

## Decision Notice

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### Decision 53/2023: Bermuda Tourism Authority

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#### **Records on the Bermuda Tourism Authority Board of Directors**

**Reference no: 20220607**

**Decision date: 22 December 2023**

## Summary

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The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Tourism Authority (**BTA**) for records regarding the BTA Board of Directors (**Board**) and a former BTA board member. The BTA abandoned its reliance on sections 16(1)(c) (administrative burden) and 16(1)(f) (publicly available) during this review, and ultimately only relied on section 16(1)(a) to administratively deny access to records in part.

The Information Commissioner has upheld in part and varied in part the BTA's internal review decision and has found that certain parts of the request were appropriately denied under section 16(1)(a). The BTA is not required to take any further steps in relation to this review.

## Relevant statutory provisions

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

PATI Regulations 2014: regulation 5 (reasonable search).

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

## Background

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1. On 2 February 2022, the Applicant made a public access to information (**PATI**) request to the Bermuda Tourism Authority (**BTA**) asking for all records regarding a former BTA board member, including:
  - a. minutes of the BTA Board meetings from August 2020 to date, including attendance record of board members (**item 1**);
  - b. any press release or public statement issued by the BTA about the appointment of the board member (**item 2**);
  - c. any correspondence between BTA Chairman Wayne Caines and Premier David Burt about the board member (**item 3**);
  - d. records showing payments made to BTA board members by the BTA since August 2020 with a breakdown for each board member (**item 4**);
  - e. any contract or agreement the BTA has or has had with US company Mosaic Sales Solution (**Mosaic**) or any associated company (**item 5**);

- f. any contract or agreement the BTA has or has had with any company connected to the board member (**item 6**); and
  - g. records showing any payments made by the BTA for travel by the board member, including hotel, airfare and any other travel costs (**item 7**).
- 2. On 3 March 2022, the BTA issued an initial decision administratively denying the request using language that referred to the provisions in section 16, in some instances without express reference to the PATI provisions:
  - a. Items 1 and 3 were refused on the basis that the request for these items was “particularly broad and onerous”, which suggested reliance on section 16(1)(c), and in the alternative, on the basis that the board meeting minutes for item 1 were exempt under section 29(1);
  - b. Item 2 was refused on the basis that the information was already available to the public under section 16(1)(f); and
  - c. Items 5, 6 and 7 were refused on the basis that no records existed or could not be found after all reasonable steps had been taken, which suggested reliance on section 16(1)(a).
- 3. The BTA also responded to item 4 with information, stating the fixed fee for all BTA board members and that the information was already available to the public, citing a Royal Gazette article, which suggested a reliance on section 16(1)(f), although this provision was not cited.
- 4. On 8 March 2022, the Applicant asked the BTA for the BTA Chairman’s email address so they could seek an internal review. The BTA responded on 15 March 2022 stating that the Chairman is subject to part of the enquiry in the PATI request and therefore the request for an internal review should be addressed to the BTA’s Chief Executive Officer (**CEO**).
- 5. On 17 March 2022, the Applicant asked for an internal review. On 18 March 2022, the BTA acknowledged receipt of the request. On 21 March 2022, the BTA sent a further email asking the Applicant if they wished to narrow or refine the scope of any part of the request. The Applicant responded that they were not inclined to do that because they were seeking all of the records requested.
- 6. On 29 April 2022, the BTA sent the Applicant a letter in the form of an internal review decision that was signed by the CEO of the BTA, but was an attempt to engage in consultation with the Applicant. The letter adopted the same reasoning and outcome as

the initial decision other than for item 3, which the BTA revised to state that no records existed following a reasonable search of the BTA's internal files. With regard to item 1, the BTA further stated "[s]hould you consider revising the scope of this request to statistical information only, namely the attendance record only or only the attendance record of a specific board member, we will consider this request further in accordance with the [Act]." This was repeated in the closing paragraph of the letter.

7. On 18 May 2022, the Applicant responded to the BTA stating that they would like the BTA to provide the attendance records for the BTA Board meetings for the timeframe specified in item 1 of the request.
8. After some clarification and intervention involving the ICO on the correct procedures, the BTA ultimately issued an internal review decision in this review on 2 June 2022. In that decision, the BTA noted that the Applicant had revised the scope of item 1 of the request to statistical information only, "namely the attendance record only", citing the Applicant's email dated 18 May 2022. The BTA provided the Applicant with the attendance records for the period August 2020 to 2 February 2022. The BTA refused access to the remainder of the request on the administrative grounds.
9. On 7 June 2022, the Applicant copied the ICO on an email to the BTA where they noted that at no point did they revise the scope of the request to statistical information only. The Applicant explained that they asked the CEO again for the attendance figures but this was not on the basis that the minutes were no longer sought. The Applicant questioned why the statistical information would only be provided if the request for the meeting minutes was dropped.
10. On the same day, the Applicant asked the Information Commissioner for an independent review.

## Investigation

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11. 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.
12. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because submissions were required from the BTA to determine whether its reliance on the administrative denials was justified.

13. On 12 July 2022, the Information Commissioner's Office (**ICO**) notified the BTA of the Applicant's valid application. Because this review only addresses the administrative denials to refuse the request, the ICO did not require copies of any records.
14. As required by section 47(4) of the PATI Act, the Information Commissioner afforded the BTA and the Applicant a reasonable opportunity to make representations. The BTA, through its counsel, made formal submissions on 23 December 2022, 27 October 2023, 17 November 2023 and 13 December 2023. Some of the submissions were in response to a meeting between the ICO and the BTA and its legal counsel in November 2023. The Applicant made formal submissions in March 2023.
15. In their 27 October 2023 submissions, the BTA offered to reconsider its position on the meeting minutes responsive to item 1 in light of the clarification that the Applicant had not narrowed the request. It also confirmed that it was abandoning its reliance on section 16(1)(f) for item 2 and instead relied on section 16(1)(a) because no records existed.
16. Further, the BTA confirmed the email addresses used by the BTA Chairman to conduct BTA business and confirmed that a search of those email addresses did not identify any records responsive to item 3 of the request. Finally, the BTA provided the ICO with a record containing information on board member fees that the BTA had collated, which was information responsive to item 4 of the PATI request.
17. Following the meeting on 1 November 2023, the BTA conducted additional searches for records responsive to items 5, 6 and 7, and identified one record responsive to item 7. The BTA then provided the ICO with submissions on the reasonableness of the additional searches conducted for records responsive to items 5, 6 and 7.
18. At the ICO's request, the BTA also provided an affidavit signed by the BTA Chairman confirming the searches conducted for records responsive to item 3 of the PATI request and confirming that no records had been found.
19. Separately, the BTA also confirmed that it abandoned its reliance on section 16(1)(c) to withhold the meeting minutes responsive to item 1 of the PATI request and that it intended to issue a new initial decision to the Applicant.

20. On 12 December 2023, the BTA disclosed the two documents identified during the course of the review to the Applicant, i.e., the collated information responsive to item 4<sup>1</sup> and the travel expense record responsive to item 7. On the same day, the BTA issued a new initial decision to the Applicant on item 1, disclosing the meeting minutes with redactions based on the exemptions in sections 23, 25, 26, 29 and 30 of the PATI Act.<sup>2</sup>
21. On 12 December 2023, the ICO notified the Applicant that the BTA had abandoned its reliance on section 16(1)(f) for item 2 and relied, instead, on section 16(1)(a).

## Information Commissioner's analysis and findings

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22. In coming to this Decision, the Information Commissioner has considered all the relevant submissions, or parts of submissions, from the BTA 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)*

23. 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.
24. 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.
25. 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.

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<sup>1</sup> As the disclosure of the information responsive to item 4 satisfied that part of the request for records, the BTA abandoned its reliance on section 16(1)(f) of the PATI Act and this issue is, therefore, not considered in this review.

<sup>2</sup> The BTA's new initial decision on 12 December 2023 is not considered in this review. The Applicant has the right to seek an internal review of that initial decision as well as an independent review by the Information Commissioner.

26. In determining whether a public authority's search was reasonable, the Information Commissioner considers 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 based on that analysis; and
  - [3] the rigour and efficiency with which the search was then conducted.
27. The specific circumstances in each case will inform the Information Commissioner's assessment.
28. 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>3</sup>

*Public authority's submissions*

29. As noted above, on 27 October 2023, the BTA abandoned its reliance on section 16(1)(f) for item 2 because any press release or public statement about the appointment of the board member was already in the public domain. The BTA explained instead that pursuant to section 4 of the Bermuda Tourism Authority Act 2013, it is the responsibility of the Minister to publish a Gazette Notice relating to the appointment and it confirmed that the BTA's communications team had not published any press release or public statement relating to the appointment.
30. In its original submissions dated 23 December 2022, the BTA explained that the scope of items 3, 5, 6 and 7 was self-explanatory. Regarding relevant locations, the BTA explained that it maintains electronic and hard copy files, with electronic records maintained within SharePoint, One-Drive or in email format. Payment records are stored electronically in the BTA's accounting software. The BTA confirmed that a search had been conducted by the BTA's IT manager on 26 April 2022 and that they had been fully appraised of the terms of the PATI request. The BTA further stated that around the same time it had searched its accounting software for relevant payment records. The BTA submitted that no records were found during that search and the internal review reflected as such.
31. In relation to item 3, on 30 November 2023, the BTA provided a signed affidavit from the BTA Chairman certifying that he had conducted a search of the email accounts that he

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<sup>3</sup> 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.

regularly used to conduct BTA business, including his BTA email account, with the relevant search parameters, and that no records were found.

32. The BTA provided submissions on additional searches on 17 November 2023. The BTA stated that it conducted an additional search for items 5, 6 and 7 of the PATI request on 8 November 2023. The search was performed by the BTA's Vice President of Finance and Information Officer (who had attended the meeting with the ICO), assisted by the BTA's IT team. The BTA confirmed that it had searched its hard copy files for any records under the name 'Mosaic Sales Solution' and performed an electronic key word search of its accounting software using 'Mosaic' and the board member's name for the search parameters.
33. The electronic search only generated results relating to the director fees paid to the board member, which the BTA disclosed to the Applicant. The BTA also confirmed that a search of vendors in the BTA's accounting system returned nil results for 'Mosaic' and that the only payments made directly to the board member (as a vendor in the accounting system) were the directors fees, paid quarterly.
34. Regarding items 5 and 6, the BTA initially stated that that it was not aware of any specific names of any companies connected to the board member to conduct a more specific search for other companies.
35. Further to a request made by the ICO, the BTA confirmed in follow up submissions on 13 December 2023, that the board member had listed one entity on their Register of Interests made pursuant to section 13 of the Bermuda Tourism Authority Act 2013.<sup>4</sup> The BTA submitted that the searches conducted by the BTA would have included a search for any records showing payments to the company.
36. With regard to item 7, the BTA stated that it typically outsources booking of travel to a third party vendor and that most travel bookings would be made by credit card which would typically not reference the name of the party on whose behalf the payment or booking was made directly, and the accounting software only records the name of the vendor. For the purposes of this review, the BTA requested its third party vendor to provide any BTA invoices which referenced the board member. The BTA was then able

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<sup>4</sup> Section 13 of the BTA Act provides that "[t]he Minister shall cause to be compiled and maintained, in accordance with this Act and the regulations made thereunder, an interest register" and "where the Minister or any member of the Board has an interest in any business conducted by the [BTA], the Minister or member shall file a written notice in the interest register as soon as reasonably practicable after the Minister or member becomes aware that such business is being transacted." Furthermore, section 13(3) provides that "[t]he interest register may be inspected by members of the public".



to cross reference its own records to confirm that it had paid for an airline ticket issued to the board member on 29 October 2021.<sup>5</sup>

37. The BTA further performed a search of its hotel bookings for October 2021 to identify if any hotel bookings were made for the board member. The BTA confirmed that it had not located the board member's name on any of the room lists or invoices for the event that they had attended.

*Applicant's submissions*

38. In relation to item 3, the Applicant stated that they were aware that discussions took place between the BTA Chairman and the Premier about the board member, so they would expect there to be some records relating to this.
39. In relation to items 5 and 6, the Applicant stated that they believed that the BTA had been involved in events involving the US-based company, Mosaic, and companies it has worked with. The Applicant further stated they believed that the BTA may have had contracts with or hired companies linked to the board member and was not satisfied that a reasonable search had been conducted.

*Discussion*

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

40. Based on the language in the PATI request and the ICO's various discussions with the BTA regarding its understanding of the PATI request and the search conducted by the BTA, the BTA has shown that it accurately understood items 2, 3, 5, 6 and 7 of the PATI request.
41. The BTA understood item 3 as email correspondence between the BTA's Chairman and the Premier. Although the Applicant in their submissions to the ICO stated that correspondence should include WhatsApp messages, voice notes, texts, and written notes from conversations, email correspondence was the primary mode of communication for conducting BTA business. In light of this, the BTA's understanding of this part of the PATI request was adequate.

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<sup>5</sup> A copy of this record was provided to the Applicant on 12 December 2023.

42. The Applicant did not provide names of any of the 'associated companies' referred to in items 5 and 6, but the BTA understood that the Applicant was seeking records related to any company connected to Mosaic or the board member.

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

43. The BTA did not provide sufficient documentation to support the reasonableness of its search during its handling of the PATI request, and its initial handling of the PATI request is not considered further. The remaining analysis assesses the reasonableness of the steps the BTA took during this review to remedy any gaps in the scope of its search.
44. For item 2, the Communications Department of the BTA confirmed whether any press release or public statement had been published on the appointment of the board member and that their response was sufficient in determining that no record existed. For item 3, the Chairman searched both email addresses that were identified during the ICO's review as the ones he used during the relevant time to conduct BTA business.
45. In relation to items 5 and 6, given the explanations provided by the BTA regarding the structure of their electronic records, the scope of the search conducted by the BTA for contracts involving Mosaic and any associated company, as well as any companies associated with the board member, was adequate. The BTA also took reasonable steps to ascertain whether it was aware of companies associated with the relevant board member. The individuals involved with the search were familiar with the topics and records and searched the appropriate locations.
46. Finally, for item 7, the BTA explained, in its submissions, the structure of its relevant electronic records and accounting software. Based on its business practices, the BTA also contacted the third party vendor it uses for travel bookings to confirm whether the vendors records showed any purchases related to the board member.
47. Based on the above, the scope of the BTA's search reached the relevant locations and involved the appropriate employees and vendors to locate responsive records. The BTA also used appropriate search parameters to locate records during this review.

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

48. Based on the above, as well as the BTA's submission and meetings with the ICO, the rigour and efficiency of the search conducted during this review was adequate. Where the BTA did not locate records, such as for item 2, it queried further and provided the ICO with an explanation of why the records did not exist. In other instances, such as for

item 7, the BTA contacted its third party vendor to determine if its information could assist the BTA in locating records.

49. The BTA also identified the correct individuals to conduct or assist with the searches for efficiency, including the Chairman, CEO, Chief Financial Officer, Communications Department, IT staff, accounting officers and relevant vendors.
50. The BTA, informed by its discussions with the ICO, also conducted searches using appropriate search terms and parameters, including variations on the relevant board member's name. When it located a record, the BTA then expanded its scope to account for any new information learned.

### *Conclusion*

51. The Information Commissioner is not satisfied that the BTA provided sufficient documentation to show it conducted a reasonable search when handling this PATI request.
52. During this review, however, the BTA took steps to conduct a reasonable search and addresses any gaps in its prior handling of the request. Accordingly, the Information Commissioner is satisfied that items 2, 3, 5 and 6 of the request, for which no records were located, were properly administratively denied under section 16(1)(a).
53. During this review, the BTA disclosed to the Applicant the newly located information and records in response to items 4 and 7, respectively, and has issued a new initial decision to the Applicant disclosing records responsive to item 1 of the PATI request (Board meeting minutes), in part. The Applicant has the ordinary rights of review under the PATI Act of this new initial decision.

## Decision

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The Information Commissioner finds that the Bermuda Tourism Authority (**BTA**) 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 acknowledges that during this review, the BTA has abandoned the other grounds relied upon on its internal review decision.

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

- varies the internal review decision to administratively refuse access to items 2, 3, 5 and 6 in whole and item 7 in part under section 16(1)(a), and
- annuls part of the BTA's internal review decision refusing access to items 1 and 4 of the PATI request under sections 16(1)(c) and 16(1)(f) of the PATI Act, respectively.

Because during the review the BTA has already conducted a reasonable search, processed the newly located records and issued a new initial decision on the records that were not disclosed in whole, the Information Commissioner does not require the BTA to take any further action with respect to this Decision.

## Judicial Review

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The Applicant, the BTA 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  
22 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;
  - ...

### 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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