

Decision Notice

Decisions 19 & 20/2023: Bermuda Police Service

Internal emails

Reference no: 20200721-01 & -02

Decision date: 24 July 2023

Summary

The Applicant made requests under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for various records, including internal emails, relating to the Applicant and an incident. The BPS disclosed a number of responsive records, but the Applicant challenged the reasonableness of the BPS's search to locate some records.

The Acting Information Commissioner has found that the BPS conducted a reasonable search for records, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014, except for one part of the request.

The Acting Information Commissioner has ordered the BPS to conduct a reasonable search for the remaining part of the request and to issue a new initial decision to the Applicant, as directed by this Decision Notice and the accompanying Order.

Relevant statutory provisions

Public Access to Information Act 2010: section 12(2)(b) reasonable search.

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

The Appendix provides the text of these statutory provisions and forms part of this Decision Notice.

Background

1. This Decision Notice considers the handling by the Bermuda Police Service (**BPS**) of two requests made under the Public Access to Information (**PATI**) Act 2010. The BPS addressed both PATI requests in one initial decision and one internal review decision. The Information Commissioner's Office (**ICO**) conducted two independent reviews to consider the BPS's handling of the two requests separately. Because the two PATI requests related to the same topic and had an overlapping procedural history, the Acting Information Commissioner considers them in a single Decision Notice with two decision numbers: namely, Decision 19/2023 for review no. 20200721-01 and Decision 20/2023 for review no. 20200721-02.
2. On 14 April 2020, the Applicant filed a request under the PATI Act with the BPS asking for the following (**first PATI request**):

- a. All emails sent from a specific senior police officer (**Senior Officer A**) in relation to the Applicant from 12 April 2020 (**item 1**);
 - b. All emails sent from Senior Officer A surrounding a certain incident that happened on a railway trail (**railway trail incident**) (**item 2**);
 - c. All incoming and outgoing cellular numbers and landline numbers made on devices assigned to Senior Officer A from 12 April 2020 (**item 3**); and
 - d. All text messages and WhatsApp messages sent and received by devices assigned to Senior Officer A from 12 April 2020 (**item 4**).
3. While the first PATI request was being actioned by the BPS, on 16 April 2020 the Applicant asked for the following (**second PATI request**):
 - a. All emails from another senior police officer (**Senior Officer B**) to the Department of Public Prosecutions (**DPP**) or any emails received from the DPP by Senior Officers A and B (**item 5**);
 - b. All recorded voice calls from a cell phone assigned to Senior Officer A from 12 April 2020 (**item 6**);
 - c. An email from the Commissioner of Police (**CoP**) to senior command in relation to the railway trail incident, sent between 12 and 16 April 2020 (**item 7**); and
 - d. All emails from the CoP about the Applicant and Senior Officer A in relation to the railway trail incident (**item 8**).
4. On 25 May 2020, the BPS issued an initial decision, addressing both PATI requests, which:
 - a. Disclosed an email responsive to items 1 and 2, an email responsive to item 2, five WhatsApp screenshots responsive to item 4 (one of which was redacted in part as the BPS initially found it not responsive to the PATI request), and an email responsive to both items 7 and 8;
 - b. Refused access to records responsive to item 5, because they were created or obtained by the DPP in the course of performing its functions and thus fell outside the scope of the PATI Act (section 4(1)(b)(v)); and
 - c. Refused item 6 under section 16(1)(a), because responsive records did not exist.
5. The BPS's initial decision also informed the Applicant that another responsive record existed. But because the record was an email sent by the Applicant, the BPS did not include it in its initial decision. This part of the BPS's response was not challenged by the Applicant.

6. On 3 June 2020, the Applicant asked for an internal review. The BPS's internal review decision of 14 July 2020 addressed the first and second PATI requests. It:
 - a. Disclosed a part of a record responsive to item 3, also informing the Applicant that the complete record was a statement from the telephone company, which had exempt and other information not responsive to the PATI request—and offering to show the Applicant a redacted copy of the statement if they wished;
 - b. Disclosed an email responsive to both items 1 and 2 and another email responsive to item 1;
 - c. Disclosed a WhatsApp screenshot responsive to item 4, which was partially redacted under the exemption in section 34(1)(a) (about prejudice to a possible breach of the law); and
 - d. Informed the Applicant that records responsive to item 6 did not exist.
7. The internal review decision did not speak to items 5, 7 and 8 and thus was understood to be upholding the initial decision on these items.
8. On 21 July 2020, the Applicant made a timely application for an independent review by the Information Commissioner of the BPS's internal review decision.

Investigation

9. 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.
10. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions were required from the BPS to determine whether its reliance on the various provisions in the PATI Act was justified and whether the BPS's search was reasonable.
11. The ICO notified the BPS of the valid review application on 2 September 2020. The BPS was informed that, because the Applicant had made two separate, though related, PATI requests on 14 and 16 April 2020, the BPS's responses to these requests would be considered in two separate reviews no. 20200721-01 and 20200721-02. This was despite both PATI requests being addressed by the BPS in one initial decision and one internal review decision. The ICO also asked the BPS to submit a copy of all records responsive to item 4 of the first PATI request.

12. On 17 September 2020, the BPS provided the ICO with an unredacted copy of six WhatsApp screenshots responsive to item 4. Four screenshots had been disclosed to the Applicant with no redactions, as well as one screenshot with a part removed, at the initial decision stage, followed by one redacted screenshot at the internal review stage. The BPS relied on section 34(1)(a) to justify not disclosing the redacted parts of the two screenshots. The BPS also provided the ICO with a record responsive to item 5, which it had withheld in full under section 4(1)(b)(v).
13. At an early stage of these reviews, the BPS claimed that the Applicant's PATI requests were vexatious. As such, in addition to considering the BPS's reliance on sections 4(1)(b)(v), 34(1)(a) and 16(1)(a) as well as the reasonableness of its search, the reviews initially considered the BPS's claim that the Applicant's requests were vexatious (section 16(1)(e)).
14. During the Information Commissioner's reviews, the Applicant confirmed that they no longer wished to challenge the BPS's responses to items 3-6 of their PATI requests. The BPS later conceded that its previous claim that the requests were vexatious was unfounded, effectively abandoning its reliance on section 16(1)(e). Given changes in both parties' positions, the remaining issue in these reviews was the reasonableness of the BPS's search to locate records responsive to items 1, 2, 7 and 8.
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 BPS and the Applicant were invited to comment on the issue under review and made submissions.

Acting Information Commissioner's analysis and findings

16. In coming to these Decisions, the Acting Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the BPS and the Applicant. 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

17. 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 records. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.

18. 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.
19. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following:
 - [1] the quality of the public authority's analysis of the request;
 - [2] the scope of the search that it decided to make on the basis of that analysis; and
 - [3] the rigour and efficiency with which the search was then conducted.
20. The public authority bears the burden to establish that the search conducted to locate records responsive to a PATI request was reasonable.¹

Public authority's submissions

21. The BPS understood item 1 to be asking for all emails sent from Senior Officer A from 12-13 April 2020, in relation to the Applicant and the railway trail incident. It further understood item 2 to be asking for all emails from the same officer surrounding the railway trail incident.
22. In its written submission to the ICO, the BPS explained that it understood item 7 to be asking for an email from the CoP to senior command between 12 and 16 April 2020 about the railway trail incident. It understood item 8 to be asking for all emails from the CoP about the Applicant and Senior Officer A in relation to the railway trail incident.
23. The BPS submitted that the records responsive to item 2 were provided to the Applicant with its internal review decision on 14 July 2020. The BPS further asserted that items 7 and 8 related to the same email.
24. The BPS submitted that, to locate records responsive to items 1 and 2, an email was sent to certain officers who were part of the BPS Senior Leadership, asking them to locate the responsive records. The BPS stated that all addressees responded providing an email from Senior Officer A to Senior Leadership about the railway trail incident.

¹ See [Decision 04/2017](#), [Department of Health](#), at paras. 37-49, and more recently [Decision 08/2023](#), [Ministry of Finance Headquarters](#), at paras. 28-31.

25. The BPS further submitted that the CoP's email was searched to locate records responsive to item 7. It explained that there was nothing on file to indicate that the CoP's email was searched to locate records responsive to item 8.
26. The BPS explained that it searched its 'PATI outlook folder' relevant to the two PATI requests, which consisted of 69 email threads dating from between 14 April and 18 September 2020.
27. The BPS submitted that Senior Officer A and its Senior Leadership (including the CoP) were asked to conduct the search, because they were the holders of the responsive records. The BPS submitted that the potential holders provided the responsive records.
28. The BPS provided a number of screenshots to support its assertion that the search it conducted to locate records responsive to items 1, 2, and 7 was reasonable.

Applicant's submissions

29. The Applicant was concerned that information was lacking from Senior Officer A and that the Head of Authority had not conducted a proper review of Senior Officer A's work email search.
30. The Applicant believed that there were more responsive records which had not been disclosed by the BPS. Specifically for items 1 and 2, the Applicant further questioned why the BPS limited its search to records from between 12 and 14 April 2020 only, given the Applicant never included an end date for the request.
31. The Applicant provided a copy of their exchange with the BPS throughout the PATI process. The Applicant expressed concern that the requested emails would be deleted from the BPS's system, referencing how it had happened with another account (from their understanding). They requested that the Information Commissioner forensically review the BPS's computer system for the records requested.

Discussion

32. The Acting Information Commissioner considers the reasonableness of the BPS's search to locate records responsive to items 1, 2, 7 and 8 only.

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

Items 1 and 2

33. There was no dispute that items 1 and 2 were looking for emails from Senior Officer A concerning the Applicant and the railway trail incident, respectively. The Applicant

questioned, however, the BPS's decision to limit its search for records from between 12 and 14 April 2020 only, because the first PATI request did not specify the dates of the records being sought.

34. The Acting Information Commissioner is satisfied that the BPS's analysis of items 1 and 2 of the PATI request was adequate. When responding to PATI requests, public authorities are expected to locate and process responsive records that were held at the time of the PATI request only. Unless a PATI request specifies the time range for the requested records, public authorities are justified to use the PATI request date as the 'cut-off' date when locating records and deciding the responsiveness of a record to the request. It was thus reasonable for the BPS to limit the scope of items 1 and 2 to emails from 12 April 2020 (specified in the PATI request) to 14 April 2020 (date of items 1 and 2 of the first PATI request).
35. The Acting Information Commissioner noted that the BPS's written submission and a screenshot of its search suggested that the BPS initially understood items 1 and 2 to be looking for responsive emails from 12 and 13 April 2020 only. The disclosed responsive records showed, however, that the BPS also looked for records from 14 April 2020.

Item 7

36. The Acting Information Commissioner is satisfied that the BPS's analysis of item 7 of the second PATI request was adequate. Its initial decision, written submission, a screenshot of the relevant search as well as the disclosed responsive email showed the BPS's understanding that item 7 was asking for an email sent by the CoP to senior command between 12 and 16 April 2020 in relation to the railway trail incident.

Item 8

37. In contrast, the BPS's initial and internal review decisions and the screenshots it submitted to the ICO during the review did not show that the BPS's analysis of the scope of item 8 was adequate.
38. The BPS made a very limited submission on item 8: only stating that items 7 and 8 related to the same email that had been disclosed to the Applicant at the initial decision stage. The Acting Information Commissioner accepts that, because there was some overlap in the scope of items 7 and 8, the disclosed email was responsive to both items 7 and 8. She is of the view, however, that the part of the second PATI request labelled as item 8 in this review is separate and distinct from item 7.
39. The relevant part of the second PATI request read:

“I would also like any and all emails from the Commissioner of Police in relation to me and or [Senior Officer A] ... on the Railway Trail on 12th April 2020. I am also aware that [the CoP] caused an email to be sent to senior command in relation to the matter sometime between 12th April 2020 and 16th April 2020. All such emails to be unredacted.”

40. One possible reading of the identified part of the second PATI request was that the Applicant only wanted to obtain the one email sent by the CoP to senior command between the stated dates, and that the earlier sentence was simply introductory. This might have been the BPS’s understanding during its initial handling of the second PATI request. But such reading of the request was neither adequate nor reasonable. The first sentence of the cited part clearly asked for “any and all emails” and the later sentence referred to “all such emails”. These suggested that the Applicant expected and asked for more than just one email. Whether there was only one email responsive to this part of the request is a separate question. What matters here was that the first sentence was not simply an opening sentence to what came next. The two sentences asked for two distinct, though closely related, items. If anything, it would have been more reasonable to treat the CoP email to senior command as an example of “any and all” CoP emails that the Applicant was looking for.
41. The Acting Information Commissioner is not satisfied that the BPS’s analysis of item 8 during its initial handling of the second PATI request was adequate. For the sake of completeness, however, she continues considering the reasonableness of the BPS’s search for records responsive to item 8.

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

Items 1 and 2

42. To locate the records responsive to items 1 and 2, the BPS searched the email of Senior Officer A. This step was reasonable, given items 1 and 2 asked for emails from Senior Officer A. To make sure that its search for records responsive to items 1 and 2 was adequate, the BPS also asked another 11 officers to search their work emails. The Acting Information Commissioner is satisfied that the scope of the search that the BPS conducted to locate records responsive to items 1 and 2 was adequate.

Item 7

43. Item 7 asked for an email sent by the CoP to senior command between 12 and 16 April 2020. In response to this item, the BPS searched the CoP’s email. The Acting Information

Commissioner is satisfied that the scope of the BPS's search to locate the record responsive to item 7 was adequate.

Item 8

44. The BPS confirmed that there was no evidence that the CoP was asked to locate emails responsive to item 8 at the time. The Acting Information Commissioner is thus not satisfied that the scope of the BPS's search to locate records responsive to item 8 was adequate.

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

Items 1 and 2

45. The search for records responsive to items 1 and 2 was conducted by Senior Officer A who had full access to the relevant email and was familiar with the relevant subject of the PATI request. As mentioned above, the BPS also expanded its search by asking other officers who could potentially be the recipients of emails from Senior Officer A to search their own emails.
46. The BPS started its search within a few days after its receipt of the first PATI request, which gave it enough time to diligently follow up on its search requests. Due to the Applicant's internal review request, the BPS again emailed the officers asking them to locate and provide a copy of any other responsive records. Screenshots submitted showed that the BPS sent a chaser to the officers who did not initially respond to its search request.
47. Given the above, the Acting Information Commissioner is satisfied that the BPS conducted its search for records responsive to items 1 and 2 with adequate rigour and efficiency.

Item 7

48. The Acting Information Commissioner has no reason to doubt that the BPS's search for the record responsive to item 7 was conducted with adequate rigour and efficiency.

Item 8

49. In the absence of evidence showing that the BPS conducted a search to locate records responsive to item 8, the Acting Information Commissioner cannot be satisfied that the search was conducted with adequate rigour and efficiency.

Conclusion

50. For the reasons above, the Acting Information Commissioner is satisfied that the BPS conducted a reasonable search, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations, to locate records responsive to items 1, 2 and 7.
51. The Acting Information Commissioner is not satisfied that the BPS conducted a reasonable search to locate records responsive to item 8.

Decision

The Acting Information Commissioner finds that the Bermuda Police Service (**BPS**) did not conduct a reasonable search for records responsive to item 8 of the Applicant's Public Access to Information (**PATI**) request, as required by section 12(2)(b) of the PATI Act 2010 and regulation 5 of the PATI Regulations 2014, while it did for records responsive to items 1, 2 and 7 of the PATI requests.

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

- affirms the BPS's internal review decision on items 1, 2 and 7;
- annuls the BPS's internal review decision on item 8;
- orders the BPS to conduct a reasonable search to locate records responsive to item 8 and document its search, as instructed in this Decision Notice's confidential cover letter to the BPS; and
- orders the BPS to issue a new initial decision on item 8, with a copy to the Information Commissioner's Office.

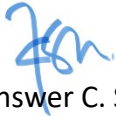
The Acting Information Commissioner requires the BPS to comply with above, as directed by this Decision Notice and the accompanying Order, on or before **Tuesday, 5 September 2023**.

Judicial Review

The Applicant, the Bermuda Police Service, or any person aggrieved by these Decisions 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 Notice.

Enforcement

This Decision Notice has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the BPS fails to comply with Decision 20/2023, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Answer C. Styannes

Acting Information Commissioner

24 July 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

- 12 (2) Public authorities shall make every reasonable effort to—
- ...
- (b) respond to requests completely, accurately and in a timely manner.
- ...

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.

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