

Decision Notice

Decision 24/2022: Department of Education

Personal information records and school complaint policies

Reference no: 20190912

Decision date: 7 October 2022

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 that was transferred to the Department of Education (**Department**), for personal information records and school complaint policies. The Department administratively denied the request under section 16(1)(a) of the PATI Act, stating the records did not exist.

The Information Commissioner has found that the Department's administrative denial, while justified in part, was not fully justified because the Department had not taken all reasonable steps to locate records before concluding they did not exist.

The Information Commissioner has ordered the Department to conduct a reasonable search and issue a new initial decision to the Applicant.

Relevant statutory provisions

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

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

Appendix 1 provides the text of these statutory provisions and forms part of this Decision.

Background

1. On 13 March 2019, the Applicant made a PATI request to the Ministry of Education Headquarters (**Ministry Headquarters**), asking for the following records from a specific period:
 - a. item 1: a list of any agencies, organisations, individuals or other bodies with which the Ministry Headquarters had shared any personal information of the Applicant and their child (**any shared personal information**);
 - b. item 2: information on the purpose and legislative basis for any such sharing of their personal information (**legislative basis**);
 - c. item 3: any records of personal information on the Applicant's child (**child's personal information**);
 - d. item 4: any records of personal information on the Applicant (**Applicant's personal information**);

- e. items 5-7: the policy and procedure manuals for principals and for teaching staff, and the Ministry Headquarters' complaint policy; and
 - f. item 8: the complaint policy at the schools attended by the Applicant's child (**school complaint policies**).
2. In the PATI request, the Applicant noted their understanding that the public schools attended by their child were part of the Ministry Headquarters.
 3. The Ministry Headquarters transferred the PATI request, in full, to the Department of Education (**Department**) on 10 May 2019. The Applicant did not receive an initial decision from the Department on the transferred PATI request and asked for an internal review by the Head of Authority for the Department, who is designated as the Permanent Secretary with responsibility for the Department of Education.
 4. Separately, the Applicant asked the Information Commissioner for an independent review of the Ministry Headquarters' decision to transfer their PATI request to the Department. During that review, as decided by the Information Commissioner in [Decision 03/2020](#), the Ministry Headquarters ultimately conducted a reasonable search of its files and issued a new initial decision, disclosing a number of records responsive to a portion of the PATI request.
 5. On 14 August 2019, the Permanent Secretary for the Ministry Headquarters provided the Applicant with a letter that addressed two separate, but related, matters. Subject to this review is the internal review decision issued in the Permanent Secretary's capacity as the Department's Head of the Authority.
 6. The Department's internal review decision stated the following:
 - a. In response to items "1 to 4", "no information has been released to agencies, organisations, individuals or any other bodies" about the Applicant and their child. The Department explained that, according to its policy, "an Information/Released Records Form must be completed by the parent or guardian to release student records/information" (**consent form**). The Department explained that it did not find any form on file which authorised it to release the Applicant's or their child's information.
 - b. The manuals responsive to items 5 and 6 were on its website. A complaint policy for the Ministry Headquarters, responsive to item 7, did not exist; though at that time, a policy was being developed by the Department.
 - c. School complaint policies, responsive to item 8, did not exist. The Department referred the Applicant to one school's parent handbook, available online, which

described how to deal with school concerns. The Department also included a copy of its emails with the relevant schools, showing the schools' confirmation that they did not hold any specific complaint policy.

7. On 12 September 2019, the Applicant made a timely application for an independent review by the Information Commissioner of the Department's internal review decision on items 1-4 and 8 only, about records on any sharing of their personal information and the relevant legislative basis, records on their personal information, and school complaint policies.

Investigation

8. 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.
9. On 2 October 2019, the Information Commissioner's Office (ICO) notified the Department of the valid application.
10. The Information Commissioner decided that early resolution under section 46 of the PATI Act was appropriate, but the parties' consent for early resolution could not be obtained, despite efforts by the ICO.
11. 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. Both the Department and the Applicant were invited to make submissions to the Information Commissioner for her consideration. The ICO Investigation Officer also informed the Department of their preliminary view that its initial search was not reasonable.
12. The ICO received submissions from the Department. In response to the ICO Investigation Officer's preliminary view, the Department searched and identified 78 additional responsive records, after duplicates were removed. The Department has not yet determined whether to disclose these records to the Applicant, but provided a copy to the ICO. Given its view that the searches conducted thus far have been reasonable, the Department did not take a final opportunity to address the remaining search deficiencies as the ICO identified, despite being given a reasonable opportunity to do so during this review.

13. The Applicant did not respond to the ICO's invitation to make a submission, but the Information Commissioner takes into consideration the information they provided during this review and the related review for [Decision 03/2020](#), arising out of the same PATI request.

Information Commissioner's analysis and findings

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

Record does not exist – 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 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 does not determine to a point of certainty if a record does not exist or is lost. Rather, the Information Commissioner is required to assess whether the public authority took all reasonable steps to find the record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration¹.
18. In assessing the reasonableness of the public authority's search, the Information Commissioner considers the following factors:
 - [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.

¹ [Decision 08/2021](#), [Police Complaints Authority](#), para. 92.

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.

Public authority's submissions

21. On the scope of item 1 of the PATI request, about any shared personal information, the Department submitted that it understood the "agencies, organisations, individuals or any other bodies" to include but not be limited to: the Bermuda Hospitals Board's Child and Adolescent Services (**CAS**), any private psychologist, other public authorities as well as the Department's staff and public school teachers. The Department also indicated that it referred to the definition in section 24 of the PATI Act to understand the Applicant's reference to 'personal information' in the PATI request.
22. In response to the ICO Investigation Officer's preliminary view, the Department accepted that its initial search had not been reasonable. The Department agreed that 12 additional individuals were reasonably viewed as potential holders of records responsive to items 1-4 of the PATI request (**identified individuals**)—including the Commissioner of Education, a school psychologist, the Director of Academics (**individual 8**), a senior officer in the Student Services section (**individual 9**), another staff known to the Applicant (**individual 11**) and an Education Officer (**individual 12**), who are identified in the confidential Appendix 2. The Department acknowledged that these individuals' files were not searched prior to its internal review decision being issued to the Applicant.
23. During the ICO's review, the Department, through its Information Officer, contacted 11 of the 12 identified individuals via email, requesting them to search their physical and electronic files. This search request email, dated 21 November 2021, was provided to the ICO.
24. As a result of its search during this review, the Department identified and submitted to the ICO various records generated from the email accounts of six identified individuals. Individual 8 claimed that limited records were located due to their past files being corrupted. The Department submitted screenshots of the searches of some identified individuals' emails and other relevant correspondence. This included an email from the Commissioner of Education, noting they had "not sent any personal information about" the Applicant or their child to any agencies, organisations, individuals or other bodies.

25. An email from the school psychologist was provided, informing the Information Officer that the only record they held from the relevant period was a school staff's report, which they suspected the Information Officer might already have on file from processing the request.
26. The Department explained that it was unable to reach individual 11, who did not use email to correspond. As a result, individual 11's files were not searched.
27. The Department's submissions showed that individuals 9 and 12 did not respond to the search request email.
28. Following its search during the ICO's review, the Department maintained that, for items 1 and 2 of the PATI request, no record existed that revealed any sharing of the Applicant's or their child's personal information with any agencies, organisations, individuals or other bodies.

Applicant's submissions

29. The Applicant identified twelve individuals who could reasonably be expected to hold records responsive to items 1-4 of the PATI request, given their communication with the Department at that time. The Applicant recalled submitting a consent form via the school psychologist. The Applicant also understood that individual 12 had obtained their child's file from a community advocate who had been assisting the Applicant.
30. The Applicant believed that some information responsive to the PATI request was missing from the internal review decision and that some statements were inaccurate.
31. The Applicant stated that the Department had provided their child's personal information to individual 11, who was personally known to the Applicant but not as being involved with their child's schooling. The Applicant was also concerned that their child was externally referred to the CAS, based on their understanding, without their prior consent.

Discussion

32. The Information Commissioner considers whether the Department took all reasonable steps to locate the records responsive to items 1-4 and 8 of the PATI request.

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

33. The Information Commissioner considers the scope of items 1, 3 and 4 in light of the definition of 'personal information' under the PATI Act.

34. The Applicant phrased items 1-4 of the PATI request in a way that would ensure all information held by the Department which related to them and their child would be located and processed. As demonstrated below, however, understanding how the scope of the items differs is important, as a misunderstanding could result in some records sought being excluded.
35. Section 24(1) of the PATI Act describes 'personal information' broadly as "information recorded in any form about an identifiable individual". This includes, but is not limited to, information relating to an individual's race, age, marital status (subsection (1)(a)), an individual's correspondence with a public authority (subsection 1(f)), and any other person's views or opinions on the individual (subsection (1)(g)). Public authorities should bear this broad definition in mind when processing any requests made under the PATI Act for records of 'personal information'.

Items 1 and 2: Shared personal information and legislative basis

36. Item 1 of the PATI request asked for records specifically capturing any personal information of the Applicant or their child being shared by the Department, including by the public schools attended by the child, with other agencies, organisations, individuals or other bodies. Although it originally sought information shared by the Ministry Headquarters, all parties involved have understood that, once the PATI request was transferred, item 1 sought any information that was shared by the Department. Item 2 asked for records explaining the legislative basis for and purpose of any such sharing of personal information.
37. The Department's submissions showed its adequate understanding of the scope of items 1 and 2. The Department understood the reference in item 1 to "agencies, organisations, individuals or any other bodies" as including, but not being limited to, the following external entities: the CAS, other public authorities, and any private psychologist. This submission was supported by the Department's search request email.

Items 3 and 4: Applicant and child's personal information

38. Unlike items 1 and 2—which focused on their personal information only as being shared with external organisations or individuals and the legislative basis for doing so—the scope of items 3 and 4 is very broad. They include all records of personal information on the Applicant and their child, regardless of whether the Department shared the information. Internal emails between the Department's staff expressing an opinion about the Applicant or their child, for example, would fall squarely within the scope of items 3 and 4, by virtue of section 24(1)(g) of the PATI Act. The Applicant and child's

personal information also would include any relevant parts of file notes and other records kept by individuals in the Department which were not shared with anyone else.

39. Here, the Department did not seek to clarify the Applicant's information needs while responding to the PATI request. Instead, the Department's internal review decision appears to have blurred the scope of items 1-2 with items 3-4 by focusing only on whether any personal information had been shared.
40. Specifically during its handling of the PATI request, the Department did not appear to view items 3 and 4 as including the Applicant and child's personal information that had not been shared, but still was held by the Department. For example, when responding to the Applicant's "questions 1-4", the internal review decision stated that "no information has been released to agencies, organisations, individuals or any other bodies" about the Applicant and their child. The internal review decision explained the Department's policy requiring the parent or guardian to complete a form before it releases student information, and that none was on file. In response to the ICO's questions on items 3 and 4, the Department repeated its position, that "there were no records found that shared personal information with agencies, organisations, individuals or any other bodies".
41. During this review, however, the Department largely remedied its understanding of the scope of items 3 and 4. The Information Officer's search request email clearly distinguished the scope of items 1-2 from items 3-4 for the additional searches to be conducted. As a result, most individuals seem to have understood that items 3 and 4 were looking generally for records of the Applicant and their child's personal information. This was evidenced by the content of the records these individuals identified as responsive to items 3 and 4 of the PATI request.
42. In contrast, the Commissioner of Education's reply on their additional search did not distinguish items 3-4 from items 1-2. Their email stated that they had not "sent any personal information about [the Applicant and her child] to any agencies, organisations, individuals or other bodies". This suggests that the Commissioner of Education may have continued to blur the scope of items 1-2 and 3-4 in a manner that failed to locate records responsive only to items 3-4. The fact remains that the scope of items 3-4 was much broader than that of items 1-2, and the search of the Commissioner of Education's records did not consider this distinction. In this way, not all individuals within the Department who searched their files as part of this review had a consistent understanding on the scope of items 3-4 and how it differed from the scope of items 1-2.

Item 8: School complaint policies

43. The Information Commissioner is satisfied that the Department’s original analysis of the scope of item 8 was adequate. This was evident from what the Department wrote in its emails to the relevant schools, asking for a copy of the school complaint policy if it existed, and if not whether the school intended to implement one—as shared with the Applicant in its internal review decision.

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

44. Though the Department and the Ministry Headquarters responded to the same PATI request, the Information Commissioner now assesses the adequacy of the scope of the Department’s search based on its own records. Under the PATI Act, the Department is a separate public authority from the Ministry Headquarters. While the Department and the Ministry Headquarters share the same Head of Authority (the Permanent Secretary), each is a “department of the Government” referred to as a public authority in paragraph 12 of the Schedule to the PATI Act.
45. As explained in their individual Information Statements, the Ministry Headquarters and the Department have different functions, powers and duties. While the Ministry Headquarters is responsible for providing strategic policy for the public school education system, for example, the Department is responsible for the provision of education for students up to the age of 18.²
46. Because the Ministry Headquarters and the Department are separate public authorities, each must meet its obligations under the PATI Act. If the Ministry Headquarters and the Department receive an identical PATI request, each one must respond to the request separately, after considering the records it holds. Given the difference in their functions, powers and duties, it can reasonably be expected that the Ministry Headquarters and the Department will hold different records, although some overlap may exist. An identical PATI request made to both public authorities could, therefore, result in different records that are responsive to the request and different outcomes for the requester.
47. The PATI Act requires a public authority to search records only that it holds within the meaning of section 3(3) of the PATI Act, i.e., records in the possession or custody of, or under the control of, that authority. For this reason, in [Decision 03/2020](#), the Ministry Headquarters was not required to search the Department’s records, including records held by public schools within the Department. Similarly, in this review, the Department was required to search only the records it holds, and not those held by the Ministry

² See section B of the Ministry Headquarters’ [Information Statement](#) (24 December 2021) and section B of the Department’s [Information Statement](#) (30 March 2015).

Headquarters. In this case, the Department's records do not include those held within the Permanent Secretary's email account, because the Permanent Secretary belongs to the Ministry Headquarters, institutionally. For the purposes of the PATI Act, public schools are deemed part of the Department, and the records held by public schools are records the Department holds³. As a result, in this request, the Department was required to search the records of the relevant schools.

Items 1 and 2: Shared personal information and legislative basis

48. The Department did not submit any evidence showing that the emails of individuals 9 and 12 were searched, even though the Department accepted that these individuals could potentially hold records responsive to item 1 or 2 of the PATI request. No evidence was submitted showing the Department's efforts to ask individual 11 to search their files, despite the Department's acceptance that such search was reasonable. While the Department stated that it was "unable to reach" individual 11 because they did not use email, this claim alone is not sufficient for removing a potential location from a reasonable search's scope. For example, the Department could have attempted to contact individual 11 by telephone or in-person, and then submitted to the ICO a note detailing its attempts, e.g., the dates and times of each contact.
49. Given the Applicant's submission that individual 12 received a physical copy of a file on their child from the community advocate who was assisting the Applicant, it would also be reasonable for the Department to confirm with individual 12 whether they held a physical file related to the Applicant's child or the Applicant.

Items 3 and 4: Applicant and child's personal information

50. As explained above, the Department's understanding of the scope of items 3 and 4 was inadequate. In any event, the scope of the Department's search to locate records responsive to items 3 and 4 was not adequate for the same reasons stated in paragraphs 48-49.

Item 8: School complaint policies

51. The Information Commissioner is satisfied that the scope of the Department's search for records responsive to item 8 was adequate, given its documented communication with the relevant public schools asking for a copy of any complaint policy.

³ See, for example, pages B-133 to B-314 of the [Approved Estimates of Revenue and Expenditure for the Year 2022/23](#) (25 February 2022). The relevant pages list the preschools, primary schools, special schools, middle schools and secondary schools under the Department's budget.

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

Items 1 and 2: Shared personal information and legislative basis

52. Even if it were found that the scope of the Department's search to locate records responsive to items 1 and 2 was adequate, the Department did not conduct its search with adequate rigour and efficiency.
53. On the one hand, the Department took a number of appropriate steps during its search. Individuals tasked with conducting the search were involved in matters relating to the Applicant and their child. As a result, these individuals could reasonably be expected to be familiar with any responsive records. The Information Officer's search request email restated items 1-4 sufficiently and accurately described the parameters of the search to ensure an efficient process. The Information Officer also showed sufficient rigour by emailing reminders to those who had not responded to their original search request.
54. On the other hand, notable inadequacies with the search's rigour and efficiency arose. The Department did not follow up with individuals 9 and 12 (who did not respond to the search request email). The Department also did not contact individual 11 by means other than email, or seek IT support for accessing individual 8's corrupted files.
55. The Department did further probe on the school psychologist's records, who explained they held only one responsive report and that it was probably already processed by the Information Officer. The Applicant's recollection that they had sent the school psychologist a signed consent form raised a question of whether, in fact, the Department held any such form.
56. After careful review of the additional records provided to the ICO, as explained above in paragraph 12, the circumstances make it reasonable to follow up with the school psychologist to conduct a more rigorous search of their files or, at a minimum, seek clarification on their recordkeeping approach concerning the Applicant and their child.
57. The Department's search documentation was also incomplete and, as a result, the rigour and efficiency of the search could not be fully evidenced. Specifically, some screenshots were either cut off, showed the search of limited folders only, or did not show all emails generated from the search. The Department also did not submit any screenshots on the searches of some individuals' email folders.
58. As explained above, the Information Commissioner's review of a public authority's reliance on section 16(1)(a) does not require her to assess whether a responsive record exists to the point of certainty, nor does it concern whether a public authority should

hold a record as a matter of good public administration. Adequate rigour and efficiency are required, though, when the circumstances indicate that a record responsive to a PATI request existed or should have existed, because, for example, by law the record must be created or retained or if mentioned in another record.

59. In this case, the Department did not show that its search for records of any external sharing of personal information of the Applicant or their child was conducted with adequate rigour and efficiency. This was despite indications from the records identified by the Department during this review and the Applicant's concerns that such records were likely to exist. Ultimately, the records may not exist, but the Department is under a requirement, before administratively denying a PATI request under 16(1)(a), to conduct its search with adequate rigour and efficiency under the circumstances.

Items 3 and 4: Applicant and child's personal information

60. The Department's search for records responsive to items 3 and 4 was not conducted with adequate rigour or efficiency for the same reasons as stated above, in paragraphs 54-59.

Item 8: School complaint policies

61. The individuals contacted by the Department were the heads of each school who had knowledge on their school's policies. Prior to issuing its internal review decision, the Department followed up with the schools that did not respond to its original request for a search in July 2019. The parties did not provide any submissions or records that indicated that the Department should have taken additional steps during its search for school complaint policies.
62. Under these circumstances, the Department conducted its search for records responsive to item 8 with adequate rigour and efficiency.

Conclusion

63. The Information Commissioner is satisfied that the Department was justified in relying on section 16(1)(a) to deny item 8 of the PATI request, because it had taken all reasonable steps to locate responsive records before concluding they did not exist.
64. The Information Commissioner is not satisfied that the Department was justified in relying on section 16(1)(a) to deny items 1-4 of the PATI request, because it had not taken all reasonable steps to locate responsive records before concluding they did not exist, either at the time of its internal review decision or during the Information Commissioner's review.

Decision

The Information Commissioner finds that the Department of Education (**Department**) was justified in relying on section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010 to administratively deny item 8 of the PATI request, because it had taken all reasonable steps to locate responsive records before deciding they did not exist. The Information Commissioner also finds that the Department was not justified in relying on section 16(1)(a) to deny access to items 1-4 of the PATI request, because the Department has not taken all reasonable steps to locate records responsive to these items.

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

- affirms the Department's administrative denial for item 8 of the PATI request;
- annuls the Department's internal review decision for items 1-4 of the PATI request;
- orders the Department to conduct a reasonable search to locate records responsive to items 1-4, under the ICO's supervision and as instructed in the confidential cover letter to this Decision, although the Department need not re-identify the same records located during this review; and
- orders the Department to issue a new initial decision on items 1-4, which requires the processing of the records additionally identified during this review along with any records located during the additional search, i.e., decide to withhold or disclose them.

The Information Commissioner requires the Department to conduct a reasonable search and issue a new initial decision, as directed by this Decision and the accompanying Order, on or before **Friday, 18 November 2022**.

Judicial Review

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

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Department fails to comply with this Decision, the Information Commissioner

has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.

A handwritten signature in black ink, appearing to read 'G. Gutierrez', with a long horizontal line extending to the right.

Gitanjali S. Gutierrez
Information Commissioner
7 October 2022

Appendix 1: Relevant statutory provisions

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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