

Decision Notice

Decision 10/2021: Department of Child and Family Services

Records related to policies and protocols, complaints, disciplinary procedures, restraining orders, litigation guardians and legal fees

Reference no: 20190515-01

Decision date: 30 September 2021

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Child and Family Services (**DCFS**) for various records related to its work. DCFS provided information responsive to some items of the PATI request, but denied access to records responsive to the remaining items under section 37(1) of the PATI Act (disclosure prohibited by other legislation), section 16(1)(a) (records did not exist) or section 3(3) (responsive records not held).

The Information Commissioner has varied, in part, the internal review decision to deny access to one responsive record because it relates to the exercise of a judicial function of the Family Court and the PATI Act does not apply to it by virtue of section 4(1)(a) of the PATI Act. The Information Commissioner has also found that DCFS was not justified in relying on section 16(1)(a) to administratively refuse items 7, 8 and 9 of the PATI request because DCFS did not establish that, after taking all reasonable steps to locate them, the responsive records did not exist. Finally, the Information Commissioner also has found that DCFS was not justified in refusing item 11 of the PATI request because DCFS did not show that the records were not 'held by' DCFS within the meaning of section 3(3) of the PATI Act. The Information Commissioner has annulled DCFS's decisions on items 7, 8, 9 and 11 of the PATI request and ordered DCFS to conduct a reasonable search, process any responsive records and issue a new initial decision, in accordance with the provisions of the PATI Act and Regulations 2014.

Relevant statutory provisions

Public Access to Information Act 2010: section 3 (interpretation); section 4 (application); section 16(1)(a) (record does not exist).

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 August 2018, an advocate made allegations of misconduct against the staff members of the Department of Child and Family Services (**DCFS**), including its Director (**Director**). The allegations led to the Director being placed on administrative leave.¹
2. The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to DCFS on 10 October 2018, requesting the following:
 - a. DCFS's policy and/or protocol for dealing with complaints against staff members, particularly complaints of wrongdoing involving children (**item 1**);
 - b. details of any complaints made against DCFS staff between 1 October 2017 and 10 October 2018 (**item 2**);
 - c. the number of complaints against staff which were referred to the Head of the Public Service during the same timeframe (**item 3**);
 - d. details, including outcomes, of any inquiries launched as a result of complaints against DCFS staff for the same timeframe (**item 4**);
 - e. the number of staff who faced disciplinary procedures for the same timeframe (**item 5**);
 - f. details of any restraining orders made against DCFS staff for the same timeframe (**item 6**);
 - g. the number of times counsel from the Attorney-General's Chambers (**AG's Chambers**) were required to represent DCFS in court for the same timeframe (**item 7**);
 - h. the number of times DCFS opposed the appointment of a litigation guardian and lawyer for a minor for the same timeframe (**item 8**);
 - i. the number of times DCFS made an application for the appointment of a litigation guardian and lawyer for a minor for the same timeframe (**item 9**);
 - j. the amount of money spent by DCFS on counsel outside AG's Chambers for the fiscal year 2017/18 (**item 10**); and

¹ For more detailed background information on this matter, see Decision 05/2021, Ministry of Legal Affairs and Constitutional Reform Headquarters, paras. 1-6.

- k. details of when and why the Director was suspended, including the period of the suspension and whether the Director was on full or partial pay (**item 11**).

The Applicant expressly did not seek any information identifying minors.

3. On 2 January 2019, DCFS issued an initial decision in response to the PATI request. The initial decision provided the Applicant with information responsive to items 1-5 and 10 of the request. In the initial decision, DCFS also:
 - a. denied access to records responsive to item 6 of the request under section 37(1) because disclosure of the details of any restraining order is prohibited by section 17 of the Children Act 1998 (**Children Act**);
 - b. explained it did not collect statistics on the frequency of AG's Chambers attendance in court on DCFS matters, which would be responsive to item 7;
 - c. informed the Applicant it did not have any record indicating DCFS's opposition to the appointment of a litigation guardian and lawyer during the timeframe specified in the PATI request, which would be responsive to item 8;
 - d. in response to item 9, explained that the appointment of a litigation guardian and lawyer is at the discretion of the court and not upon application by DCFS or any other entity; and
 - e. informed the Applicant that records responsive to item 11 were not held by DCFS but rather by the Ministry of Legal Affairs Headquarters (**Ministry**). DCFS asked whether the Applicant would like item 11 to be transferred to the Ministry.
4. The Applicant confirmed on 22 January 2019 that they would like item 11 to be transferred to the Ministry. The Applicant also wrote to DCFS on 23 January 2019, seeking clarification on a number of points mentioned in the initial decision. The Applicant specifically asked whether AG's Chambers would hold records responsive to item 7 and, if so, requested for item 7 to be transferred to AG's Chambers.
5. The Applicant did not receive confirmation of transfers of item 7 or 11. During this review, DCFS informed the ICO that it did not respond to the Applicant's 23 January 2019 email.

6. Upon the Applicant's request, DCFS conducted an internal review and issued a decision on 7 May 2019². The internal review decision upheld the initial decision on item 6 and clarified that items 7, 8 and 9 of the request were refused under section 16(1)(a) because the responsive records did not exist. DCFS explained that, even if they existed, the records responsive to item 8 would be exempt under the legal professional privilege exemption in section 35(3) of the PATI Act. The internal review decision further informed the Applicant that records responsive to item 11 were not held by DCFS, in accordance with definition of 'held by' in section 3(3) of the PATI Act. DCFS also commented that any disclosable information had been given to the Applicant in a separate PATI request to another public authority.
7. The Applicant made a timely application on 15 May 2019 for an independent review by the Information Commissioner.

Investigation

8. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
9. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine whether its denial of access to the records was justified.
10. The Information Commissioner's Office (**ICO**) notified DCFS of the Applicant's valid application on 27 May 2019 and requested a copy of records responsive to item 6. DCFS provided a copy of a Family Court Order (**the item 6 record**). When submitting the record, DCFS changed its position to assert that the item 6 record falls outside the scope of the PATI Act in accordance with section 4(1)(a), because it related to the exercise of a judicial function by the Family Court.
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. DCFS and the Applicant were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review.

² The internal review decision was issued out of time, during and as a result of the Information Commissioner's review in Decision 11/2019, [Department of Child and Family Services](#).

12. Both DCFS and Applicant made submissions.

Information Commissioner's analysis and findings

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

Applicability of the PATI Act – section 4(1)(a)

14. Section 4(1)(a) of the PATI Act states that the PATI Act does not apply to records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person. The PATI Act would still apply, however, to records relating to their general administration, by virtue of section 4(2)(a).
15. Neither the PATI Act nor the Interpretation Act 1951 provides a definition of 'judicial functions'. It is well-established, however, that 'judicial functions' include the adjudicative functions (i.e., making an official decision about who is right between disagreeing parties³) of the court⁴.
16. As stated above, section 4(2) creates an exception to the removal of records from the scope of the PATI Act. The Information Commissioner has consistently understood 'records related to general administration' in section 4(2) as those records which have to do with the management of a public authority, such as those relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures and the like⁵.
17. For a record to fall outside the scope of the PATI Act under section 4(1)(a), the following must be considered⁶:

- [1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?
- [2] What is the relevant exercise of a judicial or quasi-judicial function to which the record relates?

³ Oxford Dictionary of English (3rd ed. 2010).

⁴ Decision 08/2021, Police Complaints Authority, para. 15.

⁵ Decision 19/2019, Department of Internal Audit, para. 19.

⁶ Decision 08/2021, Police Complaints Authority, para. 20.

- [3] Does the record relate to the general administration of the court, tribunal or other body or person, and come within the scope of the PATI Act by virtue of section 4(2)(a)?

Public authority's submissions

18. DCFS explained that the item 6 record is an Order of the Family Court, and thus is related to the exercise of a judicial hearing and produced by the judiciary.

Applicant's submissions

19. The Applicant did not comment on whether section 4(1)(a) is applicable to the records responsive to item 6. But the Applicant emphasised that the PATI Act must apply to responsive records not produced by the court, such as emails or other communication among staff of DCFS or the relevant Ministry.

Discussion

20. As a preliminary matter, the Information Commissioner notes that DCFS's initial decision stated that "any order" responsive to item 6 was exempt under section 37(1) because its disclosure is prohibited by the Children Act. In response, the Applicant argued that the relevant provision in the Children Act "does not mention orders of the court at all" and "does not say that orders of the court cannot be made public". The Applicant later urged in their submissions to the ICO in this review that records responsive to item 6 would include records other than those produced by the court, such as emails between DCFS staff. When DCFS was processing the PATI request, however, both DCFS and the Applicant understood that item 6 sought details of any restraining order.
21. In light of this, the Information Commissioner considers the applicability of section 4(1)(a) of the PATI Act to the Order of the Family Court, which is the only record DCFS identified as a responsive record for the time period in the PATI request. This Decision does not consider the applicability of section 4(1)(a) to other related records, if any, which may be sought in future PATI requests.

- [1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?

22. The item 6 record is an Order issued by the Family Court as a result of legal proceedings before the court.

[2] What is the relevant exercise of a judicial or quasi-judicial function to which the record relates?

23. Having reviewed the record, the Information Commissioner agrees with DCFS that the item 6 record relates to the adjudicative function of the Family Court.

[3] Does the record relate to the general administration of the court, tribunal or other body or person, and come within the scope of the PATI Act by virtue of section 4(2)(a)?

24. The Information Commissioner is satisfied that the item 6 record does not relate to the Family Court's general administration as it has nothing to do with the court's management.

Conclusion

25. The Information Commissioner is satisfied that the PATI Act does not apply to the item 6 record, in accordance with section 4(1)(a) because it relates to the exercise of the Family Court's judicial function and does not relate to the court's general administration.

26. Because the item 6 record does not fall within the scope of the PATI Act, the Information Commissioner does not consider DCFS's reliance on the exemption in section 37(1) of the PATI Act.

Record does not exist – section 16(1)(a) of the PATI Act

27. Public authorities are entitled to refuse a PATI request under section 16(1)(a) if the requested record does not exist or could not be found, after reasonable steps have been taken to locate them.

28. Regulation 5 of the PATI Regulations 2014 requires public authorities, through their Information Officers, to make reasonable efforts to locate records.

29. In cases where a public authority relies on section 16(1)(a) to refuse a PATI request, the Information Commissioner is required to assess the reasonableness of the search conducted by the public authority⁷. The Information Commissioner must determine whether, on the balance of probabilities, the public authority has established that the responsive records did not exist or could not be found after taking all reasonable steps

⁷ Decision 04/2017, Department of Health, para. 41.

to find them⁸. The Information Commissioner does not assess whether certain records should be held by a public authority. Neither is she required to establish the existence or non-existence of a record to the point of certainty.

30. In assessing the reasonableness of a public authority's search, the Information Commissioner considers the following factors⁹:

- [1] The quality of the public authority's analysis of the PATI 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.

31. The specific circumstances in each case will inform the Information Commissioner's assessment.

32. The public authority bears the burden to establish that the records did not exist or could not be found, after taking all reasonable steps to find them.

Public authority's submissions

33. DCFS asserted that records responsive to items 7, 8 and 9 did not exist.

34. DCFS explained that the scope of the PATI request was clear and did not require any clarification.

35. With respect to item 7, DCFS confirmed that AG's Chambers represented DCFS in some cases but explained that it does not collect statistics regarding the frequency of representation by AG's Chambers in court. It also explained that DCFS had seven sections which appear in court multiple times per week on child welfare matters, and none formally document statistics on whether clients are legally represented and on the frequency of their court appearances either in pending or concluded legal matters. DCFS explained that its client files would have file notes on hearing outcomes and if applicable, a court order issued at the end of each hearing. According to DCFS, however, it had no record that specifically captured information regarding legal representation.

⁸ Decision 04/2017, Department of Health, para. 48.

⁹ Decision 04/2017, Department of Health, para. 49.

36. DCFS submitted that over 900 client files were open at DCFS around the time of the PATI request. DCFS did not search these files as doing so would be extensive and unrealistic, thereby triggering the administrative denial in section 16(1)(c) based on substantial and unreasonable interference with or disruption to DCFS's other work.
37. With respect to item 8, DCFS submitted it did not have any record indicating its opposition to the appointment of a litigation guardian and lawyer during the time period specified in the PATI request. It also did not collect statistics on the number of times DCFS might have opposed the appointment of a litigation guardian and lawyer for minors. DCFS further explained that the appointment of a litigation guardian and lawyer is at the discretion of the court, in accordance with the Children Act. In its submission to the ICO, DCFS asserted that it was not aware of any records showing a DCFS instruction to AG's Chambers to oppose the appointment of a litigation guardian or lawyer.
38. On item 9, DCFS explained that the appointment of a litigation guardian and lawyer for minors is at the discretion of the court, and not upon application by DCFS or any other entity. As such, there is no record of DCFS applying for an appointment of a litigation guardian or lawyer for minors.

Applicant's submissions

39. The Applicant asserted that DCFS's explanation on not collecting statistics relevant to items 7, 8 and 9 does not mean that the responsive records did not exist. Instead, the explanation suggested that DCFS did not attempt to locate the records.
40. Regarding item 7, the Applicant submitted that DCFS was regularly represented by AG's Chambers in the Family Court. DCFS must be able to review its cases before the Family Court and ascertain the number of times DCFS had been represented by AG's Chambers. There was no reason not to disclose this information to the public, as DCFS and AG's Chambers are publicly funded and the information related to the operations of these public authorities.
41. On item 8, the Applicant explained their understanding that DCFS has been invited to make submissions on the appointment of a litigation guardian and lawyer for minors and had opposed such appointments on occasion. The Applicant emphasised the fact that the appointment being at the discretion of the court would not mean DCFS did not have any opportunity to express its view on such appointments. It also would not mean the responsive records did not exist. The Applicant questioned whether DCFS had searched its files to locate the responsive records, as there must be records in its files showing when DCFS sought to deter the court from making the appointments.

42. The Applicant clarified that item 9 of the request asked for records showing the number of times DCFS had applied for an appointment of a litigation guardian and counsel for minors. DCFS had not informed the Applicant of whether it had made any effort to locate the responsive records. The Applicant submitted that, if DCFS knew that it has never made such an application, then this should have been explained in response to the PATI request.
43. For context to the PATI request, the Applicant referred the ICO to the Court of Appeal judgment in Childwatch et al v The Family Court, The Minister of Social Development and Sports and the Director of DCFS, Civil Jurisdiction 2017: No. 230, and provided a copy of the Originating Summons dated 15 July 2017 in this case. The Applicant pointed to this case to highlight the opportunity for DCFS to make submissions to the Court on such appointments.

Discussion

44. The Information Commissioner considers DCFS's reliance on section 16(1)(a) to justify its responses to items 7, 8 and 9 of the PATI request.

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

45. Before discussing the substance of the matter, it is important to note that one of the purposes of the PATI Act is to give the public the right to obtain information held by public authorities. The mechanism for doing so is by accessing records held by those public authorities. A person wishing to obtain information from a public authority must make a request for records that contain the information sought. Requests for information or for answers to questions, as opposed to requests for records, are not valid requests under the PATI Act, except to the extent that a request for information or for an answer to a question can reasonably be inferred to be a request for a record containing the information or answer sought.
46. The Applicant framed some of the items in the PATI request, including items 7, 8 and 9, as questions. But the Information Commissioner is satisfied that items 7, 8 and 9 can reasonably be understood to be asking for records containing the information sought.
47. DCFS submitted the PATI request was "very clear and direct and did not require additional clarification". Consequently, DCFS never asked the Applicant to clarify the scope of the request or to check whether its understanding of the scope of the request was correct. Having reviewed the submissions from both parties, however, the

Information Commissioner concluded there was a gap between DCFS's understanding of the scope of items 7, 8 and 9 and what the Applicant was hoping to obtain.

48. DCFS understood item 7 of the PATI request to be asking for a specific record containing statistical information on the number of times it had been represented by AG's Chambers in court between 1 October 2017 and 10 October 2018. DCFS's understanding of the scope can be concluded from both its responses to the Applicant, stating it did not collect statistics regarding legal representation by AG's Chambers, as well as its submissions to the ICO stating there is no record in the client files specifically regarding their legal representation.
49. But, as the Applicant explained, item 7 of the PATI request did not ask for a record which specifically captures the statistical information. Instead, it asked for records indicating the number of times AG's Chambers represented DCFS between 1 October 2017 and 10 October 2018. This means item 7 could potentially be satisfied by either providing statistical numbers (if they were kept or easily extracted) or providing the 'raw' or underlying records from which the Applicant could derive their own tallies. By interpreting item 7 as a request for a specific record containing statistical information on representation by AG's Chambers, DCFS unreasonably narrowed the scope of item 7.
50. As with item 7, DCFS unreasonably narrowed its understanding of items 8 and 9 to be asking for a specific record containing statistical information, even though these items could be satisfied by either providing the records documenting DCFS's oppositions to or applications for the appointments of litigation guardians and counsel for minors between 1 October 2017 and 10 October 2018. The Information Commissioner is therefore not satisfied that DCFS's analysis of the scope of items 7, 8 and 9 was adequate.

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

51. Based on DCFS's response to the PATI request, the Applicant questioned whether DCFS took any steps to locate the records responsive to items 7, 8 and 9. DCFS acknowledged to the ICO that it had not taken steps to locate records responsive to these items. This was despite knowing its client files potentially stored responsive records, such as court orders which might be responsive to item 7. DCFS also did not provide any evidence showing that it consulted with its staff members who were involved in relevant litigation during the responsive period to assist in identifying whether the sought records were held and, if so, to locate these. For instance, DCFS's

submissions made no reference to any actions that might potentially narrow down the number or type of files to be examined to locate and extract information.

52. DCFS explained to the ICO that searching the client files would be an extensive and unrealistic exercise, which would amount to an unreasonable and substantial interference with or disruption to its other work, in accordance with section 16(1)(c) of the PATI Act. It is important to bear in mind, however, that this review does not and cannot assess DCFS's claim on section 16(1)(c) because DCFS did not refuse items 7, 8 and 9 under that administrative denial ground. DCFS never informed the Applicant that fully responding to these items would have caused an unreasonable and substantial interference with or disruption to its work.
53. Before relying on section 16(1)(c), public authorities must assist or offer to assist the requester to amend the PATI request, in accordance with section 16(2). DCFS did not offer this assistance to the requester. As such, it is premature for DCFS to rely on section 16(1)(c) and for the ICO to assess such reliance.
54. Even if this review were to consider DCFS's reliance on section 16(1)(c), the likelihood of the reliance being upheld would be questionable. In addition to the onus on DCFS to assist or offer to assist the requester to amend the PATI request as stated above, public authorities also have to attempt to locate the responsive records before refusing a request under section 16(1)(c). In this case, the Information Commissioner is not satisfied that DCFS had considered or explored avenues for obtaining the records that might reasonably be expected to contain some or all of the information sought by the requester.
55. The PATI Act imposes on public authorities a duty to make a reasonable effort to respond completely to PATI requests. Read together with the requirement to provide reasons for refusal, this duty obligates public authorities to provide an accurate explanation to the requester as to why a PATI request is refused. The explanation might not have any impact on the outcome, in that access to the responsive records would perhaps still be denied. Nonetheless, there is a value in the explanations themselves as they inform requesters of the practices, procedures and other aspects of the work of that public authority. From the public's perspective, it is very different for a public authority to state that responsive records do not exist as opposed to refusing the request because retrieving the records would be unreasonably and substantially burdensome.

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

56. Because DCFS acknowledged it did not take steps to locate records responsive to items 7, 8 and 9, the Information Commissioner is unable to assess the rigour and efficiency of its searches.

Conclusion

57. The Information Commissioner is not satisfied that DCFS correctly relied on the administrative ground in section 16(1)(a) of the PATI Act to deny access to records responsive to items 7, 8 and 9 because DCFS did not establish that, after taking all reasonable steps to locate them, the responsive records did not exist.

Definition of 'held by' – section 3(3)

58. Section 12(1) of the PATI Act gives Bermudians and residents access to non-exempt records held by public authorities. Section 3(3) defines a record and explains that it is 'held by' a public authority when it is "in the possession or custody of, or is under the control of, that authority".
59. The plain meaning of 'possession' is "the state of having, owning, or controlling something"¹⁰. Because the use of this plain and broad meaning might lead to an absurd and unintended outcome, a number of factors should be considered when determining whether a record in a public authority's possession is 'possessed' by that authority for purposes of the PATI Act, including whether the record relates to the authority's mandate, functions and operation, the extent of the authority using or relying on the record, etc.¹¹
60. A record is in the 'custody of' a public authority when it is in the physical possession of the authority, and the authority has the power to use, maintain, care for, dispose of or disseminate the record¹². If the public authority does not have physical possession of a record, but retains power over it (i.e., to restrict, regulate and administer its use, disclosure or disposition), then the record is 'under the control of' that authority¹³.
61. The Information Commissioner explained in Decision 11/2018, Bermuda Police Service that to determine what records it holds, a public authority must first conduct

¹⁰ Oxford Dictionary of English (3rd ed. 2010).

¹¹ Decision 11/2018, Bermuda Police Service, paras. 24-29.

¹² Decision 11/2018, Bermuda Police Service, para. 22.

¹³ Decision 11/2018, Bermuda Police Service, para. 23.

a reasonable search under the circumstances, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations¹⁴. The factors to be considered in determining whether a public authority's search was reasonable was set out in paragraph 30.

Public authority's submissions

62. DCFS submitted it does not hold records responsive to item 11 and that certain responsive records might be held by the Ministry. It also submitted that some of the responsive records fell within the scope of a separate PATI request made by the Applicant to the Ministry, and that any disclosable had been provided to the Applicant in response to that PATI request.
63. DCFS stated that there were no records responsive to item 11 of the request in the Director's personnel file.
64. DCFS also explained that it had not searched the Director's gov.bm email account or "physical files made by" its Information Officer because "any information would be held" by the Ministry.

Applicant's submissions

65. During the investigation, the Applicant confirmed they would like the Information Commissioner to review DCFS's response to item 11 of the PATI request. The Applicant submitted that they did not receive a confirmation of the transfer of item 11. Further, the Applicant was unsure of the meaning of DCFS's reference to another PATI request filed with the Ministry.
66. The Applicant asserted that, if the records being sought were available in the public domain, DCFS should have specified where these records could be found. DCFS referred to a disclosure made to the Applicant in response to a separate PATI request, but did not specify the request or describe it further. This left the Applicant unable to locate the referenced disclosure.

Discussion

67. There was no apparent discrepancy between what the Applicant was seeking and DCFS's understanding of item 11 of the PATI request. The Information Commissioner is satisfied that DCFS's understanding of item 11 was adequate.

¹⁴ Decision 11/2018, Bermuda Police Service, para. 20.

68. The Information Commissioner is not satisfied, however, that the scope of the search conducted by DCFS to locate the responsive records was adequate. DCFS asserted that it had searched the Director's personnel file, but no evidence of the search was provided. Even if it were accepted that the Director's personnel file had been searched, the scope of DCFS's search would still be inadequate because the Director's government email account was not searched. The Director's email is a reasonable potential location for records responsive to item 11 because any correspondence relating to the Director's administrative leave would likely be sent to or from that account.
69. DCFS explained that the Director's email account was not searched because the responsive records were held by the Ministry. This is not an acceptable explanation. The PATI Act requires public authorities to take reasonable steps to identify the requested records they hold. Public authorities need not, generally, concern themselves with records held by other public authorities. The question on what records are or might be held by other public authorities is relevant only when a public authority considers transferring a PATI request, either in full or in part. Even in that scenario, a public authority first has to ask itself whether it holds the records being sought and must take reasonable actions to answer that question, prior to transferring the request¹⁵. In this case, there is no evidence that DCFS took any reasonable steps to locate the responsive records.

Conclusion

70. Given the above, the Information Commissioner is not satisfied that DCFS was justified in refusing item 11 of the request because DCFS did not establish that the responsive records were not "held by" it, within the meaning of section 3(3) of the PATI Act.

Conclusion

71. The Information Commissioner is satisfied that DCFS's reliance on section 4(1)(a) to withhold the item 6 record was justified because the record relates to the exercise of a judicial function by the Family Court.
72. The Information Commissioner is not satisfied that DCFS was justified in relying on section 16(1)(a) to administratively refuse items 7, 8 and 9 of the PATI request because DCFS did not establish that, after taking all reasonable steps to locate them, the responsive records did not exist.

¹⁵ Decision 11/2018, Bermuda Police Service, para. 56.

73. Finally, the Information Commissioner is not satisfied that DCFS was justified to refuse item 11 of the request because DCFS did not establish that the responsive records were not 'held' within the meaning of section 3(3) of the PATI Act.

Decision

The Information Commissioner finds that the Department of Child and Family Services (**DCFS**) was justified in relying on section 4(1)(a) of the Public Access to Information (**PATI**) Act 2010 to deny access to one record responsive to item 6 of the PATI request because the Order related to the exercise of a judicial function by the Family Court. The Information Commissioner further finds that DCFS was not justified in relying on section 16(1)(a) to administratively refuse items 7, 8 and 9 of the PATI request because DCFS did not establish that, after taking all reasonable steps to locate them, the responsive records did not exist. Finally, the Information Commissioner finds that DCFS was not justified in refusing item 11 of the PATI request because DCFS did not establish that the responsive records were not 'held by' it, within the meaning of section 3(3) of the PATI Act.

In accordance with section 48 of the PATI Act, the Information Commissioner:

- varies DCFS's internal review decision on item 6 of the PATI request by upholding the decision to deny access to the item 6 record in accordance with section 4(1)(a) of the PATI Act;
- annuls DCFS's decisions on items 7, 8, 9 and 11; and
- orders DCFS to conduct a reasonable search to locate records responsive to items 7, 8, 9 and 11, following the instructions in the confidential cover letter to this Decision, process any responsive records and to issue a new initial decision to the Applicant according to the provisions of the PATI Act and Regulations.

The Information Commissioner requires that DCFS issue the new initial decision, as directed by this Decision and the accompanying Order, on or before **Thursday, 11 November 2021**.

Judicial Review

The Applicant, DCFS, 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.

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If DCFS fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez
Information Commissioner
30 September 2021

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Interpretation

3 ...

(3) In this Act, a reference to a record that is held by a public authority includes a record that is in the possession or custody of, or is under the control of, that authority.

...

Application

4 (1) Subject to subsection (2), this Act does not apply to—

(a) records relating the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person; or

...

(2) The reference to records in subsection (1) does not include records relating to the general administration of—

(a) any court, tribunal or other body or person referred to in subsection (1)(a).

...

Refusal of request on administrative ground

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;

...

**Information Commissioner for Bermuda
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