan, its Gang and Violence Reduction Strategy, or the Policy on Mass Arrests.

101. The BPS did not make any submissions on the public interest test.

*Applicant's submissions*

102. The Applicant submitted that the exemptions cited by the BPS are subject to the public interest test. Given the time lapse, the Applicant does not believe that the exemptions are still relevant.

103. In the Applicant's view, the BPS's methods to handle large-scale protests have presumably now changed in light of further training.

*Discussion*

104. The parts of the Operational Order withheld under section 34(1)(e) are as follows:

- a. Information related to operational outcomes: section 2.8.2,
- b. Discussion of the methods: sections 3.1.5 to 3.1.7, page 30, and parts of Appendix C of the Operational Order, and
- c. Radio channel information: sections 6.1 and 6.2.

[1] *What are the breaches or evasions of the law that are being prevented, detected, investigated, or dealt with?*

105. The Information Commissioner is satisfied that the BPS identified breaches or evasions of the law that it wanted to prevent, detect, investigate or deal with in relation to its policing of the 2 December 2016 protest. These included potential offences identified above in paragraph 96.

[2] *What are the methods or procedures for preventing, detecting, investigating or dealing with matters arising out of those breaches or evasions of the law?*

106. After carefully reviewing the relevant withheld sections of the Operational Order, the Information Commissioner is satisfied that some of the parts of the Operational Order listed in paragraph 104 identify specific methods and procedures for preventing and dealing with the matters arising from the potential breaches of law identified in paragraph 96.

107. Some of the withheld portions of the Operational Order involve details about the deployment of certain officers to certain locations at specific times to exercise specific duties. They also involve the various tactical options as well as details about how the BPS officers communicate.

[3] *How can disclosure reveal these methods or procedures?*

108. Sections 3.1.5 to 3.1.7, sections 6.1 to 6.2, and page 30 directly refer to the methods or procedures the BPS planned, or potentially planned, to deploy during the policing of the protest. The Information Commissioner accepts that disclosure of these parts of the Operational Order would reveal law enforcement methods or procedures.

109. In contrast, section 2.8.2 only discusses operational outcomes and does not refer to any methods or procedures. The NPOCC Report, at paragraph 2.4, describes 'outcomes' as designed to 'inform what tone, look, feel and legacy the Gold Commander wants to achieve for the event'.

110. Finally, the redacted part of Appendix C of the Operational Order names some specific methods or procedures. The majority of it, however, does not discuss any specific methods or procedures. Rather, these parts of Appendix C of the Operational Order outline potential positive and negative results.

111. The BPS has not provided an explanation on how disclosure of section 2.8.2 or the parts of Appendix C that discuss outcomes could reveal the law enforcement methods or procedures that the BPS seeks to protect. In the absence of such explanation, the Information Commissioner is not satisfied that disclosure of section 2.8.2 and these parts of Appendix C of the Operational Order could disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law.

[4] *How can disclosure prejudice the effectiveness of those identified methods or procedures?*

112. The Information Commissioner has carefully reviewed Sections 3.1.5 to 3.1.7, sections 6.1 to 6.2, page 30, and the identification of methods or procedures in Appendix C of the Operational Order. She accepts that disclosure of these methods or procedures might prejudice their effectiveness. These parts of the Operational Order contain details of how the methods or procedures operate and disclosure might enable individuals to modify their behaviour to circumvent or undermine them.

[5] *Whether this prejudice could reasonably be expected to occur?*

113. Although prejudice might occur, the requirement under section 34(1)(e) is whether prejudice to the effectiveness of the methods or procedure could reasonably be expected to occur. The Information Commissioner notes that the policing of the 2 December 2016 protest has been examined and discussed in three separate public reports, including the report by the NPoCC and the decision issued by the PCA. Both the NPoCC report and the PCA decision discuss the details of some of the methods and procedures set out in the Operational Order.

114. In light of the information published in the NPoCC report and the PCA decision, it cannot reasonably be expected that disclosure of sections 3.1.5 to 3.1.7, page 30, and the options listed in Appendix C of the Operational Order will prejudice the effectiveness of any methods or procedures discussed. The particular methods and procedures named in these part of the Operational Order are each already publicly known and no further prejudice can reasonably be expected from disclosure.

115. The law enforcement methods or procedures in sections 6.1 and 6.2 of the Operational Order are not already available in the public domain. It is reasonable to expect that disclosure of the details in sections 6.1 and 6.2 will prejudice the effectiveness of the methods or procedures by enabling individuals to interfere with it.

[6] *If the exemption is engaged, whether the record falls with an category of information listed in section 34(2)(a) and the balance of the public interest requires disclosure?*

116. None of the parts of the Operational Order withheld under section 34(1)(e) fall within the categories of information listed in section 34(2)(a). In particular, the Information Commissioner agrees with the BPS that because the Operational Order was for a specific event, it is not a record consisting of a 'general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law' referred to in section 34(2)(a)(ii).

117. Because the information withheld under section 34(1)(e) does not fall within the categories listed in section 34(2)(a), the Information Commissioner need not consider the public interest test.

### *Conclusion*

118. The Information Commissioner is not satisfied that disclosure of sections 2.8.2, and 3.1.5 to 3.1.7, page 30, and Appendix C of the Operational Order will prejudice the effectiveness of law enforcement methods or procedures.
119. The Information Commissioner is satisfied that disclosure of the withheld portions of sections 6.1 and 6.2 could reasonably be expected to prejudice law enforcement methods or procedures and are exempt in accordance with section 34(1)(e).

## Decision

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The Information Commissioner finds that the Bermuda Police Service (**BPS**) 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, the BPS justified in reliance on sections 22(1) and section 34(1)(e) to deny the public access to some parts of the Operational Order. The BPS failed to justify the denial of access to the remaining parts of the Operational Order in accordance with these exemptions. Finally, the BPS failed to conduct a reasonable search, in accordance with section 12(2) of the PATI Act and Regulation 5 of the Public Access to Information Regulations 2014, for records responsive to items 1, 3, and 4 of the PATI request.

In accordance with section 48(1) of the PATI Act, the Information Commissioner:

- affirms the BPS's decision to deny access to the BPS officers' identities, with the exception of the Gold and Silver Commanders, and to deny access to sections 6.1 and 6.1, on the basis that these parts of the Operational Order are exempt in accordance with sections 22(1) or section 34(1)(e) of the PATI Act;
- annuls the BPS's decisions on Items 1, 3 and 4 of the PATI request on the basis that the BPS did not conduct a reasonable search for records responsive to the PATI request and requires the BPS to conduct a reasonable search consistent with this Decision and, if additional responsive records are located, to issue a new initial decision on whether access is granted or denied;
- reverses the decision to deny access to the identity of the Gold and Silver Commanders and sections 2.8.2, 3.1.5 to 3.1.7, page 30, and Appendix C of the Operational Order, and orders the BPS to disclose these parts of the Operational Order, and
- orders the BPS to provide an initial decision whether to grant or deny access to the meeting notes and the Tactical Advisors Log, as listed in paragraph 16 of this Decision.

The Information Commissioner requires that the BPS grant access to the parts of the record listed above, as well as issue a new initial decision, as directed by this Decision and the accompanying Order **on or before Thursday, 12 December 2019**.



## **Judicial Review**

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The Applicant, the Bermuda Police Service, or any person aggrieved by this Decision have the right to seek and apply for judicial review to the Supreme Court according to 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, according to section 48(3) of the PATI Act. If the Bermuda Police Service 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  
31 October 2019

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Access to records

12 ...

(2) Public authorities shall make every reasonable effort to-

...

(b) respond to requests completely, accurately and in a timely manner.

#### 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.

#### Health or safety of individual

22 (1) Subject to subsection (2), a record is exempt from disclosure if its disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual.

(2) 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—

...

(e) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the effectiveness of those methods or procedures;

...

(2) Subsection (1) does not apply to a record if –

(a) it consists of—

...

(ii) a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law;

... and

(b) its disclosure would be in the public interest

## **Public Access to Information Regulations 2014**

### **Reasonable search**

5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information officer has been unable to locate a record referred to in paragraph (1), he shall make a record of the efforts he made.

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