

Decision Notice

Decision 11/2022: Ministry of National Security Headquarters

Legal settlement payments

Reference no: 20191028

Decision date: 28 April 2022

Summary

The Applicant made a request under the Public Access to Information (PATI) Act 2010 to the Ministry of National Security Headquarters (**Ministry Headquarters**) for records relating to the legal settlement payments made to certain individuals participating in the protest on 2 December 2016. The Ministry Headquarters made a partial disclosure in response to the PATI request but denied access to records explaining the basis for the payment calculations as well as the names of the payment recipients under sections 16(1)(a) (record does not exist) and 35 (legal professional privilege exemptions).

The Information Commissioner has found that the PATI Act does not apply to the names of the payment recipients by virtue of section 4(1)(b)(vi), because the list containing them was created or obtained by the Attorney General's Chambers in the course of carrying out its functions. The Information Commissioner has further found that the Ministry Headquarters was not justified in relying on section 16(1)(a) to deny public access to records explaining the basis for the payment calculations, because it did not take reasonable steps to locate the responsive records before concluding that the records did not exist.

The Information Commissioner has ordered the Ministry Headquarters to conduct a reasonable search for responsive records and issue a new initial decision to the Applicant on this part of the PATI request.

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 the statutory provisions cited above is reproduced in the Appendix to this Decision. The Appendix forms part of this Decision.

Background

1. On 2 December 2016, a protest against the redevelopment proposal for the L.F. Wade International Airport was held outside the House of Assembly. Officers of the Bermuda Police Service (**BPS**) used captor spray, commonly known as 'pepper spray', against the protestors. A number of individuals were injured by the pepper spray, including seniors.

2. In response to the BPS's use of the pepper spray, 26 complaints were filed to the Police Complaints Authority (**PCA**). The PCA released its public report on the 26 complaints on 10 August 2017.
3. On 8 February 2018, a number of individuals submitted an application for judicial review challenging the PCA report (**the judicial review**). The Supreme Court granted leave for the judicial review application.
4. In February 2019, the media reported that the parties to the judicial review had reached an agreement to settle the matter and that the complainants were financially compensated¹.
5. On 3 May 2019, the Applicant made the following Public Access to Information (**PATI**) request to the Ministry of National Security Headquarters (**Ministry Headquarters**) asking for records relating to the settlement payments, specifically those showing:
 - a. the number of payments made (**item 1**);
 - b. the basis or matrix for deciding the payment figure to be received by each protester (**item 2**);
 - c. the figure of each payment (**item 3**);
 - d. the names of the payment recipients (**item 4**);
 - e. the person authorising the payments (**item 5**);
 - f. when the payments were authorised (**item 6**); and
 - g. the sources of the payments (i.e., which Government Department and Budget Head) (**item 7**).
6. On 25 June 2019, the Ministry Headquarters issued an initial decision that provided the Applicant with information responsive to items 1, 3, 6 and 7 of the PATI request. The Ministry Headquarters was unable to give a definitive response to item 5 of the request, but explained that its Financial Comptroller received the approval for the payments from the then-Permanent Secretary. In response to item 2, the Ministry Headquarters informed the Applicant that there is "no record or document to explain" the basis or matrix for deciding how much each protestor should receive. The Ministry Headquarters provided the Applicant with a copy of the list of payment recipients (**list**

¹ Settlements made following pepper spraying, [Bernews](http://bernews.com/2019/02/settlements-made-following-pepper-spraying), 12 February 2019, available at bernews.com/2019/02/settlements-made-following-pepper-spraying.

of payments), with the names of the recipients responsive to item 4 of the request redacted under the personal information exemption in section 23(1) of the PATI Act.

7. On 8 July 2019, the Applicant asked the head of the authority to conduct an internal review of the Ministry Headquarters' initial decision on items 2 and 4 of the PATI request.
8. The Ministry Headquarters issued its internal review decision on 16 October 2019². The internal review decision upheld the Ministry Headquarters' reliance on section 16(1)(a) to deny access to item 2 of the request. It also found that the names of the payment recipients responsive to item 4 of the request should be withheld under the legal professional privilege exemptions in section 35 of the PATI Act. During this review, the Ministry Headquarters clarified that it is relying on exemptions in both section 35(1) and (3).
9. The Applicant made a timely application for an independent review by the Information Commissioner.

Investigation

10. 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.
11. 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 reliance on the administrative ground and exemption was justified.
12. On 5 November 2019, the Information Commissioner's Office (**ICO**) notified the Ministry Headquarters of the valid application and requested a copy of the records responsive to item 4 of the PATI request. The Ministry Headquarters provided the ICO with a clean copy of the list of payments on 9 December 2019.
13. During this review, the ICO raised with the parties that the list of payments might fall outside the scope of the PATI Act by virtue of section 4(1)(b)(vi) because it was created

² This internal review decision was issued during and in response to the Information Commissioner's Decision 22/2019, Ministry of National Security Headquarters.

or obtained by the Attorney General’s Chambers (**AG’s Chambers**) in the course of the performance of its functions.

14. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. Both the Ministry Headquarters and the Applicant were invited to comment on the applicability of the PATI Act to the list of payments as well as the Ministry Headquarters’ reliance on the administrative ground in section 16(1)(a), for the Information Commissioner’s consideration. The ICO received submissions from both the Ministry Headquarters and the Applicant.
15. In response to the ICO Investigation Officer’s preliminary view that the Ministry Headquarters’ reliance on section 16(1)(a) was not justified because it had not conducted a reasonable search, the Ministry Headquarters submitted that it did not hold email records of its former Permanent Secretaries or Ministers. In light of this submission, the Ministry Headquarters was informed on 26 October 2021 that the Information Commissioner’s review will also consider whether it held the email accounts of the relevant former Minister and Permanent Secretaries. The Ministry Headquarters did not make further submissions, despite being given a reasonable opportunity to do so.

Information Commissioner’s analysis and findings

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

Applicability of the PATI Act – section 4(1)(b)(vi)

17. The scope of the application of the PATI Act may be determined by section 4, which lists the classes of materials to which the legislation does not apply³. According to section 4(1)(b)(vi), the PATI Act does not apply to records obtained or created by certain public authorities in the course of carrying out their functions.
18. In accordance with the definition in the Interpretation Act 1951, ‘functions’ should be understood as “powers conferred, or duties imposed, on a public authority or public officer by or under any provision of law”.

³ See Attorney General v Information Commissioner [2022] SC (Bda) 6 Civ (25 January 2022), para. 24.

19. The PATI Act applies to records relating to the general administration of those certain public authorities by virtue of section 4(2)(b). In Attorney General v Information Commissioner, para. 37, Puisne Judge Williams adopted the definition of ‘general administration’ set out by the Irish Information Commissioner, i.e., as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures and the like. Puisne Judge Williams further agreed that records related to matters concerning the core business of the relevant public authority are not records relating to its general administration⁴.
20. For a record to be removed from the scope of the PATI Act’s application by virtue of section 4(1)(b), the following must be considered:
 - [1] Was the record obtained or created by one of the public authorities listed in section 4(1)(b)?
 - [2] Was the record obtained or created by that public authority in the course of carrying out its functions?
 - [3] Does the record relate to that public authority’s general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?
21. Because section 4(1) addresses the applicability of the PATI Act, the Information Commissioner may consider this provision on her own accord when the parties do not raise it, as has occurred in this review.

Public authority’s submissions

22. The Ministry Headquarters explained in its internal review decision that the list of payments responsive to item 4 of the request is contained in a confidential settlement document prepared by AG’s Chambers. The document was then sent to the lawyers representing the Government to execute the settlement.

Applicant’s submissions

23. The Applicant expressed concerns with the seeming lack of transparency around the payments, recipients and their circumstances. The Applicant asserted that this matter

⁴ See Attorney General v Information Commissioner, para. 40. In Decision 02/2019, Office of the Governor, para. 20, the Information Commissioner adopted this definition of ‘general administration’ as applied by the Irish Information Commissioner. See also Decision 06/2022, Attorney General’s Chambers, para. 21; Decision 20/2021, Office of the Clerk of the Legislature, para. 15; Decision 09/2021, Human Rights Commission, para. 17; Decision 05/2020, Human Rights Commission, para. 15; and Decision 19/2019, Internal Audit Department, para. 19.

related to good governance, which was a “classic circumstance for the mandate of the ICO”.

24. The Applicant was of the view that the public interest requires disclosure of the recipients’ names.
25. The Applicant accepted that the list of payments could have been a record created or obtained by AG’s Chambers. But the Applicant highlighted that this was not the reason which the Ministry Headquarters provided to them in refusing access to this list. Instead, the Ministry Headquarters only informed the Applicant that it was unable to provide the responsive record because it is exempt.

Discussion

26. The Information Commissioner considers the applicability of section 4(1)(b) to the recipients’ names in the list of payments responsive to item 4 of the PATI request only, because the payment figures were released at the initial decision stage.

[1] Was the record obtained or created by one of the public authorities listed in section 4(1)(b)?

27. The Information Commissioner accepts the Ministry Headquarters’ submission that the list of payments is part of a confidential settlement document prepared by AG’s Chambers, which is a public authority listed in section 4(1)(b)(vi).

[2] Was the record obtained or created by that public authority in the course of carrying out its functions?

28. Given the pending litigation at the time, the Information Commissioner is satisfied that the list of payments was created by AG’s Chambers in the course of exercising its functions as the principal legal advisor to the Government, in accordance with section 71(1) of the Bermuda Constitution Order 1968.

[3] Does the record relate to that public authority’s general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

29. The list of payments directly relates to the core functions, instead of the general administration, of AG’s Chambers. It is not a record that is related to activities which are common to all public authorities, such as building management, human resource or personnel, information systems and other common management processes. Although the list may relate to the Ministry Headquarters’ general administration (i.e.,

finances), it is removed from the scope of the PATI Act because it relates to the core functions of AG's Chambers.

Conclusion

30. The Information Commissioner is satisfied that in accordance with section 4(1)(b)(vi), the PATI Act does not apply to the recipients' names in the list of payments responsive to item 4 of the request because the list was created by AG's Chambers in the course of carrying out its functions. The list was not a record that is related to AG's Chambers' general administration.
31. Because the Information Commissioner finds that the PATI Act does not apply to the recipients' names, the Ministry Headquarters' reliance on the exemption for legal professional privilege in section 35(3) need not be considered.

Record does not exist – section 16(1)(a)

32. Public authorities are entitled to refuse a PATI request under section 16(1)(a) if the requested records did not exist or could not be found after reasonable steps have been taken to locate them.
33. Regulation 5 of the PATI Regulations 2014 requires public authorities, through their Information Officers, to make reasonable efforts to locate records. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate the records.
34. 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 authority under the circumstances⁵. 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 to find them⁶.
35. Public authorities are required to make efforts only to locate records that they hold. In accordance with section 3(3), a record is held by a public authority if it is in the possession or custody of, or is under the control of, that authority. Relevant to this review are the records that are under the control of a public authority.

⁵ See Decision 04/2017, Department of Health, para. 41.

⁶ See Decision 04/2017, Department of Health, para. 48.

36. The Information Commissioner explained in her Decision 11/2018, Bermuda Police Service that a record is under the control of a public authority when it has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition. This includes an instance where a public authority does not have physical possession of a record but retains control over it⁷.
37. In assessing the reasonableness of the public authority's search, the Information Commissioner considers the following factors:
 - [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.
38. The specific circumstances in each case will inform the Information Commissioner's assessment of the objective reasonableness of the public authority's efforts.
39. Finally, 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

40. In its internal review decision, the Ministry Headquarters explained the context for why it maintains that no written record documents the basis or matrix for deciding how much each protester should receive. The Ministry Headquarters explained that, because the 2 December 2016 protest happened under the previous Government administration, any legal matters or discussions would have been initiated under that administration. The change of administration in 2017 led to personnel changes within the Ministry Headquarters and the appointment of a new Minister assuming responsibility for any discussions around litigation or settlement. By the time the Head of Authority who conducted the internal review arrived at the Ministry Headquarters, discussions on the payment amounts had already occurred and the direction to make the payments already agreed.
41. The internal review decision explained that, at around the time of the internal review, the Ministry Headquarters enquired with technical officers and elected officials who had been involved in addressing the matter. The Ministry Headquarters was informed

⁷ See Decision 11/2018, Bermuda Police Service, para. 23.

that the discussions around the payments were not documented, given the sensitive nature of the matter.

42. The Ministry Headquarters' internal review decision acknowledged the difference with one of the payments and explained that it would have been determined by those involved in the discussions. The Permanent Secretary who conducted the internal review offered their individual opinion that the decision "would reasonably be a combination of factors such as the particular individual circumstances, potential additional liability and the merits of the claim".
43. In its submissions in this review, the Ministry Headquarters explained that it searched the government email account of the Permanent Secretary who had conducted the internal review but did not identify any responsive record. It also submitted that it contacted AG's Chambers. The Ministry Headquarters admitted, however, that the search was not documented.
44. The Ministry Headquarters explained to the ICO that it did not search the government email accounts of the former Minister of National Security or its former Permanent Secretaries because it does not hold their email records.

Applicant's submissions

45. The Applicant understood the payment figures were determined by the Ministry Headquarters. They highlighted that one payment was notably higher than the others and, in their view, a record that speaks to this must exist.
46. The Applicant expressed concerns that the determination to make the discretionary payments to unnamed individuals happened during undocumented private conversations. The Applicant was further concerned that, without clear lines qualifying them, the payments from the public purse could appear to be random.

Discussion

47. The Information Commissioner considers the reasonableness of the Ministry Headquarters' search to locate records responsive to item 2 of the PATI request (the matrix or basis for deciding the payment figure to be received by each protester).

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

48. While the Ministry Headquarters did not provide specific submissions explaining its understanding of the scope of item 2, it is clear from the Ministry Headquarters' internal review decision that it understood item 2 to be asking for records explaining

the calculation of the figures of the payments, particularly with regard to one payment that was significantly higher than the rest.

49. The Information Commissioner is satisfied that the Ministry Headquarters' analysis of item 2 of the request was adequate.

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

50. The Ministry Headquarters submitted that it searched the government email account of the Permanent Secretary who conducted the internal review and that it made queries to technical officers and AG's Chambers. In the absence of any search documentation, as required by regulation 5(2) of the PATI Regulations, the scope of this search could not be verified.
51. Even if it were accepted that the Ministry Headquarters took the steps above, the Information Commissioner is not satisfied that the search was reasonable. As the Ministry acknowledged, it did not search the government email account of the then-Minister of National Security who was involved in the judicial review challenging the PCA report. The Ministry Headquarters only searched the email account of the Permanent Secretary who conducted the internal review, even though three individuals had assumed the role of Permanent Secretary for the Ministry Headquarters during the relevant period⁸.
52. The Ministry Headquarters explained that the discussions on the payment amounts had already taken place and the direction had been agreed on by the time the Permanent Secretary who conducted the internal review had assumed their post. Given that the Permanent Secretary who conducted the internal review was the one who approved the payments, it was reasonable that the Ministry Headquarters searched that former Permanent Secretary's records, including their government email account. But it is also reasonable to conclude that the records responsive to item 2 could be held in the records of the former Minister and other former Permanent Secretaries in post at the time of the negotiations, given these individuals were in the relevant posts at the time the settlement figures were determined.
53. The Information Commissioner does not accept the Ministry Headquarters' argument that it did not hold government email records of former Ministers or Permanent

⁸ The PCA report was published in August 2017 and the settlement payments were made on 12 February 2019. For information on the Permanent Secretaries for the Ministry Headquarters between August 2017 and February 2019, see the Government of Bermuda's organisational charts as of [July 2017](#), [April 2018](#), [September 2018](#) and [March 2019](#).

Secretaries at the time of the request. As explained above, a public authority holds a record if the record is in the possession or custody of, or under the control of, that authority. When asked directly during this review, the Ministry Headquarters offered no explanation or support for why these records are not viewed as institutional records it holds.

54. In particular, email records of public officers formerly working in the Ministry Headquarters, such as a former Permanent Secretary that has retired or been assigned to a new Ministry, are reasonably viewed as institutional records managed by the original public authority. Such email correspondence is not a privately held record of the individual. Nor would it be reasonable to assert that emails discussing the business of the Ministry Headquarters would convert to records held by another public authority at the time a Permanent Secretary were to be assigned to a different public authority.
55. One can reasonably imagine numerous scenarios where information required by the Ministry Headquarters is contained within former officers' email correspondence and, in the absence of explanation to the contrary, remains a part of the Ministry Headquarters' records for purposes of the PATI Act. The Ministry Headquarters' control over these email accounts and the emails stored in those accounts is evidenced by its ability to request access to them from the Government's Information and Digital Technologies Department. The Ministry Headquarters has not pointed to a record management policy nor any other practice that would explain why these emails were not a part of the Ministry Headquarters' records. At a minimum, the email accounts of the former Minister and Permanent Secretaries are locations that should have been included in a reasonable search to locate records responsive to item 2 of the PATI request.
56. Based on the above, the Information Commissioner is not satisfied that the scope of the Ministry Headquarters' search was adequate. The Information Commissioner need not further consider the Ministry Headquarters' reliance on section 16(1)(a).

Conclusion

57. The Information Commission is not satisfied that the Ministry Headquarters justified its reliance on section 16(1)(a) for item 2 of the PATI request, because all reasonable steps were not taken to locate the records before concluding that they did not exist.

Conclusion

58. The Information Commissioner finds that the redacted recipients' names in the list of payments responsive to item 4 do not fall within the scope of the PATI Act by virtue of section 4(1)(b)(vi), because the list was obtained or created by AG's Chambers in the course of carrying out its functions.
59. The Information Commissioner further finds that the Ministry Headquarters did not justify its reliance on section 16(1)(a) to administratively deny access to records responsive to item 2 of the PATI request. This is because the Ministry Headquarters did not take all reasonable steps to locate the records before concluding that they did not exist.

Decision

The Information Commissioner finds that by virtue of section 4(1)(b)(vi) of the Public Access to Information (**PATI**) Act 2010, the Act does not apply to the names of recipients redacted from the list of payments responsive to item 4 of the PATI request. The Information Commissioner further finds that the Ministry of National Security Headquarters (**Ministry Headquarters**) was not justified in relying on section 16(1)(a) to administratively deny access to item 2 of the PATI request, because it did not take reasonable steps to locate the records prior to concluding that the records did not exist.

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

- varies the decision to deny access to the recipients' names in the list of payments responsive to item 4, because this information is excluded from the scope of the PATI Act by virtue of section 4(1)(b)(vi);
- annuls the decision with respect to item 2 of the PATI request;
- requires the Ministry Headquarters to conduct a reasonable search for records responsive to item 2 of the PATI request and document its search, in accordance with section 12 of the PATI Act and regulation 5 of the PATI Regulations 2014; and
- requires the Ministry Headquarters to issue a new initial decision to the Applicant with respect to item 2 of the PATI request, which includes the processing of any newly located records responsive to item 2, i.e., decide to withhold or disclose them.

The Information Commissioner requires that the Ministry Headquarters comply with the requirements above, as directed by this Decision and the accompanying Order, on or before **Thursday, 9 June 2022**.

Judicial Review

The Applicant, the Ministry of National Security Headquarters, 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 the Ministry of National Security Headquarters 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
28 April 2022

Appendix: 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—

...

(b) records obtained or created by any of the following public authorities in the course of carrying out their functions—

...

(vi) the Attorney General's Chambers;

...

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

...

(b) any public authority referred to in subsection (1)(b).

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;

...

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