

Decision Notice

Decision 06/2019: Judicial Department

Records supporting performance measure outcomes

Reference no: 30122016

Decision date: 27 February 2019

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Judicial Department for records about the data supporting the Judicial Department's performance measure outcomes regarding court recordings. The Judicial Department's initial decision did not grant or deny access to records, but provided information relating to the performance measure outcomes. Following an internal review, the Judicial Department denied the request on the basis that the records did not exist.

The Information Commissioner has found that the Judicial Department incorrectly relied on section 16(1)(a) because records responsive to the PATI request did exist. The Information Commissioner is satisfied that during the course of this review, the Judicial Department identified the records and granted access to them, in accordance with the PATI Act.

The Information Commissioner has not required the Judicial Department to take any further action in response to this request.

Relevant Statutory provisions

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

Public Access to Information Regulations (**PAIR**) 2014: regulation 5 (reasonable search requirement).

The full text of the statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

Background

1. On 24 February 2016, the Applicant made a Public Access to Information (**PATI**) request to the Judicial Department. The Applicant sought documentary evidence supporting the 'actual outcome' performance measure of '100% of cases captured in the Court Smart System' for certain years. The Court Smart System produces audio recordings of all court cases in the Magistrate's Courts, the Supreme Court and the Court of Appeal.
2. On or about 13 April 2016, the Judicial Department sent the Applicant a document that outlined the recording procedures and processes of the Court Smart System. The Judicial Department did not grant or deny access to records responsive to the PATI request. It also stated that the reported numbers (100% captured) indicated that "no cases were lost due to system failures".

3. On 26 May 2016, the Applicant requested an internal review. The Applicant identified records that would be responsive to the PATI request based on the recording procedures and processes provided by the Judicial Department. This included the “daily testing records/tags/logs” from the Court Smart System for the responsive period.
4. On 18 November 2016, the Judicial Department issued an internal review decision¹. The internal review decision stated, among other things, that “aside from actual recordings of court proceedings ... there is no documentary evidence to support how the performance measure was generated”. The decision also stated that there were “no specific daily testing records which tabulate actual outcomes of 100% recordings of court proceedings” for the calendar years requested.
5. The Applicant submitted a timely application on 30 December 2016 seeking an independent review by the Information Commissioner.

Investigation

6. 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.
7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Judicial Department.
8. On 1 September 2016, the Information Commissioner’s Office (**ICO**) notified the Judicial Department that the Applicant had made a valid application. During investigation, it was determined that a facilitated resolution was appropriate because the Judicial Department was willing to conduct additional searches for responsive records. Both parties agreed to participate in a facilitated resolution.
9. As part of the facilitated resolution, the parties agreed to revise the issues under review to narrow the relevant time period and focus the records at issue. The Judicial Department conducted additional searches of the Court Smart System which led to the identification of records. On 14 December 2018, the Judicial Department issued a new initial decision granting the Applicant access to all records at issue. The records included daily tests from the Court Smart System for the Court of Appeal sessions in 2011, as well as actual recordings of various proceedings. The Applicant was satisfied that all responsive records had been provided.

¹ The internal review decision was issued in accordance with Decision Notice 02/2016 Judicial Department.

10. The Applicant exercised the right to a decision by the Information Commissioner on the application for review.
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. Both parties were given an opportunity to make representations during the review.

Information Commissioner's analysis and findings

12. 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 Judicial Department. She is satisfied that no matter of relevance has been overlooked.

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

13. 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 it.
14. The Information Commissioner's Decision Notice 04/2017 Department of Health, 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.

Public authority's submissions

15. The Judicial Department did not make any submissions regarding its handling of the PATI request prior to this review.

Applicant's submissions

16. Throughout the review, the Applicant made submissions regarding the Judicial Department's handling of the PATI request. Those submissions explained the context in which the PATI request had been made.
17. This included the Applicant's submission that individuals had been denied access to audio recordings of their cases before the Court of Appeal on the basis that either no audio recordings existed or that the recordings were not available to litigants in the Court of Appeal. The Applicant highlighted that the Government of Bermuda Approved Estimates of Revenue and Expenditure for the Ministry of Legal Affairs for the years 2013/2014, 2014/15 and 2015/16 reported that 100% of cases had been recorded on the Court Smart System for the years 2011, 2012 and 2013. In light of this inconsistency, the Applicant requested records supporting this performance measure outcome.

Discussion

18. The Information Commissioner is satisfied that the Judicial Department did not correctly rely on section 16(1)(a) because, as a matter of fact, records responsive to the PATI request did exist.
19. During this review, the Judicial Department agreed to conduct further searches and located the responsive records. The Information Commissioner recognises that the Judicial Department also voluntarily searched for additional, related records. It subsequently issued a new decision providing the Applicant with full access to all of the relevant records.
20. The Information Commissioner is satisfied that the Judicial Department has now properly located and processed the relevant records in accordance with the provisions of the PATI Act. The Information Commissioner expresses appreciation to the Applicant and the Judicial Department for their efforts and cooperation during this review.

Decision

The Information Commissioner finds that the Judicial Department failed to comply with Part 3 of the Public Access to Information (PATI) Act 2010 in responding to the Applicant's PATI request. Specifically, the Judicial Department incorrectly relied on section 16(1)(a) to deny the request. The Information Commissioner annuls the Judicial Department's decision in accordance with section 48(1)(b) of the Act.

The Judicial Department has issued a new decision and provided the Applicant with access to the responsive records, in accordance with the provisions of the PATI Act. The Information Commissioner does not require the Judicial Department to take any further action in response to this request.

Judicial Review

Should either the Applicant or the Judicial Department 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
27 February 2019

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

- 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;
 - ...

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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