



Decision Notice

Decision 04/2020: Cabinet Office

Cabinet Office's correspondence with the US on the Uighurs

Reference no: 28092017-01

Decision date: 28 May 2020

Summary

The Applicant made a request under the Public Access to Information Act (**PATI**) 2010 to the Cabinet Office for its and the Premier's correspondence with the authorities of the United States (**US authorities**) on the Uighurs who were transferred to Bermuda in 2009.

The PATI request was refused because no responsive records were found.

The Acting Information Commissioner has found that the Cabinet Office did not conduct a reasonable search when it initially processed the request. She is satisfied that an additional search conducted by the Cabinet Office during this review met the reasonable search requirement under the PATI Act.

The Acting Information Commissioner did not require the Cabinet Office to take any further action in response to this request.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 16 (refusal of request on administrative grounds).

PATI 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. In June 2009, four former detainees of Guantanamo Bay of Uighur ethnicity were transferred to Bermuda. The public learned about their transfer on the day these men arrived on the island. It was reported that the transfer plan was known only to the Premier at the time and one of his ministers.
2. On 17 January 2017, the Applicant filed a Public Access to Information (**PATI**) request to the Cabinet Office for all "correspondence between the Cabinet Office (including the Premier) and US authorities regarding the four Uighurs who came to Bermuda on June 11, 2009."

3. The original PATI request asked for records from between 1 January 2009 and 17 January 2017. After corresponding with the Cabinet Office, the Applicant revised the request to ask for records from between 1 January 2009 and 31 October 2010.
4. The Cabinet Office informed the Applicant of the challenges it had in locating the responsive records. Upon the Cabinet Office's request, the Applicant provided a number of keywords to assist with the search of electronic records.
5. On 25 April 2017, the Cabinet Office informed the Applicant that no responsive records were found. The Applicant subsequently sought an internal review.
6. The Cabinet Office's internal review decision of 28 August 2017 informed the Applicant that, despite its utmost efforts, no responsive records were found.
7. The Applicant submitted a timely request for an independent review by the Information Commissioner of the Cabinet Office's internal review decision. The Applicant challenged the reasonableness of the search conducted by the Cabinet Office.

Investigation

8. The application was accepted as valid. The Information Commissioner notified the parties of her recusal from the review, due to her previous extensive work providing direct legal representation to, and human rights advocacy on behalf of, men detained in Guantanamo Bay. Given the Information Commissioner's recusal, this review has been managed by investigators in the Information Commissioner's Office (**ICO**).
9. The Acting Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review. Additionally, the Acting Information Commissioner confirmed the issues the Applicant wanted her to review.
10. The Acting Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the Cabinet Office to determine whether its search was reasonable.
11. The ICO notified the Cabinet Office of the Applicant's valid application. After corresponding with the ICO, later in the review the Cabinet Office agreed to conduct an additional search and re-search some of the potential locations. These searches, verified by the ICO, did not generate any records responsive to the PATI request.

12. The ICO informed the Applicant of the additional steps taken by the Cabinet Office during the review and that they met the reasonable search requirement under the PATI Act. The Applicant exercised the right to a decision by the Acting Information Commissioner on the application for review.
13. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. Both parties made representations upon the ICO's invitation.

Acting Information Commissioner's analysis and findings

14. In coming to a decision on this matter, the Acting Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Applicant and the Cabinet Office. She is satisfied that no matter of relevance has been overlooked.
15. The Cabinet Office's internal review decision informed the Applicant that no responsive records were found. As such, it is deemed that the Cabinet Office refused the request under section 16(1)(a).

Record does not exist or cannot be found – section 16(1)(a)

16. Section 16(1)(a) of the PATI Act allows public authorities to administratively deny a request if the responsive record does not exist or cannot be found after all reasonable steps have been taken to find it.
17. As explained in Decision 04/2017, Department of Health, in reviews where a public authority refused a request because the responsive record does not exist or cannot be found, the Information Commissioner is required to assess the reasonableness of the public authority's search.¹ 'Reasonable' in this context means that a public authority took all the steps that a fair and rational person would expect to have been taken under all of the circumstances to locate the responsive record.²
18. The following factors should be taken into account in determining whether a public authority's search was reasonable³:

[1] the quality of the public authority's analysis of the request,

¹ Decision Notice 04/2017, Department of Health, para. 43.

² See Decision Notice 04/2018, Board of Immigration, para. 20, in which the Information Commissioner discussed the reasonableness test in the context of public authorities' duty to assist. See also Order M-909 of the Information and Privacy Commissioner of Ontario, Peel Regional Police Services Board.

³ Decision Notice 04/2017, Department of Health, para. 49.

[2] the scope of 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.

19. When a public authority is unable to locate a responsive record, it is required by regulation 5 of the PATI Regulations to document the efforts it took.
20. The circumstances of each case will inform the assessment of whether a reasonable search has been conducted.
21. A public authority bears the burden of satisfying that, on the balance of probabilities, it has conducted a reasonable search for records.

Public authority's submissions

22. The Cabinet Office understood the PATI request to be asking for the correspondence between the Government of Bermuda and the US authorities on the transfer of the Uighurs to Bermuda.
23. Its correspondence with the US authorities on immigration and security is ordinarily stored in a paper file and on a secure shared drive. The Cabinet Office emphasised, however, that matters of international relations fall within the remit of the Office of the Governor. Records relating to this are therefore ordinarily held by the Office of the Governor.
24. The Cabinet Office prepared a search plan and searched the relevant paper file. It also searched the emails of a number of officers attached to the Cabinet Office during the relevant time. This included the former Premier, Chief of Staff, Cabinet Secretary, Communications Consultant, Premier's Personal Assistant, and Administrative Assistant. It searched their emails using keywords provided by the Applicant, including Guantanamo, Uighurs, and the names of the Uighur men.
25. The Cabinet Office provided the ICO with a number of supporting documents, including an internal memo dating from around the time of its handling of the PATI request, which documented the steps it had taken to locate the responsive records.
26. The Cabinet Office emphasised the highly unusual and unprecedented circumstances in the transfer of the Uighurs to Bermuda, in that the matter was known only to the then Premier and Minister of Home Affairs. The other ministers were not aware of it until after the Uighurs had arrived in Bermuda.

Applicant's submissions

27. The Applicant clarified that the PATI request was asking for the Cabinet Office's correspondence with the US authorities on the Uighurs both on their pre- and post-arrival in Bermuda.

Discussion

[1] The quality of the public authority's analysis of the request

28. The Acting Information Commissioner is satisfied that the Cabinet Office's understanding of the PATI request was adequate. It looked for the Cabinet Office's correspondence with the US authorities which related to the Uighurs' transfer to Bermuda and the subsequent events dating from 1 January 2009 up until 31 October 2010.

[2] The scope of the search that the public authority decided to make on the basis of that analysis

29. In light of the supporting documentation provided by the Cabinet Office as well as additional steps it took during this review, the Acting Information Commissioner accepts that the relevant paper file as well as the emails of relevant individuals within the Cabinet Office were searched in response to the PATI request. During this review, the ICO was able to verify that the Cabinet Office's search of these locations did not generate any records responsive to the PATI request.
30. The Acting Information Commissioner is not satisfied that the scope of the Cabinet Office's initial search was adequate because it could not confirm that it had searched its shared drive during the handling of the PATI request. However, this potential location was searched during the ICO's review. The Acting Information Commissioner is satisfied that the scope of the Cabinet Office's search is now adequate.

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

31. As required in regulation 5(2) of the PATI Regulations, the Cabinet Office documented the steps it took to locate the responsive records.
32. The Cabinet Office communicated the challenges it had in searching for the records to the Applicant and invited the Applicant to provide additional information.
33. The email accounts searched by the Cabinet Office were of individuals who, given their positions and roles at the relevant time period, could reasonably be expected to hold the responsive records. The keywords used to locate the electronic records were

appropriate and could reasonably be expected to generate records responsive to the PATI request.

34. The Cabinet Office agreed to re-search some of the potential locations and search the shared drive during the ICO's review.

35. Given the above search efforts, the Acting Information Commissioner is satisfied that the Cabinet Office conducted its search with rigour and efficiency.

Conclusion

36. While the Cabinet Office's initial search was not adequate, the Acting Information Commissioner is satisfied that the Cabinet Office has now conducted a reasonable search.

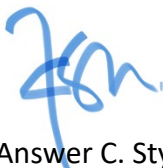
Decision

The Acting Information Commissioner finds that the Cabinet Office 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 Cabinet Office failed to conduct a reasonable search before refusing the request under section 16(1)(a) which allows public authorities to deny access because the responsive record cannot be found.

The Cabinet Office has now conducted a reasonable search. The Acting Information Commissioner does not require the Cabinet Office to take any further action in response to this request.

Judicial Review

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



Answer C. Styannes
Acting Information Commissioner
28 May 2020

Public Access to Information Act 2010

Refusal of request on administrative grounds

- 16 (1) A public authority may refuse to grant a request if—
- (a) the record requested does not exist or cannot be found after all reasonable steps have been taken to find it;

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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