

## Decision Notice

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### Decision 11/2024: Bermuda Police Service

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#### **Records related to the execution of a search warrant**

**Reference no:** 2021036

**Decision date:** 27 March 2024

## 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 records relating to the execution of a residential search warrant. In its internal review decision, the BPS decided that the record was exempt under section 30(1)(a) (prejudice to the effectiveness of an investigation) because its disclosure would prejudice the effectiveness of disciplinary investigations by the BPS. During this review, the BPS invoked additional exemptions—section 34(1)(a), (b) and (c)—to withhold the record.

The Information Commissioner has varied the BPS’s internal review decision to grant access to the record, in part, with exempt personal information withheld under section 23(1) and ordered the BPS to disclose the record, in part, in accordance with this Decision and accompanying Confidential Annex and Order by **Wednesday, 8 May 2024**.

## 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 30(1)(a) (prejudice to the effectiveness of an investigation), section 34(1)(a) (prejudice to prevention, detection or investigation of possible breach of law), section 34(1)(b) (prejudice to enforcement of, compliance with or administration of any law), section 34(1)(c) (prejudice to fair trial or impartial adjudication).

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

## Background

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1. On 17 November 2021, the Applicant made a PATI request to the Bermuda Police Service (**BPS**), asking for records related to the execution of a residential search warrant. The Applicant sought:
  - a. a copy of all body camera footage taken by any and all officers who attended [the Applicant’s] home (**item 1**); and
  - b. a copy of the contemporaneous notes that were recorded at that same time (**item 2**).
2. On 14 December 2021, the BPS issued an initial decision. The BPS confirmed that it held records responsive to items 1 and 2 of the PATI request but denied access to them under section 30(1)(a) of the PATI Act on the basis that disclosure would prejudice the

effectiveness of ongoing misconduct investigations under the Police (Conduct) Orders 2016 (**Conduct Orders**). The BPS stated in its initial decision that the Applicant would be provided with all of the relevant documentation prior to any misconduct proceedings, citing section 26 of the Conduct Orders.

3. On 14 December 2021, the Applicant asked for an internal review.
4. On 16 February 2022, the BPS issued its internal review decision out of time,<sup>1</sup> and upheld the initial decision. The internal review decision reiterated that the records would be provided prior to the misconduct proceedings in accordance with section 26 of the Conduct Orders.
5. On 17 February 2022, the Applicant made a timely application for an independent review by the Information Commissioner, challenging the BPS's reliance on section 30(1)(a).

## Investigation

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6. The Information Commissioner's Office (**ICO**) accepted the application as valid on 17 February 2022, on the basis that the Applicant had made a PATI request to a public authority and had asked that public authority for an internal review. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review.
7. During validation, the Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application, because examining the withheld records was required to evaluate the public authority's reliance on the provisions.
8. The ICO notified the BPS of the valid application on 25 February 2022 and asked for the responsive records. The ICO corresponded with the BPS regarding the records held and was informed that the BPS held two video records responsive to item 1 of the PATI request and that they had been having difficulty accessing files relevant to item 2 of the PATI request. On 18 April 2022, the ICO wrote to the BPS detailing the search steps required by section 12 of the PATI Act and regulation 5 of the PATI Regulations 2014 (**PATI Regulations**).
9. On 29 April 2022, the BPS provided the withheld record responsive to item 2 of the PATI request:

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<sup>1</sup> See [Decision 05/2022](#), [Bermuda Police Service](#).

- a. A search report containing contemporaneous notes from the execution of the search warrant at the Applicant's home on 11 December 2020 (**Search Report**).
10. At the time that the BPS provided the withheld record, on 29 April 2022, the BPS invoked additional exemptions to withhold the record—section 34(1)(a), (b) and (c)—in addition to the previously relied on exemption in section 30(1)(a) and cited a pending judicial review as the basis of non-disclosure.
11. On 31 October 2022, the ICO met with the Applicant in relation to their pending reviews and the Applicant confirmed the withdrawal of item 1 of the PATI request (for body camera footage).
12. This review, therefore, only considers the Search Report responsive to item 2 of the PATI request.
13. As required by section 47(4) of the PATI Act, the ICO invited the parties to make representations. The ICO also informed the Applicant of the additional exemptions invoked by the BPS to withhold the record. The Applicant made a submission on 27 September 2023. The BPS made submissions on 26 October 2023 and 1 November 2023.

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

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

### ***Prejudice to the effectiveness of investigations – section 30(1)(a)***

15. Public authorities may refuse to disclose a record under section 30(1)(a) of the PATI Act if its disclosure could reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by, or on behalf of, the public authority; or the procedures or methods used to conduct them<sup>2</sup>.

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<sup>2</sup> The exemption in section 30(1)(a) of the PATI Act is similar to section 30(1)(a) of the Irish Freedom of Information (**FOI**) Act 2014:

A head may refuse to grant an FOI request if access to the record concerned could . . . reasonably be expected to—(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof.

16. The exemption in section 30(1)(a) is subject to the public interest test. This means that if the exemption in section 30(1)(a) is engaged, the records must still be disclosed if the balance of the public interest favours disclosure, as set out in section 21 of the PATI Act.
17. In the absence of a definition of ‘tests, examinations, investigations, inquiries or audits’ as well as ‘procedures or methods’ in the PATI Act and the Interpretation Act 1951 (**Interpretation Act**), these terms are to be read in their plain, ordinary meaning. Relevant in this review are the following definitions<sup>3</sup>:
  - a. ‘investigation’ is defined as ‘the action of investigating something or someone’, and ‘investigate’ means to ‘carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth’; and
  - b. ‘procedures’ is defined as ‘an established or official way of doing something’ or ‘a series of actions conducted in a certain order or manner’.
18. The exemption in section 30(1)(a) may apply to either ongoing or future investigations. It may also be applied to the procedures or methods used to conduct the relevant investigations.
19. For the exemption to apply, the relevant investigation must be conducted by or on behalf of the public authority concerned.
20. For the purposes of section 30(1)(a), ‘prejudice’ should be understood as a harm that is actual, real and significant to the effectiveness of investigations or the procedures used to conduct the investigation. Public authorities must be able to show that the effect caused by disclosure would be negative or detrimental in a way that undermines the effectiveness of the investigations or their procedures.
21. As the Information Commissioner explained in [Decision 27/2019, Bermuda Health Council](#), ‘effectiveness’ in section 30(1)(a) refers to the ability of the investigations or the procedures to produce or lead to a result of some kind. If, after disclosure, the investigations or their procedures could still be used to achieve their purposes, section 30(1)(a) may not be applicable.
22. To appropriately rely on the exemptions in section 30(1)(a), public authorities should also be able to show that disclosure ‘could reasonably be expected to’ cause the harm. This means a public authority must be able to show that their expectations on the negative impact of disclosure are likely, plausible or possible based on real and substantial facts.

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<sup>3</sup> Oxford Dictionary of English, 3<sup>rd</sup> Edition.

23. As summarised in [Decision 27/2019, Bermuda Health Council](#), to withhold a record under section 30(1)(a), a public authority must ask:
- [1] What was the relevant test, examination, investigation, inquiry, or audit, or the procedures or methods employed to conduct it?
  - [2] How could disclosure cause prejudice to the effectiveness of the relevant test, examination, etc., describing the circumstances or events that can lead to the prejudice?
  - [3] Whether the prejudice could reasonably be expected to occur under the circumstances?
  - [4] If the exemption was engaged, whether the balance of the public interests required disclosure of the records?
24. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 30(1)(a) to deny access to the records.

*Public authority's submissions*

25. The BPS submitted that the Search Report related to ongoing disciplinary investigations being conducted by the Professional Standards Department (**PSD**) under the Conduct Orders. The BPS stated that the disciplinary matter under investigation at the time of the PATI request related to material seized from the Applicant's residence during the execution of the search warrant and the information contained in the Search Report, including notes on what the Applicant said.
26. The BPS acknowledged that if an investigation is continued under the Conduct Orders, the Applicant would be given a copy of the Search Report as it forms the basis of the alleged misconduct, in accordance with the Conduct Orders. However, the BPS submitted that the process under the Conduct Orders should be followed with regard to the timing of that disclosure.
27. In response to specific questions asked by the ICO when inviting the BPS's submissions, the BPS stated that there are no written guidelines with respect to disallowing the subject of a search to obtain a copy of a completed Search Report either from the BPS or by using their own mobile device (e.g., by taking a photo of it on their phone) at the time of the search. The BPS submitted that the Disclosure and Criminal Reform Act 2015 (**Disclosure and Criminal Reform Act**) provides for when and how material seized under a search warrant is to be provided to the accused in criminal proceedings and the Conduct Orders provide for the disclosure of evidence with respect to disciplinary proceedings instituted against an accused.

### *Applicant's submissions*

28. The Applicant submitted that at the time the PATI request was made, the criminal investigation surrounding the warrant to search the Applicant's home was completed and closed with no wrongdoing found on the Applicant's part. In July 2021, the Department of Public Prosecutions refused to approve charges and therefore the matter under investigation was completed at the time of the PATI request (which was made on 17 November 2021).
29. The Applicant stated that the notes were simply a record of what transpired from the moment the BPS officers entered the Applicant's home until the moment they left. The Applicant also signed the notes. The Applicant submitted that such notes are always handed over to the accused before a trial and that, in this case, because the Applicant was never charged with a crime, the only way they can obtain the notes is via the PATI Act.
30. The Applicant further submitted that while searching their home, a member of the Applicant's household was always present and, as such, the procedures or methods employed by the BPS were not secretive. The Applicant also stated that, as a BPS officer, they had executed numerous search warrants and therefore were well aware of the procedures and methods employed for the conduct of any such investigations.

### *Discussion*

[1] What was the relevant test, examination, investigation, inquiry, or audit, or the procedures or methods employed to conduct it?

31. The relevant investigation was an ongoing disciplinary investigation<sup>4</sup> of the Applicant, as well as any future disciplinary investigations conducted by the PSD. The disciplinary investigations, which are aimed at investigating any potential breach of the Standards of Professional Behaviour, fall within the definition of an investigation for the purposes of section 30(1)(a) of the PATI Act and are conducted by a public authority, i.e., the BPS.
32. The Information Commissioner accepts that the Conduct Orders set out the procedures employed by the BPS to conduct the disciplinary investigation, as well as any future disciplinary investigation.

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<sup>4</sup> The Information Commissioner understands 'disciplinary investigation' to refer to both an investigation conducted under Part 3 of the Conduct Orders and a misconduct proceeding under Part 4 of the Conduct Orders, which includes misconduct hearings and misconduct meetings. See Order 2 of the Conduct Orders for definitions of misconduct proceedings, hearings, and meetings.

[2] How could disclosure cause prejudice to the effectiveness of the investigation or procedures, describing the circumstances or events that can lead to the prejudice?

33. The BPS has not explained how disclosure of the record could cause prejudice to the effectiveness of the disciplinary investigation or the procedures employed by the BPS to conduct the investigation.
34. In [Decision 15/2020](#), [Bermuda Police Service](#), the disclosure of records relevant to an investigation under the Conduct Orders were considered. In that Decision, the Information Commissioner found that the BPS had sufficiently demonstrated how the Conduct Orders have set out the categories of information and documents to be provided to officers subjected to a disciplinary investigation, and the fact that they prescribe a specific timeline for the provision of such information and documents.
35. As stated in [Decision 15/2020](#):

“46. Given these provisions in the Conduct Orders, the Information Commissioner accepts that disclosure of the responsive records could prejudice the effectiveness of the procedures the BPS uses to conduct disciplinary investigations. First, the PATI request in this review was made shortly after the Applicant was served with the Order 14 Notice, and while the disciplinary investigation against the Applicant was ongoing. Disclosure of the responsive records as a result of a PATI request would undermine the timelines specifically set out in the Conduct Orders.

47. Second, and perhaps most importantly, disclosure under the PATI Act of the responsive records could reasonably be expected to undermine the authority granted by the Conduct Orders to the BPS’s assigned investigator and the appropriate authority to make decisions on withholding certain information or documents from the Applicant. Disclosure under the PATI Act would circumvent the procedures and decision making authority in the Conduct Orders, and render them less effective, if not meaningless.

48. Although the procedures in the Conduct Orders would still be technically available, disclosure of the responsive records under the PATI Act would defeat the purposes of the structured processes, timelines and decision making authority in the Conduct Orders. This, in turn, defeats the balance struck in the Conduct Orders between an officer’s right to a fair



proceeding and maintaining the integrity of the BPS's disciplinary investigations.”

36. The record in this review, however, can be distinguished from the records in [Decision 15/2020](#). First, in that case, the withheld records contained correspondence between officers about the conduct of the police officer concerned and about the relevant disciplinary investigation. The records had been created in the context of the disciplinary investigation.
37. In this case, the Applicant is seeking a record that was created prior to any disciplinary investigation and one which the Applicant has already seen. It is evident from the document itself (and accepted by both parties) that the Applicant witnessed and signed each page of the Search Report at the time that it was recorded. The BPS has also confirmed that there are no written guidelines that would have prevented the Applicant from taking a copy of the record at the time that it was witnessed and signed.
38. Second, the BPS has admitted that in accordance with the Disclosure and Criminal Reform Act, if charges had been brought against the Applicant, the Applicant would have most likely been given a copy of the Search Report to assist in his defence of any criminal charges relating to material seized during the execution of the search warrant. The criminal proceedings would have been conducted prior to any disciplinary investigation under the Conduct Orders and disclosure of the record would not have prejudiced the disciplinary investigation; therefore, it is hard to understand why, where criminal charges were not brought, that disclosure of the record is said to be prejudicial to the investigation.
39. Third, the BPS has also admitted that if an investigation is continued under the Conduct Orders, the Applicant would be given a copy of the Search Report as it forms the basis of the alleged misconduct, in accordance with Orders 16<sup>5</sup> and 20<sup>6</sup> of the Conduct Orders. The BPS has simply submitted that the process under the Conduct Orders should be followed with regard to the timing of that disclosure. This is unlike the BPS's submissions

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<sup>5</sup> Order 16 relates to the interview of the police officer concerned by an investigator as part of his investigation. Order 16(6) provides that “the investigator must, in advance of the interview, provide the police officer concerned with such information as the investigator considers appropriate in the circumstances of the case to enable the police officer concerned to prepare for the interview”.

<sup>6</sup> Order 20 relates to the notice that must be provided to the police officer concerned where the investigation has found that the matter should be referred to misconduct proceedings. The appropriate authority is required to give the police officer concerned written notice of, among other things, the “referral; conduct that is the subject matter of the case and how that conduct is alleged to amount to misconduct or gross misconduct, as the case may be...”.

in [Decision 15/2020](#), where the BPS argued that the records may have been subject to the 'harm test' pursuant to Order 4(g).

40. In the circumstances, it is not clear how the disclosure of the record could prejudice the investigation or the operations of the BPS in administering the Conduct Orders. The BPS's justification of this exemption is not considered further in this Decision.

*Conclusion*

41. The Information Commissioner is not satisfied that the BPS has justified its reliance on section 30(1)(a) to withhold the Search Report because the BPS has not explained how disclosure could cause prejudice to the effectiveness of the disciplinary investigation or procedures employed in the conduct of the investigation.

***Prejudice to prevention, detection or investigation of possible breach of law and prejudice to the enforcement of, compliance with or administration of any law – section 34(1)(a) and (b)***

42. Section 34(1)(a) allows a public authority to refuse access to a record whose disclosure would, or could reasonably be expected to, prejudice the prevent, detection or investigation of a breach or possible breach of the law. As set out in [Decision 28/2022, Cabinet Office](#), paragraph 37, when applying section 34(1)(a) a public authority must ask:

- [1] What was the breach or possible breach of law?
- [2] How could disclosure prejudice the prevention, detection or investigation of this breach?
- [3] Could this reasonably be expected to occur?
- [4] Did the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?

43. Further, section 34(1)(b) allows a public authority to refuse access to a record when its disclosure would, or could reasonably be expected to, prejudice the enforcement of, compliance with, or administration of any law. In applying section 34(1)(b), a public authority must ask:

- [1] What was the law that is being enforced, complied with or administered?
- [2] How could disclosure prejudice the enforcement of, compliance with, or administration of that law?
- [3] Could this reasonably be expected to occur?

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

44. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 34(1)(a) or (b) to deny access to the records.

*Public authority's submissions*

45. The BPS made similar submissions as above at paragraphs 25-27. The record relates to matters under the Conduct Orders and an ongoing misconduct investigation. The Conduct Orders provides for the disclosure of material, prior to an interview with the investigator and after referral to a misconduct hearing. The BPS must follow the provisions of the Conduct Orders in relation to the timing of disclosure.

*Applicant's submissions*

46. The Applicant made the same submissions as above at paragraphs 28-30.

*Discussion*

47. The BPS's reliance on section 34(1) (b) is based on the disciplinary investigation being conducted under the Conduct Orders, and this also appears to be the bases for its assertion of section 34(1)(a).
48. Given that the BPS appears to have relied on the same factual basis and reasoning with respect to section 34(1)(a) and (b), as they relate to the disciplinary investigation, these exemptions are considered together.

[1] What was the breach or possible breach of law?

[1] What was the law that is being enforced, complied with or administered?

49. The relevant breach or possible breach of law for the purposes of section 34(1)(a) is a breach of the Standards of Professional Behaviour contained in the Schedule to the Conduct Orders.

50. The relevant law that is being enforced, complied with or administered is the Conduct Orders.

[2] How could disclosure prejudice the prevention, detection or investigation of this breach?

[2] How could disclosure prejudice the enforcement of, compliance with, or administration of that law?

51. As stated above, the BPS has not made sufficient submissions to explain how disclosure of the record could prejudice the investigation of the Applicant’s breach of the Standards of Professional Behaviour contained in the Schedule to the Conduct Orders; or prejudice the enforcement of, compliance with, or administration of the Conduct Orders. The mere fact that the records may relate to an ongoing investigation under the Conduct Orders does not, of itself, establish a link between disclosure and prejudice to an investigation under the Conduct Orders or the enforcement of, compliance with, or administration of the Conduct Orders.
52. The exemptions in section 34(1)(a) and (b) are not considered further.

*Conclusion*

53. The Information Commissioner is not satisfied that the BPS has justified its reliance on the exemptions in section 34(1)(a) and (b).

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

54. A public authority may rely on section 34(1)(c) to deny access to a public record where disclosure would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case. This exemption aims to prevent the release of records that could result in unfairness in the conduct of a trial or adjudication. It safeguards the integrity of the court, or other adjudicating body, and protects a person’s right to a fair trial.
55. As explained in [Decision 28/2022, Cabinet Office](#), a public authority applying section 34(1)(c) must first establish that the record relates to the trial of a person or adjudication of a particular case, which is either a current legal proceeding or one contemplated in future.<sup>7</sup> When identifying the trial or adjudication, the public authority may need to specify the parties to the proceeding, the offence or cause of action as well as the relevance of the record to the proceeding. The public authority also must indicate the proceeding’s status at the time of the PATI request (or internal review), e.g., whether the trial or adjudication was ongoing, concluded or anticipated.
56. The PATI Act and the Interpretation Act do not define ‘fair trial’ or ‘impartial adjudication’. However, the Bermuda Court has accepted that section 6(1) of the Bermuda Constitution derives from Article 6(1) of the European Convention on Human Rights.<sup>8</sup> In the context of civil proceedings, fair trial encompasses a wide range of both

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<sup>7</sup> See [Decision 28/2022, Cabinet Office](#), at paragraph 55.

<sup>8</sup> See [Tafari Wilson v Fiona Miller](#) [2018] SC (Bda) 6 App (23 January 2018), at paragraph 16.

institutional and procedural requirements, such as independent and impartial tribunals, the right of parties to present the observations which they regard as relevant, equality of arms, and sufficient reasoning of judicial decisions.<sup>9</sup>

57. The Bermuda Constitution requires any court prescribed by law to determine the existence or extent of any civil right or obligation, or of any criminal charges, to be independent and impartial. Citing a UK Court judgment, Justice Subair Williams stated:

All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.<sup>10</sup>

58. A public authority relying on section 34(1)(c) must show how disclosure could cause prejudice to a fair trial of a person or impartial adjudication of a case. The likelihood of harm required is that prejudicing the proceeding's fairness or the impartial adjudication 'could reasonably be expected to' occur. This is a lesser likelihood of harm compared to 'would', which means a high probability that the harm will occur. The mere fact that the records may relate to the proceeding does not, of itself, establish a link between disclosure and prejudice to the fairness or impartiality of the trial or adjudication.
59. The exceptions and public interest test that apply to section 34 differ from all other harm-based exemptions in the PATI Act. A public authority must consider the public interest test only when a record falls within a category listed in section 34(2)(a) as an exception. If the record does not fall within a section 34(2)(a) exception, the public interest test does not apply.
60. Where disclosure of a record falling within section 34(2)(a) would be in the public interest, the exemption does not apply. Unless another exemption applies, the record thus must be disclosed as it properly falls within an exception to section 34. If, however, the public authority decides the public interest weighs against disclosing a record falling

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<sup>9</sup> See European Court of Human Rights, '[Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial \(civil limb\)](#)' (31 August 2022).

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

within section 34(2)(a), the exception no longer applies, and the exemption may be justified to withhold the record.

61. In sum, when applying the exemption in section 34(1)(c), a public authority must ask:<sup>11</sup>
- [1] What was the relevant trial or adjudication?
  - [2] How could disclosure prejudice the fairness of the trial or impartiality of the adjudication?
  - [3] Could this prejudice reasonably be expected to occur?
  - [4] Did the record, or any part of it, fall within an exception listed in section 34(2)(a), and, if yes, would its disclosure be in the public interest?
62. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify its reliance on section 34(1)(c) to deny access to the records.

*Public authority's submissions*

63. The BPS has stated that the withheld record forms a material part of evidence that may be adduced in a judicial review that was launched by the Applicant in respect of the search executed under the search warrant. The BPS submitted that to release the record would impact those proceedings. The BPS further submitted that there would be some form of discovery as part of the judicial review and, where required, the document may be provided in that forum.

*Applicant's submissions*

64. The Applicant made the same submissions as above at paragraphs 28-30.

*Discussion*

- [1] What was the relevant trial or adjudication?
65. The relevant trial or adjudication was the pending judicial review brought by the Applicant against the Senior Magistrate and the Commissioner of Police challenging the lawfulness of the search warrant relevant to the record in this review.

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<sup>11</sup> See [Decision 28/2022, Cabinet Office](#), at paragraph 66.

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

66. Apart from a general statement that the release of the withheld record would impact the judicial review, the BPS has not made submissions on how disclosure of the record could prejudice the fairness or impartiality of the judicial review. Both parties to the judicial review have had sight of the record—it is held by the BPS and the Applicant witnessed and signed the record at the time it was created. The mere fact that the records may relate to the proceeding does not, of itself, establish a link between disclosure and prejudice to the fairness or impartiality of the trial or adjudication.
67. The Information Commissioner is not satisfied that the BPS has explained how disclosure could prejudice the fairness or impartiality of the judicial review. The BPS's justification of this exemption is not considered further in this Decision.

*Conclusion*

68. In conclusion, the Information Commissioner is not satisfied that the BPS has justified its reliance on the exemption in section 34(1)(c) because the BPS has not explained how disclosure of the record would, or could reasonably be expected to, prejudice the fairness or impartiality of the pending judicial review.

***Personal information – section 23***

69. Under section 23(1) of the PATI Act, public authorities may deny public access to records or parts of records which consist of personal information. Section 24(1) broadly defines 'personal information' as information recorded in any form about an identifiable individual.
70. Certain information about identifiable individuals is excluded from the definition of 'personal information' in the PATI Act, in accordance with section 24(2). For example, section 24(2) excludes certain information about contractors performing services for a public authority, or information relating to any discretionary benefit of a financial nature conferred on an individual by a public authority.
71. The exemption in section 23(1) also does not apply to the limited circumstances set out in subsection (2). It does not apply, for example, if the information in the requested records relates to the PATI requester (see subsection (2)(a)).
72. The personal information exemption is subject to the public interest test. Records which are found to be exempt under section 23(1) would still have to be disclosed, if the public interest would, on balance, be better served by disclosure instead of non-disclosure. In

considering the public interest test for disclosure of personal information, the following factors have to be taken into consideration<sup>12</sup>:

- 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. Evaluating the fairness of any disclosure may include consideration of the following:
    - i. Whether sensitive personal information was involved?
    - ii. What would be the consequences upon the individual of disclosure?
    - iii. What are the reasonable expectations of privacy of a person in the individual's position?
  - c. Whether disclosure of the personal information is necessary to further the public interests that have been identified.
73. 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".
74. The disclosure of the personal information must also be necessary. The Information Commissioner will consider whether the public interest concerns can be met by disclosure of other information in the records that interferes less with an individual's right to privacy. If so, the public interest concerns in favour of disclosure may be given less weight in the balance than the individual's privacy rights and freedoms.
75. In sum, as the Information Commissioner explained in [Decision 02/2019, Office of the Governor](#), public authorities must consider the following questions before denying public access to records under the personal information exemption<sup>13</sup>:

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

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<sup>12</sup> [Decision 02/2019, Office of the Governor](#), paragraph 51.

<sup>13</sup> [Decision 02/2019, Office of the Governor](#), paragraph 56.



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

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

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

76. Given the importance of the protection of personal information and privacy, particularly in a small jurisdiction such as Bermuda, the Information Commissioner may consider the personal information exemption on her own accord and without the provision being relied upon by any of the parties.

*Discussion*

77. The parties did not make submissions on section 23(1). However, given the Information Commissioner's conclusions above that the BPS has not justified its reliance on the exemptions to withhold the record, the Information Commissioner considers section 23(1) on her own accord.

[1] Whether the record consisted of information about an identifiable individual?

78. The record consisted of the following information about identifiable individuals: the name and address of the Applicant, the name of the Applicant's family member, statements made by the Applicant, the IP address of the Applicant's router, information about the Applicant's family life, the names of the police officers that executed the search and identifying numbers assigned to them.

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

79. None of the exclusions to the definition of personal information in section 24(2) apply to the information identified as personal information.

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

80. The personal information of the Applicant, including the Applicant's name, address, signature, IP address, statements, and other personal information about the Applicant, falls within the exception in section 23(2)(a) and the exemption for personal information is not considered further for this information.

81. It should be noted, however, that if another individual requests a copy of the withheld record for disclosure to the public at large, the Applicant's personal information, identified above, must be redacted under section 23.
82. None of the exceptions in section 23(2) applied to the names, signatures and identifying numbers of the police officers that executed the search.

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

83. Where a record contains personal information, it is necessary to balance the legitimate public interests in disclosure against the public interest in maintaining an individual's expectation of privacy.
84. As per section 2 of the PATI Regulations, 'public interest' should be interpreted to include things that may or would tend to promote accountability of and within the Government. Here, none of the police officers involved in the execution of the search warrant were individuals holding senior posts in the BPS to the extent that disclosure of their names would promote accountability and transparency. Such individuals were not in roles where they are publicly accountable for the decision making or conduct of the BPS. Disclosure of their personal information in the Search Report would therefore be unfair and unnecessary. The exemption for personal information is applicable to withhold their names and any other personal information about them in the record.

#### *Conclusion*

85. In conclusion, the Information Commissioner is satisfied that the exemption in section 23 applies to the names, signatures and identifying numbers of the police officers that are named in the withheld record.
86. As noted above, although the exception in section 23(2)(a) applies to the personal information of the Applicant, this information should only be provided to the Applicant. If other individuals ask for a copy of the record ordered to be disclosed, the Applicant's personal information (identified in paragraph 78 above) must be redacted by virtue of section 23(1).

#### *Conclusion*

87. The Information Commissioner is not satisfied that the BPS was justified in relying on sections 30(1)(a) and 34(1)(a), (b) and (c) to deny access to the withheld record. Given these conclusions, the Information Commissioner raised section 23(1) on her own accord

and has found that part of the record contains personal information exempt from disclosure.

## Decision

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The Information Commissioner finds that Bermuda Police Service (**BPS**) was not justified in relying on sections 30(1)(a), 34(1)(a), (b) and (c) to deny access to the record in full. The Information Commissioner finds that part of the record is exempt from disclosure under section 23.

In accordance with section 48 of the PATI Act, the Information Commissioner varies the BPS's internal review decision to deny access to part of the record under section 23(1) and orders the BPS to disclose a redacted copy of the record in accordance with this Decision and accompanying Confidential Annex and Order by **Wednesday, 8 May 2024**.

## 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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This Decision has been filed with the Supreme Court, in accordance with 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  
27 March 2024

## Appendix: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Public interest test

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

#### Personal information

- 23 (1) Subject to the provisions of this section, a record that consists of personal information is exempt from disclosure.
- (2) Subsection (1) does not apply if—
- (a) subject to subsection (3), the information concerned relates to the requester;
  - ...
  - (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 the provisions of this section, a record that consists of personal information is exempt from disclosure.

#### Operations of public authorities

- 30 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
- (a) information relating to the race, national or ethnic origin, religion, age, sex or marital status of the individual;
  - (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
  - (c) any identifying number or other particular assigned to the individual;
  - (d) the address, fingerprints or blood type of the individual;
  - (e) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;
  - (f) correspondence sent to a public authority by the individual that is explicitly or implicitly of a private or confidential nature, and replies to

such correspondence that would reveal the contents of the original correspondence; or  
(g) the views or opinions of any other person about the individual.

...

**Law enforcement**

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

- (a) prejudice the prevention, detection or investigation of a breach or possible breach of law;
- (b) prejudice the enforcement of, compliance with, or administration of, any law;
- (c) prejudice the fair trial of a person or the impartial adjudication of a particular case;

...

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