

## Decision Notice

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**Decision 02/2018: Department of Human Resources**

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### **Personnel records**

**Reference no: 10072015**

**Decision date: 28 February 2018**

## Summary

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The Department of Human Resources (DHR) was asked for personnel records related to the Applicant's referral to Benedict Associated Ltd (BAL). DHR denied the Applicant access to the responsive records under the exemption in section 23(3) of the Public Access to Information (PATI) Act because disclosure of the Applicant's personal information might prejudice the Applicant's physical or mental health. During the Information Commissioner's investigation, DHR abandoned its reliance on section 23(3), and did not invoke any further exemptions to withhold the responsive records. The Applicant challenged whether records in the possession of BAL were deemed to be "held by" DHR, and whether DHR conducted a reasonable search for records.

The Information Commissioner reversed DHR's decision to deny access to the records. The Information Commissioner found that DHR failed to conduct a reasonable search for responsive records, in accordance with section 12(2) of the PATI Act. The Information Commissioner required DHR to conduct a reasonable search for responsive records, except for those in the possession of BAL, and to issue a revised review decision. The Information Commissioner further found that any records in the possession of BAL related to the Applicant's formal disciplinary referral to BAL are deemed to be held by DHR, in accordance with section 3(4) of the PATI Act. The Applicant has until 16 April 2018, to notify DHR to request and process any responsive records in the possession of BAL.

## Relevant statutory provisions

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Public Access to Information (**PATI**) Act 2010, section 3(4) (definition of a public record); section 12(1) (access must be given to non-exempt records held by public authorities); 12(2)(b) (requirement for public authorities to respond completely and accurately); and PATI Regulations 5 (reasonable search requirement).

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. This Decision involves a PATI request arising out of a long-standing dispute between the Applicant and the Department of Human Resources (**DHR**), the employing Department within the Government of Bermuda (**the Department**) and to some extent, Benedict Associates Ltd. (**BAL**). In October 2013, the Department made a Formal Referral to BAL

as part of its disciplinary process against the Applicant. BAL was the Government of Bermuda's employee assistance provider at the time. At the Applicant's first attendance, BAL recommended that the Applicant undergo psychological assessments. The government approved the additional expenditure, and the Department head directed the Applicant to undergo the assessments. The process does not appear to have been productive for any of the parties involved. The Applicant made extensive submissions outlining challenges to the actions taken by DHR, the Department and BAL, which are discussed throughout this Decision where relevant.

2. Through a 17 April, 2015 PATI request to DHR, the Applicant sought to obtain access to various records related to the formal disciplinary referral and attendance at BAL. The PATI request specifically sought "my personal record (file) that is associated with Benedict Associates". The PATI request also referred to files associated with three individuals employed by BAL, as well as a file provided by the Department to BAL during a meeting on a date specified in the request. The Applicant sought a copy directly from BAL as well as a copy from DHR.
3. On 21 April 2015, DHR met with the Applicant in an attempt to clarify the records that were sought. DHR did not have further clarity after the meeting.
4. On 18 May 2015, DHR denied the PATI request on administrative grounds in accordance with section 16(1)(a) of the PATI Act. DHR stated that the records did not exist; that DHR did not hold the requested records; and, to its knowledge, no other public authority held them.
5. On 1 June 2015, the Applicant made a written request to DHR for an internal review. The Applicant also requested that the Head recuse herself from conducting the internal review because of prior involvement in the Applicant's disciplinary proceedings.
6. On 10 July 2015, DHR issued an internal review decision. DHR determined that the PATI Act did not allow the head of a public authority to recuse themselves from issuing a decision. DHR also determined that it held some responsive records related to the Applicant's attendance at Benedict Associates. It concluded, however, that it could not release the records because disclosure of the personal information might be prejudicial to the Applicant's physical or mental health, and invoked section 23(3) of the PATI Act. Finally, DHR offered to disclose the withheld records to a health professional, as provided for under section 23(4) of the PATI Act.
7. The Applicant filed a valid application on 10 July 2015, seeking an independent review by the Information Commissioner. The Applicant challenged the reasonableness of DHR's search for responsive records; whether records in the possession of BAL are "held by" DHR and accessible to the Applicant; DHR's decision that disclosure of the records to the Applicant might be prejudicial to the physical or mental health of the Applicant;

and DHR's failure to consider under section 23(6) whether the public interest or the benefit to the Applicant would require disclosure.

## Investigation

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8. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority to conduct an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
9. The Information Commissioner decided early resolution under section 46 of the PATI Act was not appropriate because review of the withheld records was necessary for her to determine whether DHR's reliance on the exemption was justified. Submissions were also required from DHR to assess the reasonableness of its search.
10. On 31 August 2015, DHR was notified in writing that the Applicant had made a valid application.
11. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review a reasonable opportunity to make representations.
12. Although the Applicant did not need to prove a right to access records, the Applicant was invited to make submissions and did so, making extensive submissions throughout the investigation.
13. DHR was invited to comment on this application and answer specific questions, with particular reference to the records that it held, the nature of the relationship between DHR and BAL, the searches carried out for responsive records, and DHR's justification for the use of the exemption in section 23(3) for personal information.
14. DHR provided submissions in response to these questions. During the investigation, DHR explained that the relevant DHR Human Resources Manager's hard copy files had not been searched. DHR then searched these files and 11 responsive records were located in April 2017. Two of these records were duplicates of the records that had been withheld at the internal review stage. The ICO required DHR to process these records in accordance with the PATI Act.
15. In April 2017, the Information Commissioner also required DHR to request BAL to preserve all records in its possession which may be responsive to this PATI request. DHR did so promptly.

16. In December 2017, the ICO required DHR to clarify whether or not it was continuing to assert the exemption in section 23(3) to withhold the Applicant's own personal information. DHR confirmed on 21 December 2017 that it was no longer relying on section 23(3) to withhold some of the records. DHR did not invoke any other exemption to withhold the records from the Applicant.
17. On 14 December 2017, DHR provided the Applicant with copies of 5 of 11 responsive records.
18. DHR determined that it intended to disclose the remaining 6 responsive records but was first required to provide third party notification under section 39 of the PATI Act to two individuals before DHR made its final decision. DHR sent the third party notification on 21 December 2017. At the same time, DHR also notified the Applicant of this process, in accordance with section 39(3) of the PATI Act.
19. On 18 January 2018, DHR made a final decision to provide the Applicant with access to the remaining 6 records. DHR provided notice of its decision to the third parties and to the Applicant. DHR's decision notice informed the third parties of their right to seek a review by the Information Commissioner.
20. In early December 2017, the ICO met with the Applicant and an advocate to discuss the privacy implications of various potential outcomes of this Decision. Specifically, the ICO identified the potential privacy concerns raised by having BAL's psychological records related to the Applicant retrieved by DHR for processing in response to the Applicant's PATI request.
21. To summarise the developments during the ICO's investigation, DHR:
  - abandoned any reliance on exemptions;
  - identified a total of 11 responsive records;
  - decided to release the 11 responsive records to Applicant; and
  - provided copies of five records to the Applicant, with the remainder being provided on 1 March 2018, unless the third parties seek a review.
22. The remaining issues considered in this Decision are (1) whether records in the possession of BAL are deemed to be held by DHR, in accordance with the definition of "record" in section 3(4) of the PATI Act, and (2) whether DHR conducted a reasonable search for responsive records. Additionally, the Information Commissioner addresses whether a head of authority can be recused from issuing an internal review decision in accordance with section 43(1) of the PATI Act.

## Information Commissioner's analysis and findings

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

### *Internal review decision required by head of authority – section 43(1)*

24. Before addressing the substantive issues, the requirement for the head of the authority to decide an internal review is affirmed. Section 43(1) requires that “[a]n internal review of a decision by a public authority, other than a decision made by the head of a public authority, shall be conducted by the head of the public authority concerned”. If the head of the authority issued the initial PATI decision, then section 44 of the PATI Act allows the request for an internal review to be referred directly to the Information Commissioner for an independent review.

25. The plain language of section 43(1)—“shall be conducted”— makes the decision making by the head of the authority mandatory, except when the initial decision is made by the head.

26. Here, the Applicant requested that the head of the authority recuse herself because of a conflict of interest based on her prior involvement with the Applicant, not because she made the initial PATI decision. In its internal review decision, DHR noted that apart from section 44, the PATI Act makes no provision for a head of an authority to recuse themselves due to a conflict of interest.

27. Individuals involved in processing PATI requests and issuing decisions, including the heads of authorities, may routinely find themselves processing records that indirectly or directly relate to their work. Individuals within public authorities are expected to process PATI requests in accordance with the PATI Act and with professionalism.

28. The PATI Act also recognises the concerns raised by the Applicant: the critical importance of ensuring an independent review and oversight of public authorities’ PATI actions and decisions. Under the PATI Act, this independent review occurs with the Information Commissioner, not the head of the authority.

29. The Information Commissioner is satisfied that DHR correctly determined that its head must issue a decision under section 43(1) except under circumstances not present in this case.

### *Records held by a public authority – section 3(4)*

30. Section 12(1) of the PATI Act affords Bermudians and residents of Bermuda a right to access records “held by” public authorities, other than an exempt record. Section (3)(3)

makes clear that, for the purposes of the PATI Act, “a reference to a record that is held by a public authority includes a record that is in the possession or custody of, or is under the control of, that public authority”.

31. The Oxford English Dictionary defines the word “hold” as to “have in one’s possession”. It defines the word “control” as “to maintain influence or authority over”.
32. Some records may be held by a public authority, even if they are not in the physical possession of the public authority. Section 3(4) clarifies that “any record that is held by an independent contractor relating to a contract for which the contractor is engaged by a public authority is deemed to be a record held by that public authority”.
33. The ordinary meaning of “relating to” in the Oxford English Dictionary is to “have reference to; concern”.
34. The definition of a “record” in the PATI Act, therefore, includes records in the possession of a contractor that concern the services the contractor provides to a public authority under the contract. Section 3(4) goes on to create an implied provision in the contract that requires the contractor to provide these records to the public authority upon request.
35. Section 3(4) ensures that records related, for example, to the provision of public services or the transparency of public spending will be subject to a PATI request and, potentially, public scrutiny. This is true even if the records are in the possession of the public authority’ contractor. This is consistent with the various purposes of the PATI Act listed in section 2 of the legislation.
36. The Information Commissioner must decide whether records at BAL created by BAL employees in the course of fulfilling its services under its employee assistance programme (EAP) contract with the Government of Bermuda (GOB) are records “relating to” the GOB-BAL contract for purposes of the PATI Act. If so, those records are deemed to be held by DHR in accordance with section 3(4) of the PATI Act, and, thus, must be provided to DHR upon request.

#### *Public authority’s submissions*

37. During the ICO’s investigation, DHR was asked whether it considered records in the possession of BAL to be public records. DHR stated that the GOB-BAL contract is available for public review and submitted a copy of it. DHR did not provide any further explanation or evidence concerning whether or not records in the possession of BAL are deemed to be held by DHR or subject to the PATI Act.

#### *Applicant’s submissions*

38. The Applicant recognised that there may be some records that are in the possession of BAL that were not provided to DHR or the Department. These may include any results or notes from the psychological assessments BAL attempted to administer on two occasions. The Applicant noted that at the time of the PATI request, BAL was the EAP-service provider under contract with the Government of Bermuda, but the Applicant did not make any further arguments concerning the definition of a record under section 3(4).

#### *Discussion*

39. According to the contract provided by DHR, BAL was an independent contractor engaged by the Government to provide various EAP-related services from 1 July 2014 to 30 June 2016. The Information Commissioner expressly notes that this Decision does not concern records created by BAL when providing EAP services to government employees who voluntarily sought EAP counselling.

40. Rather, the contractual services BAL provided in this case related exclusively to a Formal Referral in the context of disciplinary proceedings. In the Terms of Reference in Appendix A of the GOB-BAL contract, these services are identified as “Formal disciplinary referrals”.

41. The services related to the Applicant included individual meetings with BAL psychologists, as well as efforts on two occasions by BAL to administer psychological assessments. The services also included reports back to the Department, copied to DHR.

42. The written communications from BAL to the Department and DHR reflect little confidentiality surrounding the Applicant’s attendance at BAL. BAL gave the Applicant a copy of its *Statement of Understanding for EAP Counselling Services*, which explained that:

***Formals:** If you have been asked to come and see a counselor by your employer. Your counselor will liaise with your supervisor regarding your attendance and general progress. This process will be fully explained to you by your employer.*

43. The communications between DHR, the Department and BAL appear to have gone beyond updates on the Applicant’s attendance and general progress. Despite BAL’s openness with the Department and DHR, BAL refused in April 2014 to give the Applicant copies of records related to attendance and psychological assessments at BAL. One would not ordinarily expect that recourse to the PATI Act would be required to get copies of one’s own records, particularly when those records related to any disciplinary process or psychological assessment.



44. Unfortunately, in the absence of BAL's willingness to provide the Applicant with copies of the records, the Applicant had to submit a PATI request to DHR for the records. Section 3(4) ensures that DHR may require BAL to provide it with copies of any responsive records for DHR's processing under the PATI Act.
45. The Information Commissioner is satisfied that the records in the possession of BAL related to the Applicant's formal disciplinary referral to BAL are deemed to be held by DHR for purposes of the PATI Act, in accordance with section 3(4).

***Reasonable search – section 12***

46. Section 12(2)(b) of the PATI Act requires public authorities to make a reasonable effort to provide a response to a PATI request that is complete and accurate.
47. Regulation 5(1) further requires that the public authority, through its Information Officer and delegates, make a reasonable effort to locate a record that is responsive. Should the Information Officer not locate a responsive record, he or she is required by Regulation 5(2) to make a record of the efforts taken. This record is often referred to as a "search log".
48. Together, these provisions require the public authority to conduct a reasonable search in support of the right to access public records set out in section 12(1).
49. In *Department of Health*, Decision No. 04/2017, the Information Commissioner set out the test for assessing a public authority's administrative denial of access because the record did not exist or could not be found after all reasonable steps were taken to locate it. Here, the Information Commissioner adopts the same analysis for deciding whether a public authority has conducted a reasonable search to meet its obligations under section 12 of the PATI Act.
50. The Information Commissioner must decide whether, on the balance of probabilities, the public authority conducted a reasonable search.
51. In making this decision, the Information Commissioner shall consider:
  - the quality of the public authority's analysis of the request;
  - the scope of the search that it decided to make on the basis of that analysis; and
  - the rigour and efficiency with which the search was then conducted.

The specific circumstances of each case will inform this assessment and may include, when appropriate, evidence related to discussions with a requester to clarify a request, the public authority's records management practices, the details of any search plan, or any reason offered by the public authority to justify the reasonableness of its search.

The public authority bears the burden of demonstrating the reasonableness of its search.

*Public authority's submissions*

52. DHR submitted that it initially viewed the PATI request as seeking files on three individuals who worked at BAL. Because of this view, DHR met with the Applicant on 21 April 2015 to clarify the request. During that meeting, DHR directed the Applicant to its Information Statement to select the relevant record type from the Records and Documents Held section. DHR submitted that the Applicant was “uncooperative in clarifying [the] request during the meeting held on 21 April 2015”. DHR stated the meeting was “not successful” and “no further clarity was garnered”.
53. As a result, DHR initially understood the request to be for files related to three BAL employees.
54. The internal review decision stated that responsive records had been identified but they were withheld as exempt records. These records were located in the files of the head of the authority when conducting the internal review decision.
55. Later, in response to the ICO’s investigation in this review, DHR clarified that it now understood the request to be seeking “Benedict Associates Personnel Records File relating to the Requester”.
56. DHR also explained the nature of its files. It holds centralised personnel, or personal, files with only hard copies for each employee. These employee files contain records such as copies of employee’s applications, resumes, degree/qualifications, and other documents. DHR’s submissions also indicated that the centralised employee file contained records related to disciplinary matters.
57. DHR’s Human Resources Managers and Officers may maintain client-department files. There are electronic and hard copy records of their individual department client files that contain records from meetings, telephone discussions, advice, consultation, assistance, and guidance provided on a matter.
58. DHR submitted that any documents received from a department head that are specific to an employee matter are not placed in the central Employee Personnel File held by DHR. Although DHR stated that these records are held by the employing Department, DHR did not explain what it did when such records were sent, by hard copy or email, to DHR. DHR also stated that formal referrals to EAP services during disciplinary proceedings are made by the employing Department, not DHR, and the related records are held by that employing department.
59. When conducting its initial search, DHR focused only on the centralised administrative file for BAL, which contained information related to the tender process and the BAL

contract, as well as files containing Board and other corporate information for BAL. DHR's submissions in this investigation explained that it had searched the Applicant's "personal file" located in DHR's centralized files, although it is unclear when this search occurred.

60. DHR explained that at the time the PATI request was made, the request was not transferred to the employing Department because the Applicant was "uncooperative" in clarifying the request during the 21 April 2015 meeting.
61. At the time, DHR also did not see any need for further searches because it held only the EAP Contract and other nonresponsive non-employee documents related to the EAP in its centralised files.
62. DHR submitted that it processed the initial request within 21 days, which included the meeting with the Applicant and the subsequent search for records.
63. It also acknowledged that it did not search any electronic files, which would include emails. It also did not search the Client File held by relevant Human Resources Manager, which includes related disciplinary and consultation hard copy and electronic records.
64. During the course of the ICO's investigation, DHR identified the files held by the Human Resources Manager as a potential location for responsive records. It conducted a search of the Human Resources Manager's files. DHR did not indicate whether the electronic files were searched. It did, however, locate eleven responsive records, two of which were duplicates of the two records located during DHR's internal review.
65. At the ICO's request, DHR processed the responsive records. Five of the responsive records were released to the Applicant in December 2017, with minor redactions for third party personal information. DHR decided to release the remaining 6 records to the Applicant if neither of the third parties seeks a review by the Information Commissioner of DHR's decision.

#### *Applicant's submissions*

66. The Applicant provided a copy of the PATI request seeking "my personal record (file) that is associated with Benedict Associates". The request also names three individuals at BAL that met with the Applicant, as well as the date of a meeting between the employing Department and BAL during which the Department provided documentation to BAL.
67. The Applicant also made thorough submissions on the records that DHR should have held and located in response to the PATI request. These included documents making references to the "extensive documentation" that was provided to BAL when the Department made the formal disciplinary referral to BAL.

68. During the course of the ICO investigation, the Applicant also identified various additional responsive records that should have been located within the files at DHR, or at BAL. The Applicant supplied detailed evidence about the background of the Applicant's history with DHR, the Department and BAL. This included emails, notes from meetings, and photographs of documents. The Applicant submitted that the evidence establishes that certain records were created and shared between these three entities.
69. The Applicant provided credible evidence of written communications between DHR, the employing department, and BAL. From the content of these records, it appears that at least two individuals within DHR had been carbon copied, or cc'd, into and reviewed emails from the Department related to the Applicant's disciplinary referral to BAL and related matters.
70. At the initial stages of the investigation, the Applicant confirmed that this review should consider whether records in BAL's possession are records held by DHR. However, several times during the course of the investigation the Applicant made extensive arguments that it was unnecessary for the Information Commissioner to consider whether BAL had responsive records in its possession. The Applicant expressed the view that DHR and the Department would already have copies of any and all records from BAL because of their collusion against the Applicant. The Applicant, for example, pointed to eleven pages of email correspondence between the Applicant, the Department, BAL, and DHR as evidence of the close working relationship. The Applicant argued that this, in turn, supported the assumption that DHR or the Department would already have any and all responsive records from BAL.
71. The Applicant expressed disbelief and frustration that resort to the PATI Act was necessary to obtain personnel records and records related to sessions and attempted psychological assessments from BAL.
72. Finally, the Applicant also vigorously argued that DHR's failure to locate and disclose responsive records, along with other actions, demonstrated that DHR, the Department, and BAL were falsifying records and fabricating information. The Applicant articulated two overarching concerns: that DHR and the Department wanted to obtain a diagnosis of mental illness from BAL and that BAL conducted an assessment of the Applicant on an invalid psychological instrument, which reflected BAL's attempt to construct a specific outcome.
73. From these concerns flows the Applicant's argument that DHR's failures in processing the PATI request represented a "clear deception" and intentional avoidance of locating records as a strategy to undermine the Applicant's efforts to gain evidence in support of the Applicant's broader complaints.

74. Taken in its strongest terms, the Applicant argued “that the concealing, the altering, the contravening and the bad faith” that the public authorities demonstrated from the beginning of the PATI request were indicative of violations of the offense provisions under sections 64 and 65 of the PATI Act. The Applicant urged the Information Commissioner to sanction individual public officers for this conduct.

#### *Discussion*

##### The quality and nature of the public authority’s initial analysis of the request

75. The Applicant’s original PATI request sought “my personal (file) that is associated with Benedict Associates” and listed particular individuals at BAL with whom the Applicant met. The Applicant also referenced a file provided to BAL by the Department during a meeting on a specific date. The Applicant’s reference to a specific date provided further details for understanding the subject matter of the request.

76. DHR’s initial analysis was that the request sought only records about three individuals who worked at BAL. Although the Applicant did not explicitly state that the requested records were related to a formal referral to BAL, DHR was consulted and provided guidance during this process. Further, the reference to the meeting date provided further detail about the matter the Applicant was describing.

77. The PATI request also made clear that the records sought were personal to the Applicant. These details should have indicated to DHR that the Applicant was seeking individualized records. Further, despite the unproductive meeting on 21 April 2015, DHR could have learned the details of the specific meeting referenced in the PATI request as a means of better understanding the initial request.

78. It is unclear why DHR initially framed the PATI request as seeking only records related to the three individuals working at BAL or the general provision of EAP services, rather than seeking EAP records specifically related to the Applicant and the referral to BAL. By at least the internal review stage, however, DHR had corrected this analysis of the request and was aware that the requested records related to the Applicant’s referral to BAL as part of a disciplinary proceeding initiated by the Department. This is an accurate understanding of the PATI request.

79. The Information Commissioner is satisfied that while the initial analysis of the request was inadequate, DHR’s analysis of the request during the internal review was accurate, complete, and adequate. DHR understood the Applicant to be seeking records related to the Department’s formal disciplinary referral of the Applicant to BAL.

##### The scope of search of DHR decided to make on the basis of that analysis

80. DHR did not detail the steps it took to identify relevant locations and the types of records that were searched. Beyond stating that it took 21 days to process the record

and explaining that the head of the authority located two records during the internal review, DHR did not offer support for the adequacy of the scope of its search.

81. Importantly, DHR identified responsive records during the internal review stage that related to the formal disciplinary referral but did not initiate a search of the Human Resource Managers' files at that time. These files should have been identified as a probable location for responsive records during the internal review.
82. Because DHR had an inaccurate initial understanding of the request, its initial search did not identify the relevant file locations. No files specific to the Applicant's formal disciplinary referral to BAL were identified or searched for during the initial processing.
83. DHR acknowledged in its submissions to the ICO that not all relevant locations were searched. Specifically, it noted that the files in the relevant Human Resource Manager's office were not searched until the ICO investigation.
84. DHR also did not search any electronic files, although no explanation was given for this.
85. When emails are potentially responsive records, they must be included in searches for responsive records. The broad definition of a record in section 3 of the PATI Act is "a record held by a public authority, in any form or medium, in which an information is recorded, whether printed or on tape or film or by electronic means or otherwise, and includes any map, diagram, photograph, film, microfilm, videotape, sound recording, or machine-readable record produced by means of equipment or a program".
86. Emails held by public authorities contain written information and are "records" within the meaning of the PATI Act and are subject to a PATI request. The employee of the public authority may be sent the email directly, or may be intentionally copied or blind copied on the email. At a minimum, emails that remain in draft or deleted folders are also "held by" the public authority. These locations should be searched for responsive records, when relevant.
87. During the investigation, the Applicant submitted copies of emails that provided evidence that individuals within DHR were copied on responsive emails. These email folders should have been included in the scope of the search.
88. As discussed above, DHR also did not consider the relevant records at BAL to be held by the department and subject to search. Records responsive to the Applicant's PATI request in the possession of BAL are deemed by the PATI Act to be held by DHR. This makes BAL a relevant location for responsive records.
89. The scope of the potentially responsive records that BAL has in its possession is unknown. The responsive records at BAL may include the results of psychological assessments or attempted psychological assessments, summary reports of results,

internal memos and notes, internal emails, letter correspondence, interview and meeting notes, billing records, and more.

90. At various points, the Applicant asserted that DHR and the Department have copies of all of the responsive records that would be in the possession of BAL. The Information Commissioner disagrees with this assumption. BAL created records related to its sessions and testing processes required by the disciplinary process. Although BAL gave summary reports of these sessions and assessment attempts to the Department and DHR, the underlying records were in BAL's office, and do not appear to have been provided to DHR. It is precisely these records that the Applicant has repeatedly expressed a desire to obtain and compare to the Applicant's notes and recordings of the interactions with BAL.
91. Further, the Applicant's evidence indicates that BAL holds records responsive to the PATI request. This evidence included electronic and hard copy correspondence and photos of documents taken during the Applicant's attendance at BAL. Although the extent and nature of the responsive records are not known, it is probable that BAL possesses records responsive to the Applicant's PATI request. DHR, in accordance with section 3(4) of the PATI, should have required that BAL search for and provide copies of all responsive records. These records would then be subject to processing by DHR in accordance with the PATI Act.
92. The Information Commissioner is not satisfied that the scope of the search was adequate because:
- the relevant "Client files" with the Human Resources Managers were not searched;
  - no electronic searches were conducted, including no searches of email folders; and
  - files located at BAL were not requested, searched or processed.

The rigour and efficiency with which the public authority conducted its search

93. DHR met with the Applicant on 21 April 2015 to obtain further clarification of the records sought. Although the meeting was not productive, it is unclear whether such a meeting was needed.
94. The PATI request stated that it was seeking records related to an attendance at BAL. The reference to a meeting on a specific date between the Applicant's Department and BAL provided DHR with sufficient information to learn more about the nature of the attendance at BAL. One query to the employing department to ask what the meeting was about would have provided the information needed to continue the search, namely, that this request related to a specific disciplinary referral. It did not refer to an employee's voluntary use of EAP services or to BAL and its employees more generally.

95. During the internal review, DHR located two responsive records that confirmed that, by this stage, it knew it was searching for records related to a specific disciplinary referral to BAL. As soon as DHR learned that the meeting cited in the PATI request related to a formal disciplinary referral, DHR should have known that the files of the Human Resources Managers for the Department were locations that should be searched. These are not extensive steps to take to process this PATI request.
96. DHR did not search the Human Resources Managers' files until the ICO's investigation. Through this search, additional records were located.
97. At a minimum, the records could have been located, disclosed and processed more efficiently if DHR had engaged in a more rigorous search. It could have taken steps to learn more about the meeting between BAL and the Department, and searched the files of the Human Resources Managers during its processing of the request.
98. Given the search efforts that DHR made, the Information Commissioner is not satisfied that the search was conducted with the required rigour and efficiency.

*Conclusion*

99. Based upon an assessment of the quality of the public authority's analysis of the request; the scope of the search it decided to make based on this analysis; and the rigor and efficiency with which the search was conducted, the Information Commissioner is not satisfied, on the balance of probabilities, that DHR has conducted a reasonable search.
100. The Applicant urges the Information Commissioner to sanction individuals at DHR under sections 64 and 65 of the PATI Act because DHR's failures to meet its PATI Act obligations are indicative of fabrication, concealment, collusion, fraud, and bad faith. The Information Commissioner does not share the Applicant's view. In reviewing the withheld materials, the Information Commissioner did not find evidence that records provided to the ICO were falsified.
101. DHR did not conduct a reasonable search. DHR has acknowledged this and sought to remedy this failing through its search, processing and disclosure of records during the ICO's investigations. From the beginning, DHR also should have understood what records the Applicant sought based upon the information in the PATI request. The Information Commission is cognizant, though, that the Applicant's request was filed and in April 2015, two weeks after the PATI Act went into effect. It is also clear that it was filed in the context of the strained relationship between the Applicant and the public authorities. This strain, combined with the lack of familiarity with practices under the PATI Act, acerbated the handling of the request.



102. Public authorities are expected to overcome such strains and continue to assist PATI requesters. None of these issues, however, rises to a level of bad faith handling of the request which would trigger a referral by the Information Commissioner to the relevant authorities for criminal sanctions under section 64 or 65 of the PATI Act.
103. Relatedly, the Applicant requested that the Information Commissioner “ensure [that] authentic, honest and accurate records” are produced and identify any false records. The Applicant also asked the Information Commissioner, on her own initiative, to correct any errors founds in the records. The Information Commissioner appreciates the Applicant’s desire to address the underlying issues raised by the responsive records.
104. The mandate and jurisdiction of the Information Commissioner is established in the PATI Act. It focuses on enforcing the right to access public records. The questioning of the content of those records is not within the Information Commissioner’s authority, nor is it appropriate for a neutral oversight body to speak to the content of the public records.
105. Instead, the Information Commissioner strives to safeguard the right to access public records, and to strengthen good governance and democratic engagement. Once public records are in the hands of the public, the assessment of and accountability for the content of those records rests in the hands of individuals such as the Applicant and other members of the public.
106. Finally, the Information Commissioner notes that the Order accompanying this Decision takes into account the unavoidable privacy concerns raised by our current legislative framework, under which the Applicant’s only recourse is having DHR process records related to the Applicant’s attendance at BAL. The right to request one’s personal information from private sector entities in accordance with the Personal Information Protection Act 2017 has not yet gone into effect. The Applicant’s only right to access to the personnel records that are in the possession of BAL is through the present PATI request to a public authority. Access through the PATI Act would require DHR to review and process any responsive records. The Order affords the Applicant time to consider whether to exercise this right of access.

## **Decision**

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The Information Commissioner finds that the Department of Human Resources (DHR) failed to comply with Part 3 of the Public Access to Information (PATI) Act in responding to the request for access to records made by the Applicant. Specifically, DHR failed to conduct a reasonable search, in accordance with section 12(2) of the PATI Act and Regulation 5 of the Public Access to Information Regulations. The Information Commissioner reverses DHR’s internal review decision to withhold responsive records.

DHR now has a different view of the request and has abandoned its prior reliance on section 23(3) of the PATI Act to deny access responsive records previously located. Given this, in accordance with section 48(1) of the PATI Act, the Information Commissioner requires DHR to conduct a reasonable search for all records except those in the possession of Benedict Associates Ltd. (BAL), consistent with the instructions in the letter accompanying this Decision, and issue a revised review decision within 42 days, **on or before 11 April 2018**.

The Information Commissioner further finds that any records in the possession of BAL related to the Applicant's formal disciplinary referral to BAL are deemed to be held by DHR, in accordance with section 3(4) of the PATI Act. The BAL contract with the Government of Bermuda, dated 26 June 2015, is deemed to include a provision requiring BAL to provide DHR with copies of any such records if DHR requests them.

The Applicant has until **on or before 16 April 2018**, to submit the accompanying notification requiring DHR to request and process any responsive records in the possession of BAL. Upon receiving the notification, DHR is required to process any responsive records in the possession of BAL within six weeks of the receipt of the notice from the Applicant.

If the Applicant does not submit the accompanying notification to DHR on or before 16 April 2018, the Information Commissioner does not require DHR to take any further action concerning any responsive records in the possession of BAL.

## **Judicial Review**

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Should the Applicant, Department of Human Resources, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez  
Information Commissioner  
28 February 2018

## Appendix 1: Relevant statutory provisions

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### **Public Access to Information Act 2010**

#### **Interpretation**

3 ...

(4) For the purposes of this Act, any record that is held by an independent contractor relating to a contract for which the contractor is engaged by a public authority is deemed to be a record held by that public authority; and there is deemed to be included in the contract a provision that the contractor shall, if requested by the public authority concerned, give a copy of the record to the public authority.

...

#### **Access to records**

12 (1) Subject to this Act, every person who is a Bermudian or a resident of Bermuda has a right to and shall, on request, be given access to any record that is held by a public authority, other than an exempt record.

(2) Public authorities shall make every reasonable effort to—

(a) assist persons in connection with requests; and

(b) respond to requests completely, accurately and in a timely manner.

...

### **Public Access to Information Regulations 2014**

#### **Reasonable search**

5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

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