

Decision Notice

Decision 31/2019: Ministry of Health Headquarters

Medical cannabis import application records

Reference no: 25102017-02

Decision date: 19 December 2019

Summary

The Applicant made a request under the Public Access to Information Act (**PATI**) 2010 to the Ministry of Health Headquarters (**Ministry**) seeking a list of all physicians who have submitted referral letters to the Ministry in support of applications for licenses to import controlled drugs containing cannabinoids in accordance with section 12 of the Misuse of Drugs Act 1972 and regulation 4 of the Misuse of Drugs Regulations 1973. The Applicant requested that the names of the physicians be substituted by a letter code, to preserve the physicians' anonymity. The Applicant also requested that the physicians' area of practice and the associated application reference number be disclosed.

The Ministry denied the Applicant's request, relying on the administrative ground for refusal in section 16(1)(a) because the record did not exist.

The Information Commissioner has varied the Ministry's internal review decision to a denial of the PATI request on the grounds that the records are exempt under section 23(1) of the PATI Act for personal information.

This review is related to two other Decisions, Decision 30/2019 and Decision 32/2019, involving related PATI requests and should be read together with those Decisions.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 16(1)(a) (records do not exist).

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

1. This review is related to the PATI requests in prior Decision 30/2019 and subsequent Decision 32/2019, all issued today. This Decision should be read together with these two related Decisions.
2. The prior background of these requests is not repeated in full, but is summarised. The Applicant submitted an earlier PATI request to the Ministry on 8 July 2017, seeking:

Copies of all doctor's letters submitted in support of Section 12/
Reg. 4 application to date. It will be necessary to redact much of

the letter as it contains patient's private medical information. However, I would like to specifically request that the name of the doctor is left unredacted. I would also like to request that the application reference number is attached to each letter.

If this is not possible, I would like to request a list of doctor's names who have supported each application and the associated application reference number.

3. The Ministry refused the request on various grounds, but primarily on the basis of the exemption in section 23 of the PATI Act for personal information.
4. The present review arose out of the Applicant's subsequent revised PATI request in response to the Ministry's refusal of the first PATI request. On 1 September 2017, the Applicant submitted a modified PATI request, as follows:

My previous request for a list of doctors' names who have supported each application to date was denied so I would like to request that the doctor's [sic] names be substituted for a letter code (e.g. 'A', 'B', 'C') plus their area of practice (i.e. speciality) and the associated application reference number.

5. In the covering email, the Applicant stated:

I would like to submit the attached PATI application which is very similar to my previous application #478 regarding the names of doctors who have signed off on section 12 applications for medical cannabis.

In this application, I have requested that the names of the doctors be substituted for single letter codes (e.g. A, B, C, etc.). This ought to address confidentiality concerns.

6. The Applicant also provided the Ministry with a table outlining the information that the Applicant was seeking.
7. The Ministry wrote to the Applicant on 29 September 2017 informing the Applicant that the Ministry "did not have a record in the manner . . . requested", and asked "[I]s there a way you can tailor your request or provide me with some information about what you are seeking so I can help?"
8. The Applicant responded by stating:

Thank you for your email and sorry for the confusion. Just hoping that you may be able to redact the names of the doctors and, in their place, assign a letter code and their area of practice (e.g. "Doctor A – Oncology" "Doctor – B Oncology", etc.)

In that way, I am able to get some of the information I am after, but without the need for your office to release any names.

9. The Ministry then informed the Applicant that:

The doctors are not listed by speciality on the applications or in the database for licensing. This would require creating an entirely new record.

Can you help me understand what you are looking for? There is the register of physicians which provides their list of specialities. Perhaps you could contact those who work in a field that is relevant to the drug you are looking into, they would be able to assist with the information you are looking for.

10. On 29 September 2017, the Applicant sent a copy of the email containing the type of table the Applicant hoped the Ministry would be able to provide. In a separate email, the Applicant provided the Ministry with a copy of the Medical Practitioner Register to cross-reference the physicians' names with their area of practice.

11. On 6 October 2017, the Ministry refused to grant the Applicant's request on the administrative ground in section 16(1)(a) of the PATI Act because the record requested did not exist.

12. That same day, the Applicant sought an internal review. In a separate email to the Ministry, the Applicant stated:

I understand the confidentiality concerns that you articulated in your internal review letter [in the prior PATI request], but I wonder if there may be a way for me to get the information I am looking for without intruding upon the confidentiality of those physicians. Essentially, I am hoping to determine:

1. the number of Section 12/Reg. 4 applications approved to date (I have this already, but it is now a little out of date);

2. the number of practitioners who have approved those applications;
3. the areas of practice (i.e. presumably oncology, family practice, and perhaps something else for the pediatric seizure disorder applicant); and
4. if possible, the total number of physicians from each area of practice (e.g. 6 oncology, 3 family practice).

Please let me know if there are any circumstances under which you would release any of the above information to me.

13. The Applicant also provided the Ministry with the table outlining the manner in which the information could be provided, which the Applicant had sent to two others within the Ministry previously.

14. On 7 October 2017, the Ministry wrote to the Applicant, stating:

I will respond to your request for an internal review, but I'm not in a position to do your primary research. Your request for a table with a breakdown of referral numbers by practice type is not information held by my office, and we don't have the resources to pull and analyse the hard copy files for what you want.

Based on my Internal Review [of the previous PATI request] I can tell you that 6 physicians referred since 2016. I did not research the specialty of each one; I know that 2 were GPs, and 1 an oncologist but I don't know and won't research the remaining 3.

This is as much as I have from my review. I would be grateful that you not ask me any further questions as I won't be able to entertain them. And please understand that the Ministry's resources are exceedingly stretched and not designed for primary research on behalf of others. You need to contact the Bermuda Medical Doctors Association (they have a web site) and ask them to circulate a survey to physicians to find out what you are looking for. The BHB web site also has a list of physicians which you may want to contact directly.

15. The Applicant sent the following response:

Firstly, thank you for the numbers of physicians and areas of practice you provided. That is essentially all of the info I am looking for. . . .

16. In light of the responses the Applicant received from the Ministry, on 10 October 2017 the Applicant filed another related PATI request. This PATI request, and the Ministry's response to it, is discussed in Decision 32/2019.

17. On 20 October 2017, the Ministry issued an internal review decision upholding the refusal on the same grounds as the initial decisions, i.e., that the record does not exist. The Ministry stated that:

Prior review of the original records, and review of the PATI Officer's investigation for [the prior request] concluded that the applications for medical cannabis do not require or include statement of the referring physician's speciality. As such, the files do not contain that information.

18. The Applicant submitted a request for an independent review by the Information Commissioner of the Ministry's internal review decision in this case.

Investigation

19. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.

20. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Ministry to determine whether its administrative denial was justified.

21. The Information Commissioner notified the Ministry that the Applicant had made a valid application. The Ministry provided the Information Commissioner's Office (**ICO**) with copies of the records that are responsive to the PATI request.

22. In the prior review, Decision 30/2019, the Ministry provided the ICO with the withheld records. These consisted of twenty files, each containing a separate application for a license to import products containing cannabidiol (**CBD**). The twenty files contained some duplicate physicians' letters and some documents were misfiled. To the best that the ICO could assess, eight of the files contained a total of twelve distinct letters from

local registered physicians, as some applications contained letters from two different physicians. Twelve of the application files did not contain a physician's letter. The Ministry explained that seven of these files did not contain a physician's letter because when an individual submitted a repeat application, the individual did not need to resubmit the physician's letter provided as part of the previous application. A copy of the physician's letter was therefore not included in the subsequent file. It was unclear why the other five files did not have a physician's letter.

23. Ten of the twelve physicians' letters contain the physician's speciality, identified either in the signature field or on the letterhead.
24. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review a reasonable opportunity to make representations. The ICO invited the Applicant and the Ministry to comment on this application, and to make submissions to the Information Commissioner for consideration in this review. The Ministry was asked specific questions to justify its administrative denial under section 16(1)(a). Both the Applicant and the Ministry made submissions.

Information Commissioner's analysis and findings

25. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Applicant and the Ministry. She is satisfied that no matter of relevance has been overlooked.

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

26. Section 16(1)(a) allows public authorities to refuse a PATI request because the records do not exist or cannot be found after all reasonable steps have been taken to find them.
27. The Information Commissioner's Decision 04/2017 Department of Health states that section 16(1)(a) cases require the Information Commissioner to assess the reasonableness of a public authority's search. In the same decision, the Information Commissioner sets out the tests to be met for determining whether, on the balance of probabilities, all reasonable steps have been taken to find records responsive to a PATI request.
28. Finally, a public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, it has justified its reliance on section 16(1)(a).

Public authority's submissions

29. The Ministry submitted that the requester was asking for a document to be created from information in the physicians' letters submitted as part of a patients' application to the Office of the Chief Medical Examiner for CBD-containing products. The Ministry explained that the Applicant specifically requested that the Ministry substitute the physicians' names for a letter code, e.g., 'A', 'B', 'C', along with the physicians' area of practice and the associated reference number for the application.
30. The Ministry stated that it did not keep this information. Based on its review of the withheld records in this case and the prior related-PATI request, the Ministry concluded that the files, including the physicians' letters, do not contain information about the referring physicians' specialities.
31. The Ministry also submitted that the physicians were not required to declare their specialities for the referral letters. The Ministry did not, therefore, review the letters to assess how many letters identified the physicians' speciality in the letterhead and how many did not.

Applicant's submissions

32. The Applicant did not make submissions on the existence of the records, but explained the purpose of the PATI request.
33. The Applicant also provided copies of correspondence with the Ministry related to this PATI request.

Discussion

34. In this case, and the prior Decision 30/2019, the Ministry provided a thorough explanation of the record keeping related to the section 12/regulation 4 applications. The Ministry has identified twelve physician referral letters. The Information Commissioner is satisfied that the Ministry has conducted a reasonable search for these physician referral letters.
35. At issue in this review is whether the records (or part of a record) sought by the Applicant 'exist' within the records the Ministry located after a reasonable search. The Ministry limited its understanding of the Applicant's PATI request in this review as seeking a specific record containing a list of physicians, with letter codes substituted for their names, and including their speciality and the application reference number.

36. The Information Commissioner recognises that the Applicant did ask for a list of the physicians with their names substituted by letter codes, in an effort to avoid the issues that were raised by the Applicant's prior PATI request for redacted letters.
37. In correspondence with the Ministry during the internal review, though, the Applicant clearly explained the type of information that was sought, regardless of what record might hold that information, see paragraph 12. The Applicant also expressly asked if there were any circumstances under which the Ministry would release the requested information.
38. The information the Applicant sought included the physicians' specialities, as well as the number of physicians providing referral letters. The Applicant sought this information, regardless of whether the Ministry could provide it as a list or through some other disclosure.
39. The Information Commissioner has carefully reviewed the twelve physician referral letters. It is clear from the records the Ministry provided to the ICO that the Ministry holds records containing information that is responsive to the Applicant's PATI request in this review. Specifically, ten of the letters identify the physicians' speciality in the letterhead or signature. The fact that the Ministry does not require physicians to identify their speciality as part of the section 12/regulation 4 application process does not negate the fact that ten of the letters contain the physicians' speciality.
40. The Ministry's internal review decision limited the scope of the Applicant's PATI request as seeking a specific record consisting of a list of physicians. The Information Commissioner is of the view that it was unreasonable for the Ministry to limit its understanding of the Applicant's PATI request, particularly in light of the Applicant's correspondence with the Ministry specifying the information sought.
41. Furthermore, the Ministry provided an inaccurate response to the Applicant based on its narrow reading of the PATI request. In its internal review decision, the Ministry stated that "applications for medical cannabis do not require or include statement of the referring physician's speciality. As such, files do not contain that information." In fact, all but two of the physician referral letters contained in the records provided by the Ministry do identify the physician's speciality in the letterhead and/or the signature field.
42. Because of this, and the fact that records exist that are responsive to the Applicant's PATI request, the Information Commissioner is not satisfied that the Ministry's reliance on section 16(1)(a) was justified.

43. The Information Commissioner recognises, however, that the records that exist are exempt under section 23 of the PATI, as discussed in Decision 30/2019. The Information Commissioner cannot, therefore, order the Ministry to disclose the records.

Conclusion

44. The Information Commissioner is satisfied that the Ministry's reliance on section 16(1)(a) was not justified, as records responsive to the PATI request do exist. However, as discussed in the related Decision 30/2019, the physician referral letters themselves fall within the definition of personal information and are properly exempt under section 23 of the PATI Act. The Ministry, therefore, is not required to disclose the referral letters themselves.

45. Despite this finding, the Information Commissioner notes that there were a number of procedural matters that arose in the handling of this PATI request. In this review, it is clear that the Applicant was seeking to obtain statistical information without infringing on the valid confidentiality concerns of the Ministry.

46. In circumstances such as these, where a requester is seeking statistical information contained in records that are otherwise exempt, the Information Commissioner would encourage the Ministry to provide a requester with that information to the greatest extent possible. In some cases, this will be required by the duty to assist (i.e. by providing an accurate description of the records held), and in others it will simply be in keeping with the primary purpose of the PATI Act, which is to provide public access to information to the greatest extent possible.

47. In this case, the information should have been provided as part of the duty to assist, including, for example, an accurate schedule of records listing the PIL reference numbers of the applications held by the Ministry and the number of physician referral letters associated with each. This would have met at least part of the Applicant's information needs, as expressed in the Applicant's correspondence of 6 October 2017, and perhaps avoided the need for further PATI requests.

48. The Information Commissioner notes that although the Ministry cited the strain on its resources for not being able to provide the information sought by the Applicant, the failure to assist the Applicant resulted in substantially more resources being expended by the Ministry and the ICO as part of this review process. Based on the Information Commissioner's estimates, having access to the hard copy files provided by the Ministry, it would only require minimal time to provide the Applicant with the statistical information sought. Indeed, this is the approach that numerous public authorities have taken when faced with similar circumstances.

49. Finally, the Information Commissioner acknowledges that this review considers the Ministry's handling of a request that was received during the first few years of the PATI Act. The Ministry's practice under the PATI Act has developed significantly since then, with notable and commendable shifts in its willingness to be open with its records, when appropriate. The Information Commissioner hopes that in the future, requests such as these will be dealt with in accordance with the Ministry's obligations under the duty to assist and in keeping with the purposes of the PATI Act.

Decision

The Information Commissioner finds that the Ministry of Health Headquarters (**Ministry**) did not comply with Part 3 of the Public Access to Information (**PATI**) Act 2010 when it relied on section 16(1)(a) to administratively deny the Applicant's PATI request because the records did not exist.

In accordance with section 48(1)(a) of the PATI Act, the Information Commissioner varies the Ministry's internal review decision to change the grounds for the denial from section 16(1)(a) to section 23(1) because the requested information is exempt personal information.

Judicial Review

The Applicant, the Ministry, or any party aggrieved by this Decision have the right to seek and apply for judicial review to the Supreme Court according to section 49 of the PATI Act. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez
Information Commissioner
19 December 2019

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

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;

...

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