

## Decision Notice

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### Decision 31/2024: Bermuda Police Service

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#### Complaints against officers

**Reference no:** 2021055

**Decision date:** 28 October 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 related to complaints made against specific, named, police officers. In response, the BPS disclosed an anonymised table summarising the number of complaints made against each officer and refused access to the responsive records under section 23 (personal information).

In this Decision, the Information Commissioner has affirmed the BPS's decision to withhold the responsive records under section 23 of the PATI Act.

## 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).

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

## Background

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1. As background, complaints against police officers are dealt with under either the Police (Conduct) Orders 2016 (**Conduct Orders**) or the Police (Performance) Orders 2016 (**Performance Orders**), depending on the severity of the allegations.<sup>1</sup> If the complaint is made by a member of the public, the Police Complaints Authority (**PCA**) must be notified (where the complaint was not made directly to the PCA) and the PCA has powers regarding the investigation of the complaint.<sup>2</sup> Complaints made by a police officer against another police officer, however, are considered internal conduct matters (where the complaint amounts to misconduct or gross misconduct) and the PCA does not have any oversight

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<sup>1</sup> 'Unsatisfactory performance' (e.g. carelessness and needing to learn and improve) and 'attendance' matters are dealt with under the Performance Orders and anything amounting to 'misconduct' (e.g. deliberate or persistent conduct) or 'gross misconduct' (e.g. pre-meditated conduct or criminal conduct) is dealt with under the Conduct Orders.

<sup>2</sup> In practice, however, due to a lack of investigative resources in the PCA, substantive investigations are often done by the BPS's Professional Standards Department, although the PCA will be provided with any investigation reports and can direct that further investigations be made. See section 13 of the [PCA Act 1998](#), 'Subsequent powers in relation to complaint'. See also Royal Gazette, '[Police regulator 'run on a shoestring', says chairman](#)' dated 1 December 2023, where the Chairman of the PCA explained that "all complaints made by members of the public to the PCA were initially investigated by the BPS's own professional standards department. They send us the report and we confirm whether they have got it right ... Once in a blue moon, we reject what they say, and we get them to do it again."

powers. This review only involves internal conduct matters as the PATI request sought complaints “made by serving police officers”.

2. Where a conduct matter is raised against a police officer (whether by a public complaint or internally), the matter is referred to the appropriate authority under the Conduct Orders. The appropriate authority for police officers below the rank of Deputy Commissioner of Police is the Commissioner of Police (**COP**), but the COP may delegate the function to an officer having the rank of Superintendent or higher. The role of delegated appropriate authority had previously been assumed by the Head of the Professional Standards Department (**PSD**).<sup>3</sup> The appropriate authority where the conduct matter is raised against the Commissioner of Police or the Deputy Commissioner of Police, is the Governor.
3. On 30 June 2021 (amended on 1 July 2021), the Applicant made a public access to information (**PATI**) request to the BPS, asking for records about complaints “made by serving police officers” against 13 named police officers between 1 August 2018 and 30 June 2021. The request specifically sought a copy of the complaints themselves, any transfer or referral of the complaints to the PCA<sup>4</sup> or Government House, and the outcome of the complaints.
4. The BPS initially relied on section 16(1)(e), that the request was frivolous or vexatious, to administratively deny the PATI request in July 2021. In [Decision 22/2023, Bermuda Police Service](#), the Information Commissioner annulled that decision and the BPS was ordered to issue a new initial decision. The BPS issued a new initial decision on 1 August 2023.<sup>5</sup>
5. In its initial decision on 1 August 2023, the BPS disclosed a table of information about the number of complaints made against each named police officer but anonymised the information by assigning each officer a number from 1 to 13. The BPS explained that the underlying records were exempt under section 23 of the PATI Act and that the public interest test fell in favour of non-disclosure.

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<sup>3</sup> Based on information provided by the PSD in a meeting on 5 June 2024, the PSD team has increased and the COP’s duties as the appropriate authority may be delegated to the Deputy Commissioner of Police, two Assistant Commissioners of Police, five Superintendents and the Chief Inspector of the PSD.

<sup>4</sup> As noted in the background above, complaints made by serving police officers do not fall under the jurisdiction of the PCA. Therefore, any complaints responsive to the PATI request in this review would not have been transferred or referred to the PCA.

<sup>5</sup> The initial decision was issued to the Applicant prior to the issuing of Decision 22/2023 on 15 August 2023, but the BPS only notified the Information Commissioner’s Office of its initial decision on 16 August 2023.

6. On 20 August 2023, the Applicant asked for an internal review. On 2 November 2023 (by letter dated 29 September 2023),<sup>6</sup> the BPS issued an internal review decision, which upheld the initial decision.
7. On 20 November 2023, the Applicant asked for an independent review by the Information Commissioner, to challenge the BPS's internal review decision.

## Investigation

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8. The Information Commissioner's Office (**ICO**) accepted the application as valid on 7 December 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.
9. 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 BPS's reliance on section 23.
10. The ICO notified the BPS of the valid application on 19 December 2023 and asked for the responsive records.
11. On 23 February 2024, the BPS submitted 21 records. Two of the records were considered by the Information Commissioner to be non-responsive because one related to a complaint made by a member of the public rather than a serving police officer and another fell outside of the timeframe of the PATI request (i.e. between 1 August 2018 and 30 June 2021).
12. During the review, the ICO noted that the records provided by the BPS did not align with the table of information provided to the Applicant in the BPS's initial decision. Specifically, in many instances, there was only the letter of complaint provided, without any documentation regarding the outcome of the complaints and whether any of the complaints had been referred to the Government House.

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<sup>6</sup> Due to a communication error, the internal review decision was not issued to the Applicant in September 2023, as intended by the BPS. Therefore, on 26 October 2023, the Applicant requested an independent review of the BPS's 'failure to decide' but this was not progressed by the Information Commissioner's Office (with consent from the Applicant) once the BPS issued the internal review decision to the Applicant on 2 November 2023.

13. As required by section 47(4) of the PATI Act, on 18 April 2024, the parties were invited to make representations to the Information Commissioner. Neither the BPS nor the Applicant made formal submissions to the ICO.
14. Given the gaps identified in the records, the ICO sought additional records or an explanation of the gaps from the BPS.
15. On 5 June 2024, the ICO met with the BPS's Head of the PSD and other officers to understand the process related to conduct complaints. The ICO viewed the PSD's records held on its shared drive and the PSD provided the ICO with Guidance Notes on the Conduct Orders and the Performance Orders, a graphic on the assessment of conduct (the scale of unsatisfactory performance to gross misconduct) and a PowerPoint presentation on the BPS's Professional Standards that had been given to all officers.
16. On 20 June 2024, the BPS provided the ICO with a document provided by the former Head of the PSD, with information responding to the PATI request. The ICO followed up directly with the former Head of the PSD to clarify the information contained in the document and to confirm whether additional records existed. In a meeting with the former Head of the PSD on 17 July 2024, the ICO was shown two Excel spreadsheets listing complaints that had been made by serving police officers against other police officers.
17. The Excel spreadsheets listed the various complaints that had been made against specific police officers and, among other things, noted the date of the complaints, the nature of the complaints, whether a formal assessment was required (and whether one had been completed), whether the complaints had been referred to the Governor and the status and outcome of each complaint.
18. The former Head of the PSD went through each of the complaints on the list and explained, in detail, the nature of the complaint and its status. It was explained that some of the complaints related to the same conduct matter. Where an assessment or investigation had already been commenced against an officer, any additional complaints were added to the ongoing assessment or investigation.
19. On 29 and 31 July 2024, the BPS provided the ICO with additional documents related to the complaints made against the officers named in the PATI request, including copies of the spreadsheets shown during the meeting on 17 July 2024. The two spreadsheets, as well

as two additional documents, are considered in this review as four additional responsive records.<sup>7</sup>

20. The Information Commissioner notes that record 5 in this review was the subject of an order for disclosure in [Decision 10/2024](#), issued 25 March 2024, and a redacted copy of that record (with personal information redacted) has been disclosed by the BPS. Although the redacted copy of record 5 had not been disclosed at the time of the BPS's internal review decision in this review, the Information Commissioner is of the view that an analysis of record 5 below would be an academic, and redundant exercise, in light of this change of circumstance. Record 5, therefore, is being treated as 'in the public domain' already, and the Information Commissioner's analysis below does not consider record 5.
21. This review therefore considers 22 records in total.

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

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

#### ***Personal information – section 23***

23. Section 23(1) allows a public authority to deny public access to a record or part of a record if it consists of personal information. Section 24(1) broadly defines personal information as information recorded in any form about an identifiable individual.
24. 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)(a) excludes information that relates to the position or functions of an individual who is or was a public officer. Section 24(2)(b) excludes certain information about contractors performing services for a public authority (including the terms of the contract and name of the individual).
25. The exemption in section 23(1) also does not apply to the limited circumstances set out in subsection (2), none of which apply here.
26. The personal information exemption is subject to the public interest test in section 23(6). In the context of personal information, the public interest test requires a balancing of the public interests in favour of publicly knowing an individual's personal information, on the

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<sup>7</sup> The other records provided by the BPS were not responsive to the PATI request or were duplicates of the records provided to the ICO on 23 February 2024.

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

27. When considering the public interest test for a personal information disclosure, public authorities should take into account the following factors:<sup>8</sup>
- a. whether disclosure would further the public interest, including but not limited to the factors listed in regulation 2 of the PATI Regulations;
  - b. whether disclosure would be fair to the individual under all of the circumstances, which would include consideration of whether sensitive personal information was involved, the potential consequences of disclosure on the individual, and the individual's reasonable expectations of privacy; and
  - c. whether disclosure of the personal information was necessary to further the public interests that have been identified.
28. The Information Commissioner will consider whether the public interest concerns, if any, 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.
29. In sum, to appropriately rely on the personal information exemption in section 23(1), the public authority must consider:<sup>9</sup>
- [1] Whether the record consisted of information about an identifiable individual?
  - [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 on personal information in section 23(1) was engaged, whether the balance of the public interest required disclosure?<sup>10</sup>

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<sup>8</sup> See [Decision 02/2019, Office of the Governor](#), at paragraph 51.

<sup>9</sup> See [Decision 02/2019, Office of the Governor](#), at paragraph 56.

<sup>10</sup> Disclosure of records consisting of personal information should also be made if disclosure would benefit the individual, in accordance with section 23(6) of the PATI Act, which is irrelevant in this case.

30. A public authority invoking section 23(1) has the burden to show that, on the balance of probabilities, the exemption is justified.

#### *Public authority's submissions*

31. The BPS stated in their initial decision (upheld by the internal review decision) that the underlying records consisted of personal information about the named police officers and that the information did not fall within the exclusions to the definition of personal information in section 24(2) or the exceptions to the exemption in section 23(2). The BPS explained that the threshold for a matter to be considered under the Conduct Orders is very low and that there is an implied expectation of privacy during misconduct proceedings.
32. On the public interest test, the BPS acknowledged that there was a public interest in disclosure because the public had a right to accountability and transparency of exchanges that relate to members of the BPS and disciplinary matters within the BPS. On the other hand, the BPS considered the public interest in protecting the privacy of the individuals and submitted that it would be unfair to the officers to disclose the information, which may cause harm and prejudice to the officer's careers, considering the very low threshold to engage a conduct matter.
33. The BPS concluded that the public interest would not be better served by granting access to the requested records due to the confidential nature of disciplinary investigations and that the public interest in accountability and transparency was served by the partial disclosure of the responsive records.

#### *Applicant's submissions*

34. The Applicant has not made any submissions.

#### *Discussion*

[1] Did the record consist of information about an identifiable individual?

35. The records requested in this case related to complaints made against named individuals. The records consisted of information about an identifiable individual, specifically, the fact of whether complaints had been made about them, the nature of the complaints made against them, and the status or outcome of the complaints made against them.

[2] Did the information fall within any exclusion in section 24(2) to the definition of personal information?



36. The Information Commissioner is satisfied that the information in the records did not fall within any exclusion to the definition of personal information in section 24(2). As noted above, section 24(2)(a) excludes information about “an officer or employee of a public authority that relates to the position or functions of the individual”.
37. It is true that the information in the records relates to complaints made about individuals who were police officers. The Information Commissioner has consistently found, however, that the exclusion in section 24(2)(a) does not extend to information about an individual’s performance of the functions of the post—including any disciplinary actions, performance reviews, or complaint details—that is far more attached to the individual than the general nature of the post. Instead, this information remains an individual’s routine personal work information, as explained in [Decision 02/2019](#),<sup>11</sup> and the exemption for personal information is still applicable.<sup>12</sup> In contrast, section 24(2)(a) excludes other information that attaches generally to the position or function and would relate to any individual in the post, such as the position’s duties, job title or a salary scale.
38. Some of the complaint records in this review also relate to an individual who served as a consultant at the BPS. Section 24(2)(b) excludes from the definition of personal information any “information about an individual who is or was performing services under contract for a public authority that relates to the services performed, including the terms of the contract and the name of the individual”. The Information Commissioner has previously found that an individual consultant’s name and the terms of a consultancy service agreement fell within the exception to personal information in section 24(2)(b).<sup>13</sup> Thus, individual consultants do not enjoy as much privacy protections as public officers because,

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<sup>11</sup> See [Decision 02/2019](#), [Office of the Governor](#), at paragraphs 43-44.

<sup>12</sup> See also [Decision 20/2021](#), [Office of the Clerk of Legislature](#), at paragraph 54 (finding that records related to any complaints filed against a former Member of Parliament did not fall within the exclusion in section 24(2)(a) or (b) because the information did not attach to the position or function of an individual as a public officer or contractor providing services to a public authority); [Decision 34/2022](#), [Office of the Governor](#), at paragraph 30 (finding that records relating to the reasons for the former Commissioner of Police’s resignation did not fall within the exclusion in 24(2)(a) because the information attached to the individual, and not the post); [Decision 40/2023](#), [Bermuda Police Service](#), at paragraph 97 (finding that the relevant parts of the records did not fall within the exclusion in section 24(2)(a) because the information related to the “individual performance of their positions or functions, rather than to the position or function itself”). As a result, whether personal work information must be disclosed is determined by the balance of the public interest. Generally, public officers in non-executive and non-public facing public roles retain a reasonable expectation of privacy concerning their performance of their duties. This would include a reasonable expectation that information related to any disciplinary complaint or matter involving them would remain confidential.

<sup>13</sup> See [Decision 16/2024](#), [Ministry of Legal Affairs Headquarters](#), at paragraph 114.

for example, section 24(2)(b) excludes a consultant's name from the definition of personal information.

39. Like the exclusion for public officers, though, section 24(2)(b) maintains some protection for an individual's routine personal work information. Here, the information in the relevant records extends into a separate category of information related to an unresolved complaint in a consultant's human resources file. This information is clearly of a personal nature and did not fall within the exclusion from the definition personal information in section 24(2)(b).

[3] Did any exceptions in section 23(2) apply to the records?

40. None of the exceptions in section 23(2) applied to the records.

[4] If the exemption was engaged, did the balance of the public interest require its disclosure?

41. Where a record contains personal information, it is necessary to determine whether the balance of the public interest requires disclosure. As per section 2 of the PATI Regulations 2014, 'public interest' should be interpreted to include things that may or would tend to promote accountability of and within the Government, and to reveal wrongdoing or maladministration.<sup>14</sup> Here, disclosure of the personal information would not further any identified public interest.
42. The BPS identified several potential public interests, including those related to furthering good public administration, transparency and accountability. This included ensuring that officers of the BPS, and particularly senior officers, are held accountable for any misconduct or wrongdoing. The public also has an interest in ensuring the proper administration of the processes for deciding allegations of misconduct against officers.<sup>15</sup> It is important that the public maintains confidence in the BPS's processes as it relates to internal conduct complaints, particularly where the PCA does not have oversight powers.
43. The Information Commissioner, however, agrees with the BPS that disclosure of unproven, untested allegations does not further these public interests, even for allegations made against executive officers. Instead, such disclosures could be misleading and fail to promote

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<sup>14</sup> See [Decision 10/2024](#), [Bermuda Police Service](#).

<sup>15</sup> See [Decision 15/2020](#), [Bermuda Police Service](#), at paragraph 57 (noting that the public interest is served by "the orderly administration of justice through an established, comprehensive framework for addressing disciplinary proceedings").

transparency.<sup>16</sup> Moreover, even when an outcome has been reached on a complaint, if the BPS has followed the proper processes, no public interest would be furthered by disclosure of the details of a specific conduct investigation or its outcome as it relates to an individual officer who is not in an executive role.<sup>17</sup>

44. In some circumstances, not present here, the public interest may be furthered by disclosure of a limited amount of personal information related to the decision-making process when questions arise about the integrity of that process. In [Decision 10/2024](#), the Information Commissioner found that disclosure of the names of the individuals, the fact of the communications and the timing of the communications would promote accountability and transparency because the records contained information regarding the BPS's and Government House's decision-making processes related to a complaint.
45. In this case, though, nothing in the records suggested any impropriety in the process that was followed. As a result, any disclosure would not promote the accountability and transparency of the BPS's decision-making process, as it related to executive and non-executive officers. The Excel spreadsheet provided evidence that the BPS had been tracking the status of the complaints, including their transfer to the Governor as the appropriate authority, where relevant. The Information Commissioner is satisfied that the relevant appropriate authority was aware of the underlying basis of the various complaints and that, based on the records provided, the BPS followed the decision-making process under the Conduct Orders.
46. Finally, the Information Commissioner notes that speculation or assumptions exist in the public domain about complaints that had been made against some of the named officers, but the BPS has not disclosed or confirmed this information. As was stated in [Decision 02/2019](#), [Office of the Governor](#), at paragraph 63, "the Information Commissioner places great emphasis upon the PATI Act's protection of personal information in section 23(1) because an official disclosure has a far greater impact than [public] commentary upon an

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<sup>16</sup> See [Decision 17/2023](#), [Office of the Governor](#), at paragraph 61. See also [Decision Notice FS50086498](#) dated 14 May 2007 and [Decision Notice FS50233972](#) dated 17 September 2009, where the UK Information Commissioner stated, "To release the fact that a complaint has been made against an employee may lead to assumptions being made about that employee's competence. However, the complaint may be unsubstantiated or malicious, or certain employees may be involved more frequently with difficult decisions that are more likely to result in dissatisfaction. Therefore, releasing this information does not aid transparency or accountability but could be misleading and unfair to particular employees".

<sup>17</sup> See [Decision 15/2020](#), [Bermuda Police Service](#), at paragraphs 56-57. For senior officers that are accountable to the public and hold outward-facing roles, the analysis may be different; however, this issue does not fall to be decided by the Information Commissioner in this review, as none of the records contained an outcome related to a completed investigation of a complaint made against a senior officer.

individual's personal and professional life". Therefore, just because some information is in the public domain, it does not justify public disclosure under the PATI Act to further a public interest.

47. Because no public interest would be furthered by disclosure, the balance of the public interest favours maintaining the confidentiality of the personal information.

#### *Conclusion*

48. In conclusion, the Information Commissioner is satisfied that the BPS has justified its reliance on section 23 of the PATI Act to withhold the requested records.

#### *Conclusions*

49. The Information Commissioner is satisfied that the BPS has justified its reliance on section 23 of the PATI Act to withhold the records responsive to the PATI request.
50. The Information Commissioner also observes that, although a question arose regarding the completeness and accuracy of the information, the BPS was striving to promote accountability by disclosing anonymised information about the complaints.
51. Given the importance of protecting personal information while also maintaining the public's confidence as it relates to the BPS's management of conduct complaints, the BPS may consider implementing a proactive publication regime for aggregate statistical data related to internal conduct matters, on a quarterly or annual basis.<sup>18</sup> The Information Commissioner notes that, in the past, the PCA has included statistical data on the number and types of public complaints in its Annual Report, but that this would not include data on internal conduct complaints. A proactive publication by the BPS would complement the PCA's disclosures.<sup>19</sup> The Information Commissioner also notes that this would mitigate any need for ad hoc disclosures made in response to individual PATI requests.

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<sup>18</sup> A similar approach was successfully adopted by the Bermuda Hospitals Board (**BHB**) following a PATI request related to 'serious untoward incidents' and resulted in the BHB publishing quarterly 'Quality and Patient Satisfaction' data on its [website](#). See The Royal Gazette, '[Hospital reveals harm figures](#)', 10 July 2018, for more information.

<sup>19</sup> See the [Annual Report for 2012/2013/2014](#) and the [Annual Report for 2008/2009/2010](#).

## Decision

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The Information Commissioner finds that the Bermuda Police Service (**BPS**) was justified in relying on section 23 of the Public Access to Information (**PATI**) Act 2010 to refuse access to the requested records. In accordance with section 48 of the PATI Act, the Information Commissioner affirms the internal review decision by the BPS.

## 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.

Gitanjali S. Gutierrez  
Information Commissioner  
28 October 2024

### 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.
- ...
- (6) A record that contains personal information relating to an individual shall be disclosed if disclosure of it is in the public interest or would benefit the individual.

#### Definition of personal information

- 24 (1) Subject to subsection (2), “personal information” means information recorded in any form about an identifiable individual, including—
- ...
- (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;
- ...
- (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;
- ...
- (2) But “personal information” does not include—
- (a) information about an individual, except where the individual is a police officer of the Bermuda Police Service who is or was engaged in a surveillance function during the course of his employment; who is or was an officer or employee of a public authority that relates to the position or functions of the individual;
- (b) information about an individual who is or was performing services under contract for a public authority that relates to the services performed, including the terms of the contract and the name of the individual; or
- ...

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