

## Decision Notice

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### Decision 15/2023: Bermuda Police Service

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#### Records related to reports of incidents at Clifton

**Reference no:** 20220531-01

**Decision date:** 30 June 2023

## 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 any report made by a police officer, and any communications between the Commissioner of Police and the Cabinet Office, of any incident occurring in March 2021 at Clifton, the Premier's residence. The BPS refused the request under section 38 of the PATI Act because if any record exists or were to exist, it is or would be exempt under section 23 of the PATI Act as personal information.

The Information Commissioner has found that the BPS was not justified in refusing the request under section 38 of the PATI Act because it has not shown that a record, if it exists or were to exist, would be exempt under section 23. Further, and in any event, the balance of the public interest requires disclosure of the existence or non-existence of any record responsive to the PATI request, by virtue of section 38(2).

The Information Commissioner has annulled the BPS's internal review decision and ordered the BPS to issue a new initial decision informing the Applicant of the existence or non-existence of the responsive records and, if any records exist, deciding whether to grant public access to them, on or before Friday, 11 August 2023.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); section 38 (non-disclosure of existence of a record).

Public Access to Information Regulations 2015: regulation 2 (public interest).

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

## Background

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1. Clifton is a government-owned property that first became the residence of a Bermuda Premier in 2011, when the Cabinet Office made the decision to designate Clifton as the

residence of former Premier Paula Cox.<sup>1</sup> Most recently, the [Information Statement](#) of the Cabinet Office, signed on 4 June 2021, indicates that the Cabinet Office’s Protocol Office holds records related to the “general administration and management of Clifton (when the Premier is in residence)”.

2. On 3 March 2022, the Applicant made a Public Access to Information (**PATI**) request to the Bermuda Police Service (**BPS**), which asked for:
  - a. any report made by a police officer of any incident which took place in March 2021 at Clifton, the Premier’s official residence (**item 1**).
  - b. any communications between the Commissioner of Police and the Cabinet Office concerning any incident in March 2021 at Clifton (**item 2**).
3. The BPS did not issue an initial decision on the PATI request by the statutory deadline.
4. On 22 April 2022, the Applicant asked for an internal review. On 29 May 2022, the BPS issued its internal review decision refusing the PATI request in full under section 38. The BPS refused to confirm the existence or non-existence of any responsive records because if one exists or were to exist, it is or would be exempt under the personal information exemption in section 23. No further reasoning was provided. The internal review decision did not address whether the balance of the public interest required disclosure of the existence or non-existence of the record.
5. On 31 May 2022, the Applicant made a timely application for an independent review by the Information Commissioner of the BPS’s internal review decision refusing the request under section 38 of the PATI Act.

## Investigation

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6. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.

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<sup>1</sup> [Clifton expected to become residence of Premier Cox](#), Royal Gazette, 6 May 2011. No premier has ever lived in Camden in the Botanical Gardens, the official residence of Bermuda’s premier, and the home is used as a social hosting venue by the Government. See [Built Heritage: Camden](#), Bermuda National Trust (February 2022). See also Dan Jones, [Premier’s \\$1.5m makeover](#), Royal Gazette, 4 February 2011 (discussing, among other things, the renovation costs for Clifton).

7. 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 section 38 was justified.
8. The Information Commissioner notified the BPS of the review on 6 July 2022. On 20 July 2022, the BPS advised the Information Commissioner's Office (**ICO**) that it had engaged the Attorney General's Chambers for legal advice in this matter and sought additional time for providing its submissions. The ICO subsequently met with the BPS and its counsel to hear its questions and concerns about the review and to explain the ICO's review process.
9. After receiving submissions from the BPS in November 2022, the ICO sought clarification of the BPS's position relevant to the issue in this review. In January and February 2023, the BPS confirmed that it denied the request based on section 38(1) of the PATI Act because if a record responsive to the request exists or were to exist, the record is or would be, exempt under section 23(1) of the PATI Act as personal information.
10. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. The ICO invited both the BPS and the Applicant to comment on the issues under review. The ICO did not receive submissions from the Applicant, but as noted above, the BPS made submissions.

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

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11. In coming to this Decision, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the BPS and the Applicant. She is satisfied that no matter of relevance has been overlooked.
12. The Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. In some circumstances, however, section 53(2) of the PATI Act prevents discussion of information in a party's submissions. As a result, this Decision Notice also has a Confidential Annex with additional reasoning responding to the BPS's submissions and supporting the Information Commissioner's conclusions. The Confidential Annex has been provided only to the BPS.

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

13. Section 38 of the PATI Act allows a public authority to refuse to disclose whether a record exists. Similar provisions in other public access laws are referred to as ‘neither confirm nor deny’ (NCND) provisions.<sup>2</sup>
14. A public authority must satisfy two gateway requirements to justify reliance on section 38.

#### “is or would be exempt”

15. First, under section 38(1), a public authority must show that any responsive record, if it exists or were to exist, is or would be an exempt record. This means that any responsive record if it exists or were to exist is or would be “exempt from disclosure under [the PATI Act] by virtue of a provision in Part 4”<sup>3</sup>. Accordingly, the public authority must first identify an exemption that is, or would be, applicable to any responsive record and apply the test for the specific exemption to establish that any responsive record is, or would be, exempt from public disclosure. If the applicable exemption is subject to the public interest test, as part of its analysis, the public authority must show that the balance of the public interest favours or would favour upholding the exemption.

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<sup>2</sup> For example, [section 18](#) of the Freedom of Information (Scotland) Act (**FOISA**) 2002 adopts a similar approach as section 38 of the PATI Act, as discussed below in paragraphs 24-25, by creating a general NCND provision applicable to all exemptions.

In contrast, section 1 of the UK Freedom of Information Act 2000 creates the right to know whether a public authority holds information and right to have that information communicated. Then, the provisions for various exemptions have a subsection granting public authorities the power to refuse to confirm nor deny holding the information. The Freedom of Information Act 2014 in Ireland, like the law in the UK, embeds ‘neither confirm nor deny’ provisions within the exemption. In the UK and Ireland, each NCND subsection is adapted to the interests being protected by the relevant exemption.

In contrast, section 38 of the PATI Act gives public authorities a general power to respond to a PATI request by refusing to disclose whether the requested record exists, under specific circumstances. Section 38(2) also requires the application of a public interest test, regardless of the underlying exemption relied upon in section 38(1).

Another important distinction is that section 1(b) of the UK FOIA law also focuses on access to information, while section 12(1) of the PATI Act focuses on access to records. Unless it will be misleading, section 18 of the PATI Act requires a public authority to redact exempt information from a public record to enable disclosure of the non-exempt information. This means that when applying an exemption such as the personal information in section 23(1), a public authority must consider whether the entire record, or only part of a record, is exempt.

<sup>3</sup> Section 3 of the PATI Act.

16. The requirement that the record 'is' or 'would' be exempt is a high standard.<sup>4</sup> In section 38(1), this refers to a high level of certainty and requires a showing that if a record exists it is exempt or, if the record were to exist, it would be exempt from public disclosure.

Public interest test

17. Second, if a public authority satisfies section 38(1), it must then conduct the public interest test in section 38(2). Because section 38(2) addresses whether the disclosure of the existence of any responsive record is in the public interest, it does not concern question of whether the actual content of any record should or should not be disclosed. Rather, the decision maker must consider why the circumstances require that the mere existence or non-existence of a record cannot be acknowledged.
18. In sum, to justify reliance on section 38 to refuse to disclose the existence or non-existence of a record, a public authority must consider the following questions:
  - [1] If a record exists or were to exist, is it or would it be exempt from public disclosure by virtue of a provision in Part 4?
  - [2] If so, is the disclosure of the existence or non-existence of the record in the public interest?
19. The specific circumstances in each case will inform the Information Commissioner's assessment.
20. In this review, the BPS asserts that any responsive record, if it exists or were to exist, would be exempt in full under section 23(1) because it consists of personal information.
21. Section 23(1) allows a public authority to deny public access to a record or part of a record if it consists of personal information, subject to exceptions in section 23(2). Section 24(2) defines personal information as information about an identifiable individual, subject to exclusions to this definition in section 24(2)<sup>5</sup>.

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<sup>4</sup> The exemption in section 26(1)(b) similarly requires that disclosure "would constitute" a breach of confidence. The standard under section 26(1)(b) also requires "a high probability that the breach of confidence can occur". [Decision 02/2022, Bermuda Business Development Agency](#), at para. 28.

<sup>5</sup> Under section 24(2), the following information does not amount to personal information: (a) information about a current or former officer or employee of a public authority that relates to that individual's position or functions; (b) information about an individual who is or was performing services under contract, as long that the information relates to the services performed; and (c) information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority.

22. If the information in the record includes reference to an identifiable individual, it is personal information. A record will also contain personal information if the individual's identity is ascertainable from the information in the record. Certain identifiers, or a combination of identifiers, may be sufficient to identify a single individual, or to distinguish an individual from other members of a group. For example, a reference to the first female Premier of Bermuda would allow the public to identify a single individual, Dame Pamela Gordon.
23. Decision makers should therefore assess whether the disclosure of records containing identifiers other than names (such as ages, locations, occupations, etc.), when these identifiers are combined with each other or with other information in the public domain, could lead to an individual being readily identified.
24. If an access to information request names specific individuals and looks for records of those individuals, the records captured by the request would clearly relate to one or more named individuals. In that case, it might be appropriate for public authorities not to confirm the existence or non-existence of any requested records, although this would depend on various factors, such as the nature of the records being sought and the information available in public domain. In [Decision Notice 111/2021](#), for example, the Scottish Information Commissioner upheld the University of Edinburgh's refusal to confirm or deny if it held information relating to a misconduct investigation against a named individual, stating (emphasis added):

The Commissioner notes that each part of the information request is framed with reference to the named University employee and a complaint of misconduct made against them. **Given that the Applicant has named specific individuals, and the subject matter of the request is the conduct and behaviour of the named member of University staff, the Commissioner is satisfied that, if this information did exist and were held by the University, any information captured by the request would clearly relate to one or more named individuals.** The Commissioner therefore accepts that, if it existed and were held, the information would be personal data as defined in section 3(2) of the DPA [Data Protection Act (DPA)] 2018.<sup>6</sup>

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<sup>6</sup> Additional examples from the Scottish Information Commissioner include, [Decision Notice 142/2015](#) (upholding a NCND response to a request for a public authority's investigation into a specific reported disturbance); [Decision](#)

25. Similarly, in [Decision Notice 089/2022](#), the Scottish Information Commissioner found that the East Lothian Council was entitled to refuse to confirm or deny whether it held information in response to an access request. The request sought “a full copy of all the medical qualifications that [specific] employees are in possession of and have been registered with the [National Health Service] as being fully trained medical professionals<sup>7</sup>. The public authority concluded “there appeared to be no means by which it could respond to the Applicant’s request without breaching the Data Protection principles in respect of these staff members”<sup>8</sup>. In paragraphs 19-20, the Scottish Information Commissioner agreed, explaining that:

The Commissioner notes that, as mentioned above, the Applicant’s information request refers to named individuals who attended a specific meeting, and it is about them he is seeking information. Specifically, a copy of the medical qualifications they hold.

The Commissioner is satisfied that, if this information did exist and was held by the Authority, it would clearly relate to identified or identifiable living individuals. The Commissioner therefore accepts that, if it existed and were held, the information would be personal data as defined in section 3(2) of the DPA 2018<sup>9</sup>.

26. In other circumstances, the request itself does not identify any individuals but the responsive records include a third party’s personal information. When this occurs, it may be more appropriate to confirm the existence of those records and refuse public access to them, in whole or in part, under the personal information exemption. Public authorities issue such responses on a routine basis to safeguard personal information.
27. If engaged, the exemption in section 23(1) is also subject to the specific public interest test in section 23(6). The public interest test in section 23(6) requires a balancing of the public interests in favour of knowing an individual’s personal information, on the one

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[Notice 185/2021](#) (upholding the NDNC response to a request for any reported previous allegations against a named police officer before the reports that brought the officer to trial and conviction).

<sup>7</sup> [Decision Notice 089/2022](#), at para. 1.

<sup>8</sup> [Decision Notice 089/2022](#), at para. 4.

<sup>9</sup> In deciding that the public authority was justified in its refusal to confirm or deny, the Scottish Information Commissioner undertook the full analysis under the relevant Data Protection Act (**DPA**) 2018 and UK General Data Protection Regulation (**UK GDPR**).



hand, against the privacy rights of the individual and any other public interest in favour of maintaining confidentiality, on the other hand.

28. When considering the public interest test against and in favour of disclosure of personal information, public authorities should take into account the following factors:
  - a. Whether disclosure will further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations;
  - b. Whether disclosure would be fair to the individual under all of the circumstances, which would include consideration of whether sensitive personal information<sup>10</sup> was involved, the potential consequences of disclosure on the individual, and the individual's reasonable expectations of privacy; and
  - c. Whether disclosure of the personal information is necessary to further the public interests that have been identified, which involves consideration whether the public interest concerns can be met by disclosure of other information in the records that interferes less with an individual's right to privacy.
29. The analysis for the personal information exemption is discussed in further detail in [Decision 34/2022, Office of the Governor](#), paragraphs 13-22.
30. In sum, to justify withholding a record as exempt under section 23(1), a public authority must consider:
  - [1] Whether a record consists of information about an identifiable individual?
  - [2] Whether the information falls within any of the exclusions to the definition of personal information (section 24(2))?
  - [3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?
  - 4] If the exemption on personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure by virtue of section 23(6)?

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<sup>10</sup> If the information is 'sensitive' personal information, the fairness concerns surrounding disclosure may be heightened. Under section 7(1) of the Personal Information Protection Act 2016, 'sensitive personal information' means "any personal information relating to an individual's place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information."

31. Finally, the public authority bears the burden to establish, on the balance of probabilities, that it has justified its reliance on section 38 to refuse to confirm the existence or non-existence of any responsive record. The Information Commissioner will invoke section 23 on her own accord, to safeguard the right to privacy. Therefore, when a public authority relies on section 23 to justify the application of section 38, the Information Commissioner will consider the application of section 23 beyond the arguments raised by the public authority, if necessary.

*Public authority's submissions*

32. The BPS made formal submissions, along with additional correspondence and information provided to the ICO during this review.
33. The BPS explained that the requested information, if it exists or were to exist, relates or would relate to a third party and is therefore exempt from disclosure in accordance with section 23(1) of the PATI Act. The BPS reasoned that because the information, if it exists or were to exist, relates or would relate to a private individual who has not provided written consent to disclose their personal information, the BPS had a duty to comply with section 38.
34. The BPS made several arguments concerning the public interest test. Notably, the BPS stated that neither section 23 nor section 38 of the PATI Act provides for the release of information in the public interest. It stated firmly that there “can be no public interest in obtaining information related to an individual, whether that record exists or does not exist”. The BPS also referred to the public interest in section 21 of the PATI.
35. As the BPS reasoned, the PATI Act applies to access to information about a public authority and, by virtue of section 23, the PATI Act explicitly excludes information held by a public authority about an individual. An authority can only release such private information if the individual provides written consent to do so. Further, a public authority may be under a duty to deny even the existence of a record involving personal data.
36. Throughout its submissions, the BPS relied upon several cases, including the Information and Privacy Commissioner of Ontario, Order MO-2638, Niagara Regional Police Services Board (20 July 2011). It also referenced two decisions by the UK Upper Tribunal: Maurizi v Information Commissioner & The Crown Prosecution Service, [2019] UKUT 262, and Savic v Information Commissioner, Attorney General and Cabinet Office, [2016] UKUT 535 (AAC).

37. The BPS cited the UK Upper Tribunal decision in Maurizi v Information Commissioner & The Crown Prosecution Service, [2019] UKUT 262, at paras. 35 and 202, to support its point that there is no public interest in the disclosure of personal information:

The [First Tier Tribunal (**FtT**)] agreed that Mr Assange had a ‘strong personal interest’ in knowing whether the [Crown Prosecution Service] had received extradition inquiries or requests from a State other than Sweden. However, the FtT was “unable to see how it would be of more than marginal benefit to the public for that question [concerning extradition enquiries] to be answered”. While the request for information was not expressly linked to extradition, it was necessary to consider the specific question about extradition “because the effect of departing from the NCND policy in this instance would potentially be to answer that question”

38. The BPS cited Niagara to support its argument that the Adjudicator in that case held that the privacy of the individual should be protected, and that the Information and Privacy Commissioner of Ontario should not substitute its own discretion for that of the Commissioner of Police.

39. The BPS specifically highlighted various passages from Niagara, including the following on pages 11-13:

**Would the disclosure of the existence of a record reveal personal information?**

Under part one of the section 14(5) test, the Police must demonstrate that disclosure of a record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under section 2(1), “personal information” is defined, in part, to mean recorded information about an identifiable individual, including the individual’s name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual (paragraph (h)).

Having reviewed the submissions of the Police, I am satisfied that, if a record exists, it would contain the personal information of the appellant and other identifiable individuals. As stated above, the appellant in his request sought all police reports about him from May 2009 until the date of the request. The records at issue in this appeal are police investigation reports concerning alleged violations of law involving the appellant and

other identifiable individuals. These records contain the personal information of the appellant and other identifiable individuals. Similarly, if additional records did exist, they would contain the personal information of the appellant and other identifiable individuals.

...

However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the records contain the requester's own personal information.

I agree with the Senior Adjudicator's analysis and findings. Based on all of the information before me, I am satisfied that the disclosure of the fact that any additional record exists (or does not exist) would in itself convey information to the appellant. Further, I find that the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of privacy. Accordingly, I find that section 14(5) may be invoked in the circumstances of this appeal and that neither sections 14(4) nor 16 apply in the circumstances of this appeal.

Accordingly, I find that the Police may refuse to confirm or deny the existence of any additional records that might be responsive to the appellant's request.

40. The BPS did not explain its reliance on Savic.
41. The BPS also cited an extract from the UK Information Commissioner's Guidance, Neither confirm nor deny in relation to personal data, page 9:

**What do you do if it is someone else's personal data?**

You do not have to confirm or deny whether you hold the requested information if doing so would disclose personal data which relates to someone other than the requester, and one of the conditions in [the Freedom of Information Act] section 40(5B)(a)-(d) applies.

In the [Environmental Information Regulations], personal data about other people is dealt with in regulations 12(3) and 13. Regulation 12(3) says that personal data about someone other than the requester “shall not be disclosed otherwise than in accordance with regulation 13”. Regulation 13(5A) and 13(5B)(a)-(e) contain the neither confirm nor deny provisions.

These exemptions are designed to balance the right to access information with the right to privacy. They are engaged when confirming or denying would:

- breach one of the data protection principles;
- breach an objection to processing; or
- itself be exemption from a subject access request.

#### *Applicant’s submissions*

42. The Applicant did not make submissions.

#### *Discussion*

43. The Information Commissioner considers the BPS’s reliance on section 38 to refuse to disclose whether any records responsive to items 1 and 2 of the PATI request exist.
44. When section 38(1) is under consideration, the Information Commissioner must ensure that her decision does not confirm one way or another whether the requested records actually exist. This means that she is unable to comment in any detail on the BPS’s reliance on the exemptions or any other matters in such a way that would have the effect of indicating whether the requested records actually exist. Accordingly, the extent of the analysis which can be given is somewhat limited.
45. The Information Commissioner notes from the outset that the BPS has provided cases from the UK as well as Ontario that reflect the legal framework in those jurisdictions, but the BPS appears to have placed less emphasis on the framework in the PATI Act.
46. The BPS also referred to the standard of review under section 43(2) of the [Municipal Freedom of Information and Protection of Privacy Act \(MFIPPA\)](#) set out in [Niagara](#), which is irrelevant for this review.

[1] If a record exists or were to exist, is it or would it be exempt under section 23(1) from public disclosure?

47. To justify the application of section 38(1), the BPS must show, on the balance of probabilities, that if records responsive to items 1 and 2 exist or were to exist, they are or would be exempt under section 23(1) as personal information.
48. This requires consideration of the analysis for section 23(1), set forth above, in paragraphs 21-30. This analysis is considered for each item, in turn.
49. The BPS misstated the law under section 23 of the PATI Act. As noted in paragraphs 34-35, above, the BPS claimed that the PATI Act “excludes information held by a public authority about an individual’ and that an authority “can only release such private information if the individual provides written consent to do so”.
50. The PATI Act has no provision that “excludes” information because it is personal information. Nor is disclosure only permitted when an individual provides written consent. The analysis for the exemption from public access under section 23 is set out properly in this Decision and permits the disclosure of personal information held by public authorities under appropriate circumstances, as explained above in paragraphs 21-30.

[1] Whether a record consists or would consist of information about an identifiable individual?

Item 1: police reports

51. The BPS stated that if a responsive record exists or were to exist for item 1, it consists or would consist, in its entirety, of information concerning ‘a third party’, meaning a ‘person’ who is not the PATI requester. As explained above and to further clarify, personal information means information about an identifiable individual.
52. The BPS did not explain who the individual (or individuals) is or could potentially be, or how a record, if it exists or were to exist, identifies or could identify an individual or specific individuals. For example, the BPS did not elaborate on whether the relevant individual might be a victim of a crime, a perpetrator or a witness, or other class of people whom the BPS considers to be a ‘private third party’.
53. To determine whether any record responsive to item 1 is or would be exempt under the personal information exemption, the Information Commissioner considers the information and details within the PATI request and whether they might lead to identifying a specific individual.
54. Item 1 of the PATI request includes certain details for the group of records sought. This includes the date of the incident (March 2021), the location (Clifton, the Premier’s official

residence) and the author of the report (a police officer). The PATI request does not otherwise specify the nature of any incident beyond these details or refer to an identifiable individual.

55. As a general matter, a police report will contain some information about an identifiable individual, e.g., the police officer who authored it, the individual who made the complaint, etc. Unless further details which could identify any individual are available, however, such information could be redacted in a manner that withholds personal information and allows disclosure of the remaining record.
56. With respect to the officer or officers who may have authored a report, if one exists or were to exist, the BPS employs a large number of police officers. It would be difficult from the details included in the PATI request to identify a specific police officer.
57. For clarity, the PATI request refers to the “Premier’s official residence” as the location and did not ask for “any report of any incident involving the Premier”. Clifton is a government-owned building and serves as the Premier’s residence. As a result, in addition to the Premier and his family, staff may be present inside and on the grounds of the property, such as the Premier’s personal staff<sup>11</sup>, landscaping and horticultural officers from the Department of Parks<sup>12</sup>, and security personnel<sup>13</sup>.
58. Any incident occurring there may not only involve individuals associated with the property. It is also probable that external parties seeking to commit an offense on the property, such as vandalism or theft, or individuals presenting a security threat to the Premier<sup>14</sup> may be identified in a police report (if one exists or were to exist), as well as the officers responding to the incident.
59. The pool of potential individuals that could be identified by the details contained in the request (the month of the incident, location and nature of the report, if it exists or were to exist) includes a number of possible individuals. Thus, if a record exists or were to exist, the pool of potential individuals would consist of the Premier and his family, various

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<sup>11</sup> See the [Premier, Ministers and Opposition Leader Personal Staffs Act 2019 Annual Report](#) (December 2020) tabled in the House of Assembly by the Cabinet Office, Office of the Premier on 4 December 2020. No further reports on the Premier’s personal staff have been tabled.

<sup>12</sup> See [Official Hansard Report](#), 22 March 2021, at p. 1172.

<sup>13</sup> See [Police officer gets suspended prison sentence](#), Royal Gazette, 11 May 2022 (reporting on the sentencing of a police officer arrested for drug offenses while on duty at Clifton, the Premier’s residence).

<sup>14</sup> See, e.g., [Man arrested or social media threats against Bermuda’s Premier](#), Caribbean Loop News, 19 January 2022; [Man charged with making death threats to Bermuda Premier](#), Caribbean National Weekly, 11 May 2018.

staff and public officers inside and outside the residence, security, visitors, individuals seeking to commit an offense, and responding police officers. This is a sizable number of possible individuals.

60. Specific individuals could only be identified if further details contained in the actual content of a report (if it exists or were to exist) were to be disclosed. These could include details such as names, ages, sex, the nature of the offence, badge identifications, and so on.
61. This case is different from the ones which the Scottish Information Commissioner decided in Decisions 111/2021 and 089/2022, referred to above in paragraphs 24-25. In both cases, the Scottish Information Commissioner found that the authorities were justified in not confirming the existence or non-existence of the responsive information because the requests themselves refer to specific individuals and events. Here, given that item 1 of the PATI request did not refer to an identifiable individual and in the absence of adequate submissions from the BPS, the Information Commissioner is unclear how the record as a whole, if it exists or were to exist, consists or would consist of personal information.
62. One only needs to look at the daily reports that the BPS has published that provide non-identifying information about incidents reported to the BPS. Up until April 2021, the BPS published daily reports on a variety of incidents when they occurred, including traffic accidents, assaults, robberies, suspicious fires, and other offenses<sup>15</sup>. These include the daily reports of four incidents occurring in March 2021<sup>16</sup>.
63. While not identifying particular individuals, these reports include such details as intersections, streets and neighbourhoods; the age and sex of the victim or perpetrator; and the nature and date of the offense. From a review of the various daily reports published in 2021, it is clear that some information about incidents, including their

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<sup>15</sup> See, e.g., [BPS Daily Report](#), 24 March 2021 (describing a suspicious fire at a resident on Peat Lane in Pemboke); [BPS Daily Report](#), 21 February 2021 (describing a burglary of a woman's Town Hill Road, Smiths Parish residence); [BPS Daily Report](#), 20 August 2020 (detailing the arrest of a 22-year-old male resident of a Pearman's Hill, West apartment for growing cannabis in flower pots); [BPS Daily Report](#), 25 November 2019 (stating that a 29-year-old female resident of the Gulfstream multi-unit rooming house was arrested for stabbing a 34-year-old male resident); [BPS Daily Report](#), 23 December 2019 (describing the aggravated robbery at the Coco Reef Resort of a 24-year-old male front desk clerk); [BPS Daily Report](#), 15 August 2005 (describing a domestic violence incident and assault on a police officer at a Sound View Road, Sandy's Parish residence involving a 39-year-old woman and a 47-year-old man, who were Parish residents).

<sup>16</sup> See the [March 2021](#) daily reports.



general location, can be published without disclosing the withheld personal information, such as the name of the victim.

64. The relevant individuals may be able to confirm that a record relates them, if a record exists or were to exist, but they will already know this information.
65. The Information Commissioner has given regard to the pool of potential individuals who could be identified in a responsive record, if it exists or were to exist; the BPS's publication of other information in its daily reports on incidents (including four for March 2021); the nature of the PATI request for item 1; and the ability of the BPS to redact any identifying details in a record, if it exist or were to exist.
66. Given that the request specifically refers to Clifton House and March 2021, more fulsome redactions of a report (if it exists or were to exist) may be required to prevent the disclosure of any personal information. On the balance of probabilities, though, any report by a police officer, if it exists or were to exist, could be appropriately redacted to provide at least limited information without disclosing identifiers for a single individual.
67. In its submissions, the BPS references Niagara and Maurizi to support its decision not to inform the Applicant of whether a report responsive to item 1 of the PATI request exists. The circumstances in those cases, however, are notably different than those considered in this case.
68. In addition to dealing with the complexities of Ontario's MFIPPA, R.S.O. 1990, CHAPTER M.56, which are irrelevant here, Niagara considered a request from an individual who sought copies of all police report pertaining to him since May 2009. The Niagara police responded in three ways. First, it acknowledged the existence of some of the responsive records and provided the requester with access to them. Second, it acknowledged the existence of another set of records, but denied access to them under exemptions.
69. Finally, the police refused to confirm or deny the existence of any additional records that might be responsive to the request. The police described the potential personal information that would be in any additional record, if it exists or were to exist "as personal information of identifiable individuals including the [requester], the [requester's] family members, numerous complainants, subjects, and suspects. The information includes the names, addresses, telephone numbers, descriptors, occupations, ethnicity, identifying numbers, statements, etc. of these individuals." In deciding Niagara, the Adjudicator easily recognised these categories of information as personal information.

70. The Adjudicator in Niagara also relied on her review of the disclosed records, as well as the withheld records, to consider what type of information would be contained in any additional responsive records, if they exist or were to exist. Similar to the requests in the decisions from Scotland discussed above, paragraphs 24-25, the Adjudicator determined that disclosure of whether any additional records exist would, in itself, convey third party personal information to the requester, and would constitute an unjustified invasion of personal privacy under section 14(5) of the MFIPPA.
71. In the present review, the PATI request is not as specific as the access request in Niagara (i.e., it does not refer to any identifiable individual) and no responsive records have been acknowledged, disclosed or withheld. Unlike the police in Niagara, the BPS has not explained why it cannot acknowledge whether a responsive record it exists and then address whether the content of the record needs to be withheld in whole or in part under an exemption.
72. In Maurizi, the UK Upper Tribunal considered the public interest in safeguarding Julian Assange's right to gain access to extradition records related to him through a FOIA request by his lawyer. The Upper Tribunal concluded that the weight given to Mr. Assange's interests in seeing information about himself was lessened under FOIA. This is because these rights were already protected under a separate legal framework that provides an individual's right of access to information about himself, the UK Data Protection Act 2018. The public interest assessment in Maurizi was specific to the circumstances of that decision and have no bearing on the issues at hand.
73. To the extent that the BPS argues that any responsive record as a whole, if it exists or were to exist, constitutes personal information within the meaning of section 24(1), its argument is impermissibly broad. The BPS has not shown any reason why it cannot acknowledge whether a responsive record for item 1 exists, and if so, assess whether it should be disclosed or withheld in whole or in part.
74. The Information Commissioner is thus not satisfied that a record responsive to item 1, if it exists or were to exist, is or would be exempt in full under section 23 of the PATI Act. Consequently, the BPS has not met the first requirement in section 38(1) with respect to its refusal to disclose the existence or non-existence of item 1.

Item 2: communications between the Commissioner of Police and the Cabinet Office

75. Apart from the reference to a police officer who authored any report referred to item 1, the request for item 2 includes the same details as those for item 1, set forth in paragraph 54 above. Item 2 further specifies that the communications must also involve the Commissioner of Police and individuals within the Cabinet Office.

76. In addition to the pool of individuals considered above for the records potentially responsive to item 1, as described in paragraph 54-59 above, for item 2, the pool included individuals at the Cabinet Office's Protocol Office who have responsibility for administering and managing Clifton when the Premier is in residence. A number of public officers within other parts of the Cabinet Office provide support to the Premier and may be included on such communications, if the record exists or were to exist.
77. Except for the Commissioner of Police, who is identified by his position and the time of the incident, the same analysis applies as set out above, paragraphs 54-59, concerning the pool of potential individuals who might be identified by a record, if it exists or were to exist.
78. The only individual identified with specificity by the record as a whole, if it exists or were to exist, is the Commissioner of Police.
79. The Information Commissioner is satisfied that any records responsive to item 2 of the PATI request, if it exists or were to exist, consists or would consist of information about an identifiable individual, i.e., the Commissioner of Police. This is because the correspondence, if it exists or were to exist, would by definition have been sent by or received from the Commissioner of Police. Therefore, the application of section 23(1) is considered further for the identification of the Commissioner of Police in a record responsive to item 2, if it exists or were to exist.

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

80. Having considered item 2 of the request, the Information Commissioner is satisfied that none of the exclusions in section 24(2) would apply to the Commissioner of Police's information contained in a record, if such record exists or were to exist. The Commissioner of Police's information relates or would relate to his performance of his position or functions, which the Information Commissioner has consistently upheld as personal work information.

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

81. Having considered item 2 of the request, the Information Commissioner is satisfied that none of the exceptions in section 23(2) applies or would apply to the Commissioner of Police's information in a record, if such record exists or were to exist.

[4] If the exemption for personal information in section 23(2) is engaged, whether the balance of the public interest requires disclosure by virtue of section 23(6)?

82. In light of its misunderstanding of the PATI Act, the BPS failed to consider whether the personal information exemption is or would be engaged for the personal work information of the Commissioner of Police in a record responsive to item 2 (if it exists or were to exist), including if the balance of the public interest would require disclosure. The Information Commissioner notes the BPS, in paragraph 34 above, stated that section 23 (and section 38) of the PATI Act does not require the disclosure of personal information based on the public interest. This is an inaccurate statement of the law under the PATI Act. As considered here, section 23(6) of the PATI Act expressly allows for the disclosure of personal information based on the balance of the public interest under this provision and the Information Commissioner has issued a number of decision requiring such disclosures of personal information in records held by public authorities<sup>17</sup>.
83. When considering the balance of the public interests, the Information Commissioner recognises that public interests would require disclosure of at least that part of a record responsive to item 2, if it exists or were to exist, that contains certain personal work information of the Commissioner of Police.
84. When weighing the various public interest factors, the Information Commissioner emphasises that the Commissioner of Police holds a far lesser expectation of privacy with respect to professional communications conducted in his role as the head of the Bermuda Police Service. As the most senior officer within the police service, the Commissioner of Police is also accountable to the public for his work-related decision making and activities. Disclosure of certain personal work information of the Commissioner of Police in his communications with the Cabinet Office would further the purposes set out in section 2 of the PATI Act to increase transparency and accountability, and to inform the public about the decision making of public authorities.
85. Further, the disclosure of certain personal work information of the Commissioner of Police in a responsive record, if it exists or were to exist, is necessary to further the purposes set out in section 2 of the PATI Act, and does not raise concerns about unfairness.

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<sup>17</sup> See, for example, [Decision 30/2022](#), [Bermuda Gaming Commission](#), para. 105; [Decision 18/2022](#), [Ministry of Health Headquarters](#), para. 202-204.

86. For the reasons stated above, the balance of the public interest favours disclosure of certain personal work information of the Commissioner of Police in any record responsive to item 2, if it exists or were to exist. Therefore, a record responsive to item 2, if it exists or were to exist, is not or would not be an exempt record by virtue of section 23(1).

[2] Whether the disclosure of the existence or non-existence of the record is in the public interest?

87. The BPS has not met the first requirement in section 38(1), and for this reason has not justified its reliance on section 38 in response to items 1 and 2 of the PATI request.

88. In any event, even if a record responsive to items 1 and 2 (if it exists or were to exist) is or would be exempt under section 23(1), the balance of the public interest would still require disclosure of its existence or non-existence.

89. With respect to the balancing of public interests under section 38(2), the BPS must explain why the balance of the public interest requires the BPS to withhold information on the existence or non-existence of any responsive reports and any communications between the Commissioner of Police and the Cabinet Office about these reports.

90. This is particularly so because until May 2021, the BPS did inform the public of the existence of some reports by the police concerning a wide variety of criminal incidents, as noted above in paragraph 62. Further, since May 2021, the BPS continues to issue press releases concerning an equally wide variety of criminal incidents that reference a range of details about the incidents, locations, victims and alleged perpetrators<sup>18</sup>.

91. Further, the published daily reports from April 2021 and earlier include acknowledgment the existence of four incidents occurring in March 2021, none of which relate to incidents occurring at Clifton House. This leads to the obvious question of whether these four incidents represent the only reports taken by police officers in March 2021 or whether the BPS only provided information about the reports for some incidents occurring in March 2021, and not others.

92. The BPS did not offer any reasoning about a process or rationale for publishing daily reports or other information about incidents. The BPS has not explained if it made an exception for reports of incidents at Clifton to a standard practice of publishing daily reports; or, alternatively, if the practice of providing public information only about

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<sup>18</sup> See [Press Releases](#), Bermuda Police Service.

certain incidents is driven by the nature of the incident, or some other factor. Further, if an exception was made to its usual practice with respect to Clifton, the BPS may need to provide the public with an explanation of why.

93. With this in mind, a number of public interest concerns favour acknowledging the existence or non-existence of any report concerning incidents at Clifton House in March 2021, and related communications between the Commissioner of Police and the Cabinet Office.
94. In the first instance, Clifton House is a government owned and managed property used as the residence of the Premier. The nature and cost of security arrangements for Premiers residing at Clifton has been a topic of Parliamentary debate. This has included the costs of renovating Clifton and its security upgrade<sup>19</sup>, questions of whether a Premier can safely live in a private residence or must live in Clifton and the level of security provided to a Premier<sup>20</sup>.
95. An additional weighty interest is overcoming what might be unnecessary secrecy surrounding any incidents at Clifton House. The public has an interest in knowing the frequency of any incidents on such properties and whether public resources—including funds and personnel—are effectively and appropriately allocated to ensure the security of the Premier’s residence. The Information Commissioner notes the June 2019 arrest of a police officer while on duty at Clifton House for the offenses of abuse of power and offering to supply drugs<sup>21</sup>. Disclosure of the existence of reports of any incidents at Clifton will further transparency and accountability in this regard, including if no further information is disclosed except for the existence or non-existence of any responsive records.
96. In the other side of the balance, few public interest factors support withholding the existence or non-existence of responsive records. The BPS has offered no argument on how the public interest will be served by a refusal to acknowledge whether the records exist or do not exist.
97. For the reasons explained above, the Information Commissioner is satisfied that even if a record responsive to items 1 or 2 (if it exists or were to exist) is or would be exempt

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<sup>19</sup> See Dan Jones, [Premier’s \\$1.5m makeover](#), Royal Gazette, 4 February 2011.

<sup>20</sup> [Clifton expected to become residence of Premier Cox](#), Royal Gazette. 6 May 2011.

<sup>21</sup> Sekou Hendrickson, [Police officer gets suspended prison sentence](#), Royal Gazette, 11 May 2022.

under section 23, the balance of the public interest requires disclosure of its existence or non-existence.

***Conclusion***

98. The Information Commissioner is not satisfied that the BPS has justified its reliance on section 38 to refuse to disclose the existence or non-existence of a record responsive to items 1 or 2 of the PATI request.

## Decision

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The Information Commissioner finds that the Bermuda Police Service (**BPS**) has not justified its reliance on section 38 of the Public Access to Information Act (**PATI**) 2010 to refuse to disclose the existence or non-existence of a record responsive to the PATI request. This is because any record, if it exists or were to exist, is not or would not be exempt in full under section 23(1) of the PATI Act as personal information. In any event, the balance of the public interest requires disclosure of the existence or non-existence of a record responsive to the PATI request.

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

- annuls the internal review decision, and
- orders the BPS to issue a new initial decision on the PATI request.

The Information Commissioner requires the BPS to issue a new initial decision, as directed by this Decision and the accompanying Order, on or before **Friday, 11 August 2023**.

## Judicial Review

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

## Enforcement

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The Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the BPS 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  
30 June 2023



## Appendix: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Public interest test

- 21 For the purposes of [Part 4], the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure.

#### Personal information

- 23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.
- ...
- (6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

#### Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
- ...
- (2) But “personal information” does not include—
- (a) information about an individual . . . who is or was an officer or employee of a public authority that relates to the position or functions of the individual;
- ...

#### Non-disclosure of existence of records

- 38 (1) A public authority may refuse to disclose whether a record exists if the record itself, if it exists or were to exist, is or would be an exempt record.
- (2) The existence or non-existence of a record shall be disclosed if disclosure of it is in the public interest.

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