



ANY REPLY OR SUBSEQUENT REFERENCE TO THIS COMMUNICATION SHOULD BE ADDRESSED TO THE DIRECTOR OF PUBLIC PROSECUTIONS AND **NOT TO ANY OFFICER BY NAME** AND THE FOLLOWING REFERENCE QUOTED:-

TELEPHONE: 922-8321-5
TELE. FAX: (876) 922-4318

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

P.O. BOX 633,
KINGSTON,
JAMAICA

May 6, 2015.

Miss Alicia Forrest
Clerk of the Houses
Houses of Parliament
Gordon House
81 Duke Street
Kingston

Dear Miss Forrest,

RE: A REPORT TO PARLIAMENT FROM THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ON REFERRALS SENT FROM THE OFFICE OF THE CONTRACTOR-GENERAL

Reference is made to the captioned matter and your letter dated the 2nd of April 2015.

I apologise for the delay in the submission of this report, due to the work exigencies of the Office.

INTRODUCTION

1. This Report was commissioned by the Joint Select Committee of the Houses of Parliament to address concerns about referrals that were sent to the Office of the Director of Public Prosecutions (ODPP). The former Contractor-General, Mr. Greg Christie submitted official reports to Parliament, and issued public statements, criticizing the posture of the ODPP in relation to matters that had been referred to it and the DPP's alleged refusal or decision not to prosecute in a number of these matters. I wish to underscore that, whereas this DPP has always welcomed constructive criticism from any individual or entity, one would

wish that persons do so in a responsible manner and with a considered appreciation and knowledge of criminal law, practice and procedure.

2. **The ODPP is not an investigative body and therefore it is only when we are in possession of a completed file containing legally cogent evidentiary material which reveals the basis of a viable prosecution of the matter, can criminal prosecution be recommended and thereafter initiated.**
3. Regarding this matter of referrals from the Office of the Contractor-General, I have in the past on several occasions sought to explain in the public domain and to the relevant authorities concerned, the nature of these matters and the reason why, in the exercise of my constitutional discretion and as a minister of justice, I had taken the decision not to prosecute. I deem it a matter of great importance, and indeed, the public interest dictates that I respond to these enquiries by Parliament, for the avoidance of all doubt and to settle this issue once and for all.
4. The OCG referred to the ODPP the names of forty-five (45) delinquent Public Bodies for their failure to comply with a July 11, 2006 Requisition. In his letter to the former DPP, Mr. Kent Pantry QC, dated the 21st of March 2011, Mr. Christie indicated:

"We should bring to your attention the fact that as at March 16, 2007, 13 of the 45 named delinquent Public Bodies had still not submitted their 2006 4th Quarter QCA Reports to the OCG....As regards the other 32 delinquent Public Bodies, it is instructive to note that they have submitted their 2006 4th Quarter QCA but have done so after the specified January 31, 2007 deadline date and before the ending of March 16, 2007."

5. I assumed official duties as the Director of Public Prosecutions in March of 2008. (My research in respect of the existing records and whether there was any response by my predecessor in seeking to ascertain what really occurred in respect of the referenced material in the previous paragraph, has not been helpful).
6. The 23rd Annual Report of the Contractor-General 2009 made reference to twenty two (22) referrals made between the 27th of March 2008 and the 18th of February 2009 relating to delinquent declarants who failed to submit their Quarterly Contract Reports to the OCG. In a letter addressed to Mr. Christie, the former Contractor General, on March 2, 2011, I communicated my ruling in which I stated that after careful consideration of the material presented, I had declined to initiate criminal prosecutions.

7. By way of a Press Release entitled "**OCG Registers Unprecedented 100% QCA Report Submission Compliance Rate for Twelve Consecutive Quarters**" dated the 7th of May 2012, the OCG announced that it had achieved full compliance with the respective public bodies with the exception of one, the Ministry of Agriculture and Fisheries.
8. At that time, the Head of the Anti-Corruption Unit of the ODPP was Mr. Dirk Harrison. Part of his portfolio responsibilities included referrals from the Commission for the Prevention of Corruption, Anti Corruption Branch of the JCF (now MOCA), Organised Crime Investigation Division (OCID), Coroner's Courts and the OCG, namely the Quarterly Contract Reports (QCA) of the OCG. Although he dealt with the day to day operations of the Unit, I had the overall supervisory responsibility of making rulings in respect of these matters. Mr. Dirk Harrison is now the present Contractor-General.
9. I must categorically state, that the Office of the Contractor-General is always at liberty to characterize matters in any way that it finds most convenient. However, the fact that he may have expressed a particular opinion, and I say with the utmost respect, is really irrelevant to my consideration or that of the Courts. The issue is whether, on an objective set of criteria based on criminal practice and procedure, the matters referred to our office are matters where the public interest would be best served by progressing it to a formal prosecution.
10. Even though I pay great respect to the opinions of other persons or entities, I have to pay an even greater respect to **section 94 of the Constitution of Jamaica**, which obligates me to be guided by an objective standard and best practices in coming to my decision.

THE BACKGROUND – THE LAW

FUNCTIONS OF THE DPP

11. The powers and functions of the Director of Public Prosecutions under **section 94 of the Constitution of Jamaica** are:
 - I. To institute and undertake criminal proceedings
 - II. To take over criminal proceedings by others, and
 - III. To discontinue criminal proceedings

12. **Section 94 (6) of the Constitution** states that:

"The Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority in the exercise of the powers conferred upon the Office by this section."

Additionally, the ODPP is also guided by sound and time-tested principles of law and ethical practice which inform its decision on whether or not to prosecute a particular matter. These guidelines or protocols have been codified in the publication of the ODPP entitled **The Decision to Prosecute: A Jamaican Protocol**, which is available on our website at www.dpp.moj.gov.jm. This Protocol and guidelines are similar to those widely used by prosecutorial services in many other jurisdictions.

13. It is recognized worldwide by prosecution services that it is not every matter that is referred to that entity will (as a matter of course) progress to being prosecuted in the courts. The exercise of the Director of Public Prosecutions discretion is based on a variety of factors. Each case is to be decided on its own merits and the relevant law.

14. Indeed, in **Leonie Marshall and the DPP Privy Council Appeal No. 2 of 2006**, their Lordships held:

"where the decision not to prosecute is based on an assessment of the sufficiency of the evidence and the prospect of securing conviction the Court will accord great respect and weight to the judgment of experienced prosecutors."

The case further stated that there is no duty on a Director of Public Prosecutions to outline reasons in respect of why a matter will not progress to prosecution. Nevertheless, it has been my practice since I took office in March 2008, to give reasons, where appropriate, in matters of exceptional public interest, as I have always considered the need for transparency and accountability very critical in the performance of one's public function.

FUNCTIONS OF THE CONTRACTOR-GENERAL

15. The functions of the Contractor-General are clearly set out in **section 4(1)** of the **Contractor-General's Act**. It states:

"Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament –

- (a) To monitor the award and the implementation of government contracts with a view to ensuring that*
- (i) Such contracts are awarded impartially and on merit*
 - (ii) The circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity*
 - (iii) Without prejudice to the functions of any public body in relation to any contract, the implementation of each such contract to the terms thereof; and*
- (b) To monitor the grant, issue, suspension and revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof."*

16. The Contractor-General, pursuant to **section 21 and 29** of the **Contractor-General Act**, refers matters to the ODPP for due consideration of whether criminal proceedings are to be instituted in respect of any of the said matters so referred.
17. The Contractor-General is also at liberty to refer matters directly to the Police in order to initiate prosecutions as they deem appropriate.

WHAT ARE QUARTERLY REPORTS

18. Pursuant to **section 17 (1) of the Contractor-General Act**, on the 11th of July 2006, the OCG issued a Requisition to all Procuring Public Bodies regarding the award of government contracts. This was revised in November of 2008. The Requisition requires the public body to submit a Quarterly Contract Report (QCA) which documents all contracts awarded above **\$500,000.00**. The Report, which is a form created by the OCG, includes such information such as the name of contractors, type of contracts, contract value, principal site of contract performance, procurement method and number of tenders.
19. A failure by any person, without lawful justification or excuse, to comply with a lawful requirement of a Contractor-General, constitutes a criminal offence under section 29 of the Contractor-General Act. The offence is dealt with summarily and upon summary conviction before a Resident Magistrate, shall be liable to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding twelve (12) months, or to both such fine and imprisonment.
20. These matters have nothing to do with a substantive breach of the **Larceny Act, the Public Utilities Protection Act, the Corruption (Prevention)**

Act, or the law relating to conspiracy to defraud or misconduct in public office.

21. The ODPP initiated prosecution against some of the entities in appropriate cases, and elected not to prosecute in others, for example, where the particular entity did not have any contract activity and therefore nothing to report, though filing out of time. The primary objective of the Act is to ensure compliance. To this end, in the exercise of my discretion, one has to consider the circumstances of each case of non-compliance, in determining whether to go forward with a prosecution. In several of the cases in which we initiated prosecutions in the Resident Magistrate's Court, the Resident Magistrate had admonished and discharged the offenders who had filed a few days out of time, for this very reason.

QCA MATTERS REFERRED BY THE OCG TO THE ODPP.

Please refer to tables below which illustrate how the matters were dealt with by the ODPP according to the available records.

MATTERS NOT TO BE PROSECUTED AND PREVIOUSLY DEALT WITH

4 TH QUARTER 2006	38
1 ST QUARTER 2007	18
2 ND QUARTER 2007	6
TOTAL	62

***MATTERS PROSECUTED AND PREVIOUSLY DEALT WITH**

4 TH QUARTER 2006	7
1 ST QUARTER 2007	14
2 ND QUARTER 2007	5
TOTAL	26

*The Court disposed of the matters by either admonishing or discharging, or by the Crown offering no evidence.

****MATTERS WHERE ODPP DECLINED TO PROSECUTE**

3 RD QUARTER 2007	7
4 TH QUARTER 2007	5
1 ST QUARTER 2008	5
2 ND QUARTER 2008	4
3 RD QUARTER 2008	3
TOTAL	24

**These refer to instances where the declarant had not entered into any contracts and were late in filing and were not repeat offenders.

A REVIEW OF SOME OTHER MATTERS REFERRED TO THE ODPP BY THE OCG

The pronouncement of the former Contractor-General relating to the forty-five (45) QCA Referrals and his statements about the ODPP's inertia in prosecuting matters referred to it by the OCG do not give a balanced and or complete representation of the ODPP's handling of all the referrals from that entity.

Below are summaries of matters that the ODPP has ruled on. Please note that, all matters referred to the ODPP are considered and researched by our assigned team of prosecutors who prepare a legal opinion for discussion and consideration by me. Each ruling is a result of considerable consultation in the ODPP chambers.

22. Investigation into the allegations of corruption and irregularity that are related to certain Government of Jamaica Bridge Building Contracts that were awarded to the British firm of Mabey and Johnson Limited.

- The ODPP, having reviewed the Report and its attached documents, found that there was sufficient compelling material to be referred to the Commissioner of Police and his assigned investigators for further enquiries to be made in respect of the alleged actions of Mr. Joseph Hibbert and any other person of interest for the purpose of possible criminal prosecution. The report and attached documents of the OCG, as well as the opinion of the Contractor General, as a matter of criminal practice and procedure could not be used without more as evidentiary material by the Crown to ground a viable prosecution in the Courts of Jamaica. These materials however, could be used as a guide to be followed by Jamaican Law Enforcement Authorities in their enquiries during their investigations. This is the standard general practice and procedure that has always been pursued by law enforcement and the ODPP.

- We had further recommended that the line of enquiry to be pursued by the police should surround possible breaches between 2000 and 2003 of **section 14 (1) (a) and (b) of the Corruption Prevention Act 2000** and the law of Conspiracy. The fact that the OCG, having investigated the matter formed the view that there was prima facie evidence on which to prosecute Mr. Hibbert could not form the basis of the ODPP to rule or recommend that criminal charges be referred against the persons under investigation. This is because the OCG Report was based primarily on document and statements gathered by the United Kingdom's Serious Fraud Office (SFO) in an investigation of contracts awarded to Mabey and Johnson by the Government of Jamaica from 1989 to 2003.

- The investigation into this matter was at a very advanced stage, which included police officers and Senior Counsel of the Mutual Legal Assistance Unit in the ODPP travelling to the United Kingdom to obtain outstanding evidence. This was so up to the date of Mr. Hibbert's untimely death.
- In this instant, it was my considered view that without more, there was insufficient material at the time which could form the evidentiary substratum for instituting criminal proceedings against Mr. Joseph Hibbert and Mr. Deryck Gibson (former agent in Jamaica for Mabey and Johnson Limited) for the offences of Conspiracy to Defraud and breaches of the Corruption (Prevention) Act, at the requisite standard of proof in the criminal law, which is **proof beyond a reasonable doubt.** As it relates to Mr. Hibbert, who admitted to accepting monies from Mabey and Johnson for out of pocket expenses for travel, his actions would be considered a breach of the administrative guidelines as was then outlined by the Permanent Secretary of the Ministry of Transport and Works, Dr. Alwin Hales in his Requisition to the OCG. It would then be a matter entirely for the relevant authorities at the Ministry of Transport and Works, the Public Service Commission and/or the Parliamentary/Political Directorate to determine what sanctions and/or administrative actions would be appropriate and adopted. We cannot speculate on what our ruling would have been had the investigation by the police been completed.

23. Special Report of Investigation into Allegations regarding contracts awarded to contractors allegedly selected by the Honourable Derrick Kellier, MP.

- After a careful review of the material, the ODPP ruled that regarding the award of \$840,000 to M & K Heavy Equipment Hireage Equipment Company Limited, Mr. Philip Clarke was in breach of **section 40 (1) of the Public Sector Procurement Regulations, 2008.**

Regarding the conduct of The Honourable Derrick Kellier, we ruled that based on the fact that he did not direct that this award be made to M & K Heavy Equipment Hireage Co. Ltd there was no criminal breach of any applicable laws. The matter was referred to the police with a view to initiate prosecution against Mr. Philip Clarke only.

24. Special Report of Investigation into allegations of impropriety and/or irregularity in the award of certain contracts to Strathairn Construction Co. Ltd. by the St. Catherine Parish Council, the National Works Agency and the Ministry of Transport and Works.

- In this matter the ODPP ruled that prima facie there was sufficient evidence to give rise to a breach of section 29 (a) and (b) (ii) of the Contractor-General Act, due to non-reporting. However, there is not enough material to infer that the secretary of the NWA willfully made a false statement to the OCG. The failure to comply prima facie also

allows us to lay criminal charges against Mr. Clifford E. Warmington for breaches of section 29 of the Contractor-General Act. However in the exercise of our prosecutorial discretion it may be more prudent to decline to do so. I took the view that, as there was no substantive breach of law, it would be oppressive to pursue an offence for a procedural or administrative breach. Though the non response of Mr. Warmington was discourteous and improper it would not be an efficient use of judicial time to pursue that impropriety. I therefore took the decision not to commence criminal proceedings against Mr. Warmington and other persons of interest named in the report.

25. Report of Investigation of conduct in the award by the Jamaica Urban Transit Company (JUTC).

- On the 27th of September 2010, having carefully reviewed the material sent to the ODPP by the OCG, I referred the matter to the police for further investigations. I ruled that there was no material uncovered by the police investigators to support the preferring of any criminal charge against anyone in this matter. There was no material to suggest that there was any conspiracy on the part of persons to commit any criminal act. The police investigators have uncovered no material to suggest that any of the persons interviewed obtained illicit benefits from any of the procedural breaches which have been main ingredients in the would be unethical to institute criminal proceedings against anyone in this matter

26. Report of Investigations into Requisitions made of Mr. Colin Campbell regarding Oil Lifting Contracts between the Petroleum Corporation of Jamaica (PCJ) and Trafigura Beheer.

- In this case the requisitions and responses were made in 2006, however, the matter was only referred to the ODPP in August 2010. I took the decision to decline to prosecute in this matter as the Crown faced the very real prospect of submissions in limine for abuse of process resulting from the inordinate delay in instituting prosecution, in keeping with the pronouncements in the authority of **R v Alfred Flowers [2000] 1 WLR 2396**.

27. Special Statutory Investigation concerning complaint regarding the awards of contracts to construct, repair and rent shops at the Spaulding Market.

- In a very comprehensive report to the OCG, I indicated in my ruling that there was no material to suggest that Mr. John Bryant, Mr. Richard Azan and Mrs. Bridget Daley-Dixon had acted dishonestly, which is one of the main ingredients in the offence of conspiracy to defraud or an act of corruption. There was also insufficient material on which to ground, as a matter of law, an agreement to commit a criminal offence, and therefore there could be no viable prosecution brought against Mr. John Bryant, Mr. Richard Azan and Mrs. Bridget

Daley-Dixon. I however, ruled that there was clear evidentiary material to institute criminal proceedings against Mr. Scean Barnswell for the offence of Attempting to Mislead the Contractor General contrary to **section 29** of the **Contractor General Act**.

I further recommended that the flagrant administrative breaches that were committed should be dealt with by the relevant authorities in the government structure which supervise the Parish Councils and Members of Parliament and for those authorities to give effect to such sanctions as they deem appropriate in the circumstances.

✓
28. **Referral to the ODPP concerning Patrick Wong, former Chief Executive Office of the National Works Agency (NWA) for failing to comply with a lawful requisition of the Contractor-General.**

- The ODPP elected to proceed with prosecution for two counts of breach of section 29 (b) (ii) of the Contractor-General Act before the Corporate Area Resident Magistrates Court. On November 24, 2011, Mr. Wong pleaded guilty on both counts before Senior Resident Magistrate, Judith Pusey and fined him \$5,000 or 30 day imprisonment on each count.

✓
29. **Referral to the ODPP concerning Howard Charvis, Director of SCCL Limited, relating to his failing to comply the lawful Requisition of the Contractor-General and obstructing investigations conducted by the OCG.** (Please note that this matter is separate from the matter listed at paragraph 24).

- Having reviewed the material and the conduct of Mr. Charvis in not complying with the Requisition of the OCG and impeding an ongoing investigation, I ruled that criminal proceeding be initiated against him contrary to section 29(b)(1) of the Contractor-General Act. The matter is presently before the Resident Magistrate's Court for the Corporate Area and is set for trial on the 29th of June 2015.

✓
30. **Formal Referral to the DPP – Failure of the Honourable Danville Walker, OJ, former Commissioner of Customs to comply with a lawful requisition of the Contractor-General concerning alleged breaches of prescribed licences for the Scrap Metal Industry and the exportation of scrap metal in violation of the Ministerial Prohibition Order.**

- Having carefully considered the material presented to the ODPP, I ruled that Danville Walker be charged for breach **section 29 of the Contractor-General Act** for the offence of failing to comply with a lawful Requisition of the Contractor-General. The matter is presently before the Corporate Area Resident Magistrate's Court and is set for continuation on the 21st of July 2015.

31. **Special Report of Investigations conducted into Allegations concerning the award of certain contracts to the company One**

Touch Tours and Equipment Limited by the St. Thomas Parish Council.

- Having perused the documents, I ruled that there was no material submitted which evinced any proof that the OCG made any contact with Miss Fay Neufville, the Accountable Officer of the St. Thomas Parish Council, for an explanation or justification for the Parish Council's failure to disclose the required contractor information by way of the QCA. It was the parish council who brought this failure to the attention of the OCG and the appropriate systems were put in place to ensure compliance. The non-reporting took place in 2008. Though the ODPP agrees with the OCG that there may be some hint of impropriety in the award of the contracts, the material was insufficient to make a determination whether any criminal charges are to laid against anyone or whether it warranted a referral to the Police for further investigation. I however invited the OCG to initiate prosecution through the police if their policy prescriptives so obligated them to do.

32. Special Report of Investigations conducted into circumstances surrounding allegations of nepotism, conflict of interest, irregularity and or/ impropriety in the award of government contracts at the Hanover Parish Council to persons affiliated with the then Mayor of the Hanover Parish Council.

- Having carefully considered the material sent to the ODPP concerning Miss Shernet Haughton, then Councillor for the Green Island Division, Mayor and Chairperson of the Hanover Parish Council, I ruled that although the evidence of nepotism is overwhelming, that by itself is not an offence known to the criminal law. Miss Haughton's actions are not deemed criminal for the purposes of the Public Sector Procurement Regulations 2008. Although there is no criminal prosecution that could be mounted against Miss Haughton, for any offence arising from her conduct, we recommended that strong administrative action or sanction be taken against her by the relevant policy maker and or authority, which has the ultimate responsibility for the Parish Councils as is deemed appropriate.

33. Special Report of the OCG dated January 2, 2013 pertaining to the Collective Failure of the Cabinet of Jamaica to comply with requisitions of the Contractor General.

- The material transmitted to the ODPP was carefully considered. We were asked to determine whether Cabinet's request to comply with the instructions of the OCG as stated in its requisitions in breach of any applicable laws; and whether there was sufficient material in the OCG's referral to form the basis for the prosecution of any applicable laws. In all the circumstances outlined in our extensive opinion, I did rule that the ODPP would not be able to properly initiate criminal prosecution of any of the members of the Cabinet or the Cabinet Secretary.

(Please visit the ODPP's website at www.dpp.gov.jm for the full analysis of the referrals and issues as outlined in the relevant press releases)

CONCLUSION

34. The ODPP recognizes the OCG as one of its partners in the administration of justice in our country. We remain committed to that partnership and to work together with comity and integrity. We have always commended the OCG for its industry and comprehensive investigative work in bringing to light alleged irregularities in the activities of government agencies. It is unfortunate that in the past there seems to have been an occasion for misperception of the prosecutorial standard of the criminal law – the very high threshold of **beyond a reasonable doubt**.
35. One can understand that where there is a lack of prosecutorial experience at trial and in the Court of Appeal that there will always be the temptation by some persons to confuse administrative breaches and substantive breaches of the criminal law. The Crown has the burden in a criminal trial of proving the *mens rea* (i.e. the mental element or intention to commit the act), the *actus reus*, (i.e. the actual commission of the criminal act), both of which must be present for the Crown to mount a viable prosecution. We cannot overstate the fact that the Crown has the duty of proving the case beyond a reasonable doubt. A much higher threshold than the threshold required to prove an administrative breach.
36. It has not been surprising to me that it was reported in the public domain that some fifty (50) referrals were sent to the Fraud Squad by the OCG under the former Contractor-General; however, the Police was not able to initiate prosecution in any of these matters.
37. The former Contractor-General, Mr. Greg Christie spoke publicly about the forty-five (45) referrals sent to the ODPP, at a time which was unspecified which he stated were not dealt with by the ODPP. Those matters relate strictly to the QCA and do not relate to any matter where there was any material disclosed which amounted to a substantive breaches of the criminal law. Outside of what we have stated previously in this report, respect of our available records, I have never been able to sufficiently discern what he was talking about. I deliberately refrained from robustly confronting Mr. Christie, because it is not my professional style to deal with this in a negative way in the public domain where colleague heads of department are concerned.

38. The simple professional courtesy of making the information he had available to my office in an effort to have a reconciliation of our respective records was all that was required. This has been done with other agencies, if there is a need for clarity.

39. It is not surprising that since the appointment of the present Contractor-General, **Mr. Dirk Harrison**, who has the skill set of a prosecutor, the ODPP has not received any reports relating to QCAs from the OCG who will always be at liberty to refer the matters to the police, if it is deemed appropriate.

40. The ODPP will always endeavour to act professionally and ethically in the execution of its many duties and responsibilities notwithstanding the multiplicity of challenges that we face. Our respect and regard for the public interest would have it no other way.

We are duty bound to make decisions in the public interest according to well grounded legal principles, without sympathy or prejudice to anyone and based only on the existing material presented to us. The interest of justice demands that we continue to strive with integrity and excellence to overcome the challenges in our quest to deliver service above self.

41. I trust that my extension of professional courtesies by responding to your request for information on this matter has brought clarity.

Sincerely


Paula V. Llewellyn CD, QC
Director of Public Prosecutions

Karen Seymour-Johnson

Deputy Director of Public Prosecutions (Ag.)
Unit Head – Anti-Corruption Unit (ODPP)