

## Decision Notice

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**Decision 45/2023: Department of Child and Family Services**

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### **Overseas placement records**

**Reference no: 20200826-02**

**Decision date: 13 December 2023**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Child and Family Services (**Department**) for overseas placement records. The Department released most information, administratively denied other parts of the PATI request because the information requested was not held or was already in the public domain, and found the remaining records exempt under section 37 of the PATI Act.

The Information Commissioner has affirmed the Department's internal review decision administratively denying the request, in part, under sections 16(1)(a) and (f), as well as withholding certain records under section 37(1) of the PATI Act. The Information Commissioner does not require the Department to take any further steps with respect to this PATI request.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 16(1)(a) (record does not exist); section 16(1)(f) (public domain); section 37 (disclosure prohibited by other legislation).

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

Children Act 1998: section 11 (disclosure of information).

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

## Background

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1. On 26 November 2019, the Applicant made a Public Access to Information (**PATI**) request to the Department of Child and Family Services (**Department**), asking for records about Bermuda's young people being placed at overseas residential facilities.<sup>1</sup> The PATI request was assigned no. 581.
  - a. Item 1 asked for the current average annual tuition cost per client sent abroad to a behavioural or treatment centre.
  - b. Item 2 asked for the annual fee range, i.e., the lowest and highest values paid.

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<sup>1</sup> This was the Applicant's second of three PATI requests seeking the Department's records about overseas placements. The first was PATI request no. 565 about Glen Mills Schools made on 25 June 2019 (Decision 44/2023, review no. 20200124), and the third was PATI request no. 593 about Utah-based facilities (Decision 38/2023, review no. 20200826-01).

- c. Item 3 asked for the number of clients sent abroad for the first time in each year from 2015 to 2019.
  - d. Item 4 asked for the number of those clients (per item 3) who had been assessed or treated by Child and Adolescent Services or any other on-island mental healthcare provider before going overseas.
  - e. Item 5 asked for the total number of clients who were at overseas facilities in each year from 2015 to 2019.
  - f. Item 6 asked for the percentage of clients sent abroad who were incarcerated on return to Bermuda for the past five years, if any and if the data were collected by the Department.
  - g. Item 7 asked for the names of overseas facilities the Department sent clients to from 2015 to date.
  - h. Item 8 asked for records to support a ministerial statement made on 4 April 2019 about the Department's policy on staff contacts during overseas placements, including the number of visits made by staff and the visit dates, the number and dates of conference calls made, the dates of the Director's in-person visits, for each facility and each year in 2015 to 2019.
  - i. Item 9 asked for any policies for the Department's psychoeducational programme.
  - j. Item 10 asked for the annual reports of the Child Care Placement Board from 2015 to date.
2. On 26 November 2019, the Department sent its formal acknowledgement letter and offered to transfer item 10 to the attention of the appropriate Information Officer for the then-Child Care Placement Board, a separate public authority. The Applicant agreed to the transfer by reply email. The Department confirmed to the Applicant on 27 November 2019 that the transfer was made.
3. By letter of 7 January 2020, the Department applied section 15 of the PATI Act to extend its initial response period.
4. On 21 February 2020, the Department issued its initial decision a few days out of time. Specifically, the initial decision:
  - a. found that information for items 1 and 2 were in the public domain by way of its gazette notice on 7 January 2020 for contracts valued above \$50,000;

- b. released the client counts per financial year from April 2015 to December 2019, for items 3 and 5;
  - c. released the total client count for item 4;
  - d. found that a record requested for item 6 did not exist;
  - e. listed the facility names for item 7;
  - f. listed the visit dates for staff and the Director per facility, for item 8, with a note that 'no visit date' in a year meant no client placement;
  - g. administratively denied the rest of item 8, about conference calls, finding that it would have caused substantial and unreasonable interference with the Department's other work—because the information was not formally recorded outside of individual client files, therefore it would have required researching each client file for file notes documenting staff conversations, which were described as occurring frequently;
  - h. found that information for item 9 was in the public domain on gov.bm; and
  - i. affirmed that, because records for item 10 were not held by the Department, that item had been transferred to the responsible ministry headquarters.
5. In April 2020, early in the COVID-19 pandemic, the Applicant informed the Department that an internal review was desired. To avoid burdening the Department during the pandemic and aware that it was providing essential services, the Applicant and Department agreed that the Applicant would submit their formal request out of time once these challenges had eased. The Applicant asked for an internal review on 21 June 2020, and the Department accepted the late request on 1 July 2020.
6. On 12 August 2020, the Department issued an internal review decision, which explained that the initial decision was upheld on the basis that:
- a. certain information as requested was already in the public domain and reasonably accessible to the public;
  - b. the Department did not track certain data as requested; and
  - c. certain information as requested contained details that were exempt from disclosure under section 37 of the PATI Act 2010 because they revealed information that the Department was statutorily prohibited from disclosing under section 11 of the Children Act 1998 (**Children Act**).

7. On 26 August 2020, the Applicant asked for an independent review by the Information Commissioner, to challenge the Department's internal review decision.

## Investigation

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8. The Information Commissioner's Office (**ICO**) accepted the application 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.
9. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions from both parties were required on the administrative denials.
10. The ICO notified the Department of the valid application on 19 October 2020.
11. During a related review, no. 20200124, the ICO Investigator conducted an in-depth review of a selection of the Department's hard copy client files, as explained in Decision 44/2023, paragraphs 9 and 24-29. Where relevant, that information is considered in this Decision. The case then became inactive while the ICO focused on other backlogged cases and awaited the impact of the COVID-19 pandemic to ease before addressing pending reviews with the Department.
12. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. When inviting the parties to make submissions, the Investigator also shared a preliminary view that section 37 would have been appropriately engaged to deny public access under the PATI Act to the Department's overseas placement records and that the same reasoning would extend to any underlying records where the Department relied on administrative grounds. This reflected the Information Commissioner's [Decision 38/2023](#), recently issued on 31 October 2023, which had assessed the absolute exemption's application in relation to the prohibition on disclosure in the Children Act—and was the first time doing so in an ICO review.
13. The Department and the Applicant made submissions, in addition to other correspondence with the ICO during this and related reviews.
14. On 4 December 2023, the ICO notified the parties to correct which issues were on review and set a five-day deadline to receive any final comment before the Information Commissioner issued her decision. No further comments were received from the Department or Applicant.

## Information Commissioner's analysis and findings

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15. The Information Commissioner has considered all relevant evidence, being satisfied that no matter of relevance has been overlooked.

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

16. 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.
17. 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.
18. 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.
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 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.
20. The specific circumstances in each case will inform the Information Commissioner's assessment.
21. 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.<sup>2</sup>

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<sup>2</sup> 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.

*Public authority's submissions*

22. For item 6 in the PATI request, the Department's initial decision stated that requested records did not exist. The internal review decision stated that the Department did not track certain data that was requested. This information was provided by the Information Officer, a long-serving officer who had conducted an extensive review of the Department's records to prepare the response to this request, as well as confirmed by the Head of Authority, who was the responsible Permanent Secretary.
23. The Department's search efforts and records management explanations related to Decision 44/2023, review no. 20200124, paragraphs 24-29, were also considered, where relevant.

*Applicant's submissions*

24. The Applicant explained that item 6 reflected their view that it would be potentially useful for the Department to maintain that type of statistical information, as part of the Department's efforts to assess the longer-term impacts and outcomes of its interventions for clients.

*Discussion*

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

25. The request in item 6 was stated in clear and narrow terms. The Department's response did not indicate any confusion about the information the Applicant was seeking.
26. The quality of the analysis of the PATI request was adequate.

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

27. The Information Commissioner finds no reason to doubt the Department's position, as stated to the Applicant, that it did not track the percentage of clients who had gone overseas for care and were incarcerated after returning to Bermuda. While the Applicant might have challenged the Department's response to item 6 to encourage good public administration, it did not change the fact that this information was not tracked or recorded by the Department at the time of their PATI request.
28. Nothing in this review or the public record gives reason to question the assertion that the Department did not track this information. Under these circumstances, the confirmation from the Information Officer, as a long-serving officer at the Department, and the Permanent Secretary, constituted a sufficient scope to search and assess whether records existed or could be located.

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

29. The Information Officer was aware that the Department did not collect the requested information, and this was confirmed by the Permanent Secretary during the public authority's handling of the request. Further, at least some of the information requested went beyond subjects that were within the Department's statutory remit, e.g., whether individuals who were no longer under the Department's care were later incarcerated.
30. Ideally under these circumstances during the initial response to a request, an Information Officer will send a brief email to their Department Head asking for the executive officer to confirm that such information is not retained. This helps to ensure whether—unbeknownst to the Information Officer—the Department Head is aware that another officer within the Department actually does have the information sought.
31. This step is not required for the rigour of a search to be adequate in this case. Here, the position of the Information Officer in tandem with the Permanent Secretary's confirmation provides an equivalent rigour. Further, even if some of the information could be gleaned from client files for some children, the client files would fall within section 37, as discussed below, and would be exempt. It would not have been proportionate for the Department to continue searching by, for example, examining all client files to confirm to a degree of certainty that the information requested did not exist. The Information Commissioner is satisfied that the Department conducted its search with adequate rigour and efficiency in this matter.

#### *Conclusion*

32. The Information Commissioner is satisfied that the Department was justified in relying on the administrative ground in section 16(1)(a) for item 6 in the PATI request.

#### *Information in public domain – section 16(1)(f)*

33. Section 16(1)(f) allows public authorities to refuse a PATI request under three specific circumstances when the information sought is:
  - a. in the public domain;
  - b. reasonably accessible to the public; or
  - c. reasonably available to the public on request under any other statutory provision, whether free of charge or on payment.



34. Here, under consideration is the assertion that the information in the responsive record is already in the public domain. This includes information that is publicly available on the internet. Section 16(1)(f) is not applicable, however, if it is not evident that all information in the responsive record is publicly available.
35. To administratively deny a PATI request under section 16(1)(f), a public authority must consider the following<sup>3</sup>:
- [1] What information is in the record which falls within the PATI request?
  - [2] Is the information available in the public domain, including on the internet?
36. A public authority also has a duty to assist a requester in connection with a PATI request under section 12(2)(a). Under this duty, when a public authority relies on section 16(1)(f) to administratively deny a request, the public authority should provide the requester with details on how to access the public information.
37. Finally, the public authority bears the burden to establish, on the balance of probabilities, that it was justified to administratively deny the PATI request.

*Public authority's submissions*

38. The Department's initial decision referred the Applicant to the Department's contract gazette notice of 7 January 2020 for items 1 and 2 and to gov.bm for item 9. The Department's position that the information sought was in the public domain was affirmed by the internal review decision, without elaboration.

*Applicant's submissions*

39. The Applicant did not make submissions specific to this issue.

*Discussion*

- [1] What information is in the record which falls within the PATI request?
40. For items 1 and 2, one of the responsive records would have been a report from the Government of Bermuda's E-1 accounting system, showing all payments made to overseas facilities in the year or so before the PATI request. This would have aligned with the Department's search evidence for item 3 in the related review no. 20200124. Because the PATI request did not define 'annual' (i.e., whether seeking information for

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<sup>3</sup> See [Decision 17/2019](#), [Ministry of Finance Headquarters](#), at paras. 15-19.

each calendar year vs. financial year vs. programme year), the Department's understanding to use the Government's financial year was reasonable.

41. An E-1 report would have included payments to overseas facilities that totalled less than \$50,000 and those that were higher for the financial year. The Information Commissioner considered a potential gap where the Department's decisions did not state for the Applicant whether all responsive information (i.e., each facility payment that year) had met the threshold required for contract gazetting.
42. Based on the Department's search evidence in the other review, the Information Commissioner understands that the E-1 report probably could not have been relied on solely to then calculate an average per client to complete its response on item 1, because the client's identifier had not been consistently inputted into E-1. As such, the Department would have been required to reconcile the E-1 report against a manual search of its client files. As the Department submitted in related review no. 20200826-01, the format of its data for the requested period (2015-2019) did not permit it to easily release the type of statistical information the Applicant asked for, although its client data was better organised for years 2021 onwards.
43. For item 9, the Information Commissioner is satisfied that the responsive record would have been an internal policy and procedure document, which an Ombudsman [report](#) from 2010 had named as the Psycho-Educational Committee's '2009 Policy and Procedure Manual' (pages 8-10).<sup>4</sup>

[2] Is the information available in the public domain, including on the internet?

44. For items 1 and 2, the Department's relevant gazette notice was published on [6 January 2020](#) with information on contracts in 2018-2019.<sup>5</sup> The Information Commissioner observes that the Department's response to item 5 coupled with the gazette notice would have allowed the Applicant to derive their own calculations for items 1 and 2. This was a reasonable workaround, since the PATI Act provides a right to access records held at the time of the PATI request. This means that a public authority is not required to create a record that did not already exist. In this sense, though the gazette notice did not include all responsive information, the Department's response was adequate.

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<sup>4</sup> To the ICO's knowledge, this was the only policy document held by the Department in support of its psycho-ed programme, where overseas placement applications were vetted by an interdepartmental committee. Note that the Department's PATI Information Statements from 2019 to 2022 did not list this policy document, which had been publicly named by the Ombudsman as early as 2010.

<sup>5</sup> Note, [GN0021/2020](#) duplicated [GN0019/2020](#) that was dated the day before.

45. For item 9, the Government’s webpage on ‘[Psycho-Educational Services](#)’ and a relevant [ministerial statement](#) dated 8 December 2019 outlined the Department’s policy and procedures, which, at the time of the internal review decision, were in the public domain. The Applicant did not specify that they believed certain other records should have existed but were not on this webpage. The Information Commissioner is satisfied that the Department’s responsive information was in the public domain.

*Conclusion*

46. The Information Commissioner is satisfied that the Department was justified in relying on the administrative ground in section 16(1)(f) for items 1, 2 and 9 in the PATI request.

***Disclosure prohibited by other legislation – section 37(1)***

47. Section 37(1) of the PATI Act allows a public authority to refuse public access to a record whose disclosure is prohibited by a statutory provision other than the PATI Act.
48. The mandatory nature of a prohibition in a provision may be indicated by the use of the word ‘shall’ and an accompanying provision setting out penalties for unauthorised disclosures. If the relevant statutory provision only applies when a particular function or duty of a public authority is engaged, the public authority must identify that function or duty and explain how the record falls within the prohibition.
49. The exemption in section 37(1) is not subject to the public interest test.
50. In sum, to rely on section 37(1), a public authority must consider the following:
- [1] What is the statutory provision creating the mandatory prohibition on disclosure?
  - [2] Does the record fall within this statutory provision?
  - [3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?
51. A public authority bears the burden of showing that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.<sup>6</sup>

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<sup>6</sup> See the Information Commissioner’s updated [Guidance: Disclosure prohibited by other legislation \(section 37\)](#) (January 2023).

### *Public authority's submissions*

52. The Department submitted that disclosing records about its overseas client placements was prohibited by the Children Act. The relevant duties of the Director (and their delegated officer) being performed were to investigate abuse and neglect allegations about a child and to arrange for the delivery of services for that child and their placement, including at overseas treatment facilities (section 9).
53. The Department explained that placement and treatment overseas for any child in the Director's care (section 25) happened under an order of the Court (section 84). Family Court matters were private and limited to parties in the matter (e.g., the children and their parents or legal guardians, their attorneys, their appointed litigation guardians and the Department), with the public excluded (section 17).
54. The Minister or Director's discretion to release information was exercised to grant access to the parent or guardian, or to the child if of legal age (section 11(1)(b)). Discretion not to release information might be exercised if it was professionally determined that the information would harm the child or recipient's health.
55. The Department further submitted that the prohibition on disclosure in the Children Act aimed to protect the confidentiality and privacy of personal information related to very sensitive and serious family matters. The Department's client records contained personal information of both parents and children. Such personal information, including about a client's treatment at an overseas facility, would never be released to the public.

### *Applicant's submissions*

56. The Applicant was concerned that section 37 of the PATI Act prevented the Department from being transparent and accountable for matters of significant public interest. They urged for the issue to be rectified, emphasising the importance of the Department's role in servicing the least powerful members in society. They noted that, since the Department had shared some information in response to their PATI requests, it was not clear to them why some, but not other, information could be shared.

### *Discussion*

57. The Information Commissioner now considers whether the Department was justified to rely on section 37 in denying access to the withheld records that were located as responsive to item 8 in the PATI request.

[1] What is the statutory provision creating the mandatory prohibition on disclosure?

58. The Department identified a relevant statutory prohibition on disclosure set out in section 11 of the Children Act. When read together with the Director’s duties in section 9 as they relate to overseas placements under section 84 and the privacy of court matters under section 17, section 11 creates a mandatory prohibition on the disclosure of overseas placement records. Contravening this duty to not communicate in section 11 would be an offence, liable to a monetary fine on summary conviction under section 11(2) of the Children Act.
59. Further, section 11 was in effect before the PATI Act came into operation. This means that section 37 preserved its statutory prohibition on the disclosure of information even though the Children Act does not specifically reference the PATI Act.<sup>7</sup>

[2] Does the record fall within this statutory provision?

60. The records fell squarely within the broad scope of the statutory prohibition in section 11 of the Children Act because they were obtained during the Department’s performance of its duty to have a child under its care enrolled and serviced at a treatment facility.
61. Based on a plain reading of section 11, all information within the records—i.e., not only the children’s identifying information—comes within the meaning of “information obtained in the performance of [the Director’s] duties under this Act”, and specifically the duties under sections 25 and 84 of the Children Act. The records in whole fell within the statutory prohibition on the disclosure of information contained in section 11.

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

62. Section 11 does not have any provisions creating a gateway to public disclosure related to the Director’s statutory duties. Section 11(1) sets out two exceptions to the prohibition on children’s officers and persons employed in administering the Children Act: when giving evidence before the courts, and when authorised by the Director or Minister. The Department reasonably understood the Director’s discretionary power granted by section 11(1)(b) as allowing the Director to consider releasing information to the parent or legal guardian, or a child of legal age, but not to the public, in the context of a PATI request. This exception is defined and restricted by the Director’s duties, which in turn are defined by the Children Act.

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<sup>7</sup> If a statutory provision prohibiting disclosure is made after the PATI Act came into operation on 1 April 2015, section 37(5) states that it “shall not have effect unless it provided specifically that it is to have effect notwithstanding” the PATI Act.

63. By the plain language of the Children Act, the Director (or their delegate) should not disclose information outside of the specific circumstances for performing their duties as defined in the Children Act, which upholds secrecy to protect children and their families.

*Conclusion*

64. The Information Commissioner is satisfied that the Department was justified to rely on section 37(1) in denying public access to all overseas placement records, as responsive to item 8 in the PATI request, because section 11 of the Children Act was a statutory prohibition on disclosure of the requested information.

*Conclusion*

65. In sum, the Information Commissioner is satisfied that the Department was justified to rely on sections 16(1)(a), 16(1)(f) and 37(1) of the PATI Act to administratively deny parts of the PATI request and otherwise refuse access to the remaining requested records.

## Decision

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The Information Commissioner finds that the Department of Child and Family Services (**Department**) was justified in relying on sections 16(1)(a), 16(1)(f) and 37(1) of the Public Access to Information (**PATI**) Act 2010 to administratively deny parts of the PATI request and otherwise refuse access to the requested records. In accordance with section 48 of the PATI Act, the Information Commissioner affirms the internal review decision by the Department.

## Judicial Review

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The Applicant, the Department of Child and Family Services, 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  
13 December 2023

## Appendix: Relevant statutory provisions

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### 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;
  - ...
  - (f) the information is in the public domain, is reasonably accessible to the public or is reasonably available to the public on request under any other statutory provision, whether free of charge or on payment; or
  - ...

#### Disclosure prohibited by other legislation

- 37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.
- ...

### 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.

### Children Act 1998

#### Disclosure of information

- 11 (1) No children's officer or person employed in the administration of [the Children Act] shall communicate or allow to be communicated information obtained in the performance of his duties under this Act except where—
- (a) giving evidence in any court; or
  - (b) authorized by the Director or the Minister.
- (2) Any person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding \$2000.

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