

Decision Notice

Decision 52/2023: Department of Environmental and Natural Resources

Records on a specific fishing vessel

Reference no: 20211110

Decision date: 21 December 2023

Summary

The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Environment and Natural Resources (**Department**) for records about the fishing vessel, Fine Tuna. The Department's internal review decided that certain records were exempt under sections 23(1) (personal information), 25(1)(c) (commercial interests) and 34(1)(a) (prevention of breach of law), 34(1)(b) (enforcement of law), and 34(1)(c) (fair trial) of the PATI Act. The Department also administratively denied parts of the request under section 16(1)(a) because the records did not exist.

The Information Commissioner has varied, in part, and upheld, in part, the Department's decision, finding that the withheld records were exempt by virtue of section 25(1)(c) of the PATI Act and the Department was justified in relying on section 16(1)(a). The Department is not required to take any further steps in relation to this review.

Relevant statutory provisions

Public Access to Information Act 2010: section 16(1)(a) (record does not exist), section 21 (public interest test), section 25(1)(c) (commercial interests).

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

Background

1. On 25 May 2021, the Applicant made a public access to information (**PATI**) request to the Department of Environment and Natural Resources (**Department**), asking for all records held on the fishing vessel Fine Tuna, including but not limited to:
 - a. ownership information (**item 1**),
 - b. any application for a special longline fishing licence, any licence issued and the conditions attached to the licence (**item 2**),
 - c. any records on the regulation/monitoring of the boat's commercial fishing activities (**item 3**),
 - d. the number and distance of any fishing trips undertaken (**item 4**),
 - e. catch and bycatch information (**item 5**), and

- f. crew information (**item 6**).
2. On 6 July 2021, the Department notified the owner of the vessel, Bermuda Fish Co. Ltd., as a concerned third party pursuant to section 39 of the PATI Act. The Third Party made written representations to the Department.
 3. On 20 July 2021, the Department issued an initial decision. It disclosed records responsive to items 1 and 2 in whole. The Department provided information responsive to item 4 in part but stated that the distances of fishing trips was not recorded. The Department also disclosed records responsive to item 5 in part, which were completed Form 3As (Catch statistics: Pelagic longline) that capture information on the Fine Tuna's fishing methodology as well as the fish caught. The Department withheld the records responsive to item 3 in whole under sections 23(1), 25(1)(c) and 34(1)(a), (b) and (c). The Department withheld the records responsive to item 6 in whole under sections 23(1) and 25(1)(c) and (d).
 4. On 1 September 2021, the Applicant asked for an internal review.
 5. On 29 September 2021, the Department issued an internal review decision, affirming the refusal of item 3 in whole on the basis of sections 25(1)(c) and 34(1)(a), (b) and (c); of item 4 in part on the basis of section 16(1)(a); of item 5 in part on the basis of section 25(1)(c); and of item 6 in whole on the basis of sections 23(1) and 25(1)(c) and (d).
 6. On 10 November 2021, the Applicant made a timely application for an independent review by the Information Commissioner, challenging the Department's reliance on sections 16(1)(a), 23(1), 25(1)(c) and (d), and 34(1)(a), (b) and (c).

Investigation

7. 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.
8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions were required from the Department to determine whether its reliance on the exemptions was justified.
9. On 17 January 2022, the Information Commissioner's Office (**ICO**) notified the Department of the Applicant's valid application and asked for copies of the withheld

records. The Department provided 13 responsive records. Of these, the Department had disclosed the following in whole or in part:

- a. records 1-3, responsive to item 1 of the request: Fine Tuna Form 1A Applications for Renewal of Annual Fishing Vessel Licenses 2019-2021 (disclosed in whole),
 - b. records 4a and 4b, responsive to item 2 of the request: Fine Tuna Commercial Fishing Vessel Licenses 2020-21 and 2021-22 (disclosed in whole),
 - c. records 5-7, responsive to item 5 of the request: Fine Tuna Form 3As (Catch statistics: Pelagic longline) 2019-2021 (disclosed in part with redactions of commercial information), and
 - d. records 8-10, responsive to item 2 of the request: Fine Tuna Pelagic Longline Licences 2019-2021 (disclosed in whole).
10. The Department also provided to the ICO copies of records 11-13 that had been withheld in whole in response to item 3 of the request. Record 11 was a Fine Tuna Vessel Monitoring System (**VMS**) Activity Report 2019-2021 and records 12 and 13 were VMS Video Surveillance 2019-2021.
 11. As required by section 47(4) of the PATI Act, the Information Commissioner afforded the Department, the Applicant and the owner of Bermuda Fish Co Ltd (as the Third Party) a reasonable opportunity to make representations. The ICO received submissions from the Department and the Applicant.
 12. As part of their submissions, the Department clarified that it did not hold records responsive to item 6 of the PATI request. The Department also confirmed that it abandoned its reliance on sections 23(1) and 25(1)(c) and (d) to withhold records responsive to item 6, and instead relied on section 16(1)(a). The issues in this review were, therefore, revised to consider section 16(1)(a) in relation to item 6.
 13. The Department also explained that the Fine Tuna did not have a fishing vessel license prior to 2019, and therefore, only records from 2019 to the date of the PATI request were identified as responsive.

Information Commissioner's analysis and findings

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

Record does not exist or cannot be found – section 16(1)(a)

15. 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.
16. Regulation 5 of the PATI Regulations 2014 (**PATI Regulations**) 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.
17. 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.
18. 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.
19. The specific circumstances in each case will inform the Information Commissioner’s assessment.
20. 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.¹

Public authority’s submissions

21. With regard to item 4 of the PATI request, the Department submitted that it understood the Applicant to be asking for records containing the exact distance of each of the fishing trips undertaken by the Fine Tuna. The Department explained that a fishing “trip” is

¹ See [Decision 04/2017](#), [Department of Health](#), at paragraphs 37-49, and more recently [Decision 01/2023](#), [Ministry of Legal Affairs and Constitutional Reform Headquarters](#), at paragraphs 30-35.

defined by the Department to start when a vessel leaves the dock until the time it returns. The Department further explained that a fishing “trip”, for its purposes, can last anywhere from a few hours to days or weeks, and include multiple deployments of fishing gear. Each deployment of fishing gear by a vessel is defined as a ‘set’ by the Department, and the vessel is required to complete a Form 3A for each set (i.e., each time it deploys the fishing gear). The Department stated that it does not calculate the distance of vessels’ fishing trips, although the whereabouts of a vessel are tracked at all times, as explained below.

22. The Department explained that each vessel has a mandatory VMS onboard, and that Department staff are able to monitor the movements of a vessel via online software to ensure that a longline vessel is beyond 20 nautical miles from the 200-metre bathymetric curve when fishing. Through the use of sensors, the Department is alerted when the vessel leaves and returns to the bay where it is ordinarily docked and when it crosses the 200-metre bathymetric curve. A longline captain is also required to report the latitude and longitude of each longline set in a Form 3A.
23. With regard to item 6 of the PATI request, the Department did not make formal submissions on its analysis of the request, but it is clear from their internal review decision and submissions that the Department understood the Applicant to be asking for information about crew members that were working onboard the Fine Tuna. The Department explained that the vessel did not have any permanent crew members registered to it. It submitted that there was a Register of Fishermen held by the Department but that any of those registered fishermen were able to fish on the vessel. The Department submitted, generally, that it may be aware of the names of crew members working onboard a vessel but that this information is not formally requested from vessels and there are no records containing this information held by the Department.
24. The Department submitted that the search was conducted by the Department’s Marine Resources staff, all of whom were familiar with the location of records relevant to the Fine Tuna. The locations searched included the hard files, the online Fisheries Database, the relevant PCs and Fishing Trip Hard Drives, the online VMS software, staffs’ emails, and the Commercial Fisheries Council meeting minutes held in electronic and hard copies.
25. The Department also explained that a vessel’s movements can be tracked online on Global Fishing Watch (**GFW**), although the information available on GFW utilises a different tracking system and is not the same as what the Department holds in its records or uses to monitor vessels licensed with the Department.

Applicant's submissions

26. With regard to item 4 of the PATI request, the Applicant submitted that they were surprised that the Department did not hold records on the distances of fishing trips undertaken by a longline vessel as they thought the Department would need to log such information to ensure vessels were staying within the constraints of their longline licenses. The Applicant stated that they thought there would be some oversight of licensees and a log of distances and that the non-existence of such records raised questions about the public authority's oversight processes.
27. Similarly, with regard to item 6 of the PATI request, the Applicant stated that they would have expected the Department to keep crew lists for licensed vessels.

Discussion

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

28. The Department correctly understood the PATI request as seeking records that set out the distance travelled by the vessel for each fishing trip undertaken with regard to item 4, and records identifying the crew members working onboard the vessel with regard to item 6.

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

29. The scope of the search conducted by the Department was adequate. The Marine Resources section of the Department is tasked with handling the oversight of licensed fishing vessels and would have been aware of any of the responsive records held by the Department. Based on the explanation provided by the Department, the locations searched were reasonable and the staff would have been aware that no records containing information on the distance travelled by a vessel existed as this was not information requested from licensees or calculated by the Department.
30. Furthermore, the staff tasked with the search were aware of the Department's records as it relates to the crew members that work onboard fishing vessels and the fact that the Department does not request this information from vessel owners.

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

31. Based on the above, the rigour and efficiency of the search was adequate.

Conclusion

32. The Information Commissioner is satisfied that the Department has justified its reliance on section 16(1)(a) of the PATI Act to deny access to records responsive to item 6 and part of item 4 of the PATI request because the records did not exist or could not be found.
33. The Information Commissioner notes that there was an information gap between the Department and the Applicant during the processing of the PATI request. The Applicant inferred from the Department's initial and internal review decisions that because a record did not exist with a log of the distances travelled by a fishing vessel, that the Department did not monitor the geographic location of the vessel during fishing trips. In discussions with the ICO during this review, it became clear that the Applicant was seeking information on the distances travelled by the vessel to analyse whether it had remained within the constraints of its longline license. Unfortunately, this was not evident on a plain reading of item 4 of the request, and the Department did not consult the Applicant on this point as the request seemed straightforward on the face of it.
34. The Information Commissioner does not view either party as being 'in the wrong' in this situation but points out that where a public authority withholds a record, it can often be helpful to explain the nature of the record (to the extent possible without disclosing exempt information). For example, the Department might have considered explaining that while the VMS Activity Report tracks a vessel's geographic position and movements, the Department does not pull that raw data in order to calculate or record the distance travelled each time the vessel leaves and returns to the dock.
35. Similarly, if the Applicant was seeking to understand how the Department exercised its oversight over licensees, it would have been possible for the Applicant to ask the Department to explain how it uses a vessel's VMS activity (cited as a withheld record in the initial decision and in response to the Applicant's request for records on the regulation or monitoring of the boat's commercial activities) to monitor a vessel's commercial fishing activities.
36. It is possible that had the Applicant understood that the VMS Activity Report logs the geographic position of a vessel approximately every hour of every day and that this information is tracked in real time by the Department, the request in item 4 for records on the distances travelled during a fishing trip may have been clarified.

Adverse effect on commercial interests – section 25(1)(c)

37. A public authority, or a third party asserting its rights, may rely on section 25(1)(c) to deny access to a public record whose disclosure would, or could reasonably be expected

to, have an adverse effect on the commercial interests of any person to whom the information relates. This commercial interest exemption is subject to exceptions in section 25(2), which set out circumstances when the exemption cannot apply.

38. Section 7(1) of the Interpretation Act 1951 defines ‘person’ to include “any company or association or body of persons, whether corporate or unincorporated”.
39. As explained in [Decision 12/2018, Ministry of Finance Headquarters](#), ‘commercial interest’ relates to a person’s ability to participate in a commercial activity, such as the sale or exchange of goods or services or the collection of a debt.²
40. By its ordinary definition, having an ‘adverse effect’ means leading to an unfavourable or harmful result.³ A public authority, or the third party, must explain the circumstances anticipated to arise from disclosing the record at issue which could lead to such an unfavourable or harmful result on the person’s commercial interests. The exemption in section 25(1)(c) cannot be used simply to avoid embarrassment to the public authority or concerned person.⁴
41. The likelihood of the harm must be that a reasonable person, considering all circumstances of the case, may expect the adverse effect to the person’s commercial interests to occur. The expectation must be likely, plausible or possible based on real and substantial factual grounds.
42. If section 25(1)(c) is properly engaged, the public interest test must be applied. Where the public interest would, on balance, be better served by disclosure than by non-disclosure, then the records must still be disclosed.
43. In sum, a public authority, or third party, must consider these questions when seeking to justify the exemption for information with commercial value:⁵

[1] Do any of the exceptions in section 25(2) apply?

[2] Who is the person to whom the information relates?

[3] What are the commercial interests of this person that are of concern?

² See [Decision 12/2018, Ministry of Finance Headquarters](#), at paragraph 66.

³ See [Decision 12/2018, Ministry of Finance Headquarters](#), at paragraph 68, citing Oxford Dictionary of English (3rd ed. 2010).

⁴ See [Decision 12/2018, Ministry of Finance Headquarters](#), at paragraphs 68-69.

⁵ See [Decision 09/2019, Department of Public Lands and Buildings](#), at paragraphs 170-174.

[4] What adverse effect could disclosure cause?

[5] How likely is this to occur?

[6] If the exemption is engaged, does the balance of the public interest still require disclosure?

44. A public authority, or third party asserting its right under section 25(1)(c), bears the burden of showing to the Information Commissioner that, on the balance of probabilities, the exemption is justified.

Public authority's submissions

45. The Department relied on section 25(1)(c) to withhold redacted information in records 5-7 as well as to withhold records 11-13 in whole.
46. With regard to the information redacted in records 5-7, the Department submitted that the information included dates, times, moon phase, hook type, line length and other information, the disclosure of which would reveal the Fine Tuna's fishing methodology and could benefit any commercial competitors to the detriment of the Fine Tuna.
47. With regard to records 11-13, which were the VMS Activity Report and video surveillance of the vessel, the Department submitted that other competing commercial fishermen would be able to use the location information of the vessel to ascertain where and when to locate pelagic fish.⁶

Applicant's submissions

48. The Applicant made submissions on the public interest test, stating that the requested records could shed valuable light on local fishing practices, how they impact the environment and how the public authority tasked with licensing and overseeing the fishing sector conducts its work. The Applicant further stated that there is a public interest in the disclosure of these records in advance of Bermuda's Blue Prosperity Plan being finalised.⁷

⁶ Pelagic fish are found in the water column (not the bottom or near the shore of water) of coasts, open oceans and lakes.

⁷ The Draft Blue Prosperity Plan was introduced by the Deputy Premier and Minister of Home Affairs, Mr. Walter Roban, on 25 August 2022 and consists of a [Marine Spatial Plan](#), designed "to preserve 90,000 square kilometres of

49. The Applicant asked the Information Commissioner to consider, in particular, the importance of regulating the fishing industry with respect to the environmental concerns raised, the impact of overfishing and the protection of Bermuda’s marine life. The Applicant stated that the PATI request had been prompted by rumours that the terms of the vessel’s longline licence were not being adhered to,⁸ although no basis for these claims was provided. If true, the Applicant stated that there would be ramifications for the environment as well as the local fishing industry. The Applicant cited recent protests by the Fishermen’s Association of Bermuda, stating that there is clearly evidence of public concern about governmental policies in relation to the fishing industry.

Discussion

50. The Information Commissioner considers the Department’s reliance on section 25(1)(c) for parts of records 5-7 responsive to item 5 of the PATI request (i.e., the details of the fishing gear and methodology used and the precise location coordinates and timing of each set) as well as for records 11-13 in whole, responsive to item 3 of the PATI request (i.e., the VMS activity report and video surveillance).

[1] Do any of the exceptions in section 25(2) apply?

51. None of the exceptions in section 25(2) applied.

[2] Who is the person to whom the information relates?

52. The information relates to the Bermuda Fish Co. Ltd. as the owner of the Fine Tuna.

[3] What are the commercial interests of this person that are of concern?

53. The commercial interests of the Bermuda Fish Co. Ltd. that are of concern are the fishing strategies used by the vessel owner, including the details of the gear type and timing of fishing ‘sets’, as well as the vessel’s geographic positioning for the purpose of catching pelagic fish. This type of information is essential to the commercial operation of the Fine Tuna.

Bermuda’s waters within fully protected, no-take fisheries replenishment zones”, and a [Blue Economy Strategy](#) designed “to sustainably develop, manage, and improve ocean industries”. The Blue Prosperity Plan was open for [public consultation](#) between 12 September 2022 and 31 December 2022. The [feedback](#) from the consultation was released in March 2023 and is currently being considered by the Steering Committee of the Bermuda Ocean Prosperity Programme (**BOPP**)—a group created in 2019 under an agreement between the Government, the Bermuda Institute of Ocean Sciences and the Waitt Institute—in order to refine the Draft Plan.

⁸ One of the terms of the licence is that a longline vessel must fish 20 nautical miles seaward of the 200-metre bathymetric curve around the island.

54. The Information Commissioner is satisfied that the records contain information relating to the commercial interests of the Bermuda Fish Co. Ltd.⁹

[4] What adverse effect could disclosure cause?

55. The adverse effect of disclosure would have been a competitive advantage on the part of other commercial fishermen with pelagic longline fishing licenses that would have access to the commercial information of the Bermuda Fish Co. Ltd. In circumstances where commercial fishermen are not generally required to disclose their fishing strategy information, including gear type, and the timing and locations of sets, there could be a disadvantage caused to the Bermuda Fish Co. Ltd. by having this information made public.

[5] How likely is this to occur?

56. The Information Commissioner accepts the Department's submission that the fishing industry is a competitive industry and that there is a high likelihood that other commercial fishermen would utilise the information in the records to the detriment of the Bermuda Fish Co. Ltd.

[6] If the exemption is engaged, does the balance of the public interest require disclosure?

57. On the one hand, the Information Commissioner accepts the Applicant's submissions that there is a general public interest in promoting greater public understanding of the Government's policies and practices regarding the regulation and monitoring of the fishing industry.¹⁰ It is also in the public interest to reveal information relating to the protection of the environment.¹¹ These public interests would include disclosure of information about how the Department monitors and enforces the terms and conditions of a longline vessel's license.
58. On the other hand, the public also has an interest in ensuring that the Department's enforcement of licensing and fishing regulations does not undermine the very industry it seeks to regulate. In many ways, a fisherman's intimate knowledge of fishing locations

⁹ See [Australian Marine Conservation Society and Australian Fisheries Management Authority](#) [2016] AICmr 92 (14 December 2016) at paragraphs 25-33, where the Australian Information Commissioner found that similar types of information were "commercially valuable" in the context of section 47(1)(b) of the Australian Freedom of Information Act 1982.

¹⁰ See the definition of "public interest" in regulation 2(a) of the PATI Regulations.

¹¹ See the definition of "public interest" in regulation 2(h) of the PATI Regulations.

and tactics is sacrosanct. If the Department revealed such details, it could cause irreparable damage to its working relationships with individuals in the fishing industry and its ability to obtain information essential to carrying out its work, in turn potentially driving fishermen to operate outside the Department's regulation. The public has an interest in ensuring that the Department can carry out its work effectively.

59. In this case, the records at issue relate to a single vessel. In records 5-7, it is the commercial information that a vessel is required to report to the Department in its catch and bycatch statistics. The Department has disclosed information in those forms relating to the amount and type of fish caught and released but has redacted the gear used by the Bermuda Fish Co. Ltd. and the precise location coordinates and timing of each set. In records 11-13, the Department has withheld the VMS activity and video surveillance of the vessel. There is little public interest in the disclosure of an individual vessel's fishing strategy, methodology and geographic movements in promoting an understanding of the Department's general policies and practices regarding the regulating and monitoring of the fishing industry and any such interest is outweighed by the public interest protected by the exemption itself as well as ensuring the Department is able to effectively conduct its work in regulating the fishing industry.

Conclusion

60. The Information Commissioner is satisfied that the Department was justified to rely on section 25(1)(c) to deny access to records 5-7 in part, and records 11-13 in whole.
61. Given this, the Information Commissioner does not need to consider the Department's reliance on section 34(1)(a), (b), or (c).

Conclusion

62. The Information Commissioner is satisfied that the Department has justified its reliance on sections 16(1)(a) and 25(1)(c) to deny access to the withheld records, in whole or in part.

Decision

The Information Commissioner finds that the Department of Environment and Natural Resources (**Department**) was justified in administratively denying the request, in part, under section 16(1)(a) of the Public Access to Information (**PATI**) Act. The Information Commissioner further finds that the Department was justified in denying access to the withheld records, in whole or in part, by virtue of section 25(1)(c) of the PATI Act.

In accordance with section 48 of the PATI Act, the Information Commissioner upholds the Department's internal review decision to administratively deny access to records responsive to part of item 4 of the request under section 16(1)(a) and to withhold records 5-7 in part, and records 11-13 in whole under section 25(1)(c). The Information Commissioner varies the internal review decision to administratively deny access to records responsive to item 6 under section 16(1)(a).

The Information Commissioner does not require the Department to take any further action with respect to this Decision.

Judicial Review

The Applicant, the Department, the Third Party 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 December 2023

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 interest test

- 21 For the purposes of this Part, the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure.

Commercial information

- 25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—
- ...
 - (c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates; or
 - ...
- (2) Subsection (1) does not apply if—
- (a) the information concerned relates to the requester;
 - (b) the person to whom the information relates consents in writing to its disclosure; or
 - (c) the information was given to the public authority concerned by the person to whom it relates and the person was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public.
- (3) 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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