

## Decision Notice

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### Decision 08/2021: Police Complaints Authority

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**Records related to judicial review, complaints and meeting minutes**

**Reference no: 20190328**

**Decision date: 10 September 2021**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Police Complaints Authority (**PCA**) for records relating to a judicial review to which the PCA was a party. The request also asked for minutes of the PCA's meetings as well as statistical information and details about complaints received by the PCA.

The PCA disclosed a record about the complaints it received in 2017. It denied access to the judicial review records under the administrative grounds in section 16(1)(f) of the PATI Act because the information was reasonably available to the public under another statutory provision or, in the alternative, under the substantive exemption in section 26 for information received in confidence.

The PCA informed the Applicant that minutes of its meetings during the periods requested did not exist.

The Information Commissioner has varied the PCA's decision to deny access to most of the judicial review records as well as the PCA's correspondence with a specific public authority because the PATI Act does not apply to these records, in accordance with section 4(1)(a) and (1)(b) of the PATI Act, respectively. The Information Commissioner has upheld the PCA's decision to deny access to most of the remaining records under the exemption in section 26(1)(b) because their disclosure would constitute a breach of a duty of confidence. The Information Commissioner has reversed the PCA's denial of public access to two records, but found that certain information in the records is exempt under section 23(1) or 26(1)(b) of the PATI Act. The Information Commissioner has ordered disclosure of the two records in part.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 4 (application); section 12 (access to records); section 16 (refusal on administrative grounds); section 21 (public interest test); section 23 (personal information); section 24 (definition of personal information); and section 26 (information received in confidence).

Police Complaints Authority Act 1998: section 5 (functions of the Authority); section 25 (Authority and staff to maintain secrecy).

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

## Background

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1. The Police Complaints Authority (**PCA**) is a statutory entity, whose main functions include receiving and investigating complaints against members of the Bermuda Police Service (**BPS**). Following the use of captor spray (commonly known as pepper spray) by police officers during a protest outside the House of Assembly on 2 December 2016, the PCA received 26 complaints relating to the event. The PCA conducted an investigation and released its public report on the 26 complaints on 10 August 2017 (**the PCA report**)<sup>1</sup>.
2. On 8 February 2018, a number of individuals sought judicial review, 2020 No. 25 civ Winnae Wales et al v The Police Complaints Authority, to challenge the PCA report (**the judicial review**). The Supreme Court granted leave for the judicial review application.
3. The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the PCA on 16 October 2018. The request sought the following:
  - a. All records held on the judicial review (including, but not limited to, minutes, emails, letters, memos, etc.) (**item 1**);
  - b. Minutes of the PCA's meetings in 2017 and 2018 (**item 2**); and
  - c. Records showing the number, details and outcomes of complaints received and investigations launched in 2017 and 2018 (without personal information) (**item 3**).
4. Months after the PATI request was made, the parties to the judicial review reached an agreement to settle the matter and the complainants were financially compensated<sup>2</sup>.
5. The PCA did not issue an initial decision notice, but provided the Applicant with a record entitled Check List 2017. This record was responsive to item 3 of the PATI request and contains anonymised information about complaints to the PCA in 2017.

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<sup>1</sup> Police Complaints Authority, Decision in Respect of the 26 Complaints Made by Members of the Public on the Use of Captor Spray at the House of Assembly Protests on 2 December 2016, 10 August 2017, available at <https://cloudfront.bernews.com/wp-content/uploads/2017/08/Decision-on-House-of-Assembly-Complaints-against-Officers-of-BPS.pdf>.

<sup>2</sup> Settlements Made Following Pepper Spraying, Bernews, 12 February 2019, available at <https://bernews.com/2019/02/settlements-made-following-pepper-spraying/>.

The PCA also informed the Applicant that item 2 records, minutes of the PCA's meetings, did not exist.

6. The Applicant sought an internal review and the PCA issued its internal review decision on 25 March 2019<sup>3</sup>. The PCA denied access to all records responsive to item 1 under an administrative ground in section 16(1)(f) because judicial review records were reasonably available to the public under another statutory provision. In the alternative, the PCA denied access to item 1 records under the exemptions in section 26(1) for information received in confidence. The internal review decision agreed that minutes of the PCA's meetings, item 2 of the request, did not exist. For item 3, the PCA disclosed that it received 41 complaints in 2018 and did not launch any investigation in 2017 and 2018, apart from the investigation detailed in the PCA report.
7. The Applicant made a timely application on 28 March 2019 for an independent review by the Information Commissioner.

## Investigation

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8. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
9. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine whether its reliance on the exemptions was justified.
10. The Information Commissioner notified the PCA of the Applicant's valid application on 29 April 2019 and requested a copy of the withheld records responsive to item 1. The PCA promptly provided the withheld records. Considered in this review are records 3, 4, 5, 9, 10, 11, 11/1, 12/2, 13-16, 18, 19, 21-23, 28, 29, 33, 34, 38 and 39. During the review, the PCA abandoned its reliance on section 16(1)(f). This administrative denial ground is not considered in this review.
11. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. The

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<sup>3</sup> The internal review decision was issued as a result of the Information Commissioner's review no. 20190205, which was decided on 1 April 2019. See Decision 08/2019, [Police Complaints Authority](#).

PCA and the Applicant were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review, which both parties did.

## Information Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the public authority and the Applicant. She is satisfied that no matter of relevance has been overlooked.
13. The Information Commissioner strives to provide as full an explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis of various issues cannot be as detailed as would otherwise be preferred.

### *Applicability of the PATI Act – section 4(1)(a)*

14. Section 4(1)(a) of the PATI Act states that the Act does not apply to records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person. Relevant to this review are records relating to the court's exercise of judicial functions. Because section 4(1) addresses the applicability of the PATI Act, the Information Commissioner may consider this provision on her own accord when the parties do not raise it, as has occurred in this review<sup>4</sup>.
15. Neither the PATI Act nor the Interpretation Act 1951 (**Interpretation Act**) provides a definition on 'judicial functions'. It is well established, however, that 'judicial functions' include the adjudicative functions of the court<sup>5</sup>, i.e., making an official decision about who is right between disagreeing parties<sup>6</sup>.
16. This does not mean that all records related to legal proceedings that are held by a public authority are excluded from the PATI Act by virtue of section 4(1)(a). The phrase 'relating to the exercise of judicial functions by a court' (as opposed to 'relating to judicial proceedings') suggests that, for section 4(1)(a) to apply, the records ought to have some relation to the courts, either directly or indirectly. Section 4(1)(a) would likely include, but not be limited to, records created by the court in the exercise of its adjudicative functions, records filed with the court in relation to legal proceedings as

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<sup>4</sup> See, for example, Decision 27/2019, Bermuda Health Council, para. 16.

<sup>5</sup> Carmody v Information Commissioner & Ors, [2018] QCATA 14, para. 91.

<sup>6</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

well as correspondence between parties performed in accordance with a court's instructions, orders or directions. It would also include administrative records of the court's adjudicative functions such as cover letters to the court or between parties.

17. In contrast, a public authority's internal correspondence discussing a pending legal proceeding might not fall with the scope of section 4(1)(a). In these circumstances, unless another provision in section 4(1)(b) applies, the provisions of the PATI Act would be applicable and the records may still be exempt from public disclosure.
18. Section 4(2) of the PATI Act also creates an exclusion from the limitations on the scope of the PATI Act in section 4(1). In other words, section 4(1)(a) will not apply to remove records from the scope of the PATI Act if the records fall within section 4(2). Section 4(2) affirms that the PATI Act applies to records related to the general administration of the public authorities identified in section 4(1), such as the judicial and quasi-judicial bodies in section 4(1)(a).
19. As a result, the PATI Act still applies to records relating to the general administration of courts and quasi-judicial bodies. The Information Commissioner has consistently interpreted 'records related to the general administration' of a public authority as those involving activities common to all public authorities, such as facilities and buildings management, property, finances, equipment and supplies, human resources and personnel, and IT or information systems<sup>7</sup>.
20. In sum, for a record to be excluded from the scope of the PATI Act by virtue of section 4(1)(a), the following must be considered:
  - [1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?
  - [2] What is the relevant exercise of a judicial or quasi-judicial function to which the record relates?
  - [3] Does the record relate to the general administration of the court, tribunal or other body or person and come within the scope of the PATI Act by virtue of section 4(2)(a)?

### *Submissions*

21. The Information Commissioner informed the PCA and the Applicant that she would be considering the applicability of section 4 and invited submissions on this issue. The

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<sup>7</sup> See, for example, Decision 05/2020, Human Rights Commission, para. 15.

PCA did not make further submissions. The Applicant did not make submissions concerning section 4, but asserted that responsive records, which went beyond those related to judicial proceedings, were likely to exist.

### *Discussion*

22. The Information Commissioner considers the applicability of section 4(1)(a) of the PATI Act to records responsive to item 1, namely records related to the judicial review.

[1] What is the relevant court whose functions are being considered?

23. Records responsive to item 1 of the PATI request relate to a judicial review before the Supreme Court of Bermuda.

[2] What is the relevant exercise of a judicial function to which the record relates?

24. Having carefully considered the withheld records, the Information Commissioner is satisfied that records 3, 4, 9, 10, 11/1, 14, 19, 21, 22, 29, 34, 38 and 39 in full, as well as parts of records 11, 15, 16, 18 and 33 relate to the Supreme Court's adjudicative function to conduct the judicial review. They were, for example, created to comply with the instructions, orders or directions of the Supreme Court to carry out judicial review proceedings.

[3] Does the record relate to the general administration of the court and come within the scope of the PATI Act by virtue of section 4(2)(a)?

25. The records or parts of records in paragraph 24 that relate to the exercise of the judicial functions of the Supreme Court do not relate to the general administration of the court. They are not records commonly held by other public authorities, such as those involving facilities, human resources, or the like.

### *Conclusion*

26. The Information Commissioner is satisfied that in accordance with section 4(1)(a), the PATI Act does not apply to records 3, 4, 9, 10, 11/1, 14, 19, 21, 22, 29, 34, 38 and 39 in full, as well as parts of records 11, 15, 16, 18 and 33 because they relate to the exercise of judicial functions of the Supreme Court.

### ***Applicability of the PATI Act – section 4(1)(b)***

27. Section 4(1)(b) of the PATI Act also sets out additional records to which the PATI Act does not apply, namely records that were created or obtained by the listed public

authorities in the course of carrying out their functions. In accordance with the definition in the Interpretation Act, 'functions' should be understood as "powers conferred, or duties imposed, on a public authority or public officer by or under any provision of law".

28. As explained in paragraph 18 above, section 4(2) creates an exception to the removal of records from the scope of the PATI Act. Section 4(2)(b) ensures that the PATI Act will still apply to records related to the general administration of the listed public authorities.
29. For a record to be removed from the scope of the PATI Act's application by virtue of section 4(1)(b), the following must be considered:
  - [1] Was the record obtained or created by one of the public authorities listed in section 4(1)(b)?
  - [2] Was the record obtained or created by that public authority in the course of carrying out its functions?
  - [3] Does the record relate to that public authority's general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

#### *Submissions*

30. As stated above in paragraph 21, neither the PCA nor the Applicant made further submissions specifically addressing section 4.

#### *Discussion*

31. The Information Commissioner considers the applicability of section 4(1)(b) of the PATI Act to parts of records 11, 12/2 and 13.
  - [1] Was the record obtained or created by one of the public authorities listed in section 4(1)(b)?
32. The Information Commissioner has carefully reviewed the withheld records and is satisfied that parts of records 11, 12/2 and 13 were emails that were sent or received by a public authority listed in section 4(1)(b).
  - [2] Was the record obtained or created by that public authority in the course of carrying out its functions?



33. The Information Commissioner is satisfied that parts of records 11, 12/2 and 13 were obtained or created in the course of the listed public authority's carrying out of its functions.

[3] Does the record relate to that public authority's general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

34. The Information Commissioner is further satisfied that the parts of records 11, 12/2 and 13 referenced in paragraph 32 do not relate to that public authority's general administration.

### *Conclusion*

35. The Information Commissioner is satisfied that in accordance with section 4(1)(b) of the PATI Act, the PATI Act does not apply to parts of records 11, 12/2 and 13 because the records were created or obtained by a listed public authority in the course of carrying out its functions and they do not relate to that public authority's general administration.

### *Breach of confidence – section 26(1)(b)*

36. A public authority may rely on section 26(1)(b) as justification for denying access to a public record if the record's disclosure would constitute a breach of a duty of confidence arising under any provision of law.

37. In accordance with the Interpretation Act, 'any provision of law' means "any provision of law which has the effect for the time being in Bermuda, including any statutory provision, any provision of the common law, any provision of the Constitution, and any right or power which may be exercised by virtue of the Royal Prerogative".

38. Section 26(1)(b) also requires that the disclosure 'would' constitute a breach of confidence. 'Would' means that there is a high probability that the anticipated harm can occur. It has also been described as a significant and weighty chance of the harm occurring.

39. The exemption in section 26(1)(b) is subject to the public interest test. The records, or parts of records, must still be disclosed if the public interest would, on balance, be better served by disclosure than by non-disclosure.

40. In sum, a public authority seeking to rely on the exemption under section 26(1)(b) for a breach of a duty of confidence must ask:

- [1] Does a duty of confidence arise under the law?<sup>8</sup>
- [2] Would disclosure constitute a breach of that duty of confidence under the law?
- [3] If the exemption is engaged, whether the balance of the public interest requires disclosure?

41. Finally, the underlying presumption of the PATI Act is that requests for access to records will be granted, subject only to the exemptions or other administrative restrictions in the PATI Act. For section 26(1)(b), the public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption to deny access to public records.

#### *Public authority's submissions*

- 42. The PCA referred to section 25(1) of the Police Complaints Authority Act 1998 (**PCA Act**), which requires the PCA to maintain secrecy in respect of all matters that come to its knowledge in the exercise of its functions. Section 25(2) of the PCA Act allows for disclosure of records in limited circumstances only. An unauthorised disclosure is a criminal offence under section 28(d) of the PCA Act.
- 43. The PCA explained that the responsive records come to its knowledge in the exercise of its functions to receive and investigate complaints against police officers who allegedly have performed any misconduct, neglect of duty or negligent performance of duty.
- 44. The PCA emphasised the importance of its ability to maintain secrecy for matters relating to the exercise of its functions, as it has been entrusted by the law with the authority to receive complaints from members of the public against members of the BPS and to conduct investigations, where appropriate.

#### *Applicant's submissions*

- 45. The Applicant explained that item 1 of the PATI request seeks not only court records, but also other records related to the judicial review, such as emails, letters, memos and other communications held by the PCA which relate to the event of 2 December

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<sup>8</sup> Public authorities should consider additional questions if the duty of confidence arises from equity, which are not relevant to this case.

2016. The Applicant submitted that, despite being a significant day for Bermuda, the events of 2 December 2016 have yet to be fully reported on.

46. The Applicant further submitted that the current Premier and other elected officials were involved in organising the protest. Additionally, there were claims that the then Premier gave commands to the police officers responding to the protest.
47. The Applicant highlighted that the plaintiffs in the judicial review were awarded more than \$160,000 in public funds. Therefore, anything that could shed light for the public on how the day unfolded and on the decision making relating to the settlement monies could only be in the public interest.

### *Discussion*

48. As concluded above, the PATI Act does not apply to records 3, 4, 9, 10, 11/1, 14, 19, 21, 22, 29, 34, 38 and 39, as well as parts of records 11, 12/2, 13, 15, 16, 18 and 33.
49. Therefore, the Information Commissioner considers the applicability of section 26(1)(b) to records 5, 23 and 28 as well as the remaining parts of records 11, 12/2, 13, 15, 16, 18 and 33 only.

[1] Does a duty of confidence arise under the law?

50. Section 25(1) of the PCA Act states:

The Authority, and every person acting under the direction of the Authority, shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions, and shall not communicate any such matter to any person except for the purpose of carrying out their functions under [the PCA] Act.

51. Disclosure of information in contravention of section 25(1) is an offence that is subject to a maximum fine of \$2,000 (see section 28(d) of the PCA Act).
52. The Information Commissioner accepts that the PCA as “the Authority” has a statutory duty of confidence arising from section 25(1) of the PCA Act in relation to all matters that come to its knowledge in the exercise of its functions.

[2] Would disclosure constitute a breach of that duty of confidence under the law?

53. To determine whether disclosure would constitute a breach of the duty of confidence that arises under section 25(1) of the PCA Act, the Information Commissioner

considers whether the relevant records fall within the scope of “all matters that come to [the PCA’s] knowledge in the exercise of [its] functions”.

54. ‘Matters’ is given its plain meaning as “a subject or situation under consideration”<sup>9</sup>. As stated in paragraph 27, ‘functions’ means “powers conferred, or duties imposed, on the [public] authority or officer by or under any provision of law”.
55. One of the PCA’s functions under section 5(1) of the PCA Act is to receive complaints against members of the BPS, to carry out various investigations, and to take action as is contemplated by the PCA Act. Further, when carrying out an investigation, the PCA has the powers of a judge of the Supreme Court by virtue of section 18(4). In this case, the PCA decided to conduct its own investigation on the 26 complaints, in accordance with section 5(1)(b) of the PCA Act, and subsequently addressed the judicial review challenges to its public report on this investigation.
56. Given this, the Information Commissioner accepts that records 5 and 28, parts of records 11, 12/2, 15, 16, 18, 23 and 33, as well as a part of record 13 that duplicates the relevant part of record 12/2, include information that came to the PCA’s knowledge in the exercise of its functions under the PCA Act.
57. The Information Commissioner is not satisfied, however, that certain parts of records 13 and 23 contain information that came to the PCA’s knowledge in the course of exercising its functions. The exemption in section 26(1)(b) is not considered further for these parts of records 13 and 23.

[3] If the exemption is engaged, whether the balance of the public interest requires disclosure?

58. The balance of the public interest in disclosure is considered for records 5 and 28, along with all remaining parts of records 11, 12/2, 15, 16, 18 and 33, as well as certain parts of records 13 and 23.
59. The Information Commissioner agrees with the Applicant that 2 December 2016 was a significant day for Bermuda. Not only did the events on that day lead to 26 complaints filed with the PCA, it also resulted in an independent investigation into the policing of the protest by the UK National Police Coordination Centre commissioned by the Governor and the Commissioner of Police, as well as an inquiry by the Parliamentary Joint Select Committee ‘Examining the Events of the December 2<sup>nd</sup> 2016 Incident at the House of Assembly’. The significance of what happened on that

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<sup>9</sup> Oxford Dictionary of English (3<sup>rd</sup> ed. 2010).

day favours disclosure of records 5 and 28 along with parts of records 11, 12/2, 15, 16, 18, 23 and 33. Additionally, the public has a general interest in promoting greater public understanding of the process or decisions of public authorities, including the PCA.

60. Having said that, the public also has a strong interest in ensuring that the PCA is able to conduct its functions effectively. The effectiveness of the PCA's functions to receive complaints against police officers, and to take actions as appropriate, is highly dependent on its ability to obtain information from relevant parties, such as the complainants, the BPS and BPS officers subjected to the complaints. The PCA's effectiveness is also dependent upon its ability to keep this information confidential, consistent with its statutory obligation to maintain secrecy. This public interest factor weighing against disclosure is particularly heightened with respect to records containing information from third parties.
61. The Applicant emphasised the public interest in knowing more about the judicial review that led to compensation for the complainants totalling more than \$160,000 in public funds. Because information relating to the settlement had not been available at the time of the PATI request, the PCA was justified for not taking this factor into account when considering the balance of the public interest. But even if this information were taken into account, the Information Commissioner is not of the view that disclosure of further details concerning the settlement (or the proceedings leading to it) would be sufficient to outweigh the public's interest in ensuring the effectiveness of the PCA's oversight and investigations of the BPS and its officers.
62. The Applicant also raised concerns about claims that the current Premier and other elected officials were involved in organising the protest. Having carefully reviewed records 5 and 28, as well as the relevant parts of records 11, 12/2, 13 (as a duplicate of 12/2), 15, 16, 18, 23 and 33, the Information Commissioner concludes that these records do not raise or touch upon possible wrong-doing or maladministration. Neither do these records speak to whether the then Premier gave commands to the police officers responding to the protest. As a result, no public interest factors outweigh the public's need to ensure the integrity of the PCA's functions to receive complaints and to take action accordingly.

### *Conclusion*

63. The Information Commissioner is satisfied that the exemption for a breach of a duty of confidence in section 26(1)(b) of the PATI Act is engaged for records 5 and 28, the remaining parts of records 11, 12/2, 15, 16, 18 and 33, as well as certain parts of

records 13 and 23, because their disclosure would amount to a breach of a duty of confidence arising in section 25(1) of the PCA Act. Further, the Information Commissioner is satisfied that disclosure of these records or parts of records is not required by the balance of the public interests.

64. The Information Commissioner is not satisfied that the exemption in section 26(1)(b) is engaged for record 13 or the remainder of record 23 because their disclosure would not amount to a breach of the PCA's statutory duty of confidence.

***Information received in confidence – section 26(1)(a)***

65. Section 26(1)(a) allows a public authority to deny access to information that “is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential” and “the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions”.
66. The exemption for information received in confidence is also a qualified exemption subject to the public interest test. If the exemption in section 26(1)(a) is engaged, the public interest test must be considered.
67. To invoke the exemption for information received in confidence, a public authority must ask:
  - [1] Whether the information was given by a third party (other than another public authority)?
  - [2] Whether the information was given in confidence and with the understanding that it would be held confidentially?
  - [3] Whether disclosure would be likely to prevent the public authority from getting such information again in the future?
  - [4] Whether that information is required for the public authority to fulfil its functions?
  - [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?
68. Finally, the public authority has the burden to show, on the balance of probabilities, that it has provided sufficient support to justify applying the exemption to deny public access.

### *Public authority's submissions*

69. The public authority relies on the same arguments as detailed above in paragraphs 42-44.

### *Applicant's submissions*

70. The Applicant made the same submissions as detailed above in paragraphs 45-47.

### *Discussion*

71. The Information Commissioner considers the application of section 26(1)(a) to parts of records 13 and 23 only.

[1] Whether the information was given by a third party (other than another public authority)?

72. The relevant parts of records 13 and 23 do not contain information that was given by a third party. Because this is a requirement for information to be withheld by virtue of section 26(1)(a), this exemption is not considered further.

### *Conclusion*

73. The Information Commissioner is not satisfied that the exemption for information received in confidence in section 26(1)(a) of the PATI Act is engaged for the relevant parts of records 13 and 23.

### ***Personal information – section 23(1)***

74. Under section 23(1), public authorities may refuse access to a record if it consists of personal information, subject to exceptions in section 23(2), which are not relevant in this review.
75. 'Personal information' is broadly defined in section 24(1) as 'information recorded in any form about an identified individual'. Section 24(1) also provides a non-exhaustive list of categories of personal information.
76. Certain categories of information about an identifiable individual, however, do not fall within the definition of 'personal information'. Section 24(2) dictates that these categories include, among other things, information an individual who is or was an officer or employee of a public authority that relates to the position or functions of the individual or the details of a contractor providing services to the government. As the Information Commissioner has explained, however, routine personal work

information of public sector employees as well as the personal information of elected officials and other public officials still fall within the definition of 'personal information' in section 24(1)<sup>10</sup>.

77. Records consisting of personal information should be disclosed if the public interest would be better served, on balance, by disclosure than non-disclosure. Factors that should be taken into account when balancing the public interest relating to a disclosure of personal information are<sup>11</sup>:
- a. Whether the disclosure will further any public interest considerations;
  - b. Whether disclosure would be fair to the individual under all of the circumstances; and
  - c. Whether disclosure is necessary to further the public interests that have been identified.
78. Consideration of the fairness of disclosure to the individual requires a public authority to assess whether the information amounts to 'sensitive personal information'<sup>12</sup>, the potential consequences of disclosure upon the individual, and the individual's expectation of privacy.
79. In sum, to rely upon the exemption for personal information, a public authority or third party must ask<sup>13</sup>:
- [1] Whether the records consist of information about an identifiable individual?
  - [2] Whether the information falls within any of the exclusions to the definition of personal information?
  - [3] Whether any of the exceptions to the exemption in section 23(2) apply to the records?

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<sup>10</sup> Decision 02/2019, Office of the Governor, paras. 43-47.

<sup>11</sup> Decision 02/2019, Office of the Governor, para. 51.

<sup>12</sup> Section 7(1) of the Personal Information Protection Act 2016 defines 'sensitive personal information' as "any personal information relating to an individual's place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information".

<sup>13</sup> Decision 02/2019, Office of the Governor, para. 56.



[4] If the exemption for personal information in section 23(1) is engaged, whether the balance of the public interest requires disclosure, or whether disclosure would benefit the individual?

80. The PCA did not rely on section 23(1). The personal information exemption in section 23(1) is the only exemption the Information Commissioner will consider on her own initiative.

### *Discussion*

81. The Information Commissioner considers the application of section 23(1) to parts of records 13 and 23.

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

82. The relevant part of record 13 contains the names of identifiable individuals, including individuals in leadership positions within public authorities.

83. In contrast, the relevant part of record 23 does not contain any information about any identifiable individual. The exemption for personal information is not considered further for part of record 23.

[2] Whether the information falls within any of the exclusions to the definition of personal information?

84. Identifiable individuals in record 13 were, or still are, officers, employees or members of public authorities. Yet, their information, e.g., their names, email addresses and views, does not fall within the exclusion to the personal information definition in section 24(2)(a). This is because the information is not attached generally to the position or functions, regardless of who is holding such position or function. Rather, the information falls within the scope of routine personal work information.

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

85. None of the exceptions in section 23(2) are applicable to the personal information in record 13. The exemption is engaged.

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

86. There is a general public interest in transparency about the work of public authorities, including, for example, understanding how public authorities operate, what challenges they may face, and the process by which decisions are made. These interests are even more heightened when the mandate of the PCA and its service to the public are considered. The PCA provides important oversight over the BPS and, effective February 2021, the Royal Bermuda Regiment Coast Guard Unit. As the PCA explains on its website, [pca.bm](http://pca.bm):

The PCA was established by the Bermuda Government to increase public confidence in the complaints' system against those who are there to serve the people of Bermuda by ensuring public safety and order and who have been given powers by Parliament which can be intrusive and oppressive if exercised inappropriately. We are authorised to either supervise or investigate allegations of misconduct, neglect of duty or negligent performance of duty by any officer and incidents of death or serious injury.

87. Further, all of the individuals identified in record 13 were officers, employees or members of public authorities. It is reasonable to expect these individuals to be subject to public scrutiny, albeit to varying degrees. Those individuals in leadership and senior roles should have less expectation of privacy when it comes to their public work compared to those who are in less senior or non-public facing roles. Further, the disclosure of the names in record 13 of individuals in senior and public-facing roles enables the public to appreciate that these matters were considered and discussed at an executive level.
88. Although it is important for the public to have access to the content of the records to understand how the PCA operates, it is unnecessary to disclose the names of the individuals in less senior or non-public facing roles, or any of the email addresses, to safeguard this public interest. The public has no need to know which officers, employees or member in less senior roles raised a particular point or view. Such disclosure might also result in unwanted and unnecessary consequences to the individuals.
89. Given the above with respect to record 13, the Information Commissioner is satisfied that the balance of the public interest favours disclosure of the names and views of the Chairman of the PCA and individuals at a permanent secretary level and above within the public service only, who all hold executive and public facing roles, as well as an elected official.

## *Conclusion*

90. The Information Commissioner is satisfied that the personal information exemption in section 23(1) is engaged for parts of record 13. The balance of the public interest, however, requires disclosure of the names and views of the Chairman of the PCA and individuals at a permanent secretary level and above within the public service, as well as an elected official. The balance of the public interest favours maintaining the exemption for the names of the remaining individuals in the relevant part of record 13.

## *Records do not exist – section 16(1)(a)*

91. Section 16(1)(a) of the PATI Act allows a public authority to administratively deny a PATI request if the requested record does not exist or cannot be found after all reasonable steps have been taken to find it. Section 16(1)(a) cases require the Information Commissioner to assess the reasonableness of the steps taken by public authorities to locate records responsive to a PATI request under the circumstances of the case<sup>14</sup>.
92. The test in section 16(1)(a) is one of ‘reasonableness’ under the circumstances. What is reasonable in one case might not be reasonable in another. In section 16(1)(a) cases, the Information Commissioner is not required to establish the existence or non-existence of a record to a point of certainty. Furthermore, section 16(1)(a) does not concern whether a public authority should or should not hold a record as a matter of good public administration.
93. In determining whether the steps taken by a public authority were reasonable, the Information Commissioner considers the following factors:
- [1] the quality of the public authority’s analysis of the request;
  - [2] the scope of the search that it decided to make on the basis of that analysis; and
  - [3] the rigour and efficiency with which the search was conducted.
94. The public authority bears the burden to show that, on the balance of probabilities, the record does not exist or cannot be found after all reasonable steps have been taken to find it.

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<sup>14</sup> Decision 04/2017, Department of Health, para. 41.

### *Public authority's submissions*

95. The PCA understood item 2 of the PATI request to be asking for minutes of its meetings in 2017 and 2018, or documentation of its meetings in any form that could be considered akin to minutes.
96. The Chairman contacted the PCA's members to confirm no notes of any general discussion of complaints during its meetings were taken or retained.
97. The PCA explained that, as a matter of practice, its meetings consist of general discussions of complaints which have been received through the BPS or directly submitted to the PCA. Individual members either use electronic means or have paper files of each complaint. The Chairman notes on a file a list of actions that he needs to take himself on complaints.

### *Applicant's submissions*

98. The Applicant believes a public body such as the PCA would minute its meetings because this is the only way for the PCA to keep track of its discussions and decisions.

### *Discussion*

99. The Information Commissioner considers the PCA's reliance on section 16(1)(a) to deny access to records responsive to item 2 only.

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

100. The Information Commissioner is satisfied that the scope of the PCA's analysis of item 2 was adequate. The PCA did not limit the scope of item 2 to records that are formally called 'minutes', but also considered other documentation of its meetings akin to minutes.

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

101. Because the PCA submitted that it did not take minutes of its meetings as a matter of practice, it was adequate for the PCA to obtain confirmation from its members that no minutes, or anything akin to minutes, were taken.

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

102. The PCA does not, as a matter of practice, take minutes of its meetings. Nevertheless, the PCA contacted its members to confirm the non-existence of meeting minutes from

2017 and 2018. Given the PCA's practices, the Information Commissioner is satisfied that the PCA's search was conducted with adequate rigour and efficiency.

### *Conclusion*

103. The Information Commissioner is satisfied that the PCA correctly relied on the administrative ground in section 16(1)(a) of the PATI Act to deny access to records responsive to item 2, because these records did not exist after all reasonable steps had been taken to find them.

### *Reasonable efforts to provide a complete response – section 12(2)(b)*

104. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to requests completely.

105. This provision does not mean that public authorities have to ensure that every single record responsive to a PATI request is located and processed. Section 12(2)(b) also is not concerned with whether the information captured in a record is a complete documentation of an issue, nor does section 12(2)(b) require that public authorities must provide information which the requester considers to be necessary to fill in gaps in existing records.

106. Instead, section 12(2)(b) requires an assessment of whether the public authority's efforts to provide a complete response to the PATI request were reasonable, and not whether the information contained in the record itself is 'complete'.

107. Further, this requirement applies only to records that were held by a public authority at the time of the PATI request.

### *Public authority's submissions*

108. The PCA did not make written submissions on its response to item 3 of the PATI request, about complaint and investigation records.

### *Applicant's submissions*

109. The Applicant argued that Check List 2017 did not provide clear enough information about the outcomes of the complaints. The Applicant further believes that the PCA must hold records on complaints and investigations, which should be disclosed as they are descriptions of the PCA's work in its publicly-funded role. The Applicant is of the view that the records sought in item 3 of the PATI request should be made publicly available without the need for a PATI request.

## Discussion

110. The Information Commissioner considers the completeness of the PCA's response to item 3 of the PATI request.

### Check List 2017

111. Item 3 of the PATI request sought records showing the number, details and outcome of complaints received and investigations launched by the PCA in 2017 and 2018, without personal information. In response, the PCA disclosed Check List 2017 that provides, among other things, the number of complaints received, a summary of each complaint and the outcome of the complaints. No personal information was included in the record.
112. Check List 2017 was in the same format the PCA used for publishing its prior lists for 2012, 2013 and 2014. These were included in the PCA's report of its workings for the period 1 January 2012 to 1 September 2014 (**the PCA's 2012-2014 report**), available on its website. Check List 2017 also used the same language for closed cases. But Check List 2017 was not accompanied by other details that were provided in the PCA's prior lists. For instance, a summary giving the counts for cases that were 'closed with satisfactory outcome' (i.e., resolved via informal resolution, payments were made or minor disciplinary action taken); 'closed' with no further action; and 'open' (including a breakdown of the number of complaints investigated by the PCA and the BPS)<sup>15</sup>.
113. Given the more limited information provided in Check List 2017, the Applicant's dissatisfaction is understandable. As incomplete or unsatisfying as the information might be to the Applicant, Check List 2017 was the responsive record held by the PCA at the time of the PATI request. The Applicant is correct to note that the PCA must hold records relating to the complaints it received and the investigations it conducted. But this is not what was asked for in the PATI request. If the Applicant wishes to obtain records pertaining to any of the complaints listed in the list, they might do so by filing a separate PATI request, keeping the secrecy provision in section 25 of the PCA Act in mind. In this sense, Check List 2017 may serve as a helpful starting point for the public to make further PATI requests.

### 2018 complaints information

114. The PCA did not provide the Applicant with a similar record for the 2018 complaints. Instead, the PCA provided the Applicant with two counts relating to the complaints

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<sup>15</sup> See page 3 of the PCA's 2012-2014 report, available at <https://pca.bm/wp-content/uploads/2013/11/PCA-Report-9.26.2014.pdf>.

received in 2018 (41 complaints received in 2018, 26 of which were filed in relation to the 2 December 2016 events). The PCA informed the Applicant that it conducted an investigation on the 2 December 2016 events, without giving further details on the subject, the dates of receipt or the outcomes of the other 15 complaints.

115. As the PATI request was made before the end of 2018, the Information Commissioner accepts that, at the time, the PCA did not hold a record similar to Check List 2017. The Information Commissioner also accepts that such a record still did not exist at the time of the PCA's subsequent internal review decision.

116. In the absence of a record for 2018 that was similar to Check List 2017, the PCA provided the Applicant with statistical information in an effort to be helpful to the Applicant. Given this, the Information Commissioner is satisfied that the PCA's efforts to respond completely to item 3 of the PATI request were reasonable in the circumstances.

### *Conclusion*

117. The Information Commissioner is satisfied that the PCA complied with the requirement to make a reasonable effort to provide a complete response to item 3 of the PATI request, in accordance with section 12(2)(b) of the PATI Act.

### *Conclusion*

118. The Information Commissioner finds that records 3, 4, 9, 10, 11/1, 14, 19, 21, 22, 29, 28, 34 and 39, along with parts of records 11, 15, 16, 18 and 33 do not come within the scope of the PATI Act because they relate to the exercise of the judicial functions of the Supreme Court, in accordance with section 4(1)(a) of the PATI Act. Further, parts of records 11, 12/2 and 13 also do not come within the scope of the PATI Act because they were created or obtained by a listed public authority in the course of exercising its functions, in accordance with section 4(1)(b) of the PATI Act.

119. The Information Commissioner further finds that the PCA was justified in relying on section 26(1)(b) of the PATI Act to deny access to records 5 and 28 as well as parts of records 11, 12/2, 13, 15, 16, 18, 23 and 33 because their disclosure would constitute a breach of a duty of confidence and is not in the public interest. The PCA was not justified in relying on section 26(1)(b) or section 26(1)(a) to refuse access to certain parts of records 13 and 23.

120. The Information Commissioner also found that the exemption for personal information in section 23(1) was engaged for parts of record 13 and that the public

interest required disclosure of the names and views of individuals in executive and leadership positions.

121. The Information Commissioner found that the PCA was justified in relying on section 16(1)(a) to administratively deny access to records responsive to item 2 of the PATI request because these records did not exist after the PCA took all reasonable steps to locate them.
122. Finally, the Information Commissioner found that the PCA complied with the requirement to make reasonable efforts to provide a complete response to item 3 of the PATI request, in accordance with section 12(2)(b) of the PATI Act.



## Decision

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The Information Commissioner finds that the Police Complaints Authority (**PCA**) was incorrect in applying the Public Access to Information (**PATI**) Act 2010 to records 3, 4, 9, 10, 11/1, 14, 19, 21, 22, 29, 34, 38 and 39 and parts of records 11, 12/2, 13, 15, 16, 18 and 33 because these records or parts of records are excluded from the scope of the PATI by virtue of section 4(1). The Information Commissioner further finds that the PCA was justified in denying public access to records 5 and 28 as well as parts of record 11, 12/2, 13, 15, 16, 18, 23 and 33 in accordance with the exemption for information received in confidence in section 26(1)(b) of the PATI Act, but was not justified in applying this exemption or section 26(1)(a) of the PATI Act to parts of records 13 and 23.

The Information Commissioner further finds that the exemption in section 23(1) was engaged for the personal information in parts of record 13. The balance of the public interest still requires disclosure of the names and views of executive and senior employees, officers or members of a public authority. Disclosure of the remaining personal information is not required by the public interest.

Finally, the Information Commissioner finds that the PCA was justified in relying upon section 16(1)(a) to administratively deny access to records responsive to item 2 because the records did not exist, and that the PCA complied with the requirement in section 12(2)(b) of the PATI Act to provide a complete response to item 3 of the PATI request.

In accordance with section 48 of the PATI Act, the Information Commissioner:

- upholds the PCA's decision to deny access to records 5 and 28 as well as part of records 11, 12/2, 13, 15, 16, 18, 23 and 33 as exempt under section 26(1)(b), to administratively deny access to records responsive to item 2 in accordance with section 16(1)(a) of the PATI Act, and its decision on item 3 of the PATI request;
- varies the decision on records 3, 4, 9, 10, 11/1, 14, 19, 21, 22, 29, 34, 38 and 39 and parts of records 11, 12/2, 13, 15, 16, 18 and 33 because these records or parts of records are excluded from the scope of the PATI Act by virtue of section 4(1);
- varies the decision for the remaining part of record 13 to deny access to the personal information of individuals who are not in executive or leadership positions, in accordance with section 23(1);
- reverses the decision to deny access to the remaining parts of records in reliance on the exemption in section 26(1)(a); and

- orders the PCA to disclose records 13 and 23, in part, as instructed in the Confidential Annex, which forms part of this Decision.

The Information Commissioner requires that the PCA grant access to the parts of records listed above, as directed by this Decision and the accompanying Order, on or before **Friday, 22 October 2021**.

## Judicial Review

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The Applicant, the PCA, or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

## Enforcement

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This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the PCA fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez  
Information Commissioner  
10 September 2021

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Application

- 4 (1) Subject to subsection (2), this Act does not apply to—
- (a) records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person;
  - ...
  - (b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
    - (i) the Office of the Auditor General;
    - (ii) the Human Rights Commission;
    - (iii) the Office of the Information Commissioner;
    - (iv) the Office of the Ombudsman;
    - (v) the Department of Public Prosecutions which, for the purpose of this section, includes the Justice Protection Administrative Centre;
    - (vi) the Attorney General’s Chambers;
    - (vii) the Department of Internal Audit;
    - (viii) the Financial Policy Council.
- (2) The reference to records in subsection (1) does not include records relating to the general administration of—
- (a) any court, tribunal or other body or person referred to in subsection (1)(a); or
  - (b) any public authority referred to in subsection (1)(b).

#### Access to records

- 12 ...
- (2) Public authorities shall make every reasonable effort to—
- ...
  - (b) respond to requests, completely, accurately and in a timely manner.

#### 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 [Part 4], 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—

...

(2) But “personal information” does not include—

(a) Information about an individual . . . ; who is or was an officer or employee of a public authority that relates to the position or functions of the individual. . . .

### **Information received in confidence**

26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—

(a) information—

(i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and

(ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or

(b) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.

(2) A record shall be disclosed if disclosure of it is in the public interest.

## Police Complaints Authority Act 1998

### Functions of the Authority

- 5 (1) The functions of the Authority are--
- (a) to receive complaints alleging any misconduct, neglect of duty or negligent performance of duty by an officer;
  - (b) where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest, of its own initiative, to conduct its own investigation or to direct and supervise an investigation of any incident involving death or serious injury;
  - (c) to take such action in respect of complaints, incidents and other matters as is contemplated by [the PCA] Act.

...

### Authority and staff to maintain secrecy

25 (1) the Authority, and every person acting under the direction of the Authority, shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions, and shall not communicate any such matter to any person except for the purpose of carrying out their functions under this Act.

(2) Notwithstanding subsection (1), the Authority may disclose such matters as in the opinion of the Authority ought to be disclosed—

- (a) for the purposes of carrying out an investigation or other duty of the Authority under this Act; or
- (b) in order to establish grounds for the Authority's conclusions and recommendation.

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