

Decision Notice

Decision 25/2024: Bermuda Police Service

Witness evidence

Reference no: 2024008

Decision date: 30 August 2024

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Bermuda Police Service (**BPS**) for records related to witness evidence from a criminal trial. The BPS administratively denied part of the PATI request under section 16(1)(a), finding that the information requested did not exist or could not be found, and found that the PATI Act did not apply to records responsive to the other part of the PATI request under section 4(1)(b)(v). Challenging the BPS's decision on a third part of the PATI request was withdrawn by the Applicant during the Information Commissioner's review.

The Acting Information Commissioner has concluded that section 4(1)(b)(v) was appropriately engaged for the withheld records and the BPS had taken all reasonable steps before administratively denying part of the PATI request.

Relevant statutory provisions

Public Access to Information Act 2010: section 4(1)(b)(v) (application); section 16(1)(a) (record does not exist).

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

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

Background

1. On 20 December 2023, the Applicant made a public access to information (**PATI**) request to the Bermuda Police Service (**BPS**), asking for records related to witness evidence that had been obtained in relation to a specific murder investigation. The PATI request sought:
 - a. A record of the total number of affidavits held by the BPS in relation to the witness evidence of the named Witness who assisted the BPS with the murder investigation (**item 1**).
 - b. A record of files held by the BPS in relation to the withdrawal of the witness evidence of the Witness who assisted the BPS with the murder investigation (**item 2**).
 - c. Disclosure of the total costs of overseas legal advice received by the BPS in relation to the extradition of [another named individual] from the United Kingdom in relation to the murder investigation (**item 3**).

2. On 23 January 2024, the BPS issued a timely initial decision. The BPS administratively denied items 1 and 3 of the PATI request under section 16(1)(a), stating that the BPS was not in possession of any affidavits in relation to item 1 or records responsive to item 3. For item 2, the BPS explained that the records had been created for and were ultimately obtained by the Department of Public Prosecutions (**DPP**) while carrying out their functions and therefore fell outside the scope of the PATI Act under section 4(1)(b)(v). In the alternative, the BPS relied on sections 34(1)(b) and (c), that disclosure of the records could prejudice the enforcement of the law or could reasonably be expected to prejudice the 'fair trial' of a person or the impartial adjudication of a particular case.
3. On 23 January 2024, the Applicant asked for an internal review. On 7 February 2024, the BPS issued a timely internal review decision, which upheld the administrative denial of items 1 and 3 and the denial of access to records responsive to item 2.
4. On 7 February 2024, the Applicant asked the Information Commissioner for an independent review, challenging the BPS's internal review decision.

Investigation

5. The Information Commissioner's Office (**ICO**) accepted the application as valid on 14 February 2024, on the basis that the Applicant had made a PATI request to a public authority and had asked that public authority for an internal review.
6. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review. In addition to the statutory provisions relied on by the BPS to deny the request, the Applicant asked the ICO to consider whether the Information Officer or the Head of Authority had obtained the records and reviewed them before denying their access.
7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application, because the public authority's formal submission was required to justify its reliance on the administrative ground and examining the withheld records was required to evaluate the public authority's reliance on section 4.
8. The ICO notified the BPS of the valid application on 21 February 2024 and asked for a copy of the records responsive to item 2 of the PATI request. The ICO inspected the records in-person on 28 February 2024, including that the ICO viewed a copy of the Witness's letter withdrawing their witness statement.
9. In that meeting, the BPS also explained the process followed for making an extradition request, stating that extradition requests were made by the DPP, and the BPS was

involved only in carrying out the extradition. Therefore, records related to any legal advice sought on an extradition request would be held by the DPP.

10. On 25 April 2024, the ICO explained to the Applicant, who then accepted that records for item 3 would not be held by the BPS and withdrew their challenge on it. The BPS was informed of the Applicant's withdrawal for item 3 on 14 May 2024. Item 3 of the PATI request, therefore, was no longer considered in this Information Commissioner's review.
11. The Applicant also clarified the records sought in items 1 and 2 of the PATI request. For item 1, the Applicant stated that they were seeking all affidavits, whether sworn by the Witness or not. This would include any affidavit signed by a police officer for the investigation. For item 2, the Applicant stated that, in addition to any witness withdrawal statement itself, they were seeking records about whether the BPS had considered bringing charges against the Witness based on the withdrawal of their witness evidence.
12. Based on the Applicant's clarification, the BPS was asked by the ICO to conduct additional searches for records during this review, and the parties were notified that the ICO had added search for any other records responsive to item 2 of the PATI request as an issue.
13. As required by section 47(4) of the PATI Act, the parties were invited to make representations to the Information Commissioner. On 14 May 2024, the ICO invited the Applicant's and the BPS's submissions on sections 4(1)(b)(v) and 16(1)(a). The Applicant did not make further submissions.
14. On 22 May 2024, the BPS made submissions. Although the ICO had inspected only one record during the in-person visit, the BPS's written submission informed the ICO that two records were responsive to item 2 of the PATI request:
 - a. the letter signed by the Witness, withdrawing their original witness statement, and
 - b. a witness statement, which confirmed the content of the letter.
15. On 12 August 2024, the BPS submitted more evidence of the search steps it had taken to obtain responsive records prior to issuing the initial decision.
16. In sum, this Decision considers whether the BPS justified its reliance on section 16(1)(a) of the PATI Act to administratively deny item 1, whether the BPS correctly relied on section 4(1)(b)(v) to withhold the records responsive to item 2, and whether the BPS conducted a reasonable search for any other records responsive to item 2 of the PATI request.

Acting Information Commissioner's analysis and findings

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

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

18. 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.
19. 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.
20. 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.
21. 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 based on that analysis; and
 - [3] the rigour and efficiency with which the search was then conducted.
22. The specific circumstances in each case will inform the Information Commissioner's assessment.
23. 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

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.

Public authority's submissions

24. The BPS made the following submissions about its search for records responsive to items 1 and 2 of the PATI request.

Item 1

25. The BPS provided confirmation from the assigned Senior Investigating Officer (**SIO**) that no affidavits were held by the BPS in relation to the murder investigation. The BPS had explained previously that affidavits were documents that would have been held by the DPP in its handling of a case. The BPS ordinarily took witness statements only. This was confirmed by the SIO in an email to the BPS's Information Officer.

Item 2

26. The BPS submitted that its analysis of item 2 of the PATI request did not include records related to an investigation or consideration of whether the Witness had committed an offence related to their witness statement withdrawal. The BPS stated that it based its understanding on what was stated explicitly in the PATI request, which the BPS found to be clear and specific. The BPS submitted that although the request referred to the plural term 'files', the BPS's interpretation focused on the withdrawal statement itself, not an evidence file or other documents. The BPS believed the Applicant had revised their request retrospectively during the Information Commissioner's review and maintained its original reading of the request.
27. The BPS submitted that its approach of adopting a literal interpretation of PATI requests ensured efficiency and accuracy, while focusing resources on fulfilling explicit requirements without unnecessary deviations. The rigour and efficiency of the BPS's search was fully aligned with the interpretation of the request, which the BPS submitted was reasonable in this request.
28. The BPS also noted that the Applicant was a frequent PATI requester. The BPS accepted that the Applicant had a right to make requests but queried the sincerity of the Applicant's suggestion that their request may have been misunderstood when the interpretation was clear. The BPS submitted that it strived to address each request with the utmost diligence and respect for the specified parameters.

Applicant's submissions

29. As stated above, at paragraph 11, the Applicant clarified their request during the Information Commissioner's review, explaining that item 1 was seeking any affidavit, not necessarily as sworn by the Witness. This could have included an affidavit sworn by a

police officer in support of an application for extradition or any other affidavit. Item 2 was seeking the withdrawal statement itself but also any witness statements by police officers about the Witness's evidence. The Applicant further stated that they were seeking any records that might have indicated whether the BPS had considered, at any point, proceedings against the Witness for lying, because they had withdrawn their witness evidence in the case.

30. The Applicant also queried whether the Information Officer or the Head of Authority had obtained and reviewed the records before denying access to them.

Discussion

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

31. The Acting Information Commissioner is satisfied that the BPS's analysis of items 1 and 2 of the PATI request was adequate. As was clarified during the review, the BPS understood item 1 to be for any affidavits held by the BPS in relation to the murder investigation.
32. For item 2, the PATI request asked for files in relation to the withdrawal of the Witness's evidence in the murder investigation. The context of the PATI request, as indicated by the subject line of the Applicant's email when sending it, was about 'records [regarding the Witness's] assistance to the BPS regarding the murder of [a named individual]'. In this context, it was reasonable for the BPS to read the PATI request as being for files held in relation to the murder investigation only, and not including files held in relation to any separate file that may have been opened for a proceeding against the Witness for their evidence withdrawal.
33. As discussed below, during this review and as requested by the ICO, the BPS conducted a search for records related to considering any charge being brought against the Witness, but this search was beyond the scope of a reasonable reading of the PATI request.

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

34. The BPS has provided evidence of the scope of its search based on its analysis of the PATI request. On receipt of the PATI request, the BPS emailed the Acting Chief Inspector of the BPS's Serious Crime Unit asking for records responsive to the PATI request. This search request was forwarded to the Acting Detective Inspector (**ADI**) of the Serious Crime Unit, who responded to the Information Officer and attached a copy of the Witness's letter withdrawing their witness evidence. The ADI confirmed that affidavits were held by the DPP, not the BPS, and that they had spoken with the investigation's SIO.

35. During this review, the BPS also sought information directly from the SIO, who confirmed that the BPS did not possess affidavits for item 1 and provided the Information Officer with a copy of the Witness's letter withdrawing their evidence and the witness statement affirming the letter's content.
36. For item 2, the SIO provided additional information on whether charges against the Witness had been pursued. Based on the Acting Information Commissioner's view that any records related to an investigation into the Witness would have been beyond this PATI request's scope, the BPS was not asked to further search for internal records on the topic. If the Applicant wished, they may make a fresh PATI request seeking those specific records and await the BPS's decision on such request.
37. The Acting Information Commissioner is satisfied that the scope of the BPS's search was adequate for item 1 of the PATI request and for any other record responsive to item 2 (i.e. besides the Witness's letter and witness statement). The BPS's efforts during this review, to contact the SIO directly, further substantiated the adequacy of the BPS's search conducted prior to issuing the initial decision.
38. Further, the Acting Information Commissioner is satisfied that the Information Officer had obtained and reviewed the withheld records prior to issuing their initial decision denying the request, as queried by the Applicant.

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

39. For both items 1 and 2, the Acting Information Commissioner is satisfied that the BPS conducted its search with adequate rigour and efficiency. The Serious Crime Unit would have been responsible for the relevant murder investigation and would have had knowledge of the files held by the BPS in relation to that investigation. Again, this was substantiated by the BPS's additional search during this review and at the ICO's request.
40. Where there was a query by the Applicant about affidavits, the gap appears to have been in the BPS's explanation (i.e. that the DPP, not the BPS, would produce affidavits in a criminal prosecution) rather than a deficiency in the search conducted. In the future, the BPS may wish to ensure that such explanations are shared with the requester while processing their request, possibly by consulting with the requester or fuller explanation in a decision notice. This would enable a requester to adjust their request based on

information about records held by the public authority² or ask that their request be transferred to the public authority holding the relevant records.³

Conclusion

41. The Acting Information Commissioner has concluded that the BPS was justified in relying on the administrative ground in section 16(1)(a) for item 1 and that the BPS had conducted a reasonable search for additional records responsive to item 2.

Application of the PATI Act – section 4(1)(b)(v)

42. Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#), paragraph 18, that the “PATI Act excludes from its operation the records of a substantial number of public bodies to which the Legislature has decided that it shall not apply so long as such records do not relate to the general administration of the relevant body”. Among these are records that were obtained or created by the DPP in the course of carrying out its functions, as set out in section 4(1)(b)(v) of the PATI Act.
43. The provision in section 4(1)(b)(v) does not mean that the public does not have the right to ask for records obtained or created by the DPP. The public can make a PATI request for those records, and public authorities must respond to their requests in accordance with the provisions of the PATI Act.⁴ A public authority is justified to deny public access to those records if it can show that the records fall under the category prescribed in section 4(1)(b)(v).
44. Section 4(2) provides that records relating to the general administration of the DPP continue to fall within the scope of the PATI Act.

² For example, the Applicant may have wished to know how many witness statements were held by the BPS but might have been unaware of the distinction between affidavits and witness statements.

³ Where a public authority does not hold a record but knows that a record may be held by another public authority, section 13(5) of the PATI Act requires a public authority to transfer the request to the other public authority. Where those records are held by a public authority listed in section 4(1)(b), however, as was the case here, a public authority may want to consult with the requester and ask whether they wish to have the request transferred as, depending on the nature of the records sought, the PATI Act may not apply to them.

⁴ Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ, at paragraph 75: “I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act...they cannot be treated as so excluded. Accordingly, [the PATI requester] was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the [Head of Authority] in respect of the records which [the PATI requester] sought, and the Commissioner was entitled to commence a review of the matter” under section 47.

45. To determine whether a record falls outside the scope of the PATI Act by virtue of section 4(1)(b)(v), the following must be considered:

[1] Was the record obtained or created by the DPP?

[2] Was the record obtained or created by the DPP while carrying out its functions?

[3] Did the record relate to the DPP's general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

Public authority's submissions

46. The BPS submitted that the Witness was interviewed and provided a witness statement in the context of a murder investigation. In accordance with the Disclosure and Criminal Reform Act 2015, all documents obtained during an investigation must be submitted to the DPP, regardless of their perceived relevance. The BPS submitted that the DPP was responsible for determining a document's relevance and making appropriate disclosures to parties.

47. The BPS maintained that the responsive records fell outside the scope of the PATI Act pursuant to section 4(1)(b)(v) as they had been obtained by the DPP in the prosecution of a criminal case.

Applicant's submissions

48. The Applicant did not make submissions on the application of section 4 of the PATI Act to records they were seeking in their PATI request.

Discussion

[1] Was the record obtained or created by the DPP?

49. Although the BPS did not provide the ICO with the specific correspondence sent to the DPP attaching the two records at issue in this review, the Acting Information Commissioner accepts the BPS's submission that under the Disclosure and Criminal Reform Act, all documents obtained during an investigation would be submitted to the DPP. The BPS also submitted evidence from the SIO who affirmed that the records had been sent to the DPP.

50. Furthermore, the Acting Information Commissioner notes that the records were referred to in the relevant Court of Appeal judgment, which supported the BPS's submission that the records had been obtained by the DPP in the BPS's investigation.

[2] Was the record obtained or created by the DPP while carrying out its functions?

51. The Acting Information Commissioner is satisfied that the records were obtained by the DPP while carrying out its functions, i.e. to prosecute a criminal case.

[3] Did the record relate to the DPP's general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

52. The records did not relate to the DPP's general administration as they were clearly records containing potentially relevant evidence in the DPP's prosecution case.

Conclusion

53. In conclusion, the BPS was correct to rely on section 4(1)(b)(v) to deny access to the withheld records responsive to item 2 of the PATI request because the PATI Act did not apply to the records.

Conclusions

54. In conclusion, the Acting Information Commissioner is satisfied that the BPS has justified its reliance on the administrative ground in section 16(1)(a) of the PATI Act to administratively deny item 1 of the PATI request. The Acting Information Commissioner is satisfied that the BPS was correct to rely on section 4(1)(b)(v) of the PATI Act to withhold the records responsive to item 2 of the PATI request and that the BPS conducted a reasonable search for records responsive to item 2.
55. As requested by the Applicant, the Acting Information Commissioner has confirmed that the BPS's Information Officer had obtained and considered the responsive records prior to issuing the initial decision and that these would have been available for the Head of Authority's internal review.
56. The Acting Information Commissioner further notes the BPS's submissions on its approach to PATI requests given the volume of requests received by the public authority. To ensure public authorities can deal with PATI requests as efficiently as possible, requesters should ensure that, where they seek specific records from a public authority, these records are spelled out clearly in their request.

Decision

The Acting Information Commissioner finds that the Bermuda Police Service (**BPS**) was justified in relying on section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010 to administratively deny part of the PATI request and on section 4(1)(b)(v) to refuse access to the requested records. In accordance with section 48 of the PATI Act, the Acting Information Commissioner affirms the internal review decision by the BPS.

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.

LaKai Dill

Acting Information Commissioner

30 August 2024

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Application

- 4 (1) Subject to subsection (2), this Act does not apply to—
- ...
 - (b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
 - ...
 - (v) the Department of Public Prosecutions. . .;
 - ...
- (2) The reference to records in subsection (1) does not include records relating to the general administration of –
- ...
 - (b) any public authority referred to in subsection (1)(b).

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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