

Decision Notice

Decision 13/2020: Department of Education

Personal records and email correspondence

Reference no: 08032018-03

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 personal records related to the Applicant and the Applicant's email correspondence. The Department refused the Applicant's request, in part, under 16(1)(a) of the PATI Act because the responsive record could not be found after all reasonable steps were taken to locate it. The Department granted access to the remainder of the request.

The Applicant challenged the Department's reliance on the administrative denial ground as well as the reasonableness of the Department's search for records responsive to the PATI request.

The Information Commissioner has found that the Department's reliance on section 16(1)(a) of the PATI Act to refuse a part of the PATI request was justified because the Department took all reasonable steps to locate the responsive records before administratively denying that part of the PATI request. The Information Commissioner also has found that the Department complied with the reasonable search requirement of 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014 for the remainder of the request.

Relevant statutory provisions

Public Access to Information Act 2010: section 12(2)(b) (access to records); section 16(1)(a) (records cannot be found).

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 12/2020. The background set out in Decision 11/2020 is not repeated, and these three Decision Notices should be read together.
2. The Applicant was employed as a teacher within the Bermuda public school system for a fixed term but the precise date when the Applicant left this post is unclear from the disclosed records. Due to injuries from an alleged attack by a student, the

Applicant went on medical leave. The Applicant was then asked by the school to “collect her belongings”, which appeared to be around the end of the school year.

3. 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’s email correspondence within the website of the Department as well as the Ministry of Education Headquarters (**Ministry**), for a time period that was specified (**item 1**);
 - [2] the Applicant’s application for bursaries, loans and scholarships through the Department or Ministry, before or after the Applicant’s graduation from a Bermuda school, including achievements, outcomes and certifications gained and related correspondence regardless of the success of the application (**item 2**); and
 - [3] complete, archived email correspondence from the ‘education portal’ of the Applicant for the same specified time period as for item 1 (**item 3**).
4. On 29 November 2017, the Department refused the request in full on an administrative ground under section 16(1)(a) of the PATI Act because the responsive record could not be found after reasonable steps were taken to locate it. The Department informed the Applicant of the steps it took to locate the responsive record.
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 granted access to a number of records responsive to item 2 of the PATI request but upheld the administrative refusal of records responsive to items 1 and 3 under section 16(1)(a).
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) and the reasonableness of the Department’s searches for responsive records.

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 and whether its searches were reasonable.
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 ICO Investigation Officer sharing her preliminary view with the Applicant that the Department has complied with the requirements of the PATI Act and Regulations. The Applicant disagreed and exercised their right to a decision by the Information Commissioner, 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

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 prior to refusing the PATI request, it contacted the relevant officer at the Ministry who was responsible for managing scholarship applications to locate records responsive to item 2. The Ministry informed the Department that no responsive records were found.
17. The Department explained that, although it knew that the Ministry manages scholarship records, it processed item 2 of the PATI request to be helpful to the Applicant.
18. The Department transferred item 2 of the PATI request to the Ministry and notified the Applicant during this review.

Applicant's submissions

19. The Applicant provided background information, including their education background as well as information about the scholarship applications that they had submitted.

Discussion

20. The Information Commissioner considers the reasonableness of the search conducted by the Department to locate records responsive to item 2 of the PATI request.

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

21. Although the Department did not provide specific submissions on its understanding of item 2 of the PATI request, its search documentation shows that it understood the request to be seeking the Applicant's scholarship records.
22. The Information Commissioner is satisfied that the Department's analysis of item 2 of the PATI request was adequate.

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

23. In this case, the Department knew that the Ministry ordinarily holds scholarship records. Because the Ministry is a separate public authority, the Department did not need to ask the Ministry to search for the record so the Department could respond to the PATI request on the Ministry's behalf. Rather, the Department should have confirmed internally that it did not hold the responsive record and then transferred item 2 of the request, in accordance with section 13(5) of the PATI Act.
24. The Information Commissioner acknowledges that the Department was seeking to be helpful during this process and notes that the Minister's PATI Administrative Code of Practice¹ did not exist at the time the Department was handling this request.
25. The Department did not have any documentation that the scope of its internal search confirmed that it did not hold any scholarship records. The Ministry's response to the Department, however, confirmed that the Ministry ordinarily held scholarship records. In any event, the Department transferred item 2 of the PATI request to the Ministry during this review.
26. Under the circumstances of this case, the Information Commissioner accepts that the scope of the Department's search was adequate, although in the future, a transfer to the other public authority will be the appropriate action to take. The Department identified the location likely to hold the records and the Ministry confirmed this was, in fact, accurate.

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

27. The Department confirmed with the appropriate officer within the Ministry that scholarship records were located within the Ministry. The Department also provided documentation of its efforts to locate the responsive records during its initial handling

¹ Available at <https://www.gov.bm/sites/default/files/PATI-Administrative-Code-of-Practice.pdf>.

of the request. The Department made additional efforts to find records during the internal review.

28. In light of this, the rigour and efficiency of the Department's search for records responsive to item 2 was adequate.

Conclusion

29. 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 could not be found – section 16(1)(a)

30. 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.
31. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the factors listed in paragraph 14, above.
32. 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

33. The Department explained that it initially was unclear on the scope of item 1 of the PATI request.
34. The Department contacted its IT staff prior to refusing item 3 of the Applicant's request. The IT staff confirmed that the Applicant's prior email account with the Department did not appear in the Department's system. This meant that the email account was deleted and the Department was unable to retrieve any of the emails in the account.

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

35. The Department confirmed during this review that it did not have a written account retention and destruction policy for email accounts. In the absence of a written policy, the practice is for the Department's IT staff to liaise with a school and the Department's human resources section to obtain information on teachers leaving their posts. The Department's IT staff will first disable the email account of the relevant teacher. When storage becomes an issue, the Department's IT staff typically delete a disabled account within one or two years. Unless the deleted account is restored within a month, it is permanently deleted.
36. The Department provided documentation of the steps it conducted during the initial handling of the PATI request and during the Information Commissioner's review to locate records responsive to item 3 of the request.

Applicant's submissions

37. The Applicant provided background information and further clarification of the scope of the PATI request.
38. The Applicant expressed concern that the scope of item 1 of the PATI request has been understood too narrowly. The Applicant submitted that item 1 refers to more than just the emails sent by the Applicant via the Department's portal.
39. The Applicant clarified that the reference to 'educational portal' for item 3 includes the email account that the Applicant used while employed as a teacher within the Bermuda public school system.
40. The Applicant explained that they are particularly interested in receiving access to their email exchanges with particular individuals, including the former Commissioner of Education. The Applicant is also seeking emails related to an incident involving a student as well as emails about their professional development.
41. The Applicant is concerned that their colleague with the Department's IT was unable to access the Applicant's email account a month after the incident with the student. The Applicant would like to know who authorised the deletion of the email account, because the Applicant asserts that the employment contract was still in effect at the time. The Applicant attempted to access the email account again in 2011 to no avail.

Discussion

42. The Information Commissioner considers the Department's administrative denial of access to items 1 and 3 of the request under section 16(1)(a) of the PATI Act.

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

43. Both items 1 and 3 of the PATI request were clarified during the Information Commissioner's review, in light of the manner in which the Applicant wrote the original PATI request. The Applicant clarified that items 1 and 3 sought access to email exchanges between the Applicant and certain individuals within the Department, not just to emails sent by the Applicant.
44. The documentation of the Department's search shows that the Department understood that items 1 and 3 seek emails that were both sent and received by the Applicant in their email account with the Department, between the specified time period.
45. The Information Commissioner is satisfied that the Department's analysis of items 1 and 3 of the PATI request was adequate.

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

46. Based on the Department's understanding of items 1 and 3 of the PATI request, the Department identified as a potential location the email account the Applicant used during their employment as a teacher.
47. The Department contacted its IT section to locate the email account, which the Department's IT section attempted. This happened both during its initial handling of the PATI request and again during this review. These efforts revealed that the Department no longer had access to the Applicant's email account. As noted above in paragraph 35, the Department did not have a written retention and destruction policy but explained its general practise for deleting disabled accounts. The Information Commissioner has no reason to believe that the emails would be located elsewhere.
48. The Information Commissioner is satisfied that the scope of the search was adequate.

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

49. Through its IT section, the Department attempted to retrieve the Applicant's email account both during its handling of the PATI request and this review. The Department also contacted the relevant staff member to assist with the search. The Department was able to provide documentation of its various searches.
50. In light of this, the rigour and efficiency of the Department's search for records responsive to items 1 and 3 were adequate.

Conclusion

51. The Information Commissioner is satisfied that the Department was justified in relying on section 16(1)(a) to administratively deny access to records responsive to items 1 and 3 because the record could not be found after the Department took all reasonable steps to locate them.
52. The Information Commissioner acknowledges that the Applicant now seeks further information on the deletion of the relevant email account. As noted above in paragraphs 35 and 47, the Department did not have a written retention and destruction policy, but only a general practice. The Applicant also noted that emails were not retrievable shortly after the incident and following the Applicant's departure from the school, although it appears that this may be consistent with the Department's practices. The Applicant has the right to seek additional records under the PATI Act following the outcome of a prior PATI request that raises new questions.

Conclusion

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

Decision

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 PATI Act because the responsive record could not be found after the Department took all reasonable steps to locate it. The Information Commissioner further finds that the Department complied with the requirements of sections 12(2)(b) and regulation 5 of the PATI Regulations 2014 for the remainder of the PATI request.

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

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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