

## Decision Notice

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### Decision 11/2020: Department of Education

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#### **Records of personal information**

**Reference no:** 08032018-01

**Decision date:** 31 August 2020

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Education (**Department**) for certain records of their personal information. The Department disclosed a number of records and explained that no further records existed, administratively denying the request in accordance with section 16(1)(a) of the PATI Act. The Applicant challenged the Department's reliance on an administrative denial ground and the reasonableness of the Department's searches.

The Information Commissioner has found that the Department was justified in refusing part of the request for records under section 16(1)(a) of the PATI Act because the records did not exist after all reasonable steps were taken to locate them. The Information Commissioner has also found that the Department conducted a reasonable search to locate records responsive to the remainder of the request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014. The Information Commissioner has affirmed the Department's internal review decision.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 12(2)(b) (access to records); section 16(1)(a) (records do not exist).

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

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1. The Applicant was a former teacher within the Bermuda public school system. The Applicant alleged that they were attacked by a student while they were employed at a particular public school, which resulted in permanent injuries.
2. On 6 October 2017, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Education (**Department**) asking for any and all materials pertaining to:

- [1] records from a public school regarding a specific assault on the Applicant by a named student that resulted in permanent injuries to the Applicant (**item 1**);
  - [2] the Applicant's total records as a teacher within the Bermuda Government school system during a specified period (**item 2**); and
  - [3] records from the former Commissioner of Education's response to the reported incident (**item 3**).
- 3. The PATI request provided the names of the individuals involved and the relevant dates for each item.
- 4. On 1 November 2017, the Department informed the Applicant that it does not hold the requested records and therefore, the PATI request was refused in full under section 16(1)(a) of the PATI Act because the records did not exist after all reasonable steps were taken to locate them. The Department also explained to the Applicant the steps it took before coming to this decision.
- 5. On 12 December 2017, the Applicant sought an internal review by the head of the public authority. The Department's internal review decision is dated 15 January 2018, but was not received by the Applicant until 5 March 2018. The Department's internal review decision provided the Applicant with a number of records responsive to item 2, but explained that the Department did not hold any further records responsive to the PATI request.
- 6. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the Department's reliance on section 16(1)(a) (records do not exist) and the reasonableness of the Department's searches for responsive records.

## Investigation

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- 7. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
- 8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the

Department to determine whether its reliance on the administrative denial was justified and whether its searches were reasonable.

9. In June 2018, the Information Commissioner's Office (**ICO**) notified the Department of the Applicant's valid application.
10. The parties agreed to attempt facilitated resolution, during which the Department provided further information about its records and operations. The parties were not able to fully resolve the issues in the review, and the Department exercised its right to withdraw from the facilitated resolution. The review progressed and the Information Commissioner issues this Decision in accordance with section 47(6) of the PATI Act.
11. 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. The ICO invited the Department and the Applicant to comment on this application and to make submissions to the Information Commissioner for consideration in this review. Both the Department and the Applicant made submissions.

### **Information Commissioner's analysis and findings**

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

#### ***Reasonable search - section 12(2)(b) and regulation 5***

13. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to requests completely and accurately. Regulation 5 of the PATI Regulations requires the public authority to make reasonable efforts to locate records responsive to the request. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.
14. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following:
  - [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.

15. The burden is on the public authority to show that, on the balance of probabilities, it has conducted a reasonable search for records responsive to the request.

*Public authority's submissions*

16. The Department submitted that before issuing its initial decision, it contacted its human resources staff to assist with locating records responsive to item 2, the Applicant's employment records. The human resources staff also contacted the Department of Archives as part of the Department's attempt to locate the records responsive to item 2. The Department provided documentation of these efforts.
17. The Department explained that its human resources staff also searched the file room which holds its physical files relating to teachers. It further submitted that the file room was searched again before the internal review decision was issued in January 2018.
18. During the ICO's review, the Department explained that the building containing the file room was declared unsafe in August 2018. As a result, no re-enactment of the Department's initial searches could be conducted.

*Applicant's submissions*

19. The Applicant was not satisfied that they received a complete set of their employment records. As a result, the Applicant challenged the reasonableness of the Department's search for records responsive to item 2 of the PATI request.

*Discussion*

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

20. Item 2 of the PATI request is a straightforward request. The Department had an adequate understanding of the employment records sought by the Applicant.

[2] *The scope of the search that the Department decided to make on the basis of that analysis*

21. The Department contacted the appropriate officers within its human resources to assist with locating the employment records. Importantly, the Department also maintained contemporaneous documentation of the scope of its search, which was provided to the ICO.

22. Through the scope of its searches, including additional searches during the internal review process, the Department was able to provide the Applicant with records responsive to item 2.
23. The scope of the Department's searches included the relevant locations and officers and was adequate. There are no additional locations that the Department should have searched.
24. The Information Commissioner agrees that the scope of the search was reasonable. Although the Department could not re-search the file room during this review due to health and safety concerns, the documentation submitted by the Department indicates that the scope of the original searches was adequate.

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

25. In addition to identifying the appropriate potential locations and contacting the relevant individuals, the Department attempted to locate records at various stages of its handling of the PATI request.
26. The rigour and efficiency of the Department's search for records responsive to item 2 was adequate.

*Conclusion*

27. The Information Commissioner is satisfied that the Department conducted a reasonable search for records responsive to item 2 of the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.

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

28. Section 16(1)(a) of the PATI Act allows public authorities to administratively deny a PATI request if the requested record does not exist or cannot be found after all reasonable steps have been taken to find it. Section 16(1)(a) cases require the Information Commissioner to assess the reasonableness of the steps taken by public authorities to locate records responsive to a PATI request under the circumstances of the case<sup>1</sup>.
29. In determining whether a public authority's search was reasonable, the Information Commissioner considers the factors set out in paragraph 14 above.

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<sup>1</sup> Decision 04/2017, Department of Health, para. 41.

30. The burden is on the public authority to show that, on the balance of probabilities, the record does not exist or cannot be found after all reasonable steps have been taken to find it. It is not for the Information Commissioner to determine whether the responsive record exists or does not exist to the point of certainty.

#### *Public authority's submissions*

31. The Department submitted that it contacted the public school to locate records responsive to item 1 of the PATI request. It submitted a copy of its relevant correspondence with the school.
32. The Department explained that the schools maintain a practice and procedure that requires staff members to complete an incident report for any incident, including incidents involving a student. If a teacher files an incident report to the school principal, and if it is deemed necessary, the principal would send the report to the Department. Based on the incident report, the Department's officers would then investigate and submit an investigation report outlining their findings to the Commissioner of Education.
33. The Department further explained that the principal would not take further action on a reported incident if the incident was also reported to the police or to the Department of Child and Family Services, to minimise the possibility of tarnishing the external investigation.
34. The Department explained that it searched the physical file, the hard drive and the email of the former Commissioner of Education but could not locate any responsive records. It also searched the file of one of its administrative staff members.

#### *Applicant's submissions*

35. The Applicant seeks to obtain records about the incident and records on the former Commissioner of Education's response to the incident, including telephone notes and phone records.
36. The Applicant submitted that they reported the incident to the school Principal, who wrote down the complaint. The Applicant also reported the incident to the police.
37. The Applicant explained that they conferred with the former Commissioner of Education about the incident and a job placement, via telephone and email, within months of the incident. At the time, the Applicant was told by the former Commissioner of Education that there was no record of the incident.

38. The Applicant disagreed that there was no proof of their exchanges with the former Commissioner of Education. The Applicant claimed to have documents referencing these exchanges.

#### *Discussion*

39. The Department administratively denied access to records responsive to items 1 (assault records) and 3 (former Commissioner of Education's response to the assault) of the PATI request under section 16(1)(a).

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

40. The Information Commissioner is satisfied that the Department's understanding of the scope of items 1 and 3 of the PATI request was reasonable. During the review, the Department demonstrated this understanding, and these particular items in the PATI request are straightforward.

[2] *The scope of the search that the Department decided to make on the basis of that analysis*

41. The Applicant reported the incident to the police. The Department's submission explained that school principals would not take any action, including the filing of a report to the Department, if an incident was reported to the police. On the balance of probabilities, the former principal did not report the incident referred to in the PATI request to the Department.
42. Despite the Department's practices, the Department is still required to take all reasonable steps to locate records before administratively denying access in accordance with section 16(1)(a), which includes making reasonable efforts to locate the records responsive to the PATI request, in accordance with regulation 5(1) of the PATI Regulations. With respect to item 1 of the request, the Information Commissioner agrees that the Department's contact with the school met the requirement for an adequate scope of the search under the circumstances of this case. As the location where the incident occurred, this was the most likely location for records responsive to item 1. The scope of the Department's search was reasonable to confirm that the school did not hold any records, in light of the practice of not reporting an incident to the Department if it was referred to the police.
43. Because the Department did not locate any records at the school that were responsive to item 1, and in light of the practice of principals not reporting an incident to the Department if it was reported to the police, it was reasonable for the Department to



conclude that neither it nor the Commissioner of Education received any report from the school or the principal about the incident involving the Applicant.

44. With respect to item 3, the Department conducted an initial search that did not locate any responsive records. This was reasonable because no evidence indicated that the incident was referred to the former Commissioner of Education.
45. The Department's search of the school's records included the most likely locations for records responsive to items 1 or 3. The Department has also offered a reasonable explanation for why the scope of its search did not identify any records responsive to items 1 or 3.
46. The Information Commissioner notes that the Applicant stated they hold proof of their exchanges with the former Commissioner of Education that would be responsive to the PATI request. The Applicant was invited on several occasions to submit documentation of these exchanges, but this was not received. The Information Commissioner is sympathetic to the Applicant's circumstances, but this does not change the fact that the Information Commissioner has no reason to doubt the reasonableness of the scope of the Department's searches and the explanations (with documentation) that it has provided.

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

47. The Information Commissioner is satisfied that the Department conducted its searches with adequate rigour and efficiency because it contacted the relevant school to attempt to locate the responsive records.
48. The Department also made adequate efforts to ensure that the former Commissioner of Education's files did not include records responsive to item 3. This was done even though it was more probable than not that the Department did not receive any report from the school about the incident. This reflected adequate rigour and efficiency with the Department's search.
49. The Department was further able to provide documentation of these efforts.

*Conclusion*

50. The Information Commissioner is satisfied that the Department was justified in relying upon section 16(1)(a) of the PATI Act to administratively deny access to records responsive to items 1 and 3 of the request.

### ***Conclusion***

51. The Information Commissioner is satisfied the Department conducted a reasonable search for records responsive to item 2 of the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.
52. The Information Commissioner is further satisfied that the Department was justified in administratively denying access to a record responsive to items 1 and 3 under section 16(1)(a) of the PATI Act because the record did not exist after the Department took all reasonable steps to locate it.

## Decision

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The Information Commissioner finds that the Department of Education (**Department**) was justified in administratively denying part of the request in accordance with section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010 because the responsive record did not exist after the Department took all reasonable steps to locate it. The Information Commissioner further finds that the Department conducted a reasonable search in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014 to locate records responsive to the remainder of the request.

In accordance with section 48(1) of the PATI Act, the Information Commissioner affirms the Department's internal review decision.

## Judicial Review

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The Applicant, the Department of Education or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez  
Information Commissioner  
31 August 2020

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Access to records

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

...

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

#### 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 Regulation 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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