



Decision Notice

**Decision 02/2023: Ministry of Social Development and Seniors
Headquarters**

Report on misconduct allegations

Reference no: 20220106-01

Decision date: 28 February 2023

Summary

The Ministry of Social Development and Seniors Headquarters (**Ministry Headquarters**) received a transferred request under the Public Access to Information (**PATI**) Act 2010 for the full report on allegations of misconduct against the Director of Child and Family Services. The Ministry Headquarters administratively denied the request under section 16(1)(a) because the requested record did not exist.

The Information Commissioner has found that the Ministry Headquarters was justified in administratively denying the request under section 16(1)(a) of the PATI Act.

Relevant statutory provisions

Public Access to Information Act 2010: section 16(1)(a) (record does not exist).

The Appendix provides the text of the statutory provision and forms part of this Decision.

Background

1. On 3 September 2021, the Ministry of Social Development and Seniors Headquarters received a transferred request under the Public Access to Information (PATI) Act 2010 from the Ministry of Legal Affairs and Constitutional Reform Headquarters. The background for the PATI request is set out at length in Decision 01/2023, and these related Decision Notices should be read together.
2. The transferred PATI request consisted of a part of the Applicant's original PATI request dated 30 January 2019, seeking "the full report into allegations of misconduct against [the Director of Child and Family Services]". The Applicant maintained that the matter had been conducted by the then-Ministry of Social Development and Sports Headquarters, which was responsible when an advocate sent a letter dated 10 August 2018 with misconduct allegations against officers at the Department of Child and Family Services (**DCFS**), including the Director (**allegation letter**), or by the then-Ministry of Legal Affairs Headquarters, which had remit for DCFS shortly after.
3. On 15 October 2021, the Ministry of Social Development and Seniors Headquarters denied the transferred PATI request under section 16(1)(a) of the PATI Act, on the basis that the record did not exist.

4. On 19 October 2021, the Applicant asked for an internal review. On 22 December 2021, the Ministry of Social Development and Seniors Headquarters issued its internal review decision, affirming the initial decision under section 16(1)(a).
5. On 6 January 2022, the Applicant made a timely application for an independent review by the Information Commissioner of the Ministry of Social Development and Seniors Headquarters' internal review decision refusing the request.

Investigation

6. 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.
7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required.
8. On 17 January 2022, the ICO notified the Ministry of Social Development and Seniors Headquarters of the Applicant's valid application.
9. During this review, the Information Commissioner requested for the Head of Authority for the Ministry of Social Development and Seniors Headquarters to submit a sworn affidavit. As explained below, this Permanent Secretary was considered to hold crucial evidence due to their personal work knowledge and responsibility for two Ministries that had remit for DCFS during different periods while item 1 of the original PATI request had been handled.
10. Specifically, the Permanent Secretary had personal work knowledge arising from the then-Ministry's response to the misconduct allegations in 2018-2019. The Permanent Secretary was also the Head of Authority (for PATI purposes) for a time when the then-Ministry of Legal Affairs Headquarters had remit for DCFS. They had carried out an internal review for the original PATI request in July 2019. In addition, they were involved later in making submissions on the public authority's behalf during the Information Commissioner's prior related review of this PATI request's handling.

11. On 29 September 2022, the Permanent Secretary submitted a sworn affidavit to the Information Commissioner, which replied to the ICO Investigation Officer’s preliminary view on the non-existence of any responsive record (**affidavit evidence**).¹
12. 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 of Social Development and Seniors Headquarters and the Applicant were invited to make submissions during this review and did so.

Information Commissioner’s analysis and findings

13. In coming to this Decision, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Ministry of Social Development and Seniors Headquarters and the Applicant, as well as other public authorities in prior or related reviews. She is satisfied that no matter of relevance has been overlooked.

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

14. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it.
15. Regulation 5 of the PATI Regulations 2014 (**PATI Regulations**) requires public authorities, through their Information Officers, to make reasonable efforts to locate records responsive to a PATI request. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate any record.
16. When a public authority denies a PATI request under section 16(1)(a) because a record does not exist or cannot be found, the Information Commissioner’s review does not determine to a point of certainty if a record does not exist or is lost. Rather, the Information Commissioner is required to assess whether the public authority took all reasonable steps to find the record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration.²

¹ This affidavit evidence also formed part of the submissions considered on behalf of the Ministry of Legal Affairs and Constitutional Reform Headquarters in Decision 01/2023.

² See [Decision 08/2021](#), [Police Complaints Authority](#), at para. 92.

17. In assessing the reasonableness of the public authority's search, the Information Commissioner considers the following factors³:

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

[2] the scope of the search made on the basis of that analysis; and

[3] the rigour and efficiency with which the public authority conducted its search.

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

19. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.

Public authority's submissions

20. The Ministry of Social Development and Seniors Headquarters submitted that the record sought by the Applicant, as described in the PATI request in paragraph 2 above, never existed as a matter of fact. This was supported by the affidavit evidence, which was based on the Permanent Secretary's personal work knowledge while carrying out their official duties, as noted above in paragraphs 9-10. The Permanent Secretary consistently maintained their position in this review and in the review for Decision 01/2023.

21. Provided at the request of the ICO, the Permanent Secretary stated in the affidavit evidence that the only record ever produced, which met the description of item 1 of the original PATI request, was a report by the Department of Internal Audit dated 14 December 2018 (**Internal Audit Report**): the one report that "concerned the allegations against the Director". The Permanent Secretary emphasised their understanding that the Internal Audit Report did not come within the scope of the PATI Act by virtue of section 4 of the Act, and noted the Information Commissioner's [Decision 19/2019, Department of Internal Audit](#), that affirmed this position.

22. Through the Permanent Secretary's affidavit evidence, the Ministry of Social Development and Seniors Headquarters submitted that it was incorrect for the Applicant to believe that a "part of the investigation was carried out by the Permanent Secretary responsible for DCFS", although a government spokesperson for the then-Ministry of Legal Affairs Headquarters was quoted in the media as having said this in February 2019.

³ See [Decision 04/2017, Department of Health](#), at para. 49; and more recently [Decision 20/2022, Department of Public Lands and Buildings](#), at para. 17.

The Ministry of Legal Affairs and Constitutional Reform Headquarters had previously explained to the ICO that the investigation into the misconduct allegations “was not part of any separate disciplinary process at the Ministry”.

23. In support of this factual position, the Ministry of Social Development and Seniors Headquarters relied upon the affidavit evidence confirming the Permanent Secretary’s personal knowledge for the period beginning 18 November 2018, when they assumed responsibility for the then-Ministry of Legal Affairs Headquarters and “inherited the process” of the Department of Internal Audit’s review.
24. In the affidavit evidence, the Permanent Secretary affirmed, based on their personal knowledge, that the then-Ministry of Legal Affairs Headquarters itself was never involved in any investigation into DCFS matters apart from the two investigations carried out by the Department of Internal Audit, which resulted in separate reports: the first dated 14 December 2018, addressing the allegation against the DCFS Director; and the second dated 14 January 2019, a follow-up on the Department of Internal Audit’s 2015 report on DCFS operations.

Applicant’s submissions

25. To the Applicant, the issue that item 1 of their original PATI request meant to answer was: where is the report, and is there any reason it cannot be released to the public? The Applicant believed the government’s answer was still outstanding almost four years after making their PATI request.
26. The Applicant maintained that the government had officially disclosed the existence of the requested report, for some investigation or inquiry as conducted by the then-Ministry of Social Development and Sports Headquarters or the then-Ministry of Legal Affairs Headquarters prior to or separate from the one by the Department of Internal Audit. The Applicant maintained that there were two reports on the allegations against the DCFS Director.
27. In support, the Applicant pointed to certain statements, including the Premier’s statement on 14 December 2018, the government’s press release on 25 January 2019 as well as the Department of Communications’ email replies to media queries on 6 September 2018 and 26 February 2019.

Discussion

28. The Information Commissioner notes from the outset how this review involved assessing public authorities’ submissions that raised questions on apparent inconsistencies with

prior public statements about the nature of reports into the misconduct allegations, which arose in the context of services provided to some of Bermuda's most vulnerable population.

29. In light of the need to resolve these apparent inconsistencies, the Information Commissioner required the Ministry of Social Development and Seniors Headquarters to provide affidavit evidence in support of its factual position—a form of evidence not usually required during reviews. As explained below, the Information Commissioner places great weight on the Head of Authority's evidence, arising from their personal work knowledge of the events as they had taken place in 2018-2019, when contrasted with other statements by public officials which, on their face, presented inconsistent detail.

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

30. The Information Commissioner accepts that the Ministry of Social Development and Seniors Headquarters has correctly understood the transferred PATI request as seeking any document that recorded the outcome of any inquiry undertaken by either the then-Ministry of Social Development and Sports Headquarters or the then-Ministry of Legal Affairs Headquarters, in response to the misconduct allegation about the DCFS Director. Though the Ministry of Social Development and Seniors Headquarters' understanding was not set out in its decision letters to the Applicant, its understanding of the scope of the transferred PATI request was made clear by the Permanent Secretary's affidavit evidence.
31. As discussed in Decision 01/2023, a plain reading of this PATI request included only a final report into the allegation against the DCFS Director, and would not extend to other investigation-related records, such as drafts, reports from any investigation of allegations against other DCFS officers and other similar documents, if any.
32. The quality of the Ministry of Social Development and Seniors Headquarters' analysis of the request was adequate.

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

33. The Ministry of Social Development and Seniors Headquarters did not provide written submissions to evidence the scope of the search it had undertaken when responding to the transferred request. The Information Commissioner accepts that its effort was limited to relying on the Head of Authority's personal knowledge that no such record ever existed, because neither Ministry with remit for DCFS had ever investigated the matter separately in 2018-2019. If the Head of Authority for the Ministry of Social Development and Seniors Headquarters were not the same Permanent Secretary who

was responsible for the then-Ministry of Legal Affairs Headquarters when the Department of Internal Audit concluded its investigation, the circumstances might have been different. The Information Commissioner may have found it necessary for the Ministry of Social Development and Seniors Headquarters to demonstrate why it did not consider taking other steps to search its institutional records as the Ministry with remit for DCFS, before concluding whether the record existed.

34. Although the Ministry of Social Development and Seniors Headquarters did not make a record of its search efforts, as required by regulation 5(2) of the PATI Regulations, it has demonstrated a reasonable scope of its search under the circumstances by complying with the Information Commissioner's request for affidavit evidence to clarify some factual gaps as highlighted during this review. In light of the representations in the affidavit evidence, no reasonable justification existed for expanding the scope of the search that the Ministry of Social Development and Seniors Headquarters undertook.
35. The Information Commissioner acknowledges that the Permanent Secretary's affidavit evidence expressly stated that their personal work knowledge could only speak to the investigation of the allegation against the DCFS Director after they "inherited" the process on 18 November 2018. The allegation letter was received in August 2018 and, at some point later that month, the matter was referred to the Department of Internal Audit, after which that authority initiated a formal investigation in September 2018, as described in Decision 01/2023 at paragraphs 2-6.
36. In light of this, the Information Commissioner considers whether it would have been reasonable to require the Ministry of Social Development and Seniors Headquarters to have identified locations for and searched the records of the Permanent Secretary assigned to the then-Ministry of Social Development and Sports Headquarters when the allegation letter was received. This step would have answered without any doubt whether this first Permanent Secretary, and before the Department of Internal Audit's formal engagement began in September 2018, had initiated an investigation into the allegation against the DCFS Director that would have been documented by a separate report.⁴
37. It is more reasonably likely, though, that if the then-Ministry of Social Development and Sports Headquarters had completed a separate report in August/September 2018, the existence of that report would have been either acknowledged by the Department of

⁴ As a reminder, the allegation letter was received on 10 August 2018 by the Ministry of Social Development and Sports Headquarters. Once disbanded on 1 November 2018, the Ministry of Legal Affairs Headquarters became responsible for DCFS and continued to be at the time of the Internal Audit Report, issued on 14 December 2018.

Internal Audit or made known to the Permanent Secretary who inherited the process. The Permanent Secretary's affidavit evidence described the Internal Audit Report as "comprehensive", which they verified through their subsequent fact-checking.

38. Further, in the prior and related review for [Decision 05/2021](#), the ICO received submissions from the Department of Internal Audit that it did not hold any documentation for any separate investigation undertaken by any permanent secretary responsible for DCFS at the relevant time, or by any other public authority, on the allegation against the DCFS Director. This submission addressed the period from when the Department of Internal Audit's engagement was requested in August 2018 until the Internal Audit Report was issued to the Permanent Secretary conveying the investigation outcome, i.e., August to 14 December 2018.
39. Based on this, expanding the scope of the search undertaken during this review was unlikely to locate any responsive 'final investigation report created in August/September 2018' which was unknown to both the Head of Authority and the Department of Internal Audit.
40. Given these circumstances, the Ministry of Social Development and Seniors Headquarters, as the current holder of the institutional files for DCFS, reasonably limited the scope of its search in September-December 2021 to the Head of Authority's personal work knowledge. This evidence was presented in the Permanent Secretary's affidavit, which confirmed, as a factual matter, that no report existed of a separate investigation by a Ministry into the allegation against the DCFS Director.
41. The Information Commissioner appreciates that the Applicant, based on official statements alone, reasonably understood that the government's response to the allegation letter involved two separate lines of investigation on the Director, one of which was conducted by way of the Internal Audit Report. This was simply not the case. Based on this and related reviews, the allegation against the DCFS Director involved one line of investigation, resulting in the final and full report by the Department of Internal Audit dated 14 December 2018.
42. The Applicant pointed to the Premier's statement of 14 December 2018 as support for their view and as confirming the existence of a second report by the responsible Ministry into the allegation letter. The Information Commissioner agrees with the then-Ministry of Legal Affairs Headquarters' original decision that the Premier's statement did not confirm the existence of an investigation and report by any Ministry in response to the allegation letter. It is unclear whether the Premier was referring to the responsible Ministry's investigation into other DCFS officers arising from the allegation letter, if any.

Unfortunately during this review, the Ministry of Social Development and Seniors Headquarters has not provided clarification about how to appropriately understand the parts of the Premier's 2018 statement in Parliament and the then-Ministry of Legal Affairs Headquarters' 2019 statement, referring to a separate line of investigation, which appear to have led to misunderstanding within the public.

43. The Information Commissioner is satisfied that the scope of the Ministry of Social Development and Seniors Headquarters' search during this review was adequate.

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

44. In light of the above, the Ministry of Social Development and Seniors Headquarters conducted its search by relying on the Head of Authority's personal work knowledge, which was confirmed during this review in the affidavit evidence.
45. The Ministry of Social Development and Seniors Headquarters has adequately shown that the requested record was known to have never existed, as a matter of the personal work knowledge of the most senior public officer within the public authority, the Permanent Secretary. The ICO had also received a similar submission from another senior public officer, the Director of Internal Audit, as previously referred to in [Decision 19/2019](#) at paragraph 26.
46. Further, it would not have been proportionate to attempt to search the first Permanent Secretary's records, who was the responsible postholder in August until October 2018, given: the brief lapse in time between postholders (with the Permanent Secretary who swore the affidavit evidence arriving in November 2018); the referral to the Department of Internal Audit in September 2018; and the very high likelihood that the incoming Permanent Secretary would have been apprised of any existing report, either during a handover or when fact-checking the Internal Audit Report back in 2018-2019.
47. Under the circumstances, the Ministry of Social Development and Seniors Headquarters conducted its search with adequate rigour and efficiency.

Conclusion

48. The Information Commissioner is satisfied that the Ministry of Social Development and Seniors Headquarters was justified in denying the PATI request under section 16(1)(a) of the PATI Act, because the record did not exist. This is because the Ministry of Social Development and Seniors Headquarters took all reasonable steps to find a responsive record before concluding that none existed.

Decision

The Information Commissioner finds that the Ministry of Social Development and Seniors Headquarters was justified in administratively denying the transferred request, in accordance with section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010.

In accordance with section 48 of the PATI Act, the Information Commissioner affirms the internal review decision to deny the transferred request under section 16(1)(a). The Information Commissioner does not require the Ministry of Social Development and Seniors Headquarters to take further steps with respect to this Decision.

Judicial Review

The Applicant, the Ministry of Social Development and Seniors 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.



Gitanjali S. Gutierrez
Information Commissioner
28 February 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

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;
 - ...

**Information Commissioner for Bermuda
Maxwell Roberts Building
4th Floor
One Church Street
Hamilton, HM 11
ico.bm
441-543-3700**