

Decision Notice

Decision 24/2023: Ministry of Education Headquarters

Plan 2022 submissions

Reference no: 20210817

Decision date: 21 August 2023

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Education Headquarters (**Ministry Headquarters**) for records of Plan 2022 submissions. The Ministry Headquarters administratively denied the request under section 16(1)(a) of the PATI Act, stating that records as requested did not exist.

The Information Commissioner has found that the Ministry Headquarters' administrative denial was justified, because it had taken all reasonable steps in the circumstances to locate records before concluding that none existed.

Relevant statutory provisions

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

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.

Background

1. [Plan 2022](#) was published on 1 December 2017. It was described as the Department of Education's "community-developed strategic plan", whose purpose was to "[provide] the sustained direction and support needed to create transformational outcomes for Bermuda's public school education system"—resulting from a "Strategic Planning Consultation process [that] followed four phases of engagement" "over a period of ten months" in 2017.¹

¹ See Ministry of Education Headquarters, [Request for Proposals for School Redesign and Signature School Consultancy](#) (30 August 2019), at page 3; Department of Education, [Plan 2022: Bermuda's Strategic Plan for Public School Education](#) (1 December 2017), at pages 8 and 9; and Government of Bermuda, [Plan 2022: Bermuda's Strategic Plan for Public School Education](#) (1 December 2017), the Minister of Education's statement.

2. On 16 March 2021, the Applicant made a PATI request to the Ministry of Education Headquarters (**Ministry Headquarters**). Part of their request asked for “all submissions to the [Ministry of Education] in response to the Plan 2022 consultation” (**item 2**).²
3. On 2 June 2021, the Ministry Headquarters issued an initial decision on the PATI request.³ It denied item 2 and stated the relevant files were not accessible due to COVID-19 conditions. The Applicant requested an internal review.
4. On 12 July 2021, the Ministry Headquarters issued a timely internal review decision. It explained that records as requested did not exist.
5. On 17 August 2021, the Applicant made a timely application for an independent review.

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 issue the Applicant wanted her to review.
7. Before notifying the Ministry Headquarters, the Applicant agreed to no longer challenge item 1 of the PATI request, because responsive records about the parish primary school consultation had been published a week after the internal review decision.⁴
8. On 24 September 2021, the Information Commissioner’s Office (**ICO**) notified the Ministry Headquarters of the valid application about its reliance on section 16(1)(a) of the PATI Act for item 2.
9. Initially, the Applicant and the Ministry Headquarters consented for the Information Commissioner to attempt an early resolution under section 46. Having later re-assessed this approach, the Information Commissioner notified the parties on 4 May 2023 that a review and investigation pursuant to section 47 was commenced.

² The PATI request also asked for “all submissions to the Ministry of Education in response to the consultation on a [Proposal for the Introduction of Parish Primary Schools](#)” (**item 1**). As explained at paragraph 7, the Applicant’s challenge for item 1 of the PATI request was dropped at an early stage in this Information Commissioner’s review.

³ The Ministry Headquarters met the PATI deadline in issuing its initial decision because it had notified the Applicant of an extension under section 15(1)(b) within the required time.

⁴ See Ministry of Education Headquarters, [Parish Primary School Consultation Submissions](#) (July 2021).

10. 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 before she makes her decision. Both the Ministry Headquarters and the Applicant were invited to comment on the issue under review and made submissions.

Information Commissioner's analysis and findings

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

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

12. 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.
13. Regulation 5 of the PATI Regulations 2014 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.
14. 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 exists or can no longer be located. Rather, the Information Commissioner is required to assess whether the public authority took all reasonable steps to find a record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration.
15. 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 PATI request;
 - [2] the scope of the search that it decided to make on the basis of that analysis; and
 - [3] the rigour and efficiency with which the search was then conducted.
16. The specific circumstances in each case will inform the Information Commissioner's assessment.

17. 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.⁵

Public authority's submissions

18. The Ministry Headquarters' position was that "there was no consultation on the Plan 2022 document". Because it "was not the case" that "the Plan 2022 document was put forward as a proposal and submissions were made regarding it", "records of 'submissions'" did not exist.
19. The Ministry Headquarters explained that the Plan 2022 process did not follow the usual public consultation steps, where the public authority would propose something in a document and invite submissions on it. Rather than being a "proposal", Plan 2022 was a "strategic plan that was developed after obtaining thoughts from key stakeholders and the broad community during numerous community conversations about different aspects of public school system". In contrast, the consultation relevant to item 1 of the same PATI request had followed the usual process, and those responsive records included consultation submissions, which were later published.
20. The Ministry Headquarters submitted that the Permanent Secretary had personally searched for records when handling this PATI request. Ultimately, the Ministry Headquarters had decided that it held no records responsive to item 2 of the PATI request because none existed.

Applicant's submissions

21. The Applicant submitted that, when making their PATI request, they did not know exactly what consultation there was or what submissions had been collected in response to the Plan 2022 consultation. They imagined that plenty records would have been relied on to write Plan 2022, referring to the Minister of Education's description that "it was written by our very own Bermudians who have expressed and shared their vision for public school education".⁶

⁵ See [Decision 04/2017](#), [Department of Health](#), at paras. 37-49, and more recently [Decision 01/2023](#), [Ministry of Legal Affairs and Constitutional Reform Headquarters](#), at paras. 30-35.

⁶ See the Minister of Education's [statement of 1 December 2017](#).

22. The Applicant believed that records responsive to item 2 of their request would include the documents used when Plan 2022 was put together and any subsequent responses to it from the public after it was released.

Discussion

23. The Information Commissioner considers whether the Ministry Headquarters took all reasonable steps to locate records responsive to item 2 of the PATI request, before deciding that none existed.

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

24. As made obvious by their submissions, the parties had different views on item 2. Given this, the Information Commissioner considers the Ministry Headquarters' analysis together with official information that was known to the public at the relevant time, about what 'consultation' in the context of Plan 2022 meant.
25. For item 1, the consultation followed the usual process. This was publicly explained. Anyone could have made a written, formal submission by filling in a [form](#) to answer questions outlined in the [consultation proposal](#). Later, a report was published compiling the [submissions received](#).⁷ For this consultation, it was reasonable to understand that all completed forms received would have been identified as records responsive to item 1, i.e., the consultation submissions.
26. In contrast, the consultation relevant to item 2 was dynamic. This was publicly explained in 2017.⁸ The public authority did not invite consultation submissions on a proposed strategic plan that had already been drafted and was being released for public comment. Instead, the consultation outcome was a written strategic plan called 'Plan 2022'. Stakeholder feedback was received and integrated at different stages and for different parts of the draft plan. Feedback was often gathered through in-person sessions. In this sense, no 'consultation submissions' were sought or received on Plan 2022 as the published document.
27. The Information Commissioner acknowledges that the Department of Education had proactively set out in Plan 2022 itself when and how stakeholder feedback related to it had been sought and received in 2017. The consultation process relevant to item 1 also

⁷ On page 3, it was explained that the "consultation submissions were anonymized and redacted in order to remove names and personal identifiers of individuals".

⁸ The Department of Education described how [Plan 2022](#) was developed, along with the types of feedback sought during its different phases of engagement, on pages 8 and 9.

had been proactively explained by the Ministry of Education Headquarters in its 2021 publications.

28. Importantly though, the Ministry Headquarters' explanation to the Applicant identified other potential records that had existed. The Head of Authority described how 'community conversation' feedback was documented (during phase 2 of the strategic planning consultation process) and identified some records relevant to it, but which had already been destroyed. To the Applicant's point, other forms of feedback were thought about in the context of their request. In light of this, the Information Commissioner considers whether it would have been reasonable to require the Ministry Headquarters to apply a broader reading of item 2 and thus demonstrate what other documented forms of feedback related to the Plan 2022 process were held. For instance, at the very least, any stakeholder feedback during the last phase of the described process, at which point a strategic plan proposal had been published online for final feedback, would have been relevant. But doing so would have been disproportionate here.
29. Item 2 was stated in specific, clear and narrow terms. For instance, had item 2 asked for 'all *feedback* received during and after the Plan 2022 consultation', as the Applicant has submitted for the Information Commissioner's consideration, the Ministry Headquarters' analysis could have been inaccurate. But there was no obvious ambiguity or gap in the written PATI request, inviting the Ministry Headquarters to make more effort to clarify the Applicant's information needs, as a way to meet the public authority's duty to assist in section 12(2) before issuing its administrative denial. Records of those other forms of feedback were simply not requested.
30. The Information Commissioner accepts that the Ministry Headquarters had a reasonable basis to interpret item 2 as asking for any records of formal consultation submissions (i.e., equivalent to item 1 records). In their proper contexts, it was not reasonable to read item 2 as asking for all possible forms of feedback, whether written or verbal, received while Plan 2022 was being developed and thereafter on it.
31. In light of the specific records sought by the PATI request, the Information Commissioner is satisfied that the Ministry Headquarters' understanding of item 2 was accurate, complete and adequate in the circumstances.

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

32. Because the Ministry Headquarters understood item 2 as essentially asking for non-existent records, the scope of its search was reasonably limited to relying on the personal work knowledge of the Permanent Secretary, who was the most senior public officer responsible for public school reform efforts. Considering its analysis, no other potential

search location under the Ministry Headquarters' control would have been necessary. Requiring the Ministry Headquarters to evidence that it had searched all digital files held by the Permanent Secretary, the Policy Analyst and the Minister, for instance, would have been inefficient and disproportionate under these circumstances.

33. On balance, the Information Commissioner is satisfied that the scope of the Ministry Headquarters' search was reasonable.

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

34. The Information Commissioner finds no basis to dispute the Ministry Headquarters' submission in relation to the rigour of the search carried out prior to issuing its administrative denial. In all the circumstances and on the balance of probabilities, the Information Commissioner is satisfied that a reasonable search had taken place, having taken reasonable steps in analysing the request in the context of what the Plan 2022 consultation actually entailed. The Ministry Headquarters was justified in deciding that responsive records (i.e., 'consultation submissions') did not exist for item 2.

Conclusion

35. The Information Commissioner is satisfied that the Ministry Headquarters was justified in relying on section 16(1)(a) to deny item 2 of the PATI request, because it had taken all reasonable steps to locate responsive records before concluding they did not exist.

Decision

The Information Commissioner finds that the Ministry of Education Headquarters (**Ministry Headquarters**) was justified in relying on section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010 to administratively deny item 2 of the PATI request, because it had taken all reasonable steps to locate responsive records before deciding they did not exist.

In accordance with section 48 of the PATI Act, the Ministry Headquarters' internal review decision is affirmed, and the Information Commissioner does not require any further action.

Judicial Review

The Applicant, the Ministry of Education 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

21 August 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;
 - ...

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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