

Decision Notice

Decision 12/2020: Department of Education

School policy, protocol, procedures and student records

Reference no: 08032018-02

Decision date: 31 August 2020

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Education (**Department**) for the Department's policy, protocol or procedures on the handling and reporting of school incidents as well as records relating to a particular student. The Department refused the request in full under section 16(1)(a) of the PATI Act because the responsive records did not exist. The Applicant challenged the Department's administrative denial of the request.

The Information Commissioner has found that the Department's reliance on section 16(1)(a) was not justified because the Department did not take all reasonable steps to locate the records before administratively denying the PATI request. During this review, the Department took additional steps to locate the records and complied with the requirements of section 16(1)(a) of the PATI Act, as well as the reasonable search requirements in section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014. The Information Commissioner does not require the Department to take any further actions in this matter.

Relevant statutory provisions

Public Access to Information Act 2010: section 12(2)(b) (access to records) and 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

1. This review is related to Decisions 11/2020 and 13/2020. The background set out in Decision 11/2020 is not repeated, and these three Decision Notices should be read together.
2. On 25 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] the Applicant, namely the Ministry of Education or the Department's policy, protocol and procedures, whether mandatory or discretionary

for on or offsite from the Ministry of Education's property, namely within and/or outside of school hours for intervening in, reporting and/or recording all staff or student activities that are positive or negative behaviours, work input, etc. (**item 1**); and

[2] school behaviour and performance records from kindergarten to P6 of a specific student that allegedly attacked the Applicant (**item 2**).

3. For item 1, the Applicant specified that the PATI request sought procedures and documents required to be filled out as well as submitted through the educational system so that proper actions could be carried out in regard to any incident or infraction of the Department or Ministry's protocols.
4. On 29 November 2017, the Department refused item 1 of the PATI request in full under section 16(1)(a) of the PATI Act because the responsive record did not exist after reasonable steps were taken to locate it. The Department also relied on the exemption for personal information in section 23(1) of the PATI Act to refuse item 2 of the PATI request.
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 informed the Applicant that records responsive to items 1 and 2 did not exist. It further stated that any records responsive to item 2 "would have been exempt" under the personal information exemption in section 23(1) of the PATI Act.
6. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the Department's reliance on the administrative denial ground in section 16(1)(a) in refusing the PATI request.

Investigation

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 ground was justified.

9. On 21 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 took additional steps to locate records. These additional steps led to the identification of records responsive to item 2 of the PATI request. The Department process these records in accordance with the provisions of the PATI Act. It issued a new initial decision denying access to the records responsive to item 2 of the PATI request under the personal information exemption in section 23(1) of the PATI Act. The Applicant retained the rights to review of the Department's new initial decision, including the right to challenge the Department's reliance on section 23(1) of the PATI Act to deny access to the records. The Department's reliance on section 23(1) is not considered in this review.
11. The additional steps taken by the Department during facilitated resolution did not lead to the identification of any records responsive to item 1 of the PATI request. Instead, it resulted in the Department providing the Applicant with information on the general practices for the handling and reports of school incidents. The Department also provided the Application with its 2003 Code of Conduct¹, which, although it does not squarely fall within the scope of the PATI request, is relevant to the general topic the PATI request addresses.
12. The ICO Investigation Officer informed the Applicant of her preliminary view that the Department had taken reasonable steps to locate the responsive records, as required by the PATI Act and PATI Regulations 2014. The Applicant disagreed with the preliminary view and exercised their right to a decision by the Information Commissioner in accordance with section 47(6) of the PATI Act.
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. 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.

¹ Available at <https://www.moed.bm/DOE/Portal/bpss-code-of-conduct>.

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 the Department and the Applicant. She is satisfied that no matter of relevance has been overlooked.

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

15. 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 case².
16. 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.
17. The burden is on the public authority to show that, on the balance of probabilities, the responsive 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

Item 1

18. The Department submitted that it did not have any policies, procedures or protocols sought by the Applicant. The only record it held that resembled those sought by the Applicant is the Department's 2003 Code of Conduct, which is under revision.
19. As part of this review, and in the absence of a written policy, procedure or protocol during the relevant time period, the Department contacted its Assistant Director of Education Standards and Accountability to obtain information about the general

² Decision 04/2017, Department of Health, para. 41.

practices for the handling and reporting of school incidents. A summary of the general practices is set out in paragraphs 32 and 33 of the related Decision 11/2020 and is not repeated here.

Item 2

20. The Department did not provide specific submissions on what it initially considered the scope of item 2 of the PATI request.
21. During this review, the Department explained that it holds student records in physical files in its file room. It also holds student records in its electronic database, PowerSchool, which it started using in 2013/2014. This database captures student grades, their movements from one school to another and the incidents they were involved in. The Department confirmed that all data prior to 2013/2014 was migrated into PowerSchool.
22. The Department submitted that it searched the physical files in the file room before refusing the PATI request. The Department was unable to re-search the file room during the facilitated resolution because the room was declared unsafe in August 2018.
23. The Department also explained that it ran a search on PowerSchool and located records responsive to item 2 during the Information Commissioner's review. The Department provided the ICO with documentation of this search.

Applicant's submissions

24. The Applicant disagreed that the additional steps the Department took during this review resulted in reasonable searches.

Discussion

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

Item 1

25. The Department understood the PATI request to be seeking policies, protocols or procedures related to the handling of various incidents and their implementation.
26. The only potential disagreement between the parties on the Department's understanding of the request was the Applicant's assertion that the request should be understood to refer to policy, protocols or procedures concerning the Applicant specifically.

27. Policies, protocols and procedures are general in nature and do not ordinarily relate to specific individuals. In any event, the Applicant's related PATI request, considered in Decision 11/2020, would include within its scope any policies, protocols or procedures for the incident which happened to the Applicant, in particular.
28. In light of these circumstances, the quality of the Department's analysis of item 1 of the PATI request was adequate.

Item 2

29. The Department did not provide submissions on its understanding of item 2. Its internal review decision, however, makes clear that the Department understood item 2 to be seeking records limited to those related to an incident involving a specific student.
30. This analysis of item 2 of the PATI request was inadequate because the PATI request specifically sought the student's records from kindergarten to P6, and was not limited to records on a specific date.
31. During this review, the Department accepted that its initial understanding of item 2 was too narrow. The Department adopted a revised understanding of item 2 and, as noted above, conducted additional searches using an adequate understanding of the request.

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

Item 1

32. The scope of the Department's search for records responsive to item 1 of the PATI request before it issued its internal review decision is unclear. As a result, the Information Commissioner is not satisfied that the search for records responsive to item 1 is adequate.
33. During this review, however, the Department clarified the scope of the additional searches it conducted for records responsive to item 1. The Department explained that it contacted its Assistant Director of Education Standards and Accountability to confirm the non-existence of a written policy, procedure or protocol responsive to item 1. Further, the Department obtained information on the general practices for the handling and reporting of school incidents, which the Department then shared with the Applicant. The Department also shared an excerpt from its 2003 Code of Conduct.

34. As a result, the Department appropriately identified the relevant internal section and officer that would have knowledge of any written records responsive to item 1 of the PATI request. The Department's Education Standards and Accountability section is responsible for the overall supervision of schools and principals. It also maintains school incident reports and is responsible for school security.³
35. The Assistant Director of Education Standards and Accountability was also able to identify the unwritten general practices in place during the time period involved in item 1 and to locate the more recent 2003 Code of Conduct. This indicates that the scope of the locations searched during this review were also appropriate.
36. The Information Commissioner is satisfied that the scope of the Department's additional searches during this review was adequate, based on its analysis of item 1 of the PATI request.

Item 2

37. The Department identified the physical files in its file room and PowerSchool as the locations which potentially held records responsive to item 2 of the PATI request. The Department also submitted that it searched the physical files before refusing the PATI request. Unfortunately, there was no documentation of the search and the file room has since been declared unsafe. Although the Information Commissioner was unable to verify the searches that the Department conducted, nothing was presented during the review to question the veracity of the Department's representations.
38. The scope of the Department's initial search included the physical files, but did not include a search of PowerSchool. This was so despite the fact that historical records were migrated into the new database and no responsive records were found in the physical files.
39. The Information Commissioner is not satisfied that the scope of the Department's initial search for records responsive to item 2 was adequate because it did not include a location that was very likely to hold responsive records.
40. During this review, the Department conducted an additional search of PowerSchool, using the appropriate search terms, and located responsive records. The Information Commissioner is satisfied that the scope of the Department's search for records responsive to item 2 is now adequate.

³ Ministry of Education, PATI Information Statement, page 8.

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

Item 1

41. Because it is unclear what steps the Department took to locate records responsive to item 1 of the PATI request prior to its refusal, the Information Commissioner is not satisfied that the Department's search was conducted with adequate rigour and efficiency.
42. During this review, however, the Department engaged in additional searches for records responsive to item 1. This included contacting the Assistant Director of Education Standards and Accountability and searching the appropriate record locations.
43. The Information Commissioner is satisfied that the Department has now conducted its search with adequate rigour and efficiency.

Item 2

44. As noted above, the initial scope of the Department's search for records responsive to item 2 was inadequate, and this would lead to the rigour and efficiency of the search also being inadequate.
45. During this review, the Department conducted a search of PowerSchool. This was the only additional record location that the Department needed to search. The Department searched the database with sufficient rigour and efficiency, as evidenced by the documentation of the search the Department provided to the ICO.

Conclusion

46. The Information Commissioner is not satisfied that the Department was justified in administratively denying access to the records responsive to the PATI request under section 16(1)(a) of the PATI Act for the reasons set out above.
47. During this review, the Department took additional steps to comply with the requirements of section 16(1)(a) to administratively deny access to records responsive to item 1.
48. During this review, the Department also conducted additional searches for records responsive to item 2 of the PATI request and located responsive records. As a result, the Department's additional searches for records responsive to item 2 also comply with the reasonable search requirements in section 12(1)(b) of the PATI Act and regulation 5 of the PATI Regulations.

49. Finally, the Department has also issued a new initial decision on the records identified during this review. As a result, the Information Commissioner does not require the Department to take further actions on this matter.

Decision

The Information Commissioner finds that the Department of Education (**Department**) was not justified in administratively denying the request in accordance with section 16(1)(a) of the Public Access to Information (**PATI**) Act. During this review, the Department made additional efforts to meet the requirements of section 16(1)(a) the PATI Act, as well as section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014.

In accordance with section 48(1) of the PATI Act, the Information Commissioner affirms the Department's internal review decision with respect to item 1 and annul the Department's previous decisions with respect to item 2. The Department is not required to take any further actions with respect to this PATI request.

Judicial Review

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

Public Access to Information Act 2010

Access to records

12 ...

(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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