

## Decision Notice

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### Decision 14/2024: Bermuda Police Service

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#### **Correspondence and internal review of search warrant**

**Reference no:** 2021044

**Decision date:** 30 April 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 correspondence between the Officer in Charge of the Professional Standards Department and the Commissioner of Police relating to a search warrant. In its internal review decision, the BPS denied access to the records on the basis that the PATI Act did not apply to the records by virtue of section 4(1)(a) and 4(1)(b)(vi).

The Information Commissioner has found that the BPS was not justified in relying on section 4(1)(a) and 4(1)(b)(vi) to deny access to the records. The Information Commissioner has annulled the BPS's internal review decision and ordered the BPS to issue a new internal review decision on the PATI request within six weeks, i.e., by **Tuesday, 11 June 2024**.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 4 (application of the PATI Act).

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

## Background

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1. On 1 March 2023, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for correspondence between the Officer in Charge of the BPS's Professional Standards Department (**PSD**) and the Commissioner of Police (**COP**) between 27 February 2023 and 1 March 2023 relating to a residential search warrant.
2. The BPS did not issue an initial decision or an internal review decision, despite the Applicant's request for one on 21 April 2023, within the statutory time limits. Following the Information Commissioner's [Decision 18/2023, Bermuda Police Service](#), the BPS issued an internal review decision on 25 August 2023. The BPS denied access to the responsive records on the basis that the records related to the exercise of a judicial function or that the records had been obtained by the Attorney General's Chambers (**AG's Chambers**) in the course of carrying out their functions and therefore the PATI Act did not apply to the records pursuant to section 4(1)(a) and 4(1)(b)(vi).
3. On 25 August 2023, the Applicant made a timely application for an independent review by the Information Commissioner.

## Investigation

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4. The Information Commissioner's Office (**ICO**) accepted the application as valid on 12 September 2023, on the basis that the Applicant had made a PATI request to a public authority and had asked that public authority for an internal review. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review.
5. 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.
6. On 19 September 2023, the ICO notified the BPS of the independent review. On 7 March 2024, the ICO requested all records that were processed as responsive to the PATI request and thereafter withheld. On 8 March 2024, the BPS provided the following responsive records to the ICO:
  - a. Record 1: PSD report reviewing the residential search warrant referred to in the PATI request (**PSD Report**).
  - b. Record 2: Email from the Officer in Charge of the PSD to the COP dated 1 March 2023, attaching record 1.
7. As required by section 47(4) of the PATI Act, the ICO invited the parties to make representations. The Applicant provided submissions to the ICO on 3 April 2024 and the BPS provided submissions to the ICO on 17 April 2024.

## Information Commissioner's analysis and findings

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

### *Application of the PATI Act to records relating to judicial functions – section 4(1)(a)*

9. Justice Subair Williams explained in [Attorney General v Information Commissioner](#), paragraph 24, that the "scope of the application of the PATI Act may be determined by section 4 which lists the classes of material to which the legislation does not apply". Under section 4(1)(a), the PATI Act does not apply to "records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person". Relevant to this review are records relating to the exercise of a court's judicial function.

10. For section 4(1)(a) to apply, the records must also ‘relate to’ the exercise of the judicial or quasi-judicial function of the relevant court, tribunal or other body or person. ‘Related to’ is not defined in the PATI Act or the Interpretation Act 1951. Having regard to the context and purpose of the PATI Act,<sup>1</sup> which is to grant a right to access information “to the greatest extent possible” and to “eliminate unnecessary secrecy”, exceptions to the application of the PATI Act in section 4(1)(a) ought to be interpreted strictly. Section 4(1)(a) should only be held to apply insofar as its application is supported by the purposes of the PATI Act which it advances.<sup>2</sup>
11. Section 4(1)(a) serves three purposes: to ensure that the Court is in control of its procedures, to protect the independent authority of the Court, and to prevent records filed with the Court from being disclosed and short-circuiting the applicable Court procedures for disclosure. Together, these protect the integrity of the independent judicial function.
12. With these purposes in mind, records “relating to the exercise of judicial functions” in section 4(1)(a) clearly includes two categories of records. First, it includes records that were produced by a court or quasi-judicial body in the context of a particular proceeding before it. Second, it also includes records that were created or obtained or held by a public authority only for the purposes of actual or potential proceedings, such as witness statements and pleadings.
13. Notably, however, it does not include a third category of records. These are records that were not created or obtained for the purposes of carrying out a judicial function or held only for the purposes of litigation. Instead, the third category are records that were created during the normal course of business that get caught up in the litigation. This might include, for example, records created during the normal course of business that are annexed to an affidavit or submitted to Court as an exhibit. It is difficult to say that a record that predates a proceeding, and which was created and held by a public authority to fulfil its own statutory functions, instead is related to an exercise of judicial functions because it was subsequently disclosed to a court or other quasi-judicial body.<sup>3</sup> A contrary

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<sup>1</sup> See *Pickering v Liverpool Daily Post* [1991] 2 AC 370, 422B – 423G.

<sup>2</sup> The importance of having regards to purpose was re-affirmed in footnote 3 of [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ.

<sup>3</sup> Note that unlike a public authority that created a record for purposes of its own functions, a public authority (or Court) that receives a copy of the record for purposes of a proceeding would only hold the document for purposes of the litigation. It can be said that in their hand, the record does relate to the exercise of judicial function and the recipient public authority or Court could properly rely on section 4(1)(a) to exclude the record in response to receiving a PATI request.

reading of section 4(1)(a) for this third category record would create far too broad an exception to the PATI Act's applicability and would be inconsistent with the purposes section out in section 2.

14. The provision in section 4(1)(a) does not mean that the public does not have the right to ask for records relating to the exercise of judicial functions. The public can make a PATI request for those records, and public authorities must respond to their requests in accordance with the provisions of the PATI Act.<sup>4</sup> A public authority is justified to deny public access to those records if it can show that the records fall under the category prescribed in section 4(1)(a).
15. Section 4(2) provides that records relating to the court's general administration continue to fall within the scope of the PATI Act. In interpreting the scope of section 4(2), Justice Subair Williams in [Attorney General v Information Commissioner](#), paragraph 37, adopted the definition of 'general administration' set out by the Irish Information Commissioner, i.e., records relating to personnel, pay matters, recruitment, accounts, information, technology, accommodation, internal organisation, office procedures and the like.<sup>5</sup>
16. In sum, for a record to be excluded from the scope of the PATI Act by virtue of section 4(1)(a), the following must be considered:

[1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?

[2] Are the functions of that court, tribunal or other body or person of a judicial or quasi-judicial nature?

[3] Do the records relate to the exercise of the judicial or quasi-judicial functions of that court, tribunal or other body or person?

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<sup>4</sup> Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ, at paragraph 75: "I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act ... they cannot be treated as so excluded. Accordingly, [the PATI requester] was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the [Head of Authority] in respect of the records which she sought, and the Commissioner was entitled to commence a review of the matter" under section 47.

<sup>5</sup> In [Decision 02/2019, Office of the Governor](#), paragraph 20, the Information Commissioner adopted this definition of 'general administration' as applied by the Irish Information Commissioner. See also [Decision 09/2021, Human Rights Commission](#), at paragraph 17; [Decision 05/2020, Human Rights Commission](#), at paragraph 15; [Decision 19/2019, Internal Audit Department](#), at paragraph 19; and [Decision 21/2022, Office of the Governor](#), at paragraph 13.

[4] Does the record relate to the general administration of the court, tribunal or other body or person and come within the scope of the PATI Act by virtue of section 4(2)(a)?

17. Given that section 4(1)(a) goes to the application of the PATI Act, the Information Commissioner may consider section 4(1)(a) on her own accord and without the provision being relied upon by any of the parties.

*Public authority's submissions*

18. The BPS submitted that the records related to the exercise of the Supreme Court in a specific judicial review application pending at the time of the internal review decision. The BPS submitted that the records formed part of the evidence to be submitted to the Supreme Court in the judicial review. The BPS further submitted that the responsive records did not relate to the Supreme Court's general administration.
19. In response to the ICO's submissions invite, the BPS stated that the PSD was not in any possession of any email correspondence setting out the instructions to the PSD by the COP or the AG's Chambers in relation to the purpose of the PSD's internal review of the search warrant. The PSD's internal review matter was discussed in a meeting in 2022 between senior police officers, the COP and Crown Counsel from the AG's Chambers and thereafter conducted by the Officer in Charge of the PSD.

*Applicant's submissions*

20. The Applicant did not make separate submissions on section 4(1)(a) and 4(1)(b)(vi). For ease of reference, the Applicant's full submissions are provided here, and are applicable to the discussion on section 4(1)(b)(vi) below as well.
21. The Applicant submitted that the COP had commissioned a report from the PSD with regard to the validity of a specific residential search warrant obtained and executed by the BPS. The Applicant noted correspondence between themselves and the COP regarding the status of the PSD's report. The Applicant submitted that, at no point did the COP indicate that the report was being generated for the AG's Chambers. The Applicant's understanding was that the COP had sought the report for the purposes of an internal misconduct inquiry.
22. The Applicant submitted that record 1 (the PSD Report) was not addressed to the AG's Chambers and that it is clear from the contents of the record that it was prepared for the COP.
23. The Applicant further submitted that the purpose of the PATI Act is to give the public the right to obtain access to information held by public authorities to the greatest extent

possible, subject to the exceptions that are in the public interest or for the protection of the rights of others. The Applicant stated that the BPS was exploiting the Act and undermining the PATI procedures by claiming that the document was intended for the AG's Chambers to claim that the PATI Act did not apply to it.

24. The Applicant also provided the ICO with evidence from the relevant judicial review where the legal representative of the claimant in that case had sought disclosure of the record, which the AG's Chambers initially denied and later disclosed in the context of the judicial review.

*Discussion*

[1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?

25. It is the Supreme Court of Bermuda's functions that are being considered.

[2] Are the functions of that court, tribunal or other body or person of a judicial or quasi-judicial nature?

26. The Information Commissioner is satisfied that the functions of the Supreme Court are of a judicial nature.

[3] Do the records relate to the exercise of the judicial or quasi-judicial functions of that court, tribunal or other body or person?

27. The Information Commissioner is not satisfied that the records relate to the exercise of the judicial functions of the Supreme Court. It is evident from record 2 (the email from the Officer in Charge of the PSD to the COP) as well as the BPS's submissions, that the review was conducted for internal purposes. Furthermore, in their submissions, the BPS refer to the PSD Report as an "internal review".

28. It is clear that any affidavit prepared by the BPS, based on the PSD Report, would relate to the exercise of the Court's judicial function. However, the PSD Report itself is a record that was prepared for the internal purposes of the BPS and did not relate to the exercise of the Court's judicial function.

29. Given the Information Commissioner's conclusion that the records did not relate to the exercise of the Supreme Court's judicial function, section 4(1)(a) is not considered further.

### *Conclusion*

30. In conclusion, the Information Commissioner is not satisfied that the records fell under section 4(1)(a).

### ***Application of the PATI Act to AG’s Chambers’ records – section 4(1)(b)(vi)***

31. Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#), paragraph 18, that the “PATI Act excludes from its operation the records of a substantial number of public bodies to which the Legislature has decided that it shall not apply so long as such records do not relate to the general administration of the relevant body”. Among these are records that were obtained or created by the AG’s Chambers in the course of carrying out its functions, as set out in section 4(1)(b)(vi) of the PATI Act.
32. The provision in section 4(1)(b)(vi) does not mean that the public does not have the right to ask for records obtained or created by the AG’s Chambers. The public can make a PATI request for those records, and public authorities must respond to their requests in accordance with the provisions of the PATI Act.<sup>6</sup> A public authority is justified to deny public access to those records if it can show that the records fall under the category prescribed in section 4(1)(b)(vi).
33. As explained above in paragraph 15, section 4(2) provides that records relating to the general administration of the AG’s Chambers continue to fall within the scope of the PATI Act.
34. To determine whether a record falls outside the scope of the PATI Act by virtue of section 4(1)(b)(vi), the following must be considered:

[1] Was the record obtained or created by the AG’s Chambers?

[2] Was the record obtained or created by the AG’s Chambers in the course of carrying out its functions?

[3] Does the record relate to the AG’s Chambers’ general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

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<sup>6</sup> Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ, at paragraph 75: “I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act...they cannot be treated as so excluded. Accordingly, [the PATI requester] was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the [Head of Authority] in respect of the records which she sought, and the Commissioner was entitled to commence a review of the matter” under section 47.



35. Because section 4(1) addresses the application of the PATI Act, the Information Commissioner may consider this provision on her own accord when the parties do not raise it.

*Public authority's submissions*

36. In the BPS's internal review decision, the BPS stated that record 1 (the PSD Report) was created for and ultimately to be obtained by the AG's Chambers in the course of carrying out their functions as it was the AG's Chambers that was providing legal advice to the BPS and representing the BPS in the judicial review matter. The BPS stated that the provision of legal advice by the AG's Chambers relates to its core constitutional functions. The BPS further stated that none of the records relate to the general administration of the AG's Chambers.
37. As detailed above at paragraph 19, in the BPS's response to the ICO's invitation to make submissions, the BPS stated that it did not hold any email correspondence confirming that the PSD Report was prepared for the AG's Chambers. Furthermore, the BPS did not provide any documentation showing that the records had been obtained by the AG's Chambers, although this was specifically requested in the ICO's submission invite.

*Applicant's submissions*

38. The Applicant's submissions are discussed at paragraphs 20-24 above.

*Discussion*

[1] Was the record obtained or created by the AG's Chambers?

39. It is accepted that the withheld records were created by the BPS, not the AG's Chambers.
40. The issue in this review, therefore, is whether the records were obtained by the AG's Chambers. The BPS has submitted no evidence that the records were obtained by the AG's Chambers as of the time of the PATI request on 1 March 2023.
41. The Applicant suggested that record 1 was provided to the claimant in the relevant judicial review by the AG's Chambers, suggesting that at some point, the BPS provided a copy of the record to the AG's Chambers. The BPS has not, however, provided any documentation that this, in fact, occurred. In the absence of any evidence that the record was provided to the AG's Chambers, the Information Commissioner cannot conclude that the record was obtained by the AG's Chambers at the time of the PATI request or otherwise.

### *Conclusion*

42. In conclusion, the Information Commissioner is not satisfied that the records fell under section 4(1)(b)(vi) as the BPS has not provided any evidence that the records were obtained by the AG's Chambers as at the time of the PATI request.

### *Conclusions*

43. The Information Commissioner is not satisfied that the BPS was justified in relying on section 4(1)(a) or 4(1)(b)(vi) of the PATI Act to deny access to the responsive records because they did not relate to the exercise of a judicial function and the records were not obtained or created by the AG's Chambers in the course of carrying out their functions.
44. Although the BPS invoked section 16(1)(f) (record available in the public domain) in its internal review decision because discovery was available in the judicial review,<sup>7</sup> the BPS did not make submissions on section 16(1)(f) in this review. The Information Commissioner also observes that a record subject to an Order for Discovery under the Rules of the Supreme Court 1985, i.e., between parties to the litigation, is not the same as a document that is available to the public. In any event, if the BPS wishes to pursue this ground for an administrative denial, it can do so in its new internal review decision.

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<sup>7</sup> The BPS cited Order 24, Rule 3(1) of the Rules of the Supreme Court 1985 and stated that "if the probative value of the record far outweighs the prejudicial effect, the Court will instruct disclosure of the responsive record."

## Decision

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The Information Commissioner finds that the Bermuda Police Service (**BPS**) was not justified in relying on section 4(1)(a) or 4(1)(b)(vi) of the Public Access to Information (**PATI**) Act 2010 to deny access to the responsive records because they did not relate to the exercise of a judicial function and the records had not been obtained by the Attorney General's Chambers in the course of carrying out their functions. Therefore, the PATI Act applied to the records.

In accordance with section 48 of the PATI Act, the Information Commissioner annuls the BPS's internal review decision to deny access to the records and orders the BPS to issue a new internal review decision either granting access to the records or denying access to the records under an exemption in Part 4 of the PATI Act, **on or before Tuesday, 11 June 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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The 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  
30 April 2024

**Public Access to Information Act 2010**

**Application**

- 4 (1) Subject to subsection (2), this Act does not apply to—
- (a) records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person; or
  - (b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
    - ...
    - (vi) the Attorney General’s Chambers;
    - ...
- (2) The reference to records in subsection (1) does not include records relating to the general administration of –
- (a) any court, tribunal or other body or person referred to in subsection (1)(a); or
  - (b) any public authority referred to in subsection (1)(b).

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