

FOR THE RECORD:

**An Investigation into the  
Disclosure of Spent Convictions  
for U.S. Visa Applications**

VISA APPLICATION

PERSONAL INFORMATION

**REJECTED**

PASSPORT



Special Report

6 June 2024

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OMBUDSMAN FOR BERMUDA

*Privileged Communication*

28<sup>th</sup> June 2024

The Speaker of the House of Assembly  
The Hon. Dennis Lister, JP, MP  
Sessions House  
21 Parliament Street  
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present a Special Report for the Ombudsman for Bermuda's Own Motion Systemic Investigation entitled *For the Record: An Investigation into the Disclosure of Spent Convictions in U.S. Visa Applications*.

This report is submitted in accordance with sections 24(2)(a) and (3) of the Ombudsman Act 2004 which provides:

**Annual and Special Reports**

- 24(2)(a) Where any administrative action that is under investigation is in the opinion of the Ombudsman of public interest then the Ombudsman may prepare a special report on the investigation.
- 24(3) The Ombudsman shall address and deliver his annual report and any special report made under this section to the Speaker of the House of Assembly and send a copy of the report to the Governor and the President of the Senate.

Sincerely,

Michael A. DeSilva  
Ombudsman for Bermuda

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## EXECUTIVE SUMMARY

**The purpose of this Special Report is to inform the public that “spent” convictions may be included on conviction record check forms for U.S. visa applications despite the provisions in the Rehabilitation of Offenders Act 1977.**

On 19th February 2024, our Office commenced an investigation into a complaint of mistake of law against the Bermuda Police Service (“BPS”) alleging unlawfulness and unfairness in the disclosure of a spent conviction. The complaint concerned the application of the Rehabilitation of Offenders Act 1977 (“the Rehabilitation Act”) and the BPS conviction records for United States (“U.S.”) visa applications. The purpose of the Rehabilitation Act is to treat eligible criminal convictions as spent, i.e. the conviction will not be admissible as evidence in proceedings or disclosed on a conviction record check form. For a conviction to be considered “spent”, it must have resulted in a period of incarceration lasting less than three years and must have occurred more than seven years ago. The applicant complained that the disclosure by the BPS was a mistake of law because the Rehabilitation Act prohibits it.

The current Bermuda Ombudsman was formerly the Commissioner of Police. To guard against any conflict of interest, our Office outsourced the investigation to Barry Fleming, KC. Mr. Fleming has worked as a practising lawyer in Newfoundland and Labrador for the past 37 years and was that province’s Ombudsman for 16 years. He also worked for our Office between 2019 and 2020 as a consultant under the former Ombudsman, Victoria Pearman.

At the conclusion of the investigation, Mr. Fleming found no maladministration. The U.S. visa application process requires applicants to disclose all previous convictions, whether spent or not. In other words, even if the BPS did not include the spent conviction on the conviction records check form, the U.S. Consulate requires the applicant to disclose it. Further, the U.S. Consulate is not subject to local legislation and may require the disclosure as well as the arrest record as it does in all other jurisdictions.

This complaint has been the impetus for positive change. The BPS advises that it is in the process of providing standardised guidance to its officers that will ensure criminal record information shared with the U.S. for the purpose of visa applications will be first communicated with applicants, with consent forms being signed. The BPS has also shared its intention to amend its guidance note to include an explanation of what would be included on the conviction record check form.

## BACKGROUND

A member of the public filed a complaint with the Office of the Ombudsman for Bermuda, alleging that the BPS unfairly impeded his efforts, in or around 2022/2023, to obtain a 10-year immigration visa to the U.S. by communicating to U.S. officials that he had a spent criminal conviction during the process of applying for a criminal background check.

There were two aspects to his complaint. First, the transmission of information about his spent criminal conviction was unlawful. Second, if the transmittal of this information was lawful, the BPS treated him unfairly, by not informing him that it would reveal the conviction during the background check application process.

The BPS position is that, having regard for the context in which the applicant applied for his background check, it acted lawfully and in keeping with its goal of providing all things necessary to the U.S. Consulate to facilitate an application for a visa.

## THE INVESTIGATION

The investigation commenced on 19th February 2024, by providing notice to the BPS of the complaint and requesting a list of relevant information.

Our Office also wrote to the complainant to advise him that we had commenced the investigation. We analysed the information provided by the BPS and conducted relevant comparative research.

We also considered ways in which the complainant's expectations were either met or frustrated by the BPS's handling of his application for a background check.

We had the full cooperation of the BPS during our investigation.

For more information about our complaint process, visit:

[ombudsman.bm/making-a-complaint](https://ombudsman.bm/making-a-complaint)

Find more Bermuda Ombudsman Special Reports at:

[ombudsman.bm/publications](https://ombudsman.bm/publications)

## THE FAIRNESS ASSESSMENT

Fairness is a vague and often subjective concept. Ombudsmen often refer to unfairness in the public service as maladministration. It is defined in section 2 of the Ombudsman Act 2004:

*"maladministration" means inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes:*

- (a) unreasonable delay in dealing with the subject matter of an investigation;
- (b) abuse of any power (including any discretionary power); or
- (c) administrative action that was:
  - (i) contrary to law;
  - (ii) unfair, oppressive or improperly discriminatory or based on procedures that are unfair, oppressive or improperly discriminatory;
  - (iii) based wholly or partly on a mistake of law or fact or irrelevant grounds;
  - (iv) related to the application of arbitrary or unreasonable procedures; or
  - (v) negligent;

Contrary to law means contrary to legislation or any legal principle governing the circumstances of the complaint. Our assessment of the evidence requires us to determine if the actions of the BPS contravened any of the elements of maladministration outlined above.

## THE EVIDENCE

**The facts surrounding the complaint are not, in any important way, in dispute. The parties' interpretation of that evidence and their respective positions on it differ.**

The applicant was convicted in Bermuda over seven years ago of the offence of assault causing bodily harm and received a conditional discharge with two years of probation, plus an order to participate in anger management and parenting skills training. All evidence suggests that he fulfilled these conditions. In 2023, he was refused a 10-year non-immigrant visa by the U.S. Consulate in Bermuda on account of his criminal conviction. His application for the visa included a BPS criminal records check. The applicant complained to this Office in August 2023 that the BPS sent a sealed conviction report to the U.S. Consulate with his conviction record, but a copy he received in response to a second application at a later date, did not list the conviction. His position is that, as his conviction was spent, it should not have been included in the information provided by the BPS to the U.S. Consulate. Because it was included, he asserts he was denied a visa.

The BPS provided its position with respect to both applications for a criminal background check submitted by the applicant and its response to each. With respect to the second application filed in August 2022, the BPS states:

*Under routine application, criteria within Bermuda, when a certificate is supplied, we adhere to the Rehabilitation of Offenders Act [1977]. The provisions of this local law prevent disclosure of convictions not deemed reckonable. This legislation also lists instances where the Rehabilitation of Offenders Act [1977] are exempted. In the case of what the letter notes concerning a criminal convict (and the sentence has noted) we would not disclose any convictions considered spent. This disclosure posture is considered our default reporting parameter. The only time we would disclose convictions that are considered spent is with the rehabilitated person, or to another person (at their expressed request) or in good faith situations where actual belief by the record holder is that consent is given. The BPS is defended under such circumstances as provided in section 6 of this Act. Based on our "default" disclosure procedure, under the convictions as per the August 2022 application, it should show a result of No Reckonable Convictions.*

With respect to the first application (June 2022) when the record check was sent to the U.S. Consulate, the BPS states:

*Although the Rehabilitation of Offenders Act [1977] is local law, it should be stated that individuals who apply to the United States for visas are subject to their criteria and requirements. Part of the U.S. visa application calls for the provision of criminal conviction records in their entirety. Their requirements clearly state to visa applicants that the Rehabilitation of Offenders Act [1977] does not apply to United States visa laws. Additionally, part of the visa requirement is not only the provision of criminal records, but details of all arrests as well, whether or not they resulted in a conviction. Therefore, even if an arrest or conviction is considered spent, the applicant is still required to declare it, and furnish it to the U.S. Consulate officer as part of the visa application process. By this time, a visa applicant should have an understanding and acceptance that their entire record will be disclosed. The BPS makes direct electronic transmission of certificates to the U.S. Consulate. This supports the integrity of the record and is a legitimate part of the process of the provision of records to the U.S. officials.*

...

*The implication is that if a visa applicant does not agree to the requirements, then a visa will simply not be granted. For our part, we accept and fully respect that the applicant's agreement to the U.S. visa application requirement (including the authorisation for the release of all criminal convictions for that applicant) is made with the full understanding of the applicant, and we support it by furnishing the record at their request. This is explained to all individuals who submit criminal conviction applications for the purpose of obtaining a U.S. visa.*

While the policy of the BPS is to explain to criminal record check applicants that spent convictions will be given to U.S. officials to facilitate visa applications, there is no way to conclusively determine if that occurred in this case.

## THE EVIDENCE

The investigator reviewed the BPS document entitled Guidance Notes for Submitting Requests and Documentation: Police Record Check and Release Form. The only reference to the use of the form for obtaining U.S. visas states, “**For U.S. Consulate applicants only. Please provide a copy of your NIV appointment confirmation. (Appointment confirmation system).**” If this form had made some reference to the fact that, for U.S. Consulate applications, information about spent convictions would be transmitted to the US, there would be no doubt of the applicant’s knowledge, real or presumed, of this fact.

One of an Ombudsman Office’s fundamental duties is to trust, but verify, the information provided to it by public bodies. Does the U.S. require information about arrest and spent convictions for the purposes of issuing visas? Yes. The investigator reviewed the websites of a number of U.S. Consulates in different countries. The UK is typical. It clearly states that:

*“the Rehabilitation of Offenders Act does not apply to United States visa law. Therefore, even if you are*

*arrested or conviction is considered spent, you are still required to declare it and furnish an ACRO Police Certificate when applying for a visa.”*

It also states that:

*“...you are required to complete the personal data form VCUI and should provide as much detail as possible concerning your arrest, cautions, convictions, including those in a third country.”*

Thus, even if a police record check would not ordinarily include information about arrests and spent convictions, there is an obligation on the applicant to provide as much information about these incidents as possible.

To be clear, reference to an arrest or a spent conviction is not fatal to an applicant’s chances of entering the U.S., as there are other mechanisms to explain and give weight to these occurrences.

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## ANALYSIS

### Was the applicant treated unfairly by the BPS when it issued a criminal conviction check to the U.S. Consulate on his behalf revealing a spent conviction?

After reviewing the evidence and assessing it against the definition of maladministration in the Act, the investigator concluded that the applicant was not treated unfairly. The purpose of the applicant's request for a criminal record check was to facilitate him acquiring a U.S. visa. Irrespective of the actions of the BPS, or police forces similarly situated, he would have had to provide information about his previous arrest and conviction. If the BPS had not included information about his arrest as part of its normal process for issuing background criminal checks, the applicant would have had to provide this information through some other means.

There are two additional issues. First, a part of the definition of maladministration includes an administrative action which is contrary to law. Strictly speaking, the BPS breached the provisions of the Rehabilitation of Offenders Act 1977 when it did not have the express consent of the applicant to release information about his spent conviction to the U.S. Consulate. Ombudsman Offices are not police forces or crime preventing agencies. They generally give individuals and public bodies the flexibility and pragmatism necessary to fulfil the public good. To that end, the BPS was acting with a view to doing all that was necessary for the applicant to have his U.S. visa application fully assessed. It operated with his tacit or implied consent and cannot be seen as treating him unfairly.

Second, all public bodies should strive to manage the expectations of the people who use their services. While the ultimate responsibility for providing all necessary information to the U.S. Consulate for visa applicants rests on the applicant, it is easy to envisage scenarios where they might overlook or otherwise may not be aware of the requirement to detail spent convictions. To that end, the Ombudsman's Office suggests that the BPS modify its document entitled Guidance Notes for Submitting Requests and Documentation: Police Record Check and Release Form to state that release of the record check for the purposes of entry visas to the U.S. will contain information about spent convictions and arrests, and that the applicant consents to this action. By doing so, it will release busy officers and staff of the obligation to orally state that this will occur. Having regard for the experience and expertise of the BPS, it would be appropriate for its officials to develop the wording for this modification.

We should note that the Ombudsman only has the power to make a recommendation after a finding of maladministration. That is not to say that in the course of an investigation, if the Ombudsman observes ways in which administrative actions can be improved, although maladministration has not occurred, he has to remain silent. He can make a suggestion which may assist the public body and those it serves.

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## CONCLUSION

The applicant, having regard for all the circumstances of his complaint, was treated fairly by the BPS when it transmitted information about his spent conviction to the U.S. Consulate during the process of providing a criminal record check. The BPS did not commit maladministration.

We would like to thank the applicant for bringing his complaint forward. While the investigation did not permit us to make a finding in his favour, we were able to make a modest suggestion to help improve the process for issuing record checks in the future.

We would like to thank Barry Fleming, KC for his work as investigator, and acknowledge the cooperation and professionalism of the BPS officials during this investigation.

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THIS INVESTIGATION WAS COMPLETED ON 14TH DAY OF MAY 2024 BY:



**Barry Fleming K.C.**

*For the Good  
of the Public*



*and Those Who  
Serve the Public*

## **OMBUDSMAN FOR BERMUDA**

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