RE: A PATI Request  
S. Strangeways of the Department of Corrections  
Request for internal review – Ministry of National Security

1. The Original Request

By a request dated 16th November 2016, Ms. Strangeways of the Royal Gazette ("the applicant") sought the following:

"Please provide:
A list of all convicted sex offenders released from prison within the last ten years. Please provide the names & dates of birth of the offenders, along with a photograph of each, details of the crimes they were convicted of and the addresses upon release from prison. Please include records showing any rehabilitation they took part in while incarcerated."

2. The Department of Corrections’ Response

Receipt of the request was acknowledged by the Information Officer for the Department in a letter of 7th December 2016. That response indicated that the six (6) week timeframe for handling the request would be met.

There then followed a letter of 6th January 2017 to the applicant whereby the Information Officer advised that the Department was "unable to provide...the detailed information related to any inmate within our custody or those that have been released as this is not our policy and could make the Department of Corrections legally liable."

The Information Officer offered to share with the applicant "statistics related to the release, by year, of sex offenders and the category of offence."

3. The request for internal review

By an email to me on 27th April 2017, the applicant requested an internal review of her request to the Department of Corrections. In my response of 2nd May 2017, I invited the applicant to address the fact that her request for internal review appeared to be out of time on a reading of section 42(1) of the Public Access to Information Act 2010 ("The Act"). In her response of 240pm that same day, the applicant usefully set out the history of the matter and I am satisfied that her request for an internal review is not out of time and I have therefore conducted the review as requested and according to section 43 of the Act.
4. Relevant Considerations – the law

Section 2(a) of the Act states:

"The purpose of this Act is to give the public the right to obtain access to information held by public authorities to the greatest extent possible, subject to exceptions that are in the public interest or for the protection of the rights of others.”

The applicant rightly takes the point that the original decision of the Information Officer does not descend into the detail surrounding any public interest test applied or other relevant considerations surrounding the ultimate decision not to provide the records requested.

Section 21 of the Act sets out the public interest test to be applied:

“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.”

Also relevant to this request is section 23(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”.

Section 24(1) includes a relevant definition of personal information and describes it at (b) as, inter alia, “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.” (emphasis added)

5. Relevant considerations – other materials

This request seeks comprehensive information regarding sex offenders, including details which would identify them.

In reviewing the decision on this request I have had regard to the Protocol on the Disclosure of Information Identifying Sex Offenders as issued by the Attorney General’s Chambers. I have attached that Protocol as an annex to this document for ease of reference.

It is important to note that the disclosure of the kind of information requested by the applicant was thought sufficiently significant as to warrant the specific attention of the Legislature who charged the Minister of Justice with devising a protocol to guide the process. Citing a UK authority, the protocol states:

“…disclosure of information about sex offenders should be guided by three important principles:

(i) There is a general presumption that information should not be disclosed, because of:
   (a) The potentially serious effect on the ability of the convicted person to live a normal life;
   (b) The risk of violence to the offender;
   (c) The risk that disclosure might drive the offender underground;

(ii) There is a strong public interest in ensuring that information about offenders can be disclosed where it is necessary for the prevention of detection of crime, or for the protection of young or other vulnerable people;

(iii) Each case should be considered carefully on its particular facts, assessing the risk posed by the individual offender, the vulnerability of those who may be at risk; and the impact of disclosure on the offender. (emphasis added)

And later:

“Disclosure cannot be made unless that assessment (one conducted on behalf of the Commissioner of Prisons and the Court) concludes that the offender presents a risk of significant harm to the health and safety of the public, an affected group of people or an individual.”
6. Decision

The stated theme of the Protocol referred to above is one of considering each case on its particular facts. The applicant’s request is for a ten year period and seeks details of “all convicted sex offenders released from prison within the last ten years”. This does not allow for such careful, individual consideration as urged in the Protocol.

The public interest test in the protocol, which I adopt in my review herein, specifically states that disclosure is in the public interest “...where it is necessary for the prevention of detection of crime, or for the protection of young or other vulnerable people...”

It is important to note that the protocol defines a sex offender as a person convicted of any one or more of no less than eighteen (18) separate, listed offences. With so broad a list and an equally broad request by the Applicant, it is not possible to assess each case/offender/circumstances individually.

Applying the public interest test as set out in the protocol, and having considered all relevant matters set out herein, I am not satisfied that disclosure of the information, as requested by the applicant, is in the public interest and for these reasons I concur with the Information Officer’s decision not to disclose the information requested by the applicant.

7. The offer of statistics on sex offenders released

In her letter of 6th January 2017, the Information Officer offered to provide the applicant with “statistics related to the release, by year, of sex offenders and the category of offence”.

Whilst not specifically forming part of the requested review, I think it necessary to observe that such information should be handled sensitively. The Protocol’s emphasis on considering cases individually and on their own facts should be taken as cautionary in the release of information regarding sex-offenders even in the most general sense.

Maj. Marc T. Telemaque LVO, ED
Secretary for National Security
Head of Public Authority
GOVERNMENT OF BERMUDA
Ministry of Justice
Attorney-General’s Chambers

PROTOCOL ON THE DISCLOSURE OF INFORMATION IDENTIFYING SEX OFFENDERS

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1. INTRODUCTION

The Minister of Justice is empowered by section 329H of the Criminal Code Act 1907 ("the Criminal Code") to issue a Protocol governing the disclosure of information in relation to sex offenders who are considered to present a risk of significant harm to the health and safety of the public, an affected group of people or an individual.\(^1\)

In this context, "sex offender" means a person convicted of any one or more of the following offences (all references are to the Criminal Code as in effect at the date of this Protocol):—

(a) carnal knowledge of a girl under 14 (section 180);
(b) carnal knowledge of a girl between 14 and 16 (section 181);
(c) sexual exploitation of a young person (section 182A);
(d) sexual exploitation of a young person by a person in a position of trust (section 182B);
(e) incest by a male person (section 191);
(f) incest by a women (section 192);
(g) indecent acts in public or with intent to offend (section 197);
(h) indecent act involving children (section 198);
(i) sexual assault (section 323);
(j) sexual assault by a person with AIDS etc. (section 324);
(k) serious sexual assault (section 325);
(l) aggravated sexual assault (section 326);
(m) showing child abusive material, child pornography or offensive material to a child (section 182C);
(n) use of children in the production of child abusive material or child pornography (section 182D);
(o) luring of a child (section 182E);
(p) making, distributing, etc. of child abusive material or child pornography (section 182F);
(q) possession of child abusive material or child pornography (section 182G);
(r) accessing of child abusive material or child pornography (section 182H).

The Minister may amend this list by secondary legislation should it become necessary to do so, but the list shown here is current at the date of this Protocol.

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\(^1\) Criminal Code Act 1907, section 329H, as inserted by the Criminal Code Amendment (No 2) Act 2000, section 2, effective from 29 October 2001
This Protocol is not intended to lay down hard and fast rules for disclosure of information. As is explained below, this is an exercise that needs to be approached on a case-by-case basis, and this document is intended to preserve the flexibility that is required whilst at the same time giving an indication of the factors that will be taken into consideration in dealing with requests for information or making disclosure in the public interest.

This Protocol does not purport to affect the disclosure of information as between different Departments or Ministries within the Government of Bermuda. There should be full and frank disclosure of all relevant information between the various Departments and Ministries affected by any case falling within this Protocol.

2. CONSIDERING DISCLOSURE

2.1 The Starting Point

In R v Chief Constable of North Wales Police Area Authority, ex parte AB and CD, it was accepted that the Common Law position was that disclosure of information about sex offenders should be guided by three important principles:

(i) There is a general presumption that information should not be disclosed, because of

   (a) the potentially serious effect on the ability of the convicted person to live a normal life;
   (b) the risk of violence to the offender;
   (c) the risk that disclosure might drive the offender underground;

(ii) There is a strong public interest in ensuring that information about offenders can be disclosed where that is necessary for the prevention or detection of crime, or for the protection of young or other vulnerable people;

(iii) Each case should be considered carefully on its particular facts, assessing the risk posed by the individual offender, the vulnerability of those who may be at risk; and the impact of disclosure on the offender.

The law in Bermuda has been drafted with these concerns in mind. If consideration is being given to disclosing information about a convicted sex offender, the starting point will be the assessment conducted on behalf of the Commissioner of Prisons and the court under section 329E(2) of the Criminal Code. Disclosure cannot be made unless that assessment concludes that the offender presents a risk of significant harm to the health and safety of the public, an affected group of people or an individual. It follows that this assessment must

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2 [1997] EWHC Admin 667, per Lord Bingham CJ at paragraphs 24-30
be available to the Minister when considering whether or not to make a disclosure under section 329H.

2.2 Should Disclosure be made?
If the offender is considered to pose such a risk, the next question to be answered is "should any disclosure be made?" The Minister will decide this on a case-by-case basis, but lists here the factors that will be taken into account. It must be emphasised in relation to this and the succeeding paragraphs that no one factor is conclusive, the Minister will arrive at a balanced decision based on the presence or absence of these factors and will attach such weight to each of them as he or she deems appropriate.

The Minister will consider:—

(i) If a request for disclosure is made soon after conviction, whether the offender is appealing against conviction;
(ii) The seriousness of the risk posed by the offender;
(iii) Whether the offender is a risk to a particular person, group of persons or the community at large;
(iv) Whether any persons at risk are not in Bermuda;
(v) Whether there is any likelihood of the offender discovering their whereabouts;
(vi) Whether there is any likelihood of the offender being able to travel to where the person(s) at risk is/are;
(vii) The physical health of the offender;
(viii) The health of the persons at risk;
(ix) The impact of the disclosure on person(s) at risk;
(x) What use will the persons to whom information is disclosed make of that information

2.3 To whom should disclosure be made?
If as a result of the exercise referred to in paragraph 2.2, it is decided that disclosure should be made, the next issue to be decided is to whom should disclosure be made. To a very great extent, the consideration in paragraph 2.2 will determine who should be told about the offender, although there may be circumstances where, as a result of the weight attached to a particular factor, the Minister decides on a wider or narrower disclosure than might otherwise be expected.

2.4 What information will be disclosed?
Generally speaking, the information that will be disclosed will depend on the purpose for which disclosure is made. Where there is a risk that the offender could come into contact with vulnerable persons, the disclosure may be more extensive than to a prospective employer based in a remote location. For example, the disclosure to the principal of a school that a convicted sex offender resides within, say, half a mile of the school, will normally include the offender's name, any alias that may be used, nature of offence, factors of concern, age, race, sex, date of birth, height, weight, hair and eye colour, home address, any current temporary address, location of employment, vehicle make, model, colour,
licence plate number and photograph. In each case, the nature and extent of the disclosure will be a matter for the Minister's judgement.

2.5 Consultation with the Commissioner of Police
The Minister is required before notifying anyone of information regarding a sex offender to consult with the Commissioner of Police. In practice it is envisaged that the Bermuda Police Service will be heavily involved in providing the Minister with the information and assessments mentioned in paragraphs 2.2 and 2.4, and the formal consultation may involve no more than an exchange of letters. In more complicated cases, the consultation may need to be more extensive.

3. MAKING DISCLOSURE

How information is disclosed will very much depend upon the reason for the disclosure. If individuals are to be notified, it will normally be the practice for an officer of the Bermuda Police Service to visit them by prior appointment at their home or place of work and for any documented information to be handed over in a face-to-face meeting. Where a group of people have to be informed, best practice suggests that they be invited to a private face to face meeting with one or more officers, preferably in reasonably neutral but secure surroundings. Notification to the public at large would normally be undertaken through the broadcasting and/or print media, although much would depend upon the particular circumstances in which a disclosure to the public at large was contemplated.

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3 Criminal Code, s. 329H(4)