

Decision Notice

Decision 14/2019: Department of Health

Day care centres and child care provider records: failure to decide within statutory timeframes

Reference no: 20190312-01 & 20190312-02

Decision date: 10 June 2019

Summary

The Department of Health (**Department**) issued an initial decision on a Public Access to Information (**PATI**) request made on 23 February 2016, pursuant to the Information Commissioner's Order in Decision 03/2018. The Department also issued an initial decision on a separate, but related, PATI request made on 8 May 2018. The Applicant sought an internal review of both initial decisions.

This Decision finds that the Department failed to decide the Applicant's requests 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 'failure to decide' cases involving two separate, but related, applications for review under Part 6 of the Public Access to Information (**PATI**) Act that were received by the Information Commissioner's Office on 12 March 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
23 February 2016	The Applicant made a written PATI request to the Department of Health (PATI No. 341(A)).
30 April 2018	The Information Commissioner issued Decision 03/2018 and ordered the Department of Health to issue a new initial decision on PATI No. 341(A).
8 May 2018	The Applicant made a new PATI request to the Department of Health (PATI No. 534). The request asks for records similar to that responsive to PATI No. 341(A), but for different time period.

23 July 2018	The Department of Health issued its initial decision on PATI No. 341(A), in accordance with the Information Commissioner's Order.
31 July 2018	The Department of Health issued its initial decision on PATI No. 534.
28 August 2018	The Applicant requested an internal review of both initial decisions be conducted by the head of the public authority.
20 September 2018	The Department of Health extended the timeframe to respond to the Applicant's internal review requests.
	The Applicant did not receive any internal review decision within six weeks of the Department of Health's receipt of the requests for one, i.e. by 9 October 2018.
10 November 2018	The Department of Health extended the timeframe to respond to the Applicant's internal review requests.
24 December 2018	The Department of Health issued an 'interim' decision on the Applicant's internal review requests.
12 March 2019	The Applicant requested an independent review by the Information Commissioner.
6 May 2019	The Department of Health was notified in writing that the Information Commissioner accepted the Applicant's late applications. The Department of Health was asked to comment on the applications.
6 May 2019	The Department of Health issued an internal review decision on PATI No. 341(A).
10 May 2019	The Information Commissioner received submissions from the Department of Health. These submissions are considered below.
23 May 2019	The Department of Health issued an internal review decision on PATI No. 534.

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 28 August 2018, the Applicant sent emails requesting an internal review by the head of the Department of Health (**Department**) of its initial decisions on PATI requests nos. 341(A) and 534. The Applicant did not receive a decision on the internal review requests by 9 October 2018.
3. The Applicant requested an independent review of the Department's alleged failure to issue an internal review decision on 12 March 2019. The PATI Act requires a requester to ask the Information Commissioner to review a public authority's failure to issue an internal review decision within six weeks after that internal review decision was due. The Applicant's requests for independent review, therefore, were late.
4. The Information Commissioner has the discretion to accept a late application for review under section 45(2) of the PATI Act. On 6 May 2019, the Information Commissioner exercised this discretion on the basis that the Applicant had genuine confusion about the review timeframes in light of the 'interim' decision and communications with the Department. The Department was notified of the late applications and did not object. The Applicant's applications were therefore accepted.
5. By letters dated 6 May 2019, the Department was invited by the Information Commissioner's Office (**ICO**) to make submissions on these applications.
6. In its submissions, the Department explained that the internal review was 'very large due to the volume of records and required a long time to complete'. It further explained that its resources are finite and that it was handling both internal review requests concurrently. The Department asserted that the timeframe allowed in the PATI Act is not sufficient to complete a request with the magnitude and complexity such as the Applicant's PATI request. Furthermore, the timeframe in the PATI Regulations to conduct third party notifications prohibits completion of a request involving release of personal information within six weeks.

7. The Department further explained that it was initially prohibited from releasing the records and that the authority to do so fell under a different ministry which did not respond to its request for approval to release. As soon as the relevant legislation was revised and it secured statutory authority to disclose the records, the Department informed the Applicant and endeavoured to prepare the disclosure.
8. Having considered the Department's submissions, the Information Commissioner acknowledges the challenges a public authority may face when processing a PATI request¹. The Information Commissioner commends the Department's intention and efforts to disclose the responsive records during its handling of the internal review requests.
9. The timeframes set forth in the PATI Act are designed to support the public's right to access non-exempt records. For an applicant, the internal review decision, issued in accordance with section 43(2), provides certainty and triggers the applicant's right to an independent review by the Information Commissioner. There is no provision in the PATI Act for 'interim decisions' and such decisions can cause confusion with respect to the process to be followed by a requester, which may undermine their right to ask for an independent review by the Information Commissioner.
10. Where a public authority intends to disclose records, but is restricted in its ability to do so, a public authority 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.
11. It is a matter of fact that the Department did not provide the Applicant with internal review decisions within the statutory timeframe. The Information Commissioner finds that the Department failed to comply with section 43(2) of the PATI Act.
12. During the course of this review, the Department issued internal review decisions on PATI Nos. 341(A) and 543 on 6 May 2019 and 23 May 2019, respectively.
13. The Information Commissioner does not require the Department to take any further action at this time in relation to the Applicant's request for an internal review.

¹ As stated in Decision Notice 11/2019 Department of Child and Family Services, the Information Commissioner is aware of public authorities' need of support to respond to PATI requests, and is hopeful that the practice code on the administration of the Act will be issued by the Minister for the PATI Act as soon as possible.

Decision

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

During the course of this review, the Department issued the responsive internal review decisions. Consequently, the Information Commissioner does not need to order the Department to take any further action at this time in respect of this Decision.

Judicial Review

Should the Applicant, the Department, 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
10 June 2019

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