

Decision Notice

Decision 43/2023: Bermuda Police Service

Commissioner of Police correspondence

Reference no: 20210513

Decision date: 30 November 2023

Summary

The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for specific correspondence between the Commissioner of Police and certain members of the senior management about the Applicant. The BPS's internal review decision upheld its initial decision which refused the PATI request in full under section 16(1)(a), because the records did not exist.

The Information Commissioner has found that the BPS was not justified in relying on section 16(1)(a), because it did not conduct a reasonable search before concluding that the responsive records did not exist. During the Information Commissioner's review, the BPS took additional steps in an effort to meet the reasonable search requirements under the PATI Act, but one location remains unsearched.

The Information Commissioner has ordered the BPS to search the specific location and to issue a new initial decision to the Applicant, as directed by this Decision and accompanying Order.

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 the statutory provisions and forms part of this Decision.

Background

1. On 4 March 2021, the Applicant made a Public Access to Information (**PATI**) request to the Bermuda Police Service (**BPS**), asking for:
 - a. the email and/or instant messages sent by the Commissioner of Police (**COP**)¹ to named members of the BPS's senior management "et al" on 7 December 2020 or soon thereafter where the COP asked about the actions taken by the Professional Standards Department about the Applicant and another police officer (**item 1**), and

¹ References to the COP in this Decision are references to the then-COP, unless stated otherwise.

- b. any emails and/or instant messages that were sent in reply to the COP's email and/or instant messages (**item 2**).
2. The BPS's initial decision of 26 March 2021 informed the Applicant that the BPS did not hold any records responsive to the PATI request, effectively refusing the request under section 16(1)(a) on the basis that the records did not exist.
3. In response to the Applicant's internal review request, on 11 May 2021 the BPS issued an internal review decision upholding its initial decision.
4. The Applicant made a timely application for an independent review by the Information Commissioner.

Investigation

5. 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.
6. 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 administrative ground was justified.
7. On 14 June 2021, the Information Commissioner's Office (**ICO**) notified the BPS of the Applicant's valid application.
8. During the review, the ICO clarified the scope of the PATI request with the Applicant. This resulted in the Applicant providing the ICO with a copy of the email responsive to item 1 of the PATI request, which the Applicant obtained from a formal process outside the PATI Act. Because they were not at liberty to disclose the email to the public, the Applicant wanted to obtain access to the email under the PATI Act. The responsive record, marked as record 1, was an email from the COP to two other members of the BPS's senior management.
9. Also during the review, the BPS searched the emails of the COP and one of the recipients of record 1 in the presence of the ICO Investigators. These additional searches resulted in the identification of 4 records (marked as records 2-5) responsive to the PATI request. The BPS did not search the email of another recipient of record 1 during the Information Commissioner's review.

10. As required by section 47(4) of the PATI Act, the Information Commissioner afforded the public authority and the applicant a reasonable opportunity to make representations. The ICO received formal submissions from the Applicant and the BPS, which are considered below.

Information Commissioner's analysis and findings

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

Record did 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.²

Public authority's submissions

18. The BPS made two separate written submissions – one prior to the searches conducted in the presence of the ICO Investigators and another one after the searches. Paragraphs 19-22 summarised the BPS's submissions prior to the searches, while paragraphs 24 and 25 summarised the submissions made after the searches.
19. The BPS explained that when it first received the PATI request, the COP and other officers identified in the PATI request were asked to search their files to locate the responsive records. The responses from these identified individuals indicated that they did not hold any of the responsive records.
20. While no records about the Applicant were located, the BPS submitted that similar records relating to another officer were located. However, because the PATI request did not identify the other officer, the BPS was of the view that the identified records were not responsive to the PATI request. The BPS provided the ICO with the records relating to the other officer to demonstrate that attempts were made to retrieve the records responsive to the PATI request. The BPS explained that these records were responsive to different PATI requests not made by the Applicant and have been disclosed to the requester in those other requests.
21. The BPS emphasised that these emails did not relate to the Applicant but instead to another police officer. While the BPS made an assumption about the identity of other officer, it noted that the PATI request did not identify them by name. The BPS further emphasised that no consent to disclosure had been given by the "other police officer".
22. The BPS acknowledged the Applicant's allegation about deleted messages. It stated it was unable to respond to the allegation but did not explain why.
23. During the Information Commissioner's review and after its first submission to the ICO, the BPS searched the emails of the COP and another officer identified in the PATI request in the presence of the ICO Investigators. These searches resulted in the identification of records 1-5 responsive to the PATI request.

² 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.

24. The BPS was asked to comment on whether, in light of the events that transpired during the Information Commissioner's review, it agrees that the search conducted during its initial handling of the PATI request in March 2021 was not reasonable and, therefore, its reliance on section 16(1)(a) was not justified. In response, the BPS acknowledged that the Information Officer at the time did not have full access to the relevant email accounts.
25. The BPS acknowledged that the initial search was not reasonable. However, it emphasised that there were mitigating factors, namely, reliance on information provided by the officers who held the records and a misdirection as to the requirements under the PATI legislation.

Applicant's submissions

26. The Applicant mentioned in their application to the Information Commissioner that they were aware that the responsive records existed. The Applicant informed the Information Commissioner of the reason why they believed that to be the case.
27. In their internal review request, the Applicant alleged that the relevant officers had deleted the emails following the BPS's receipt of the PATI request. The Applicant asked in their internal review request that the computers and phones of the officers mentioned in the PATI request be forensically examined. The Applicant referred to a specific example of forensic examination done by the BPS in the past.
28. The Applicant provided the ICO with a number of documents obtained by the Applicant from a formal process outside the PATI Act. These included an email from the COP that the Applicant identified and confirmed to be responsive to item 1 of their PATI request.

Discussion

29. The Information Commissioner considers the BPS's reliance on section 16(1)(a) to refuse the PATI request. Although the BPS has now conceded that its reliance on the administrative ground was not justified, the Information Commissioner considers the administrative denial for the purpose of highlighting the lessons learned for the BPS and the Applicant as well as public authorities and members of the public in general.

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

30. The PATI request asked for two separate, though related, items. Item 1 asked for a specific email or instant messages sent by the COP on 7 December 2020 or "soon thereafter" to certain individuals about the Applicant and "another police officer". Item 2 asked for any emails and/or instant messages responding to the record identified in item 1. The scope of item 2 is thus dependant on the identification of the record responsive to item 1.

31. There were a few elements in item 1 of the PATI request that were unclear and thus required the Applicant's clarification, namely, "et al", "soon thereafter" and "another police officer". Despite this lack of clarity, the BPS at the time did not make any attempts to clarify the scope of the request with the Applicant. Based on this alone, the quality of the BPS's analysis of the PATI request cannot be said to be adequate.
32. Given the lack of clarity regarding the records being sought by the Applicant, during the Information Commissioner's review the ICO asked the Applicant to clarify the scope of the request. This query resulted in the Applicant providing the ICO with a copy of an email from the COP, which the parties did not dispute to be responsive to item 1 of the request. The identification of the record was of great assistance to the BPS when conducting the additional searches, which resulted not only in the identification of record 1 but also records 2-5 responsive to item 2 of the PATI request.

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

33. During its initial handling of the PATI request, the BPS asked the individuals identified in the request to search their files and locate the responsive records. This appeared to be a reasonable step to take, except that the scope of the PATI request had not been clarified. Unsurprisingly, in the absence of clarity around the scope of the PATI request, the searches generated a nil result.
34. After the scope of item 1 was clarified and record 1 was identified by the Applicant during the Information Commissioner's review, the BPS searched the emails of the COP and another officer to locate the responsive records. The search of the COP's email generated nil responsive results, but the search of the other officer's email located five records, with record 1 being responsive to item 1 and records 2-5 being responsive to item 2.
35. After record 1 was identified, it became clear that records responsive to item 2 were potentially held by another officer not specifically named in the PATI request. The BPS was unable to search the email of this particular officer during the Information Commissioner's review. As such, the scope of the BPS's search remains inadequate.
36. Given the above, the Information Commissioner is satisfied that the BPS did not conduct a reasonable search before concluding that the responsive records did not exist. Its reliance on section 16(1)(a) was not justified and the Information Commissioner does not consider this administrative denial further.
37. This case exhibits the importance of communication between public authorities and PATI requesters. Without open and clear communications with the requesters on the requesters' information needs, public authorities are at risk of misunderstanding the scope of the request, and failing to conduct a reasonable search as required by the PATI Act.

Similarly, PATI requesters should strive to submit clearly articulated PATI requests that identify the records and information they seek in a concrete manner. Vague references or broad requests can also create a risk of misunderstanding that results in a failure to properly identify the records an individual is seeking.

Conclusion

38. The Information Commissioner acknowledges the steps taken by the BPS during the course of this review to meet the requirements of a reasonable search under the PATI Act and Regulations. However, because one specific location remains unsearched, the Information Commissioner is satisfied that the BPS was not justified in relying on section 16(1)(a) to deny the PATI request, because it had not taken all reasonable steps to locate responsive records before concluding they did not exist.

Decision

The Information Commissioner finds that the Bermuda Police Service (**BPS**) was not justified in denying the PATI request under section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010, because it had not taken all reasonable steps to locate responsive records before deciding they did not exist.

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

- reverses the BPS's decision to deny the PATI request under section 16(1)(a), and
- orders the BPS to conduct a reasonable search and to issue an initial decision.

The Information Commissioner requires the BPS to conduct a reasonable search and to issue an initial decision, as directed by this Decision and the accompanying Order, on or before **Thursday, 18 January 2024**.

Judicial Review

The Applicant, the Bermuda Police Service or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Bermuda Police Service fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.

Gitanjali S. Gutierrez
Information Commissioner
30 November 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Refusal of request on administrative ground

- 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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