

Decision Notice

Decision 28/2019: Bermuda Business Development Agency

Game Theory Limited records: failure to decide within statutory timeframes

Reference no: 20191008

Decision date: 25 November 2019

Summary

On 2 May 2019, the Applicant asked the Bermuda Business Development Agency (**BDA**) for various records related to a company known as Game Theory Limited. This Decision finds that the BDA failed to decide the Applicant's request for an internal review within the statutory timeframe set forth by the Public Access to Information (PATI) Act 2010.

Background

1. This Information Commissioner's Decision is made in the context of a 'failure to decide' case involving an application for review under Part 6 of the Public Access to Information (**PATI**) Act that was received by the Information Commissioner's Office on 8 October 2019.
2. This Decision does not address whether a public authority has properly denied access to a record. Rather, it addresses the basic obligation upon a public authority to respond to a requester within the statutory timeframes.
3. Relevant dates:

Date	Action
2 May 2019	The Applicant made a written PATI request to the BDA.
25 July 2019	The BDA issued an initial decision to the Applicant.
31 July 2019	The Applicant requested an internal review be conducted by the head of the public authority.
9 September 2019	The BDA extended the timeframe to respond to the Applicant's internal review request to 11 October 2019.
	The Applicant did not receive an internal review decision within six weeks of the BDA's receipt of the request for one, i.e. by 11 September 2019.
8 October 2019	The Applicant requested an independent review by the Information Commissioner.
10 October 2019	The BDA extended the timeframe to respond to the Applicant's internal review request.

21 October 2019	The BDA was notified in writing that an application had been received from the Applicant. The BDA was asked to comment on the application.
14 November 2019	The BDA provided the Applicant with an internal review decision, in which it explained the reasons for the timing of the issuance of its internal review decision. The Information Commissioner has treated the explanation as the BDA's submissions, which are considered below.

Information Commissioner's analysis and findings

Internal Review Decision

1. Section 43(1) of the PATI Act requires the head of a public authority to conduct an internal review. Section 43(2) gives the head of the public authority a maximum of six weeks, after the date of receiving a request for an internal review, to complete the internal review. Section 43(2) also requires that the head of the authority notify the Applicant of: the internal review decision, the reasons for the decision, and the Applicant's right to seek an independent review by the Information Commissioner.
2. On 31 July 2019, the Applicant sent the BDA an email requesting an internal review. The Applicant did not receive an internal review decision by 11 September 2019.
3. By letter dated 21 October 2019, the BDA was invited by the Information Commissioner's Office (**ICO**) to make submissions on this application, as required by section 47(4) of the PATI Act.
4. During the course of this review, on 14 November 2019, the BDA provided the Applicant with an internal review decision. The internal review decision explained that the delay in the issuance of its internal review decision was because the BDA sent out a notice to third parties, in accordance with section 39 of the PATI Act, and was awaiting their responses. The BDA submitted that the delay in the issuance of the internal review decision was "consistent with the guidance [it] had received from the ICO, natural justice and the rights of third parties" and that "the ICO guidance had confirmed that, in the interests of fairness, [the BDA] was still required to consider whether any concerned third party should be notified of the internal review and given an opportunity to make representations."
5. The Information Commissioner acknowledges and appreciates the BDA's efforts to be in compliance with the third party notice requirements set out in section 39 of the PATI Act

and regulations 10 and 11 of the PATI Regulations. The Information Commissioner commends the BDA's careful approach when considering disclosure of records containing personal information of third parties.

6. As explained above, the PATI Act gives the head of a public authority six weeks from the date of an internal review request to conduct such review and issue a decision. Unlike at the initial decision stage, the PATI Act does not give public authorities the option to extend the timeframe to issue an internal review decision. The specific timeframe is designed to support the public's right to access non-exempt records. For an applicant, an internal review decision issued in accordance with section 43(2) of the PATI Act provides certainty and enables their right to an independent review by the Information Commissioner.
7. The BDA was correct to point out that it may be in the interest of fairness for a public authority to notify a third party and invite their submissions at the internal review stage, even though section 39 of the PATI Act does not require public authorities to do so. When it chooses to notify a third party at that stage, however, the public authority is still required to issue an internal review decision within the six week timeframe set out in the PATI Act.
8. Regulation 10(3) of the PATI Regulations allows public authorities to extend the timeframe for decision making if it chooses to notify third parties of potential disclosure of records containing their personal information, as defined in section 24 of the PATI Act. Regulation 10(3) of the PATI Regulations, however, refers to an extension of time to issue an initial decision, and not at the internal review stage. This can be concluded from the provision's specific reference to section 15 of the PATI Act which relates to an extension of time for the issuance of an initial decision.
9. If at the time the internal review decision is due a public authority has not received the submissions from the third parties it notified, it should continue to process the request and issue an internal review decision based on the information that is available to them at that time.¹ If the internal review decision was to withhold the third party's personal information and the requester is not satisfied, they have the right to apply for an independent review

¹ See the Information Commissioner Decision 14/2019 Department of Health, paragraph 10: "[w]here a public authority intends to disclose records, but is restricted in its ability to do so, it should still issue an internal review decision. If circumstances change following the issuing of the internal review decision, it is always open to the public authority to disclose the records at a later stage, even if an independent review by the Information Commissioner has been commenced." See also slide 46 of the Information Commissioner's Briefing Presentation dated 13 June 2016 discussing, among other things, third party notifications: "If no representations received within relevant time frame after notice provided, public authority should continue to process the request". Available at https://8692baf5-a59b-4adf-8b95-61e6b6541d57.filesusr.com/ugd/5803dc_f4cdd298434b460d9008db88376ba6f5.pptx?dn=ICO%20Briefing%20Presentation%20-%2012%20June%202019.

by the Information Commissioner. If the decision was to disclose, the third party's right would still be protected as long as the public authority:

- a. provides the third party with a copy of the internal review decision to allow them to make an application for an independent review by the Information Commissioner, in accordance with section 43(2)(b) of the PATI Act and regulation 11(1) of PATI Regulations; and
- b. discloses the records only if the third party does not make an application for an independent review by the Information Commissioner within 12 weeks from the date of the internal review decision when third party personal information is involved.

10. It is a matter of fact that the BDA did not provide the Applicant with an internal review decision within the statutory timeframe. The Information Commissioner is satisfied that the BDA failed to comply with section 43(2) of the PATI Act.

Decision

The Information Commissioner finds that the Bermuda Business Development Agency (**BDA**) failed to comply with Part 5 of the Public Access to Information (PATI) Act 2010 in responding to a request for an internal review made by the Applicant. In particular, the BDA failed to issue a decision on the Applicant's request for an internal review within the timeframe set forth in section 43(2) of the PATI Act.

During the course of this review, the BDA issued an internal review decision. Consequently, the Information Commissioner does not require the BDA to take any further action in respect of this Decision.

Judicial Review

Should the Applicant, the BDA, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such appeal must be made within six months of this Decision.



Gitanjali S. Gutierrez
Information Commissioner
25 November 2019

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