

Decision Notice

Decision 04/2018: Board of Immigration

Meeting minutes and decision making records

Reference no: 17012017

Decision date: 15 May 2018

Summary

The Board of Immigration was asked for minutes of its meeting from 8 July 2016 to 17 November 2016, as well as any memorandum, protocols, or guidelines related to work permit applications and renewals from churches which it relies upon when deciding applications and appeals. The Board denied the Applicant access to the meeting minutes under section 16(1)(a) of the Public Access to Information (PATI) Act 2010 because the records did not exist after all reasonable steps had been taken to locate them. For the decision making records, the Board directed the Applicant to the relevant sections of the Bermuda Immigration and Protection Act 1956 and its published work permit policy. The internal review decision affirmed the denial of access to the meeting minutes on the same grounds.

The Information Commissioner annuls the Board's decisions denying access to the meeting minutes according to section 16(1)(a) because the records did not exist after all reasonable steps had been taken to locate them. The Information Commissioner first found that the Board failed to comply with the duty to assist the Applicant in connection with the request and the duty to respond completely and accurately, contrary to the requirements of section 12(2)(a) and (b), respectively. During the Information Commissioner's investigation, the Board identified records that are responsive to the Applicant's request. The Information Commissioner found that the Board could not justify its reliance on section 16(1)(a) to administratively deny the Applicant's request because the Board did not take all reasonable steps to locate the records.

The Information Commissioner also found that the Board's decision notices did not comply with the requirements of section 14(2)(b) and 43(2)(b)(ii) to notify the Applicant of the right to a review of the decision.

Finally, the Information Commissioner found that any reliance on section 16(1)(b), section 22(1), and section 23(1) that the Board raised during this investigation was not justified at this time.

The Information Commissioner requires the Board of Immigration to issue a new initial decision in response to the Applicant's PATI request on or before 26 June 2018.

Relevant Statutory provisions

Public Access to Information (**PATI**) Act 2010 section 2 (purpose); section 12(1) (right to access); section 12(2)(a) (duty to assist) and (b) (duty to respond completely and accurately); section 14(2) (decision notice requirements); section 16(1)(a) (does not exist), (b) (insufficient information), and (2) (duty to assist and consult); section 22(1) (health or safety); section 23(1) (personal information); and section 43(2)(b) (decision notice requirements).

Public Access to Information Regulations 2014, regulation 5 (reasonable search).

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. On 17 November 2016, the Applicant made a Public Access to Information (**PATI**) request to the Board of Immigration (**Board**) for:
 - All minutes of meetings of the Board of Immigration between July 8, 2016 and today's date ('**meeting minutes**'), and
 - Any memorandum/protocol/guidelines which exist in relation to work permit applications and renewals from churches which the Board uses when deciding on application and appeals ('**decision making records**').
2. On 24 November 2016, the Board refused the request for meeting minutes because the records did not exist. The Board explained that it does not record minutes of its meetings. For the decision making records, the Board directed the Applicant to the Ministry of Home Affairs, Department of Immigration, Work Permit Policy (12 March 2015) ('Work Permit Policy')¹ and the Bermuda Immigration and Protection Act 1956 ('Immigration and Protection Act').
3. On December 13, 2016, the Applicant submitted a request for an internal review to the Board.
4. On 16 December 2016, the Board formally reissued its initial decision to include section 16(1)(a) of the PATI Act as the grounds for its denial of the Applicant's request. It again directed the Applicant to the Work Permit Policy and Immigration and Protection Act.

¹ Available at <https://www.gov.bm/sites/default/files/immigration-work-permit-policy-2015.pdf>.

5. On 21 December 2016, the Board issued its internal review decision affirming its initial decision. The Board explained that it was not mandated to take meeting minutes and has never done so.
6. The Board also informed the Applicant that it reviews over 150 applications each week and the record of the Board's review is made directly on each application. It went on to explain that neither the Board nor Department of Immigration could indicate which work permit applications were considered during the time period covered by the request unless they had the work permit applicant's details, such as name, employer, and so on.
7. By an email on 17 January 2017, the Applicant submitted a request for an independent review by the Information Commissioner, challenging the Board's administrative denial of the request.

Investigation

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 for 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 that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Board of Immigration to determine whether its reliance on the administrative denial under section 16(1)(a) was justified.
10. On 2 February 2017, the Information Commissioner's Office (**ICO**) notified the Board of Immigration of the valid application and the case was allocated to an investigation officer.
11. During the investigation, the ICO conducted a site visit with the Board at the Department of Immigration (**Department**) to discuss the role of the Board, its interaction with the Department, and the related policies, processes, and procedures.
12. Section 47(4) of the PATI Act requires the Information Commissioner to give a reasonable opportunity to the public authority and the Applicant to make representations. The Board of Immigration and the Applicant were invited to comment on this application and make submissions to the Information Commissioner for consideration during this review. The Board of Immigration was also asked to answer specific questions to justify its reliance on section 16(1)(a) of the PATI Act.

13. The Board of Immigration made formal submissions to the Information Commissioner in January 2018, in addition to the information received during an inspection of the Department of Immigration and Board of Immigration.

Information Commissioner's analysis and findings

14. 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 the Board of Immigration. She is satisfied that no matter of relevance has been overlooked.
15. During the ICO's investigation, the Information Commissioner determined it was necessary to address the duty to assist in section 12(2)(a) of the PATI Act and the duty to respond completely and accurately in section 12(2)(b).

Section 12(2)(a) – Duty to assist

16. The plain language of section 12(2)(a) imposes upon a public authority an express duty to assist a requester: “[p]ublic authorities shall make every reasonable effort to—assist persons in connection with requests”. The duty to assist is a fundamental duty that supports the right to access public information and stands separate from other obligations imposed by the Act.
17. The duty extends to “persons in connection with requests”. It is not limited to PATI requesters who have already submitted requests. It arises when individuals may be considering filing a PATI request and have questions for a public authority. A public authority's initial contacts with a requester are essential to satisfying a requester's access to information rights. It is an opportunity for a public authority to familiarise a requester with a public authority's records and steps for processing a request. A public authority must work with a requester, in partnership, to ensure the efficient and timely processing of a request.
18. Public authorities have an obligation to assist requesters in defining their requests and in making them as specific as possible. Failing to provide a requester with sufficient information about the nature of a public authority's records and processes may unnecessarily increase workloads for public authority staff, and may result in the release of information that is of no interest to the requesters.
19. Where requests do not correctly describe a public authority's records, a public authority has an obligation under section 12(2)(a) to attempt to contact a requester to clarify the

request and explain the records it holds. Without assistance from a public authority, a requester may not be able to specify what records satisfy their information needs.

20. The duty to assist is also essential to fulfilling the purposes of the PATI Act, as set out in section 2 of the Act. The reasonableness of a public authority's efforts to assist a requester must also be viewed in light of these purposes: to give the public the right to access to information held by public authorities to the greatest extent possible, subject to the exemptions within the Act; to increase transparency and eliminate unnecessary secrecy; to increase the accountability of public authorities; and to inform the public about a public authority's activities and decision making.
21. Section 12(2)(a) also requires a public authority to "make every reasonable effort" to assist a PATI requester. This requires the effort that a fair and rational person would expect to be made under all of the circumstances. Relevant factors for consideration may include the nature of the request, the size and resources of the public authority, and the prior communications between a requester and public authority. The use of "every" means that a public authority's efforts are to be thorough and comprehensive.
22. Finally, the burden is also on a public authority to ensure that it volunteers to provide assistance when it is reasonable to do so, regardless of whether a requester specifically asked for assistance.

Public authority's submissions

23. As evidence of its efforts to assist the Applicant, the Board relied upon its internal review decision. It emphasised that it explained in its internal review decision how many applications the board receives each week and that the Board's review is indicated "directly on each application". The Board further clarified for the Applicant that unless the Applicant provided further details such as the work permit applicant's name, employer, etc., neither the Board nor Department of Immigration could indicate whether the Board considered the application during the relevant time period.
24. During the investigation, the Board further explained that each application that the Board receives for a review is accompanied by a 'Board Sheet'. The top section of the Board Sheet is completed by a Technical Officer with the Department of Immigration and contains relevant background information, such as the name of the applicant, employer, and the type of permit sought. The bottom portion of the Board Sheet is used by the Board during its meetings to records its decision and any notes.

Applicant's submissions

25. Although the Applicant did not make any submissions that directly addressed the Board's duty to assist under section 12(2)(a), the Applicant raised several relevant points.
26. The Applicant found it hard to accept that the Board did not keep a summary, log, or other form of record of all of its meetings and the decisions it takes.
27. The Applicant also noted that the public has very limited information about the Board's work even though the Board is a publicly-funded body with member's fees paid from the public purse and carrying out decisions on behalf of the public.

Discussion

28. The Applicant's submissions raise two crucial shortcomings of the Board's compliance with the duty to assist.
29. First, the duty to assist required the Board to make every reasonable effort to offer the Applicant an explanation about the documents that record the Board's decision making. The Board's internal review decision provided the Applicant with further information about the number of applications it reviewed each week. The Board did not, though, make every reasonable effort to assist the Applicant's understanding of how and where the information that the Applicant was seeking was recorded. The Board stated only that the Board's decisions are recorded directly on the work permit applications.
30. Information about how the Board works, records its decisions, and interacts with the Department of Immigration was not obtained until the ICO investigation.
31. In response to the ICO's investigation questions, the Board explained much more about how it carries out its work. The Board meets weekly, with no minutes taken. The business of the Board is captured by attendance records and a 'Board Sheet' that accompanies each application. The Board Sheet is used to record decisions regarding that application. The Board provided examples of its Board Sheets. No other notes or recordings of the Board's business are made.
32. The Board explained that any instructions given by the Minister to the Board are delivered in person to the Chairperson or to the Board. No information was given on how the Chairperson or Board records those instructions.
33. The ICO investigator's meeting with the Board representative at the Department of Immigration was an open and productive conversation that further explained the role of

the Board, its interaction with the Department of Immigration, and the related policies, processes, and procedures.

34. Business entities and individuals submit applications to the Department by depositing them in a drop-box in the reception areas of the Department. The Department's mailroom staff retrieve the applications from the drop-box and log them in the Department's AS400 computer system before assigning them to the Work Permit Teams. The Work Permit Teams then vet the applications for completeness, with incomplete applications being returned to the applicants.
35. For complete applications, the Work Permit Teams prepare a Board Sheet for each Work Permit Application, unless it will be decided administratively rather than by the Board. The team's Technical Officers complete the sections for the date, application file number, employee file number, nationality, occupation, and history. The history section is used to identify any relevant history and technical information, such as whether an applicant seeking permission to reside and seek employment completed the required two-year period with their original employer.
36. The remaining sections of the Board Sheet are for the Board's notes and recommendations, and the Chairperson's notes and decision.
37. The prepared applications with the covering Board Sheet are then sorted into three categories: Hospitality, Finance/International Business, and Government and Other. The applications are then placed in boxes and placed in the Department's boardroom prior to the weekly Board meetings.
38. When the Board meets to deliberate over the applications, none of the Department's staff takes part in the meeting. When necessary, the Board may call upon the Chief Immigration Office or the technical officers to consult on an issuing pertaining to an application.
39. The Board Sheet presents ten options for the Board's recommendation, such as advertise, approve, hold, investigate, refuse, refer to Minister, and so on. The Board circles its decision and those members who voted in favour of the decision append their initials next to the decision. The Chairperson may then apply an 'Approved' or 'Refused' stamp, add any additional notes and sign the Board Sheet. The Board confirmed that there is no provision for a recording secretary for the Board's meeting, nor does the Department have the resources to provide an officer for that function.
40. At the completion of the meeting, the Board leaves the applications with the attached completed Board Sheet in the boardroom to be collected by the Department officers. Each

application is then returned to the Immigration Officer in charge of processing that application, who enters the Board's decision regarding that application into the Department's computer system.

41. From this discussion, the Information Commissioner accepts that it is more probable than not that neither the Board nor Department of Immigration create a log or list of the applications that are delivered to the boardroom for consideration nor retrieved from the boardroom following the Board's meeting. The Information Commissioner notes, though, that the Department of Immigration logs the receipt of work permit applications and the outcome of the Board's review in its AS400 computer system. The Board had a duty to share this information with the Applicant and discuss if these records would provide the information the Applicant sought.
42. The half-hour meeting with the ICO investigator embodied the discussion that the Board should have made a reasonable effort to have, or offer to have, with the Applicant at the initial request stage. Such a meeting or conversation with a representative of the Board would not have required extensive staff or time resources. The 2016 Board consisted of thirteen members. Officers within the Department of Immigration are also familiar with how the Board prepares for and conducts its meetings, records its review, and communicates with the Department of Immigration.
43. Even if the Applicant was ultimately unable to receive the entirety of the records sought (i.e., Board Sheets for the period of 1 July 2016 to 17 November 2016), through the PATI process, the Applicant would have learned much more about how the Board carries out its work and records its activities and decision making. It may also have been possible for the Board to work with the Applicant to identify records that would have satisfied a potentially narrower set of information the Applicant sought.
44. If the Board had discussed its process and procedures with the Applicant, it may have led to the identification of alternative records held by the Department of Immigration that would have satisfied the Applicant. At a minimum, it would have allowed the Applicant to approach the Department of Immigration to understand whether and how it tracks the outcome of work permit applications through AS400 or otherwise.
45. Second, the duty to assist also required the Board to engage the Applicant with the aim of fulfilling the purposes set out in section 2 of the Act. Specifically, the Board is required to strive to provide the Applicant with access to the information it holds to the greatest extent possible under the Act. In response to the Applicant's request, the Board must also take an approach that seeks to increase the transparency around how it works, its activities, and how it records its decisions on work permit applications. This in turn, will promote the

accountability of a Board, which the Applicant correctly notes is publicly-funded (see section 12(6) of the Bermuda Immigration and Protection Act 1956). Section 13 of the Immigration and Protection Act also outlines the public functions delegated by the Minister to the Board, which is deemed to be the Minister when exercising these functions.

46. This increased transparency will also further the accountability of the Board to the public, consistent with the purposes of the PATI Act. The Applicant expressed disbelief that the Board would not track when specific applications are considered and their outcome. The Board could have explained whether another authority, such as the Department of Immigration, records the statistical data. Or if such information is not recorded anywhere, the Board has a duty to explain this to the Applicant. The Board's explanation may afford the public an opportunity to comment on the Board's existing practices or to advocate for a change in how the Board's work is recorded.
47. The Board, through dialogue with the Applicant, would more likely than not have gained an understanding of the information the Applicant sought, that information's connection to the purposes of the PATI Act, and the need to process the PATI request with the aim of fulfilling the Act's purposes.
48. The Information Commissioner is satisfied that the Board of Immigration has not meet the requirements of the duty to assist in accordance with section 12(2)(a).

Section 12(2)(b) Duty to respond completely and accurately

49. Section 12(2)(b) creates an additional requirement for a public authority to respond completely and accurately to a PATI request. This does not require a public authority to issue a 'perfect' decision notice at the initial stage. The various stages of reviews of PATI decisions creates a process for correcting errors or providing clarification on how to meet the obligations under the Act.
50. Rather, section 12(2)(b) requires a public authority to ensure that the information it provides to a requester is an accurate and complete reflection of the facts the public authority knows and the reasoning it relies upon. In Decision 04/2017, Department of Health, the Information Commissioner explained that section 12(2)(b), taken together with the requirements in section 14(2)(b) and 43(2)(b)(ii) to notify the requester of the specific reasons for the decision, clearly establish the requester's right to know the reasons for decisions under the PATI Act and the facts supporting those decisions.
51. Similar to the duty to assist, section 12(2)(b) also requires a public authority to "make every reasonable effort" to respond completely and accurately.

Public authority's submissions

52. The Board's initial decision notified the Applicant that the Board of Immigration was a working board and does not record meeting minutes. Instead, it reviews applications and records decisions directly on the application. The Board explained that these decisions are not compiled in report form as minutes. It concluded that no meeting minutes existed that it could provide to the Applicant.

53. The Board's maintained this position in its internal review decision.

Applicant's submissions

54. The Applicant understood from the Board's decision that it claimed it only writes its decision directly onto the applications. The Applicant challenged whether this was accurate, stating that the "Board must keep some record of its meetings". The Applicant expected that a Board handling this volume of records must keep a log of the decisions it takes.

Discussion

55. The Board informed the Applicant that its decisions are recorded directly on the applications and in no other manner. This was the reason given for the nonexistence of meeting minutes.

56. In fact, the Board's decisions are recorded in a document separate from the application, the Board Sheets. The Department of Immigration also records the outcomes of the Board's review in its AS400 computer system. The Board did not inform the Applicant of the existence of its Board Sheets nor explain how it uses the Board Sheets to record and communicate its decision; nor did it inform the Applicant that the Department of Immigration logs the outcome of the Board's reviews.

57. By failing to provide this essential factual information to the Applicant, the Board failed to respond completely and accurately, as required by section 12(2)(b).

58. The Information Commissioner is satisfied that the Board of Immigration has not meet the requirements of the duty to respond completely and accurately in accordance with section 12(2)(b).

Section 16(1)(a) – record does not exist

59. Section 12(1) of the Act provides that a Bermudian or resident who requests a record from a public authority is entitled to be given access to it, subject the grounds for refusal in section 16 and Part 4. The record to be given is that falling within the scope of the request and held by the authority at the time of the request.
60. Section 16(1)(a) of the PATI Act allows a public authority to refuse a request if the record requested does not exist or cannot be found after all reasonable steps have been taken to find it. In Decision Notice 04/2017, Department of Health, the Information Commissioner set out three factors to be used to determine whether, on the balance of probabilities, all reasonable steps have been taken to find the record. These are:
- 1) the quality of the public authority’s analysis of the request
 - 2) the scope of the search that it decided to make on the basis of that analysis; and
 - 3) the rigour and efficiency with which the search was then conducted.
61. The public authority bears the burden of proving that it met its obligations under the PATI Act. The standard of proof of whether or not a public authority meets any obligation under the PATI Act is the civil standard of a balance of probabilities.

Public authority’s submissions

62. As discussed above, the Board submitted that its review decision is recorded directly on the work permit application. As a result, no meeting minutes exist for the Board. The Board did not engage in a search for any records based on this conclusion.

Applicant’s submissions

63. As discussed above, the Applicant argued that some record or log of the Board’s decision must exist, apart from writing the decision directly on the Application.

Discussion

[1] *Quality of the analysis of the request*

64. In its decision, the Board concluded that no formal ‘meeting minutes’ existed, so it did not need to search for any records that would satisfy the Applicant’s request. In doing so, the Board adopted an overly narrow and technical interpretation of the request for meeting minutes. The purposes of the PATI Act, as well as the duty to assist, are best served when

a public authority adopts a broad interpretation of the request and seeks clarification from the requester when needed.

65. A plain reading of the Applicant's PATI request indicates that it seeks documents recording the Board's decisions. The Applicant assumed the decisions would be recorded in meeting minutes, but the Board was aware that its decisions are recorded in documents called Board Sheets.
66. The Information Commissioner agrees with the Applicant that very little public information is available about how the Board conducts its business. The Board has not produced a separate Information Statement, but relies upon the Department of Immigration Information Statement. The existence of its Board Sheets or record keeping practices is not discussed. The Board has not provided the public with sufficient information about its records to help the Applicant know what records to ask for. This only increases its responsibility to adopt a broader interpretation of the request—as one that seeks insights into the Board's general workings and decision making process. It also heightens the Board's duty to subsequently dialogue with the Applicant about its Board Sheets and any other records it holds, or that it knows the Department of Immigration holds.
67. It is also clear that the Board understood more broadly that the Applicant's reference to 'meeting minutes' was meant to identify records documenting the Board's decisions, whether those documents were called 'meeting minutes' or something else. This is evidenced by the Board's response to the ICO's investigation questions in which it asserted that additional information about specific individuals, employers, etc., was needed for it to retrieve "information about the *Board's decisions*" (emphasis added).
68. The Information Commissioner notes the Board's submissions that it did not have a single document called 'meeting minutes' which collected and compiled the individual decisions from a meeting into one record. This does not lead to the conclusion that no record exists. The Board held a record of its decisions, albeit in single documents rather than meeting minutes. A reasonable analysis of the Applicant's request would have recognised that the individual Board Sheets and attendance records fell within the scope of the request. It would have also considered whether the Department of Immigration's logs of the received applications and outcome of the Board's review were within the scope of request.
69. In the absence of a practice code on the administration of the Act, the Board thought that it had satisfied its obligations under PATI. Unfortunately, its effort did not meet the requirements of the Act. All of the information above should have informed the Board's analysis of the request. The Board was aware it held records that would potentially satisfy the Applicant's PATI request, but its analysis of the request did not draw upon this

knowledge. The Board did not share with Applicant that it had attendance records or Board Sheets, or that the Department of Immigration logged immigration applications as they are received.

70. The Information Commissioner is not satisfied that the quality of the Board's analysis of the request was accurate, complete, and adequate.

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

71. The Board did not present any evidence that it conducted a search for records that were responsive to the PATI request. This was because it determined that the request was limited to formal meeting minutes, which are not kept.
72. Even under these circumstances, the Board was required to take reasonable steps to identify and locate documents that are responsive to the request. If the Board did not have formal meeting minutes, the next question for determining the scope of its search was to ask "Do we have a different record that has the some of the same information found in meeting minutes?" This would have led the Board to identify details such as the relevant individuals or offices that may have responsive records, as well as the different physical and electronic locations of records.
73. The Information Commissioner notes that this was the approach that the Board adopted during the ICO's investigation that led to the successful identification of responsive records, including Board Sheets and attendance logs.
74. The Information Commissioner is not satisfied that scope of the Board's search was adequate in the first instance.

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

75. Although it was aware that it had records that were potentially responsive to the PATI request, the Board did not make any efforts to conduct a search and did not provide a search log.
76. A search conducted with adequate rigour and efficiency would have at least reviewed, or attempted to review, the entries in the Department of Immigration's electronic log of the applications. Using this information, the Board could have taken reasonable steps to discuss the results with the Applicant and potential options for searching its Board Sheets, or transferring the request to the Department of Immigration.

77. The Information Commissioner notes further that information about the Board Sheets, attendance records, and the Department of Immigration's log of applications was not provided until the Information Commissioner's investigation. To facilitate an efficient search process, the Board should have provided this information to the Applicant during its initial processing of the request.
78. The Information Commissioner is not satisfied that the Board conducted its search with the required rigor and efficiency.
79. The Information Commissioner is not satisfied that the Board of Immigration has taken all reasonable steps to locate the responsive records before concluding that they do not exist and no search is required.

Sections 14(2)(b) and 43(2)(b)(ii)

80. Sections 14(2)(b) and section 43(2)(b)(ii) require a public authority to notify the requester of the provisions of the Act regarding review and appeal of the initial decision and internal review decision, respectively.
81. It is undisputed that the Board's decision notice letters did not inform the Applicant of the right to an internal review and the right to an independent review by the Information Commissioner.
82. The Information Commissioner is satisfied that the Board failed to comply with section 14(2)(b) and 43(2)(b)(ii) of the Act.

Newly cited grounds for denial raised during the investigation

83. During the investigation, the ICO asked the Board of Immigration if it could extract responsive information from the records and provide it to the Applicant.
84. In response, the Board referred to newly cited grounds for denying access to the records. The Board referred to an administrative denial under section 16(1)(b), which permits a refusal of access if the PATI request does not contain sufficient information to enable the public authority to identify the record by taking reasonable steps. The Board also cited the exemption in section 22, which permits a public authority to withhold information if its disclosure would, or would reasonably be likely to, endanger the physical or mental health or the safety of an individual. Finally, the Board also referred to section 23(1), which exempts personal information.

Section 16(1)(b) – Insufficient information

85. During the investigation, the ICO asked the Board of Immigration if it could extract responsive information from the records and provide it to the Applicant.
86. In response, the Board referred to an administratively denial under section 16(1)(b), which permits a refusal of access if the PATI request does not contain sufficient information to enable the public authority to identify the record by taking reasonable steps.
87. The Board explained that it could only retrieve information about the Board's decisions if the employer or potential work permit holder was identified. This would allow the Department of Immigration to retrieve the immigration file and provide the relevant Board Sheet.
88. Section 16(1)(b) must be read together with section 16(2), which provides that a public authority must first assist, or offer to assist, the requester with a view towards amending the request so that it can be processed. A public authority must provide an Applicant with sufficient details for the assistance to be meaningful. As the Information Commissioner explained in Decision 03/2018, Department of Health, at paragraphs 29-30:

29. The explanation must allow a requester a meaningful opportunity to consult with the public authority to amend the request. On the one hand, a public authority has knowledge of its records, records management practices, and resources. Along with its obligations under the duty to assist in section 12(2)(a) of the PATI Act, this makes a public authority better placed than the requester to offer practical suggestions on how to amend the request. On the other hand, the requester is often best positioned to offer suggestions for focusing a request to retrieve the information they wish to know.

30. The nature and amount of assistance required by section 16(2) may also vary significantly from case to case. It will depend upon the particular facts and circumstances of the request, including the willingness of the parties to engage in a meaningful discussion.

89. Here, the Board cited its internal review decision as evidence of its efforts to assist the Applicant. As discussed in detail above, the internal review decision did not inform the Applicant of the existence of the Board Sheets, attendance records, or the log of applications received by the Department of Immigration.

90. The Board did not make any other efforts to assist, or offer to assist, the Applicant.
91. The Information Commissioner is satisfied that the Board of Immigration did not comply with the requirements of section 16(2). The Information Commissioner is further satisfied that the Board has not justified any reliance on section 16(1)(b) as grounds for withholding records responsive to the Applicant's PATI request.

Section 22(1) – health or safety

92. Section 22(1) allows a public authority to withhold information, if its disclosure, would or would be likely to, endanger the physical or mental health or safety of an individual. This can include one individual or a group of individuals, as well as the broader public health or safety.
93. A public authority must first locate and consider a specific record before determining whether an exemption applies. As the Information Commissioner explained in Decision 04/2017, Department of Health:

23. To decide whether it may deny access to records on the basis of an exemption, the public authority must apply the specific test for the particular exemption. As explained in the ICO Guidances for exemptions, each test depends upon the circumstances of the individual request and records. Further, some exemptions, referred to as 'qualified exemptions', require the public authority to consider the public interest test. This means the public authority must weigh the relevant public interest factors for and against disclosure of the specific records before deciding whether to deny access. Thus, a public authority can accurately justify using that exemption only after it has located, retrieved, and examined the responsive records.

94. As the ICO Guidance on the section 22 exemption further explains, a public authority considering withholding information under section 22(1), "must offer supporting evidence that is appropriate under the circumstances of [its] case".²
95. The Board of Immigration offered no facts, reasoning or other evidence to justify reliance on the exemption for health or safety.

² ICO Guidance: health or safety of individual exemption (section 22), paragraph 5, available at https://docs.wixstatic.com/ugd/5803dc_e34066e165d74393bcff9c6c2ce4fd27.pdf.

96. The Information Commissioner is satisfied that the Board of Immigration has not justified reliance on section 22(1) to withhold the responsive records.

Section 23(1) – personal information

97. Section 23(1) allows public authorities to withhold records containing personal information, subject to exceptions in section 23(2). Personal information is defined in section 24(1) as ‘information recorded in any form about an identifiable individual’. Section 24(1) also provides a non-exhaustive list of categories of personal information, such as race, religion, medical or employment history, and education. The exemption in section 23(1) is also subject to the public interest test in section 23(6).

98. The Information Commissioner acknowledges that information that may fall within the exemption for personal information is required to complete the various immigration applications, including work permit applications.

99. The Board, however, has only provided a sweeping statement that “the work permit and information relating to the work permit is personal information”. The exemption for personal information cannot be applied in the abstract. The Board must apply it to records it has retrieved and processed.

100. Here, it is unclear what specific records are responsive to the Applicant’s request. This is required to determine whether, for example, a redacted Board Sheet may be provided to the Applicant.

101. Also, the Board has not engaged in any dialogue with the Applicant to determine what information is being sought through the request for records. It may be the case that the Applicant seeks only statistical information and does not require any personal information.

102. The Information Commissioner is satisfied that the Board has not justified the denial of the Applicant’s PATI request under the exemption for personal information.

Decision

The Information Commissioner finds that the Board of Immigration failed to comply with Part 3 of the Public Access to Information (PATI) Act 2010, in responding to the request for access to records made by the Applicant. Specifically, the Board failed to comply with the duty to assist the Applicant in connection with the request and the duty to respond completely and accurately, contrary to section 12(2)(a) and (b), respectively. The Information Commissioner also found that the Board was not justified in relying on section 16(1)(a) to administratively deny the Applicant's request. This is because the Board did not take all reasonable steps to locate records that are responsive to the request. The Information Commissioner found that the Board's decision notices did not comply with the requirements of section 14(2)(b) and 43(2)(b)(ii) to notify the Applicant of the right to a review of the decision. Finally, the Information Commissioner found that any reliance on section 16(1)(b), section 22(1), and section 23(1) was not justified.

In accordance with section 48(1)(b) of the PATI Act, the Information Commissioner annuls the decisions of the Board of Immigration and requires it to issue a new initial decision in response to the Applicant's 17 November 2016 PATI request for meeting minutes on or before **26 June 2018**.

Judicial Review

Should either the Applicant or the Board of Immigration 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
15 May 2018

**Information Commissioner for Bermuda
Valerie T. Scott Building
60 Reid Street
Hamilton, HM 12
www.ico.bm
441-294-9181**