

## Decision Notice

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**Decision 15/2024: Department of Child and Family Services**

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**Records related to residential care homes**

**Reference no: 20220420-02**

**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 Department of Child and Family Services (**Department**) for records about the Department's local residential care homes and transitional living regime. In its internal review decision, the Department refused a part of the PATI request or denied access to responsive records based on sections 16(1)(a) (record did not exist or could not be found), 22(1) (health or safety of individual), 30(1) (operations of public authorities), and 34(1)(f), (g) and (h) (law enforcement).

The Information Commissioner has upheld the Department's internal review decision to administratively deny item 2 of the PATI request under section 16(1)(a), varied it to deny access to records 1-12 and 16-34 under section 37(1) (disclosure prohibited by other legislation), and upheld it for records 13-15 as exempt under section 22(1). The Information Commissioner does not require the Department to take any further steps related to this Decision.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 16(1)(a) (record does not exist or cannot be found); section 21 (public interest test); section 22 (health or safety of individual); section 37 (disclosure prohibited by other legislation).

Children Act 1998: section 11 (disclosure of information).

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

## Background

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1. On 4 February 2021, the Applicant made a Public Access to Information (**PATI**) request to the Department of Child and Family Services (**Department**) about records related to the local residential care homes and the transitional living regime. The request sought:
  - a. Records providing a complete breakdown of spending on the Department's local residential homes for the past five fiscal years (**item 1**), showing how each of the different budget allocations were spent each year for each of the four homes (Brangman Home, Youth Development Centre, Observatory Cottage, and Youth Residential Treatment Centre).
  - b. The full report conducted by a private security company after it was hired in November 2018 to do a safety assessment on the Brangman Home and other residential facilities (**item 2**).

- c. Records showing the additional safety features added to all residential facilities since 1 November 2018 (**item 3**).
  - d. All health and safety reports held by the Department on the state of the local residential homes for the last five years, including the most recent reports, as well as records showing details of all health and safety improvements which had been carried out during that period—including any photographs (**item 4**).
  - e. Incident logs for each of the homes showing all incidents recorded for the past 5 years, which might have included but not limited to: accidents, medical emergencies, police callouts, complaints by residents of abuse or mistreatment, complaints by staff or others, or reports of trespassers/prowlers (**item 5**). (The Applicant stated they were not seeking personal information.)
  - f. Records showing spending and progress on the transitional living regime for children who had aged out of the Department’s care, including its cost centre number (**item 6**). (The Applicant noted that this regime had been announced in the prior year’s budget, to be established in the 2020/21 fiscal year.)
  - g. Records showing the number of children and staff in each local residential home and records showing the number of staff per shift at each home (**item 7**).
2. On 18 March 2021, the Department wrote to the Applicant informing them that the period of responding to the request had been extended for six weeks under section 15(1)(a) of the PATI Act 2010, because the Department required additional time to complete required consultations to determine if granting access to the information requested was in the public interest.
  3. On 25 April 2021, the Department wrote to the Applicant informing them that there would be a further delay in responding to their PATI request.
  4. On 30 June 2021, the Department issued an initial decision, which granted access to records responsive to item 1 of the PATI request (breakdown of spending on the Department’s local residential homes); administratively denied item 2 under section 16(1)(a) (records did not exist or could not be found) and item 6 under section 16(1)(f) (information in public domain); and refused access to the remaining records on the basis of the exemptions in sections 22(1) (health or safety of individual) and 34(1)(g) (law enforcement) for items 3-5 and 7. The Department also provided, in response to item 7, the number of children at the Brangman Home and the Observatory Cottage.
  5. On 30 June 2021, the Applicant asked for an internal review of the Department’s reliance on the exemptions cited. They also believed item 4 was misunderstood in the

Department's initial decision. On 1 July 2021, the Head of the Authority responded to the Applicant, asking for more written details of their review request, including which records they believed had not been provided. The Applicant did not respond until 25 August 2021 when stating they would endeavour to respond. In that period, the Permanent Secretary assigned to the then-Ministry of Social Development and Seniors changed. The Applicant therefore also suggested that the time for issuing an internal review decision be reset from when they would write again to the new Head of Authority.

6. On 1 September 2021, the Applicant wrote to the Head of Authority with additional details on their request for an internal review. The Applicant specifically asked for a review of section 16(1)(a) in relation to item 2 (and why the request was not transferred to the public authority that would hold the report). The Applicant also questioned whether sections 22(1) and 34(1)(g) were correctly applied in relation to items 2 and 3, in particular the public interest test. The Applicant clarified that they were seeking health and safety records held by the Department on the state of the local residential homes and not "actual security improvements" for item 4. Finally, the Applicant asked whether section 22(1), with the public interest test, was correctly applied for items 5 and 7.
7. On 23 March 2022, the Department issued an internal review decision, out of time.<sup>1</sup> The Department upheld the initial decision that records responsive to item 2 did not exist or could not be found in accordance with section 16(1)(a). The Department also varied the initial decision on item 3 to withhold the records on the basis of sections 34(1)(f), (g) and (h); on item 4 to withhold the records on the basis of sections 22(1), 30(1)(a) and 30(1)(b); and on item 7 to withhold the records on the basis of sections 22(1) and 30(1)(b). The Department also upheld the initial decision on item 5 to withhold the records under section 22(1). The internal review decision did not consider items 1 and 6 of the PATI request because the Applicant had not challenged the Department's initial decision on them.
8. On 20 April 2022, the Applicant asked for an independent review by the Information Commissioner.

## Investigation

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9. The Information Commissioner's Office (**ICO**) accepted the application as valid on 21 April 2022, on the basis that the Applicant had made a PATI request to a public authority and

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<sup>1</sup> The internal review decision was issued in compliance with the Information Commissioner's [Decision 15/2021](#) (in a 'failure to decide' review).

had asked that public authority for an internal review. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review.

10. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application because submissions were required from the public authority, along with an examination of the withheld records, to evaluate the public authority's refusal of access.
11. On 25 April 2022, the ICO notified the Department and asked for the responsive records.
12. On 18 July 2022, the ICO contacted the Department regarding the records to be provided in the review. The ICO sent a further follow-up on 9 August 2022. On 22 August 2022, the Head of Authority wrote to the ICO asking to meet with the Information Commissioner to discuss providing records containing children's personal information. On 15 September 2022, the ICO wrote to the Department assuring them of the safeguards in place for withheld records received by the ICO and offering, as an alternative, to inspect the records in-person. No response was received.
13. There was no further substantive correspondence with the Department between 15 September 2022 and October 2023, pending the ICO's investigations in five other reviews involving the Department.
14. On 17 October 2023, the ICO Investigation Officer re-engaged the Department on this review and requested to inspect the records. Due to the cybersecurity attack, correspondence with the Department was intermittent.
15. On 10 November 2023, the ICO Investigation Officer met with the Department's Information Officer to inspect the records and created a record schedule. The responsive records identified by the Department for each item included:
  - a. Records 1-8 (responsive to items 3 and 4): emails between the Department and the Department of Public Lands and Buildings regarding health and safety works to be carried out on the residential homes.
  - b. Records 9-12 (responsive to item 5): incident logs for the residential homes. The Department explained that the incident logs captured all incidents reported at the residential homes, including where police were called, where medical assistance was required, and reports of abuse or neglect. The Department also provided the ICO with a sample form that would be completed where an incident has been reported.
  - c. Records 13 and 14 (responsive to item 7): staff shift schedules for the residential homes.

- d. Record 15 (responsive to item 7): the number of children in residential homes during the first quarter of 2021.<sup>2</sup>
  - e. Records 16-34 (responsive to item 4): staff meeting minutes for the residential homes. The Department explained that it did not hold health and safety reports on the residential homes, as such. Health and safety matters would ordinarily have been addressed on an ad hoc basis, and staff members would have reported matters to the Ministry of Public Works or the Bermuda Housing Corporation to be fixed. These matters would then have been noted and discussed in the residential care staff meeting minutes.
16. On 27 February 2024, the ICO Investigation Officer met with the Department's Information Officer to reinspect the records. The Department subsequently confirmed that it invoked section 37(1) to withhold additional records (i.e., records responsive to item 3 of the PATI request) and section 34(1)(g) in the alternative.
17. As required by section 47(4) of the PATI Act, the ICO invited the parties to make representations. The Department provided submissions to the ICO on 19 March 2024. The Applicant made submissions on 24 April 2024, and their email with additional information on their request for an internal review also has been considered below.

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

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

#### ***Record does not exist or cannot be found – section 16(1)(a)***

19. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it.
20. Regulation 5 of the PATI Regulations 2014 requires public authorities, through their Information Officers, to make reasonable efforts to locate records responsive to a PATI request. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate any record.

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<sup>2</sup> The Department explained that this record was being withheld because the Department only published the number of children in residential homes on an annual basis, not on a quarterly basis.

21. When a public authority denies a PATI request under section 16(1)(a) because a record does not exist or cannot be found, the Information Commissioner's review does not determine to a point of certainty if a record exists or can no longer be located. Rather, the Information Commissioner is required to assess whether the public authority took all reasonable steps to find a record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration.
22. In determining whether a public authority's search was reasonable, the Information Commissioner considers the following:
  - [1] the quality of the public authority's analysis of the PATI request;
  - [2] the scope of the search that it decided to make based on that analysis; and
  - [3] the rigour and efficiency with which the search was then conducted.
23. The specific circumstances in each case will inform the Information Commissioner's assessment.
24. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.<sup>3</sup>

*Public authority's submissions*

25. The Department's understanding of the PATI request was that the requester was seeking a safety assessment report conducted by a private security company on the Brangman Home and other residential facilities in November 2018.<sup>4</sup>
26. During this review, the Department explained that the responsibility for maintenance of the residential homes fell under the Ministry of Public Works (i.e., the Department of Public Lands and Buildings) or the Bermuda Housing Corporation, as the landlords of the buildings used by the Department for its residential treatment services. The Department submitted that, given the nature of an intrusion into one of the homes that occurred in November 2018, it was the Bermuda Police Service (**BPS**) that had undertaken a security

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<sup>3</sup> See [Decision 04/2017](#), [Department of Health](#), at paragraphs 37-49, and more recently [Decision 55/2023](#), [Ministry of Education Headquarters](#), at paragraphs 23-28.

<sup>4</sup> The Information Commissioner notes that a [Royal Gazette article](#) dated 30 November 2018 quoted the Attorney General and Minister of Legal Affairs at the time as stating, "The safety of our residents and staff are always priority. To that end, we have taken immediate precautions to ensure the safety by increasing security measures at the facility. Additionally, this week the Ministry of Public Works has engaged the services of a private security company for a full safety assessment and additional safety features being added to all facilities."

assessment of the Brangman Home following the incident and made recommendations to the Department of Public Lands and Buildings about works required.

27. In its initial decision, and confirmed in the internal review, the Department stated that the requested report did not exist. The Department explained that the BPS had led an onsite security assessment with the Ministry of Public Works and the private security company that serviced the Brangman Home, and that all recommended improvements based on that assessment had been completed.
28. The Department conducted a search of all relevant email accounts and search locations within the Department and reached out to the Ministry of Public Works for any report that might have been done at the relevant time. The Department received email communications between the Department and the Ministry of Public Works from November 2018, which confirmed that the BPS had undertaken a security assessment of the Brangman Home.

#### *Applicant's submissions*

29. The Applicant submitted that the Department's response to item 2 was troubling. The Applicant stated that, while they understood the private security company hired to do the safety assessment was hired by the Ministry of Public Works and not the Department, they believed the Department must have been given the report, which was conducted by the company, since the Department was responsible for all the residential facilities for children in care.
30. The Applicant cited a [Royal Gazette article](#) from 30 November 2018, where the Attorney General for Bermuda (who was then the minister responsible for the Department) was quoted as stating that "this week the Ministry of Public Works has engaged the services of a private security company for a full safety assessment and additional safety features being added to all facilities."
31. In their request for an internal review, the Applicant stated that they believed the relevant record would be held by the Department. They also maintained that, if the Department did not hold the record, it should have transferred that part of the request to the authority that did hold the responsive record.

#### *Discussion*

32. The Information Commissioner considers the Department's administrative denial of item 2 ("the full report conducted by a private security company after it was hired in November 2018 to do a safety assessment on the Brangman Home and other residential facilities") on the basis that responsive records did not exist or could not be found.

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

33. The Department's understanding of the PATI request was that the requester was seeking a safety assessment report conducted by a private security company on the Brangman Home and other residential facilities in November 2018. The Information Commissioner notes that it was clear from the withheld records, and stated by the Department in its initial decision, that a security assessment had actually been carried out on the Brangman Home and, although no report, as such, existed, there were records recommending works to be carried out because of that security assessment. Although it was not carried out by a 'private security company' and did not result in a formal report, the Department could have consulted with the Applicant, explaining this and treating any correspondence regarding the recommended works as responsive to the PATI request.
34. In fact, though, the Department did provide this information to the Applicant in the initial decision, and the Applicant continued to seek a 'report' by a private security company in their request for an internal review. Given this, the Information Commissioner is satisfied that the quality of the Department's analysis was reasonable.
35. The Information Commissioner notes that, when an applicant relies on a public statement as a source for their PATI request seeking a particular record (as might have occurred here), it may be helpful to identify this for the public authority. Sharing such details may assist in closing any gaps in communication when a public authority processes the request.

[2] The scope of the search that it decided to make based on that analysis

36. The Department conducted a search of all relevant email accounts and search locations within the Department and reached out to the Department of Public Lands and Buildings (under the Ministry of Public Works) for any report that might have been done at the relevant time. The search was also conducted by a long-serving officer in the Department who had direct knowledge of the post-incident security assessment back in November 2018. Further, the officer's conclusion—that no record existed—was confirmed by the Department's Head of Authority.
37. At the time of the initial decision, the Department also received copies of emails between the Department, the Department of Public Lands and Buildings and the BPS from November 2018, which confirmed that the BPS had undertaken a security assessment of the Brangman Home and made recommendations on improvements needed.
38. The Information Commissioner is satisfied that the scope of the Department's search for item 2 was reasonable.

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

39. Given the content of the emails located by the Department in conducting the search for responsive records, it appeared clear that it was the BPS that had undertaken the security assessment and made recommendations on improvements needed. There was no report referred to in that correspondence. Further, the only public reference to a 'report' following any security assessment conducted in response to the November 2018 incident at the Brangman Home was in the news article referred to by the Applicant. Although the Applicant suggested that item 2 of their PATI request might have been transferred, the Department knew from its consultation with the Department of Public Lands and Buildings that no formal report existed. The Information Commissioner is satisfied that the rigour and efficiency with which the search was conducted was sufficient.

*Conclusion*

40. In conclusion, the Information Commissioner is satisfied that the Department has justified its reliance on section 16(1)(a) to administratively deny item 2 of the PATI request.

***Disclosure prohibited by other legislation – section 37(1)***

41. Section 37(1) of the PATI Act allows a public authority to refuse public access to a record whose disclosure is prohibited by a statutory provision other than the PATI Act.
42. The mandatory nature of a prohibition on disclosure in a provision may be indicated by the use of the word 'shall' and an accompanying provision setting out penalties for unauthorised disclosures. If the relevant statutory provisions only apply when particular functions or duties of a public authority have been engaged, the public authority must identify these functions or duties and explain how the records fall within the prohibition.
43. The exemption in section 37(1) is not subject to the public interest test.
44. In sum, to rely on section 37(1), public authorities must consider the following:
- [1] What is the statutory provision creating the mandatory prohibition on disclosure?
  - [2] Does the record fall within this statutory provision?
  - [3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

45. A public authority bears the burden of showing that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.<sup>5</sup>

*Public authority's submissions*

46. The Department relied on section 11 of the Children Act 1998 as the legislation prohibiting disclosure of the records.
47. For records 1-8 and 16-34, the Department identified the relevant duties of the Director (and their delegated officer) as to provide accommodation for children in the care of the Director, to maintain children in the care of the Director by maintaining them in a residential home (section 9(1)(b)(i) and (iv)), and to direct and supervise the inspection of the operations and records of any facility or other place where a child is placed (section 9(1)(e)).
48. The Department submitted that the relevant duties of the Director (and their delegated officer) being performed with regard to records 9-12 were to arrange for the investigation of any allegation or report that a child may have been in need of protection, care or supervision (section 42) and to arrange for the delivery of childcare services for the benefit of the child (section 9(1)(a)) and to direct and supervise the inspection of the operations and records of any facility or other place where a child is placed (section 9(1)(e)). None of the gateways in section 11(1)(a) or (b) of the Children Act applied.

*Applicant's submissions*

49. The ICO did not receive submissions from the Applicant on section 37(1).

*Discussion*

50. The Information Commissioner considers the Department's reliance on section 37(1) to withhold records 1-12 and 16-34.

[1] What is the statutory provision creating the mandatory prohibition on disclosure?

51. The Information Commissioner is satisfied that section 11 of the Children Act identified by the Department was the relevant statutory provision creating the mandatory

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<sup>5</sup> See the Information Commissioner's updated [Guidance: Disclosure prohibited by other legislation \(section 37\)](#) (January 2023).

prohibition on disclosure. Similar reasoning explained in [Decision 38/2023](#), Department of Child and Family Services, paragraphs 37 and 38, applies.

[2] Does the record fall within this statutory provision?

52. Section 11(1) of the Children Act reads:

No children's officer or person employed in the administration of this Act shall communicate or allow to be communicated information obtained in the performance of his duties under this Act except where—

- (a) giving evidence in any court; or
- (b) authorised by the Director or the Minister.

53. For a record to fall within the scope of section 11(1) of the Children Act, it must consist of information that was obtained in the performance of specific statutory duties of a children's officer or person employed in the administration of the Act. In this case, the Department relied on section 37(1) on the basis that the records contained information obtained by staff of the Department during the performance of their duties to:

- a. arrange for the investigation of any allegation or report that a child may be in need of protection, care or supervision and to arrange for the delivery of childcare services for the benefit of the child (section 9(1)(a))
- b. maintain children in the care of the Director by maintaining them in a residential home (section 9(1)(b)(i) and (iv)), and
- c. direct and supervise the inspection of the operations and records of any facility or other place where a child is placed (section 9(1)(e)).

54. Records 1-8 were correspondence relating to health and safety issues that needed to be fixed for the residential homes. The Information Commissioner agrees that, as above, these records contained information obtained during the Department's performance of its duties to maintain children in a residential home and to direct and supervise the inspection of the operations of any facility where a child is placed.

55. Records 9-12 were incident reports made in relation to the residential homes. The Information Commissioner is satisfied that this information was obtained during the Department's performance of its duties to direct and supervise the inspection of the operations and records of any facility or other place where a child is placed and to arrange for the investigation of any allegation or report that a child may be in need of protection and arrange for the delivery of childcare services for the benefit of the child.

56. Records 16-34 were meeting minutes of the residential care staff for each of the residential homes. Health and safety issues relating to the residential homes were documented in these meeting minutes. The Information Commissioner is satisfied that the records fell squarely within the scope of the statutory prohibition in section 11(1) of the Children Act because the relevant information in the meeting minutes was obtained during the Department's performance of its duties to provide accommodation for children in the care of the Director, to maintain children in the care of the Director by maintaining them in a residential home, and to direct and supervise the inspection of the operations of a facility where a child is placed.

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

57. The prohibition in section 11(1) of the Children Act does not apply if information is disclosed in the context of giving evidence before the court or if it is authorised by the Director or the Minister. Neither exception was met in this case.<sup>6</sup>

#### *Conclusion*

58. The Information Commissioner is satisfied that the Department has justified its reliance on the exemption in section 37(1) of the PATI Act to deny access to records 1-12 and 16-34, because their disclosure was prohibited by section 11 of the Children Act.

59. As the Information Commissioner has found that the records were exempt under section 37(1), the Department's reliance on sections 34 or 30 (in the alternative) is not considered in this Decision.

#### ***Health or safety of individual – section 22***

60. Section 22(1) allows a public authority to deny access to records, which, if disclosed, would or would be likely to endanger the health or safety of an individual or group of individuals.<sup>7</sup>

61. Public authorities must identify the individual or group of individuals at risk.

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<sup>6</sup> While section 11(1) of the Children Act gives the Director the discretion to authorise disclosure, the exercise of that discretion is limited by the other provisions in the Children Act (see paragraphs 42 and 43 of [Decision 38/2023, Department of Child and Family Services](#)).

<sup>7</sup> See the Information Commissioner's updated [Guidance: Health or safety of individual exemption \(section 22\)](#) (January 2023).

62. 'Endanger' in section 22(1) requires that public authorities must show that disclosure would or would be likely to have a detrimental effect on an individual's health or safety. The effect must be more than trivial or insignificant.
63. Section 22(1) protects both physical and mental health. Endangering physical health will usually refer to an adverse physical impact and involve medical matters. Endangerment to physical health could mean endangering someone as a result of physical injury, illness or disease. Endangering mental health will usually imply that the disclosure would, or would be likely to, cause or aggravate a psychological disorder or mental illness. The effect must be greater than stress or worry.
64. 'Safety' should be read in its plain meaning, i.e., the condition of being protected from harm. Safety can be understood as referring to an individual's risk of accidents or of harm to their security. Although the risk should be viewed objectively, some people or groups of society are particularly vulnerable, and their safety may be more easily endangered than that of others. This may include individuals or groups involved in controversial work.<sup>8</sup>
65. A public authority must also explain or describe the circumstances or events arising from disclosure that can cause the harm. It cannot be a remote or hypothetical possibility. In circumstances where a pre-existing risk is present, for example, the health and safety exemption will be engaged if disclosure of the withheld information will increase the risk of endangerment.<sup>9</sup>
66. The public authority must also show that disclosure 'would or would be likely to' cause the harm. 'Would' means that it is more probable than not that the harm anticipated can occur. There must be a more than 50% chance of the disclosure causing the harm. 'Would be likely' means that some significant, real risk must exist that health or safety would be endangered, even if it does not amount to being more probable than not. 'Likely' refers to a very significant and weighty chance that the identified harm will occur. It has also been described as a risk that there 'may very well' be harm to the identified interests, even when the risk falls short of being more probable than not. It must, however, be substantially more than a remote possibility.

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<sup>8</sup> See the UK Information Commissioner's Office's guidance '[Section 38 – Health and safety](#)'.

<sup>9</sup> See, e.g., [People for the Ethical Treatment of Animals Europe v Information Commissioner](#), UK Information Tribunal, EA/2009/0076, paragraph 34.

67. Public authorities may need to show objective evidence to support the likelihood of the anticipated danger. A subjective fear held by the affected individual that is not supported by external facts may not be sufficient to sustain the health and safety exemption.
68. If a record falls within the exemption in section 22(1) for health and safety, it must still be disclosed if the balance of the public interest favours disclosure. In accordance with section 21 of the PATI Act, the test for whether disclosure of a record is in the public interest is 'whether the public interest would, on balance, be better served by disclosure rather than by non-disclosure'.
69. Regulation 2 of the PATI Regulations provides a non-exhaustive list of public interest factors to be considered, including, but not limited to, things that may or would tend to: promote greater public understanding of the processes or decisions of public authorities; provide reasons for decisions taken by the Government; promote accountability of and within the Government; promote accountability for public expenditures or the more effective use of public funds; and to reveal information relating to the health and safety of the public.
70. The decision of whether endangerment 'would' occur or 'would be likely to' occur is relevant to the public interest test. The greater likelihood that the endangerment would occur, the stronger the public interest is in not disclosing the information, and vice versa.
71. In sum, to rely upon section 22(1) of the PATI Act to deny access to a record, a public authority must ask<sup>10</sup>:
  - [1] Who is the individual, or group of individuals who are, at risk from the disclosure?
  - [2] Is the endangerment to the individual's physical or mental health, to their physical or mental safety, or to a combination of these?
  - [3] How can disclosure cause the endangerment claimed?
  - [4] Whether this endangerment would be likely to occur?
  - [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?

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<sup>10</sup> See [Decision 25/2019, Bermuda Police Service](#), at paragraph 53.

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

*Public authority's submissions*

73. The individual, or group of individuals, who were (and continue to be) at risk from the disclosure, were the children maintained in the residential homes, as well as the staff that were employed to care for the children in the residential homes.
74. The endangerment was to a combination of the residents' and staff's physical and mental health and safety. Disclosure would have caused the endangerment by revealing the times at which the residential homes might have less staff, times that the shifts ended and when there was a staff turnover and, therefore, times when the residential homes might be more vulnerable to a trespasser or intruder.
75. There had been a break-in to the residential home in the past, which evidenced the fact that the endangerment was likely to have occurred. The Department clarified that, although there had only been that one actual break-in, it was a risk that the Department faced generally due to the high-risk children being cared for in the residential homes.
76. Although the Department did not make submissions on the public interest test specific to the records responsive to item 7, it submitted generally that, even if there were a public interest in transparency, the public interest would not outweigh the physical and emotional well-being of those whose safety would be compromised by disclosure.

*Applicant's submissions*

77. In their email of 1 September 2021, the Applicant maintained that they did not believe disclosure would pose a risk and that it was in the public interest, in any case, for the Department to be transparent about whether the homes were being adequately staffed. The Applicant commented that the Department's answer to item 7 of their PATI request suggested to them that the staff complement might not have been adequate for security purposes because to disclose the records would pose a risk.

*Discussion*

78. The Information Commissioner considers the Department's reliance on section 22(1) to withhold records responsive to item 7, which contained sample shift schedules for staff in the residential homes and the number of children in care for the first quarter of 2021.

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

79. The Information Commissioner accepts the Department’s submission that the residents and staff of the residential homes were the relevant individuals at risk.

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

80. The Information Commissioner accepts the Department’s submission that a relevant endangerment was to a combination of the identified individuals’ physical and mental safety.

[3] How could disclosure have caused the endangerment claimed?

81. The Information Commissioner accepts the Department’s submission that the disclosure of the staff shift schedules could have caused the endangerment by revealing the times when staff transitions or the presence of fewer staff occurred. In turn, this would have revealed when the residential homes might be more vulnerable to a trespasser or intruder, or for residents of the homes to leave or return without being noticed. This would not suggest an inadequate staff complement per se but reflect the reality of risks that could occur during shift changes. Further, with such a small population, the disclosure of the number of children in the residential homes during a three-month period would have provided too detailed a picture of the staff-to-child ratio, as compared to the Department’s usual disclosure of the annual number of children who had been in care.

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

82. The Information Commissioner notes the surrounding context regarding the timeframe for the records sought in the PATI request—referring to a break-in in November 2018 at one of the residential homes—and the vulnerability of the children whose health and safety would have been endangered. The Information Commissioner accepts that the residential homes have been targeted in the past. The staff of the residential homes would face a constant and realistic risk in ensuring that the children in the residential homes were safe and not vulnerable to any break-in or intrusion. Children in residential homes are a very distinct group in our small community and would be at a heightened risk for mental or physical harm. In the November 2018 incident, the minor was potentially exposed to an assault. This would represent a serious risk to children’s physical and mental health and safety. The fact that an intrusion had taken place once was sufficient for the Department to have considered the risk to this vulnerable population as having a ‘very significant and weighty chance’ of occurring.

83. Based on the public record of the BPS's calls for community help in locating missing teenagers, releasing staff shift schedules also would have likely increased the risk of children in residential homes leaving or returning without being noticed, by disclosing times of staff turnovers or other more vulnerable times in staffing presence.
84. The Information Commissioner accepts that the endangerment to the residents and staff would have been likely to occur.

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

85. There was a public interest in transparency and accountability about the staffing of residential homes for children under the care of the Director of the Department and ensuring that these homes were adequately staffed. On an annual basis, the Department has published its employee numbers for each residential home in the Government's Approved Estimates of Revenue and Expenditure for the Year, although this did not always reflect how many positions were vacant.<sup>11</sup> The number of people staffing the residential homes, however, differed from the shift schedule itself. The shift schedules were the only records that were found to be responsive to this part of item 7 of the PATI request—and which revealed additional information about the times that the residential homes might have been more vulnerable to intrusion.
86. Considering the vulnerability of the population served by the residential homes, as well as the risk to their physical and mental health and safety, the Information Commissioner accepts that the public interest in ensuring the physical and emotional well-being of the residents and staff of these homes outweighed the public interest in transparency under the circumstances.

### *Conclusion*

87. In conclusion, the Information Commissioner is satisfied that the Department has justified its reliance on section 22(1) to withhold the records responsive to item 7 of the PATI request.

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<sup>11</sup> See, e.g., [Approved Estimates of Revenue and Expenditure for the Year 2022/23](#), at B-295, for the Department's actual employee numbers (full-time equivalents) for the fiscal year 2020/21, which were identified as 12 for the Brangman Home, 2 for the Youth Development Centre, 11 for the Observatory Cottage, and 11 for the Youth Residential Treatment Centre.

88. Given this conclusion, the Information Commissioner has not considered the Department's reliance on section 30(1)(b) in respect of these records.

***Conclusion***

89. The Information Commissioner finds that the Department was justified to administratively deny item 2 of the PATI request under section 16(1)(a) of the PATI Act because records did not exist or could not be found. The Information Commissioner also finds that the Department properly relied on sections 37(1) and 22(1) of the PATI Act to refuse access to the records responsive to items 3-5 and to item 7, respectively.

## Decision

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The Information Commissioner finds that the Department of Child and Family Services (**Department**) was justified in administratively denying part of the Public Access to Information (**PATI**) request under section 16(1)(a) of the **PATI** Act 2010. The Information Commissioner further finds that the Department was justified to refuse access to responsive records in accordance with sections 22(1) and 37(1) because their disclosure could have caused endangerment to the health and safety of individuals in the residential homes or was prohibited by other legislation.

In accordance with section 48 of the PATI Act, the Information Commissioner upholds the part of the Department's internal review decision that administratively denied item 2 under section 16(1)(a), varies the Department's decision to deny access to records 1-12 and 16-34 under section 37(1), and upholds the Department's decision to deny access to records 13-15 under section 22(1) of the PATI Act. The Information Commissioner does not require the Department to take any further action.

## Judicial Review

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The Applicant, the Department of Child and Family Services, 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.

Gitanjali S. Gutierrez  
Information Commissioner  
30 April 2024

## Appendix: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Refusal of request on administrative grounds

- 16 (1) A public authority may refuse to grant a request if—
- (a) the record requested does not exist or cannot be found after all reasonable steps have been taken to find it;
  - ...

#### Public interest test

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

#### Health or safety of individual

- 22 (1) Subject to subsection (2), a record is exempt from disclosure if its disclosure would, or would be likely to, endanger the physical or mental health or the safety of an individual.
- (2) A record shall be disclosed if disclosure of it is in the public interest.

#### Disclosure prohibited by other legislation

- 37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.
- ...

### Children Act 1998

#### Disclosure of information

- 11 (1) No children's officer or person employed in the administration of [the Children Act] shall communicate or allow to be communicated information obtained in the performance of his duties under this Act except where—
- (a) giving evidence in any court; or
  - (b) authorized by the Director or the Minister.
- (2) Any person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding \$2000.

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