

Decision Notice

Decision 06/2023: Department of Environment and Natural Resources

Records related to shipwrecks, artefacts and finders of wrecks

Reference no: 20210824

Decision date: 28 April 2023

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Environment and Natural Resources (**Department**) for records about shipwrecks, recovered items from wrecks and listing of finders of wrecks around the island of Bermuda. The Department refused the request in part on the basis that some of the requested records did not exist. The Department also withheld other responsive records under the exemption in section 26(1)(a) of the PATI Act. The Department reasoned that the information in the records was given to the Department in confidence on the understanding that it would be treated as confidential, and disclosure of the information would be likely to prevent the Department from receiving similar information in the future required to properly fulfil its functions.

As an initial matter, the Information Commissioner has found that the Department conducted a reasonable search for records responsive to two items of the PATI request and provided a complete response to another item. The Information Commissioner has also found that the Department was justified in relying on section 26(1)(a) to deny access to the records responsive to the other items in the PATI request. The Information Commissioner affirms the Department's internal review decision and does not require the Department to take further action for this review.

Relevant statutory provisions

Public Access to Information Act 2010: section 12(2)(b) (reasonable search and complete response); section 26(1)(a) (information received in confidence)

Public Access to Information Regulations 2014: regulation 5 (reasonable search)

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

Background

1. On 10 February 2021, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Environment and Natural Resources (**Department**) for the following:
 - a. a copy of the Register of Wrecks (**item 1**);

- b. a copy of the Register of Finders (also known as the Finder of Record in the Marine Heritage Policy¹ (**MHP**) (**item 2**);
 - c. a list of locations for all known wrecks and sites (those classified as either ‘open’ or ‘restricted/closed’) provided as coordinates in decimal degrees, (and as phot locations where applicable), including a written description of the site as of the date of the PATI request (**item 3**);
 - d. a copy of the photomap referred to under section 6.4 of the MHP with locations, identifying marks/comments for all known wrecks and sites around Bermuda (**items 4**);
 - e. a listing of all artefacts falling under section 12 of the Historic Wrecks Act 2001 (**HWA**) in the National Collection, along with all associated images of said artefacts (the artefact itself and any images of the wreck from which it was taken) (**item 5**);
 - f. a listing of any items deemed to be of ‘high intrinsic value’ and proof of the most recent annual third-party certification of security protocols supplied by the holders of said items (as per paragraph 5.4 of the MHP) (**item 6**);
 - g. a listing of all honorarium payments made under section 11 of the HWA (**item 7**).
2. The Department issued a timely initial decision on 19 March 2021. The Department explained that a total of 214 shipwrecks were known, 38 of which were classified as open and 13 were classified as closed. Of the 13 closed shipwrecks, 6 were known to the public but access to them has been restricted (**restricted shipwrecks**). The Department released part of the Register of Wrecks responsive to item 1 that relates to the 38 open and 6 restricted shipwrecks. The Department invoked various exemptions² to deny access to the part of the Register of Wrecks that relates to 7 closed shipwrecks and 163³ shipwrecks that have not yet been classified. It explained that its response to item 1 was also applicable to item 3 of the request.

¹ Department of Conservation Services, ‘[Marine Heritage Policy](#)’ (July 2012).

² The Department relied on the exemptions in sections 22 (health and safety), 23 (personal information), 26 (information received in confidence) and 34 (law enforcement).

³ The Department’s initial decision stated there were 164 unclassified shipwrecks, but the Department later clarified that this was an error.

3. The Department did not disclose a copy of the Registry of Finders responsive to item 2, but explained that it contains private details of individuals or organisations as well as details of the finds they have reported to the Custodian of Historical Wrecks (CHW), since 2004⁴. In response to item 4, the Department disclosed a heatmap of non-public shipwrecks as well as photomaps on the 38 open and 6 restricted shipwrecks. The Department provided some information on recovered artefacts responsive to item 5. In response to item 6, the Department stated that no items deemed to be of 'high intrinsic value' were report to the CHW since 2004. It explained that no records responsive to item 7 existed.
4. The Applicant asked for an internal review by the head of authority on 28 April 2021.
5. The Department provided additional information on 14 May 2021 to support its initial decision. In responsive to the Information Commissioner's Decision 07/2021, Department of Environmental and Natural Resources, the Department issued an internal review decision on 19 August 2021. The Department upheld its initial decision to grant access to records responsive to items 5-7 and, for the most part, the refusal of records responsive to items 1-4, in whole or in full. The Department's internal review decision only relied on the exemption in section 26(1)(a) (information received in confidence), effectively abandoning its reliance on the other exemptions previously relied upon in its initial response. Further, the internal review decision granted the Applicant access to some information on the remaining 7 of the 13 closed shipwrecks.
6. On 24 August 2021, the Applicant requested an independent review by the Information Commissioner of the Department's handling of the PATI request and asked the Information Commissioner to compel the Department to release the responsive records.

Investigation summary

7. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review. Additionally, the Information Commissioner confirmed the issue the Applicant wanted her to review.

⁴ The Department's initial decision also explained that the Register of Finders is different from the Finders of Records. Both the Register of Finders and Finders of Records are subsets of the Register of Wrecks and contain details of finds reported to the CHW since 20014. Unlike the Register of Finders, however, the Finders of Records contains details of individuals or organisations and details of finds that, after investigation, have been determined to be new to the Register of Wrecks.

8. The Applicant confirmed that they did not wish to challenge the Department's response to item 7, relating to honorarium payments.
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 reliance on the exemption was justified, whether the search it conducted to locate records responsive to items 5 and 6 of the request was reasonable, and whether the public authority made a reasonable effort to provide a complete response to item 1.
10. On 8 October 2021, the Information Commissioner's Office (**ICO**) notified the Department of the valid application and requested the Department to provide copies of the withheld records responsive to the PATI request.
11. On 25 October 2021, the Department provided the ICO with a clean copy of the five responsive records:
 - a. locations, a photo map and details (including photos of or related to some of the wrecks) of the 7 restricted wrecks identified in the internal review decision;
 - b. the photomap showing the locations of all classified wrecks;
 - c. the photomap referred to in the MHP showing the locations of all known wrecks (both classified and unclassified)
 - d. a record of licenses and contractual terms for certain finders of wrecks; and
 - e. the master wreck list.
12. Although the Department provided records to the ICO, what was provided was a subset of a substantive working database of records that warranted a site inspection at the Department.
13. The Department did not provide the ICO with a copy of the Register of Finders responsive to item 2.
14. On 26 January 2023, the Investigator met with the Custodian of Historic Wrecks (**CHW**), who provided access to the requisite databases to view the records responsive to the request.
15. 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 Department and the Applicant were invited to comment on the Department's reliance

on the exemption, the reasonableness of the Department's search and its effort to respond completely.

16. The ICO received submissions from both the Department and the Applicant. The Information Commissioner also considers information provided by the Department and Applicant throughout this review.

Information Commissioner's analysis and findings

17. The Information Commissioner considered all of the relevant submissions, or part of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.

Reasonable search – section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations

18. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to PATI 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. A public authority is required to document its efforts if it has been unable to locate the records. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.
19. In cases where the reasonableness of a public authority's search is in question, the Information Commissioner's task is to assess whether such search was reasonable, in accordance with the provisions of the PATI Act and Regulations. It is not her role to assess whether a public authority should or should not hold a record as a matter of good public administration.
20. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following⁵:
 - [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.
21. The public authority bears the burden to establish that the searches they conducted to locate records responsive to a PATI request were reasonable.

⁵ [Decision 11/2020](#), Department of Education, para. 14.

Public authority's submissions

22. The Department understood that item 5 of the request asked for a listing of all artefacts contained in the National Collection referred to in section 12 of the HWA.
23. The Department explained that the records of artefacts that it held were for those that had been recovered under license since 2001. Records on artefacts found during these excavations were disclosed to the Applicant. Records on all previously discovered artefacts are retained by the National Museum of Bermuda (**NMOB**).
24. With regards to item 6, the Department stated that the MHP does not have a definition of items of high intrinsic value because the determination of such items is a subjective measure based on the weight of a number of relevant factors. It referred to the lists of factors used by the United States National Archives and Records Services, such as evidence of technological development, aesthetic or artistic quality and unique or curious physical features.⁶ The Department further defined 'high intrinsic value' as referring to both the physical and intellectual or cultural properties of an item which cannot be easily appraised due to the objective and the subjective elements involved.
25. The Department explained that section 5.4 of the MHP, which the Applicant referenced to in item 6 of the request, allows for the Minister to request, if desired, that institutions or individuals formally demonstrate that they meet the accredited codes of professional practice to hold artefacts found after the enactment of the HWA that are automatically part of the National Collection. The Department further explained that the MHP spoke to items of high intrinsic value in the event that something of great value is found unexpectedly on the site and thus the permit for an underwater excavation can be applied retroactively to any such items by the CHW. It emphasised that this was not a requirement under the MHP or the HWA.
26. In its initial decision, the Department explained that no items deemed to be of high intrinsic value was reported to the Custodian since 2004. The Department submitted to the ICO that, while records of items with high intrinsic value prior to 2004 exist, they were held by the NMOB at the time of the PATI request.
27. The Department submitted that the CHW conducted all of the searches and undertook all necessary steps to locate the records and information responsive to items 5 and 6. The following locations were searched:
 - a. the Bermuda 100 website (informational, with geo-location, 3D maps and links;

⁶ National Archives and Records Services, '[Intrinsic Value in Archival Material](#)' (1982).

- b. the Embark database (now defunct);
 - c. the GIS database (Fugawi) (now defunct);
 - d. the Global Mapper (now defunct);
 - e. the QGIS database (now defunct);
 - f. the QGIS database, which replaced the GIS and Global Mapper databases (high quality geo-mapper database);
 - g. all documents on all other hard drives under the remit of the CHW; and
 - h. all physical files, despite that they had not had any items added to them since 2007.
28. The Department acknowledged that it did not take screenshots of the initial searches conducted prior to responding to the PATI request.
29. The Department did not search the records of NMOB to locate records responsive to items 5 and 6 because it had no jurisdiction or association with the museum. The Department further explained that it was not in a position to transfer part of the PATI request to the NMOB because the NMOB was not recognised as a public authority for the purposes of the PATI Act⁷.
30. The Department also explained that a virtual database referred to in section 12(1) of the HWA did not exist.

Applicant's submissions

31. The Applicant was of the view that the Department did not fully disclose the records responsive to item 5 because the Applicant believed that there are more responsive records. The Applicant pointed out that in the 1970s the Government bought all Teddy Tucker's discovered items. Those items should be listed unless they were all sold at one point.
32. The Applicant referred to section 12(1) of the HWA which spoke to the creation of a National Collection designed to display Bermuda's underwater cultural heritage. The HWA also spoke to 'public access to the collection'. Given this, the Applicant questioned

⁷ The question of whether part of the request should have been transferred to the NMOB was not raised in this review. Without deciding this issue or the status of the NMOB, the Information Commissioner notes that the National Museum of Bermuda is a non-government, not for profit organization created by the National Trust in 1974 as the Bermuda Maritime Museum and is funded by private and corporate donations, along with income from admissions, membership dues and rentals, as explained on its [website](#).

the extent of the information disclosed by the Department related to the totality of the National Collection.

33. The Applicant emphasised that the National Collection is to be “an inventory of artefacts and records” and section 5.6 of the MHP states that the database section of the ‘virtual national collection’ will include not only objects held by the Minister but also objects and artefacts held in private collections found prior to 2001 that have been shared” with the CHW. They also questioned the extent of the Government’s knowledge of artefacts that it owns but are held in private collections or museums.
34. The Applicant acknowledged that the NMOB has a complete database of all objects in their possession. They submitted, however, that simply saying that further information is “available through the NMOB” runs counter to what should be the default position, i.e., granting access to public records when no exemptions apply. The Applicant emphasised that all artefacts currently held by private museums are, in fact, vested in the crown and deemed to be in the Minister’s possession.
35. The Applicant also questioned the extent of the search and the quality of information provided by the Department in relation to item 5, stating that, in accordance with section 5.6 of the MHP, the Virtual National Collection is supposed to be a database of objects and artefacts held by the Minister and in private collections found prior to 2001 that have been shared with the CHW. The Applicant expressed concerns over the apparent lack of a government-owned or government-managed and all-encompassing collection of information surrounding the National Collection. The Applicant queries the Department’s knowledge of artefacts held in private collections and museums that should be included as part of the National Collection.
36. For item 6, the Applicant questioned the definition and qualifiers used by the Department for items with ‘high intrinsic value’ and why the Department’s initial decision referred to items reported to the Custodian “since 2004” as opposed to “since 2001”.

Discussion

37. This review considers the reasonableness of the Department’s efforts to search for records in its possession responsive to item 5 and 6 of the PATI request, i.e., listed artefacts and items of ‘high intrinsic value’.

[1] the quality of the public authority’s analysis of the request

38. The Department demonstrated that it had a reasonable understanding of the information requested. The Department only provided information relating to artefacts

that were recovered under license by the Department since the enactment of the HWA in 2001. It further explained that records of any previously recovered artefacts were held by the NMOB. By referring the Applicant to the NMOB for additional records, the Department showed that it understood the Applicant's information needs framed in items 5 and 6 of the request.

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

39. The Department provided detailed information of the locations searched to identify records responsive to the request, which included the Master Wrecks list (all identified wrecks) as well as the locations listed above in paragraph 27. The Department included within its searches its older, defunct databases. Given that the searched databases are regularly used by the CHW during his daily duties, the Information Commissioner is satisfied that these databases were the locations that could reasonably be expected to hold the records responsive to items 5 and 6. The Department also searched the hard drives under the remit of the CHW as well as all relevant physical files.
40. The Information Commissioner accepts that it was reasonable for the Department to search the records of the Historic Wrecks Authority. The Historic Wrecks Authority is responsible for the management of artefacts included in the National Collection, in accordance with section 4(1)(a)(ii) of the HWA. The Historic Wrecks Authority is a separate public authority of which the CHW is an ex officio member, who is only responsible for the classification of wrecks and issuances of licenses for wreck exploration.
41. Following the ICO's meeting with the CHW and the Department's submissions, the Information Commissioner also accepts that the virtual collection does not exist.
42. The Information Commissioner is satisfied that the scope of the search that the Department conducted to locate records responsive to items 5 and 6 was adequate.

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

43. The CHW performed the task of locating the records. The CHW is the designated technical officer with expert working knowledge and non-restricted access to all databases that could reasonably hold the records responsive to items 5 and 6. The Department searched the databases at least twice: once during its handling of the PATI request and then later during the Information Commissioner's review in the presence of the Investigator.

44. Given the above, the Information Commissioner is satisfied that the Department's search was conducted with adequate rigour and efficiency.

Conclusion

45. The Information Commissioner is satisfied that the Department conducted a reasonable search for records responsive to items 5 and 6 of the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI regulations.

Complete response – section 12(2)(b)

46. Section 12(2)(b) of the PATI Act requires a public authority to make every reasonable effort to respond to requests completely.
47. This provision does not mean that a public authority must ensure that every single record responsive to a PATI request is located and processed. Section 12(2)(b) is also not concerned with whether the information captured in a record is a complete documentation of an issue, nor does section 12(2)(b) require public authorities to provide information which the requester considers to be necessary to fill gaps in the existing records.
48. Instead, section 12(2)(b) requires an assessment of whether the public authority's efforts to provide a complete response to the PATI request were reasonable, and not whether the information contained in the record itself is 'complete'.
49. Further, this requirement only applies to records that were held by a public authority at the time of the PATI request. In this instance, the question of reasonable efforts to provide a complete response is considered for item 1 of the PATI request only.

Public authority's submissions

50. The Department explained that section 6(1)(a) of the HWA requires the CHW to classify all known wrecks on the shores or in the waters of Bermuda as either 'open' or 'restricted'. Section 6(1)(b) then requires the CHW to enter the classification in an official Register of Wrecks. The Department further explained that, at the time of the PATI request, the CHW had entered 51 wrecks (38 open and 13 closed) into the Register of Wrecks.
51. The Department confirmed that the details on the 51 classified shipwrecks that it provided in its initial and internal review decisions was the complete copy of the Register of Wrecks responsive to item 1. The information was taken from the QGIS database,

which was the only database developed thus far for the purposes of creating a Register of Wrecks.

52. The Department explained that the locations of 7 of the 13 shipwrecks classified as 'closed' were not disclosed because section 6(1)(b) of the HWA requires the identification of the location of open wrecks only.
53. The Department explained that the remaining 163 wrecks remained unclassified at the time of the PATI request and thus were not part of the Register of Wrecks.
54. The Department further explained that the classified wrecks are stored in a GIS generated database that did not contain reports, documents or images. The Bermuda 100 website was designed and built to create those associations. Where completed, the reports, documents or images are available on the Bermuda 100 website. The Department provided the relevant links to the Applicant.
55. The Department submitted that it is in the process of scaling back expectations on information that the Register of Wrecks could provide and that the MHP will be changed to reflect this.

Applicant

56. The Applicant sought details relating to all shipwrecks, including the 7 closed wrecks referred to in the internal review decision. The Applicant submitted that no information was provided in relation to those 7 wrecks.
57. The Applicant highlighted the Department's acknowledgment of 163 wrecks that the CHW has not classified as 'open' or 'closed'. The Applicant submitted that the failure to classify all the wrecks is in contravention to section 6(1) of the HWA. The Applicant expressed frustration at the fact that, years after the HWA came into effect, 163 wrecks still have not been classified. The Applicant believed that the Department should be compelled to properly classify all wrecks as 'open' or 'restricted' as required by the HWA.
58. The Applicant queried the completeness of the records provided to him in response to item 1. They questioned why the disclosed Register of Wrecks did not contain detailed information in accordance with section 6.4 of the MHP which outlined that it will primarily hold:
 - a. the locations of wrecks with photo documentation;
 - b. written descriptions of the site;
 - c. links to other databases that contain artefacts collections (when possible); and

- d. written, photographic and film references that pertain to the wreck or site.
59. The Applicant further insisted that the Department must have inherited some disclosable records of wrecks prior to the enactment of the HWA, and questioned why these records were not shared. The Applicant also maintained that some disclosable information about the unclassified wrecks must exist that can be shared with the public. They also queried why the Department chose not to share 'any' information about a wreck because it has not been classified, arguing that this seems unreasonable and is contrary to the mandate of the Department.

Discussion

60. The Information Commissioner considers the reasonableness of the Department's effort to respond completely to item 1 of the PATI request.
61. The Information Commissioner agrees with the Department that the Register of Wrecks should contain details of only the shipwrecks that have been classified by the CHW, in accordance with section 6(1)(a) and (b) of the HWA. The Information Commissioner appreciates the Applicant's concerns that the CHW has only classified 51 shipwrecks as of the time of the PATI request, over 20 years after the HWA was enacted. The facts remain, however, that of the 214 known wrecks around Bermuda's waters, the CHW has only classified 51 as open or closed, and thus were included in the Register of Wrecks at the time of the request.
62. The Information Commissioner also appreciates the Applicant's expectation that for the 51 shipwrecks, the Register of Wrecks would have included more information, as outlined in the MHP. During this review, the ICO reviewed the Register of Wrecks and the Information Commissioner is satisfied that no disclosable information in the Register of Wrecks for the 51 shipwrecks had been withheld from the Applicant. The Department also frankly acknowledged the discrepancy between what was set out in the MHP and the content of the actual Register of Wrecks itself. The Department acknowledged the need for it to scale back expectations, as well as represented that the MHP would be amended. Given this, the Department made reasonable effort to respond completely to item 1 of the request.
63. The Applicant wished for the Information Commissioner to compel the CHW to classify the remaining 163 shipwrecks, but this does not fall within the scope of the Information Commissioner's jurisdiction. The Information Commissioner's reviews can only consider decisions issued by the heads of authorities in response to a PATI request and, where appropriate, she can order disclosure of records responsive to the PATI request. The

limited jurisdiction of the Information Commissioner was confirmed by the Hon. Chief Justice Hargun in [Furbert v Department of Human Resources](#) [2019] SC (Bda) 19 Civ:

17. First, the jurisdiction of the IC under the PATI Act is to review the decision made by the head of a public authority and if appropriate to order the production of documents which come within the scope of the PATI Act. It is a limited jurisdiction and does not extend to the IC making judgments in relation to whether the contents of the document are accurate. It is beyond the jurisdiction of the IC under the PATI Act to make a determination whether the documents ordered to be produced “*were falsely generated*” or to make a determination whether the documents produced are “*consistent with an employer engaging in an attempt constructive dismissal*”. There is no scope within the PATI Act for the IC to make such determinations.
18. Indeed the statutory limitations on the competence of the IC are explained in the IC’s Decision at paragraphs 104 – 105:

“104. The mandate and jurisdiction of the Information Commissioner is established in the PATI Act. It focuses on enforcing the right to access public records. The questioning of the content of those records is not within the Information Commissioner’s authority, nor is it appropriate for a neutral oversight body to speak to the content of the public records.

105. Instead, the Information Commissioner strives to safeguard the right to access public records, and to strengthen good governance and democratic engagement. Once public records are in the hands of the public, the assessment of and accountability for the content of those records rests in the hands of the individuals such as the Applicant and other members of the public”.

Conclusion

64. The Information Commissioner is satisfied that the Department complied with the requirement to make reasonable efforts to provide a complete response to item 1 of the PATI request, in accordance with section 12(2)(b) of the PATI Act.

Information received in confidence – section 26(1)(a)

65. As set out in the Information Commissioner’s previous [Decision 09/2019](#), Department of Public Lands and Buildings, paragraph 30, public authorities must ask the following set of questions before appropriately refusing a PATI request under the exemption in section 26(1)(a):
- [1] Whether the information was given by a third party (other than another public authority)?
 - [2] Whether the information was given in confidence and with the understanding that it would be held confidential?
 - [3] Whether disclosure would be likely to prevent the public authority from getting such information again in the future?
 - [4] Whether that information is required for the public authority to fulfil its functions?
 - [5] If the exemption is engaged, whether the balance of the public interest requires disclosure?
66. This exemption focuses on whether the process or circumstances by which the information was provided imply that it was given in confidence and with the understanding that it would be treated confidentially. The assessment considers factors related to how the third party gave the information and how the public authority received or agreed to hold the information.
67. Examples of factors that should be taken into account when determining whether the information was given in confidence by a third party are:
- a. the expectation of the person or entity giving the information to the public authority;
 - b. any assurances sought regarding the confidentiality of the information;
 - c. the purpose for which the information was provided; and
 - d. any other action that the person or entity giving the information may have taken with respect to the information, e.g., the information was given to other parties and under what circumstances.
68. In addition, the information must have been given with the understanding that the public authority would treat the information as confidential. The understanding of

confidentiality may be express or implied. The factors that should be taken into account when determining whether there was an understanding of confidentiality may include:

- a. any statement or assurances given at the time the information was provided;
 - b. the purpose for which the information was sought or provided;
 - c. the practice, procedure, or policy of the public authority with regard to such information generally;
 - d. any action which the public authority may be expected to take in relation to the information; and
 - e. the nature of the relationship between the provider of the information and the public authority receiving it.
69. For section 26(1)(a) to apply, public authorities must demonstrate that disclosure 'would be likely' to prevent it from receiving further similar information in the future that is required to properly fulfil the public authority's functions. 'Would be likely' means that some significant, real risk must exist such that the public authority would be prevented from receiving such information in the future. 'Functions' means 'powers conferred, or duties imposed, on the authority or officer by or under any provision of law'.⁸
70. Because the exemption in section 26(1)(a) is subject to the public interest test, a record falling within the scope of this exemption must be disclosed if 'the public interest would, on balance, be better served by disclosure than by non-disclosure'. Regulation 2 of the PATI Regulations provides a non-exhaustive list of public interest factors, such as things that may or would tend to promote greater public understanding of the processes or decisions of public authorities and to promote accountability for public expenditures or the more effective use of public funds.
71. A public authority bears the burden of satisfying the Information Commissioner that, on the balance of probabilities, they have provided sufficient support to justify relying on an exemption.

Public authority's submissions

72. The public authority relied on the exemption in section 26(1)(a) to withhold item 2 in full as well as parts of records responsive to items 3 and 4 of the PATI request.

⁸ Section 7 of the [Interpretation Act 1951](#).

73. The Department submitted that the third parties who provided the information were members of the public such as diving enthusiasts, archaeologists, research institutions and the like.
74. The Department stated that there are no formal non-disclosure agreements in place, but it maintains a level of confidentiality necessary to both encourage the continued sharing of information from finders and for the Department to fulfil its functions under the HWA.
75. The Department explained that it relies almost exclusively on members of the public to voluntarily report their findings of any potential newly discovered wrecks to the CHW, who then references the coordinates against the existing wrecks in the Master Wrecks list. The CHW confirmed that the voluntary process is the primary mechanism through which an individual can be registered as the 'finder of record'. The nature of underwater exploration is inherently secretive because certain benefits and credit can only be bestowed upon the verified 'first registered finder' of a wreck. The finder understands that CHW holds their information in confidence during the verification process because otherwise it would undermine the discovery process. The CHW checks the coordinates provided by the finder against entries in the master wrecks list; and following a survey of the site, assigns the individual as the designated finder if it is a newly discovered wreck.
76. The Department insisted that maintaining confidentiality of the finders and their attributed findings protects the finders' interests to the following:
 - a. an honorarium as the finder of a wreck;
 - b. safeguarding the media rights to any storytelling by the finder;
 - c. securing the intellectual property rights of researchers or research bodies; and
 - d. shielding the location of the wreck from the general public who could otherwise interfere with it.
77. The Department further stated that the Register of Finders exists primarily to encourage them to report their findings to the CHW, rather than to keep information about as-yet unknown wrecks private, which would deprive the public of historical knowledge and artefacts. It also exists to legislatively protect the rights of finders.
78. The Department submitted that over many years, instances have arisen where actual breaches of confidential information led to actual interference of wrecks. The Department provided a specific example to the ICO in confidence to establish that this concern was concrete and not speculative.

79. The Department acknowledged that disclosure of general wreck data would lead to increased public knowledge of Bermuda's maritime history and environment. It reasoned, however, that disclosure of unclassified wrecks could lead to interference of these wrecks and even piracy. The Department described a strong public interest in the preservation of the wrecks and the marine heritage of Bermuda, as required by the HWA. The Department explained that the HWA provides legislative protection of wrecks and marine heritage sites to ensure that they are preserved, and where possible, they are properly researched and documented for the public good. The HWA, for example, provides sanctions against anyone who interferes with such a site and requires any person who wishes to investigate a wreck to obtain a license.
80. The Department submitted that the risk of interference of a wreck is higher if more people know about it. As per the HWA, only wrecks that have been classified as 'open' can be considered wrecks whose location should be widely known by the public. Until such time that all wrecks have been classified (i.e., the CHW has ascertained their fragility, value, safety etc.), the public interest favours protection of those wrecks.
81. The Department further explained that, once the CHW classifies a wreck, the HWA requires the CHW to protect and manage the wreck, including causing the wreck or site to be identified by green or red submarine markers indicating that the wreck or site is or is not open to recreational use by divers. The Department submitted that there are limited resources available for such monitoring and protecting of sites. Until the sites can be adequately protected, the public interest remains weighted in favour of protecting the wrecks' locations from public knowledge. The Department explained that it is currently investigating other technological and partnership alternatives to assist in the monitoring and protecting of wrecks and marine heritage sites.

Applicant's submissions

82. The Applicant highlighted that in its initial and internal review decisions, the Department did not explain its reasons for not disclosing the Register of Finders responsive to item 2 and the photomap of the unclassified shipwreck responsive to item 4.
83. The Applicant queried the existence of any proof that any or all of the information provided to the CHW by the finders was given under conditions of confidence.
84. The Applicant submitted that a carte blanche approach of applying the exemption to the wrecks for which no information was provided was unfair because it did not allow the Applicant to accurately address their concerns for each individual record. The Department did not provide any explanation as to why the exemption was not applied to the wrecks whose information was disclosed at the initial and internal review stages.

85. The Applicant expressed similar concerns surrounding the conditions of confidentiality with regards to disclosure of records relating to item 3 because the public interest in accessing information about all wrecks (classified and unclassified). The Applicant also asked whether the Information Commissioner could compel the Department to classify the remaining known wrecks as a matter of priority in accordance with the HWA.
86. The Applicant submitted that the CHW's office is a public office that is publicly funded. Because it received the information about shipwrecks almost exclusively from members of the general public, it is illogical to state that the public deserves no right to simply read and view information about the wreck sites. To argue that the public would not, on balance, be better served by disclosure appears illogical and runs counter the promise made by the Government with respect to PATI to "increase transparency and eliminate unnecessary secrecy".
87. The Applicant queried the reasoning why the Department would not deem sharing of the Register of Finders, as well as locations and details of the withheld shipwrecks (including their photomap), to be in the public interest when the Department's legislated mandate is also to document information about Bermuda's wrecks for public knowledge and access.
88. The Applicant was of the view that a nation's historical, cultural and scientific information should be openly shared as a matter of routine, and not held in secret for the benefit of a select few.
89. The Applicant acknowledged that certain wrecks might contain dangerous cargo and therefore should not be dived on. The Applicant argued, though, that it was unwise and dangerous for the Government to not disclose the locations of those wrecks. Without the knowledge on which wrecks are dangerous and where they are located, divers have no information on how to avoid them.

Discussion

90. The Information Commissioner considers section 26(1)(a) for the Register of Finders responsive to item 2 and to parts of records responsive to items 3 (locations and details of the 163 unclassified wrecks and 7 closed wrecks contained in the Wrecks Master List) and 4 (photomaps of 163 unclassified wrecks and 7 closed wrecks), which have not been disclosed by the Department.

[1] Whether the information was given by a third party (other than another public authority)?

91. The Department revealed that records or parts of records responsive to items 2, 3 and 4 are withheld under this section because the information was provided by divers, researchers, and members of the public who disclose information to the Department of potential wrecks and recovered artefacts. These groups of individuals fit the definition of third-party entities under section 39 of the PATI Act.

[2] Whether the information was given in confidence and with the understanding that it would be held confidentially?

92. The Information Commissioner accepts that unless there was at least an understanding and belief that the Department would hold their information in confidence, divers would have no incentive to voluntarily reveal their finds to the Department. The Information Commissioner further accepts that information pertaining to items 2, 3 and 4 of the PATI request contains information that was shared in confidence with the understanding that it would not be shared by the Department. While there was no formal and written confidentiality agreement between the providers of the information and the Department, the process under the HWA, administered by the CHW, creates a general understanding that the information was given in confidence and would be treated as confidential. The understanding of confidentiality is evident by virtue of the very nature of the industry and as evident from the Departments verification, licensure and exclusive individual rights provided to finders.

93. The HWA, which was enacted in 2001, does not require information about shipwrecks and their finders to be made public. It only states that the CHW shall enter the details of any person who finds any previously unreported wreck and gives a notice to the Collector of Customs as the Receiver (as per sections 200 and 212 of the Merchant Shipping Act 2002), as well as the location of the relevant shipwrecks, in the Register of Finders. There is no mention in the HWA of the registers being made publicly accessible, which supports the Department's position that the registers are an internal administrative tool used to record and track wrecks and finders of record and were to remain confidential.

94. The MHP is a guidance document that details application of the functions of the Department listed in the HWA. Various parts of the policy signal that the information about the finders and their finds would be kept confidential. Although section 6.4 of the MHP states that there will be "a publicly accessible Government map and database of wrecks", for example, it is limited to those that have "been approved for broad promotion as dive sites". The MHP further stated that the contents of the Register of Wrecks and Register of Finders "will only be made available as per rules set out for access to the database". The MHP explains that both Registers will be held and managed by the CHW "as a secure database inaccessible from the Government", thus offering a level of

protection to the finders' identities and information about their finds. These statements gave assurance to the finders that (i) their information will be kept confidential, and (ii) details of their finds will be made publicly available when the CHW classifies the wreck and only if it is classified as an open or publicly-known closed wreck.

95. Furthermore, the nature of the rights and privileges awarded to the finders suggest that there was a general understanding of confidentiality between them and the Department. A finder has the right to be given the first option to conduct pre-disturbance surveys and to have their excavation licence considered. As per section 9.4 of the MHP, copyright also rests with the finder, unless it is transferred. To a great extent, these rights and privileges are dependant on the exclusivity of access to the shipwreck found by the finder. It is reasonable for a finder to expect the Department to treat information about them and their finds confidential.

[3] Whether disclosure would be likely to prevent the public authority from getting such information again in the future?

96. The Department received the information included in those records or parts of records on a voluntary basis. It has no power to compel the members of the public to provide the information to the CHW through any other reasonable means.
97. It is accepted that disclosure would be likely to prevent the public authority from getting similar information in the future which would pose a legitimate challenge to the Department meeting aspects of its statutory functions.

[4] Whether that information is required for the public authority to fulfil its functions?

98. The information contained in the records or parts of records responsive to items 2, 3 and 4 of the request is required for the Department to fulfil its function to "[r]esearch, conserve and promote awareness of Bermuda's ... marine cultural heritage". For example, without information on the locations of newly discovered shipwrecks and their finders, the Department would not be able to decide if the shipwrecks are safe, assess their historical value or decide if they should be accessible to the public. Further, finders are also researchers, scientists and historians that lend their expertise and knowledge to the CHW to provide the Department with education and research data. These are valuable resources that the Department can access due to the unique third-party partnerships that are established. These partnerships are formed through the designation, licensure and third-party privileges that the Department facilitates with finders and researchers.

99. The Department ultimately uses research data obtained from members of the dive community to educate the public on Bermuda's marine heritage. Further, this information is essential for the Department to provide regulatory oversight of surveying and archaeological operations. The information retained by the Department responsive to items 2, 3 and 4 was attained through the unique partnership with the dive community who are permitted to chart and inspect wreck sites.
100. The Information Commissioner accepts that the information is required for the Department to fulfil its functions.

[5] If the exemption is engaged, whether the balance of the public interest requires disclosure?

101. In balancing the public interests in disclosure and nondisclosure of the Register of Finders (item 2), locations and details of the 163 unclassified and 7 closed wrecks (item 3) and their photomaps (item 4), there is public interest in transparency around the Department's work on Bermuda's marine heritage. As correctly pointed out by the Applicant, the Department (which includes the CHW) is a public office receiving public funds. The Information Commissioner also agrees with the Applicant that a nation's historical, cultural and scientific information should not be held in secret for the benefit of a select few.
102. The Department, however, asserts strong public interests in the protection of unclassified wrecks from potential damage caused from unauthorized public access, preservation of the locations of historically significant wrecks, protection of the public from potentially dangerous locations, the protection of the interests of the finders, and preservation of the relationship between the Department and the diving community which allows the Department to meet its mandate.
103. In weighting these interests, the interest in immediate public disclosure of historical, cultural and scientific information outside of the process outlined in the HWA is outweighed by the duty of the Department to maintain the health and safety of the public and to carry out its regulatory functions under the HWA, which includes the preservation of confidential information on a temporary or permanent basis.
104. The HWA provides a legislative framework for the evaluation and classification of wrecks and a regulatory framework to ensure public safety and procedural fairness. In making the decision on whether a shipwreck should be classified as open or closed, the CHW has to take into account various factors, such as whether the wreck:
- a. will be adversely impacted by ordinary recreational diving activities,

- b. is safe for ordinary or recreational diving,
 - c. is dangerous (e.g., unexploded ordinance),
 - d. is of national or historic significance.
105. Given the process of classification of the shipwrecks require careful and expert consideration of those factors, the CHW (as part of the Department) is the person in the best position to make the decision on whether information about a shipwreck should be made available. The CHW is also the person who has been trusted by the legislature to make that decision through the classification process. An independent review of the Department's decision under the PATI Act by the Information Commissioner cannot facilitate a similar, appropriate evaluation as that which occurs under the existing classification process. An assessment of the withheld records, the requirements of the PATI Act, and submissions by the parties do not provide the Information Commissioner with the information required to determine, for example, which shipwreck is unsafe for the public to assess. The public has an inherent interest in ensuring that this complex administrative process is maintained in order to protect the identity and interests of finders and to ensure public safety. It is through the administration processes of the Department that the public can enjoy diving at classified wreck sites that have been deemed safe. Further, the public can gain assurances of their safety and reliability of historical information about wrecks through understanding of the classification processes more so than from gaining access to a record.
106. The Information Commissioner is satisfied that the balance of the public interest favours maintaining the exemption.

Conclusion

107. The Information Commissioner is satisfied that the Department:
- a. conducted a reasonable search for records responsive to items 5 and 6, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations;
 - b. made reasonable efforts to respond completely to item 1 of the PATI request, in accordance with section 12(2)(b) of the PATI Act; and
 - c. was justified in relying on section 26(1)(a) to withhold records or part of records responsive to items 2, 3 and 4 of the PATI request.

Decision

The Information Commissioner finds that Department of Environment and Natural Resources (**Department**) conducted a reasonable search, in accordance with section 12(2)(b) of the Public Access to Information (**PATI**) Act 2010 and regulation 5 of the PATI Regulations, as well as made reasonable efforts to respond completely, in accordance with section 12(2)(b) of the PATI Act. The Information Commissioner further finds that the Department was justified in relying on section 26(1)(a) to deny access to certain records in whole or in part.

In accordance with section 48 of the PATI Act, the Information Commissioner affirms the Department's internal review decision. The Information Commissioner does not require the Department to take any further steps in relation to this review.

Judicial Review

Should the Applicant, the Department of Environment or Natural Resources, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such appeal must be made within six months of this Decision..



Gitanjali S. Gutierrez
Information Commissioner
28 April 2023

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

12 (1) ...

(2) Public authorities shall make every reasonable effort to—

(a) ...

(b) respond to requests completely, accurately and in a timely manner.

...

Information received in confidence

26 (1) Subject to subsection (2), a record that consists of the following information is exempt from disclosure—

(a) information—

(i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and

(ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or

...

(2) A record shall be disclosed if disclosure of it is in the public interest.

Public Access to Information Regulations 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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