



## Decision Notice

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**Decision 20/2019: Ministry of Finance Headquarters and Accountant General's Department**

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**Sandys 360 payments**

**Reference no: 24082016-02**

**Decision date: 25 July 2019**

## Summary

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The Applicant made a request to the Accountant General's Department (**Department**) for records related to payments made by Government to Sandys 360. The Department transferred the request in full to the Ministry of Finance Headquarters (**Ministry**). The Department's internal review upheld the decision to transfer the PATI request to the Ministry.

The Information Commissioner has found that it was incorrect for the Department to transfer the PATI request to the Ministry. In accordance with the purposes of the PATI Act in section 2 of the Act, however, the Information Commissioner has required both the Ministry and the Department to process the PATI request.

## Relevant Statutory provisions

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Public Access to Information (**PATI**) Act 2010: section 12 (access to records); section 13 (request for access)

Public Access to Information Regulations (**PAIR**) 2014: regulation 5 (reasonable search); regulation 8 (transfer of requests)

The full text of each statutory provision cited above is reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

## Background

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1. On 5 May 2016, the Applicant made a PATI request to the Accountant General's Department (**Department**) for:
  - (a) A complete list of payments made to Sandys 360 by the government from 1 January 2007 to 5 May 2016, with the date and amount of each payment (**list of payments**); and
  - (b) All paperwork related to a payment in August 2011 of \$807,000 from the Government Reserve Fund to Sandys 360, including the cheque and any associated purchase order (**duplicate payment**).

2. On 5 July 2016, the Applicant received notice from the Department that the request had been transferred to the Ministry of Finance Headquarters (**Ministry**).
3. On 6 July 2019, the Applicant requested an internal review of the Department's actions on the grounds that the Applicant did not receive a response within the legislated timeframe.
4. On 12 August 2016, the Department issued an internal review decision that only addressed whether the Department complied with the statutory timeframes for transferring a PATI request.
5. The Applicant submitted a timely application on 24 August 2016 seeking an independent review by the Information Commissioner. The application was one of the three submitted by the Applicant to the Information Commissioner, involving PATI requests that sought similar records related to Sandys 360 from three different public authorities.

## **Early resolution**

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6. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a PATI request to a public authority and asked the public authority for an internal review before asking her for an independent review. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
7. On 1 December 2016, both the Department and Ministry were notified of the valid application. The Department and Ministry were also informed that the Information Commissioner had determined that early resolution under section 46 of the PATI Act was appropriate.
8. In December 2016, all parties agreed to attempt an early resolution. In January 2017, the Financial Secretary, the head of both public authorities, notified the Information Commissioner's Office (**ICO**) that he would be participating in the early resolution on behalf of the authorities.
9. With the parties' agreement in this section 46 early resolution, the ICO sought to address the requests for records related to the list of payments and duplicate payments held by both public authorities.
10. In January 2017, the Ministry disclosed to the Applicant a list of ten payments totalling \$61,355.00, which did not include records related to the duplicate payment. In a separate but related review, Decision 12/2018, Ministry of Finance, the Ministry had also disclosed additional records and information regarding payments made to Sandys 360. These

disclosures did not satisfy the PATI request in this case, but the parties continued to attempt to resolve the outstanding matters.

11. The Ministry accepted in September 2018 that term 'Sandys 360', should be read broadly to refer to all Sandys 360-related vendors in the government accounting software, including the Trustees of Sandys Secondary School, Sandys Secondary School, Sandys Secondary School Foundation<sup>1</sup>, and the Sandys Aquatic & Enrichment Centre.
12. During a meeting with the ICO, the Ministry conducted a search of the government accounting software for additional capital grants made to the group of Sandys 360 entities and payments made from the Government Reserves Fund. The records located were responsive to the request for a list of payments and were provided to the ICO.
13. The Ministry, however, had not provided records responsive to the request for documentation supporting the duplicate payment.
14. In November 2018, the Ministry provided an additional record and explained that it was still searching for the hard copy records stored at archives and would provide them when located. No further documents were provided to the ICO during the early resolution process.
15. On 27 November 2018, the ICO informed the parties that the Information Commissioner had decided that early resolution was no longer appropriate and that the review had been progressed to investigation under section 47 of the PATI Act. The parties were also informed that they could continue to attempt to resolve some or all of the issues during the investigation.

## Investigation

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16. In an ongoing effort to resolve this review, the ICO invited the Ministry to rectify the deficiencies with its search to bring itself into compliance with the PATI Act. Although the Ministry provided additional records to the ICO, the Ministry was informed in February 2019 that it had not addressed the deficiencies outlined by the ICO.
17. On 20 February 2019, the ICO invoked the Information Commissioner's authority under section 56 of the PATI Act to obtain further information about the relevant records and notified the Ministry and the Department. Specifically, the ICO entered the premises of the Government Records Centre to examine copies of records held in the archived boxes of the Department.

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<sup>1</sup> The Sandys Secondary School Foundation was renamed Sandys 360 in 2009.

18. The ICO located records responsive to the request for supporting documentation of the duplicate payment, which were held by the Department.
19. Because efforts to resolve this review were not successful, the issues in the review were then revised to address only the original question of the appropriateness of the Department's transfer to the Ministry in accordance with section 13(5) of the PATI Act.
20. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review an opportunity to make representations. The Ministry, the Department, and the Applicant were invited to comment on this application and make submissions to the Information Commissioner for consideration during this review. The Ministry, the Department and the Applicant provided submissions.

### **Information Commissioner's analysis and findings**

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

#### ***Duty to transfer request to another public authority – section 13(5)***

22. Section 13(5) of the PATI Act provides that:

Where a request under this section is received by a public authority and any record requested is not held by that authority but, to the knowledge of that authority, is held by one or more other public authorities, the public authority that received the request shall, not later than five working days after receipt of the request cause a copy of the request to be given—

- (a) to that other public authority; or
- (b) in the case of more than one other public authority, to the authority whose functions are, in the opinion of the head of the public authority that first received the request, most closely related to the subject matter of the request.

23. Regulation 8 of the Public Access To Information Regulations 2014 (**PAIR**) provides that:

- (1) As soon as practicable after receipt by the public authority of an application the information officer shall make a determination under

section 13(5) of the Act as to whether the application should be referred to another public authority.

(2) Where an application is transferred to another public authority under section 13(6), the information officer shall within five working days dispatch correspondence to the applicant indicating that the public authority has transferred the application to the appropriate public authority, naming the authority.

24. Section 3(3) of the PATI Act states that “a reference to a record that is held by a public authority includes a record that is in the possession or custody of, or is under the control of, that authority”.

25. In sum, before making a transfer, the public authority that originally received the PATI request (the original public authority) must consider:

[1] Whether the original public authority holds any record responsive to the request; and

[2] If not, whether the original public authority know that another public authority holds records responsive to the request?

26. To satisfy the first part of the test, a public authority must have a reasonable basis for determining that it does not hold the records. This may be achieved by conducting a reasonable search, as discussed in Decision Notice 04/2017 Department of Health, or by otherwise reasonably verifying that the record is not held, such as confirming in writing with a head of authority that no such records are held. An unverified assumption that a public authority does not hold a category of records is not sufficient.

27. The Information Commissioner emphasises that a public authority should not consider transferring a PATI request unless it has first determined that it does not hold the requested records. If the original public authority holds records responsive to the PATI request, it must process the PATI request and should not consider a transfer.

28. The Information Commissioner notes, however, that if the original public authority knows another public authority *also* holds records responsive to the request, the duty to assist in section 12(2)(a) of the PATI Act may require the public authority to share this knowledge with the requester.

29. Finally, a public authority bears the burden of demonstrating that, on the balance of probabilities, it has properly transferred a PATI request in accordance with section 13(5).

*Public authority's submissions*

30. The Department submitted that it was appropriate to transfer the PATI request to the Ministry because (a) the Ministry was the originating department<sup>2</sup>, (b) the Ministry maintained all of the supporting documentation for the payments related to the duplicate payment, and (c) the Ministry was better positioned to complete the PATI request in a more timely manner.

*Applicant's submissions*

31. The Applicant submitted that the PATI request was made to the Department because it is the public authority that approves all payments from the public purse. The Applicant stated that because payments were made to Sandys 360 from various different departments/entities within government, the Department would be the logical central repository for the records sought.

32. The Applicant did not agree with the transfer of the PATI request.

*Discussion*

[1] *Whether the original public authority holds any records responsive to the request?*

33. The Department's submissions did not address whether or not it holds records responsive to the request. Rather, the Department appears not to have considered this question.

34. The Information Commissioner agrees with the submissions of the Applicant that as the central body for the processing of all payments made from the Consolidated Fund, the Department is reasonably likely to hold some records responsive to the PATI request.

35. In accordance with section 5 of the Public Treasury (Administration and Payments) Act 1969 (**Public Treasury Act**), the Accountant General is required to "cause proper books or other records to be maintained in the Department and shall cause proper entries to be made in such books or records in respect of every payment made into or out of the Consolidated Fund".

36. Further, in accordance with section 10D of the Public Treasury Act, the Accountant General is responsible for maintaining a record of transactions of the Government Reserves Fund and is required to ensure that "all monies received are properly brought to account; and all payments out of the Fund are correctly made and properly authorised."

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<sup>2</sup> The Department did not provide any additional explanation, but appears to be referring to the 'originating department' for the duplicate payment.

37. It is reasonable therefore to conclude that the Department holds some records responsive to the PATI Act.
38. During this review, it also became apparent that the Department does, in fact, hold records that are potentially responsive to this review. On 24 January 2019, for example the Ministry stated to the ICO that the Ministry and the Department were still looking for specific records within their archives.
39. Further, the Ministry explained to the Applicant in its initial decision letter dated 18 April 2016 in a related PATI request, that the Government made capital grant payments of \$627,000 and \$180,000 to Sandys 360 in April 2011 and July 2011, respectively. Some of the hard copy records related to these payments were only identified by the ICO in April 2019 when the Information Commissioner invoked her section 56 powers to examine the records held by the Department at the Government Records Centre.
40. No evidence was provided that the Department conducted any search for responsive records before transferring the PATI request to the Ministry. As discussed in Decision Notice 01/2019, Accountant General, it would have been reasonable for the Department to conduct a search of its archived boxes to determine whether it holds records responsive to the PATI request.
41. The Information Commissioner is of the view that rather than considering whether it held responsive records, the Department decided to transfer the request based on factors that were not relevant to section 13(5), including what public authority originated a transaction and which public authority could process a request in a timelier manner.
42. The Information Commissioner is not satisfied that the Department properly determined that it does not hold records responsive to the PATI request prior to deciding to transfer the request.

[2] *Whether the original public authority knows that another public authority holds records responsive to the request?*

43. Given the Information Commissioner's conclusion above, it is not necessary to consider whether the Department knew that another public authority held responsive records.

#### *Conclusion*

44. The Information Commissioner is not satisfied that the Department properly transferred the request in accordance with section 13(5) of the PATI Act.

#### ***Duty to assist – section 12(2)(a)***

45. The Information Commissioner raises the duty to assist in section 12(2)(a) with respect to the handling of the PATI request, and to provide further explanation for her decision.



46. Section 12(2)(a) of the PATI Act provides that “public authorities shall make every reasonable effort to— assist persons in connection with requests”. The duty to assist is a fundamental duty that supports the right to access public information and stands separate from other obligations imposed by the Act. The duty extends to “persons in connection with requests” and is not limited to PATI requesters who have already submitted requests.
47. Under the duty to assist, public authorities should not withhold from requesters information that may assist requesters with formulating their request or with deciding which public authorities might be best placed to deal with the request. This includes information about the nature of the public authority’s records and processes, as well as the records and processes of other public authorities.
48. The duty to assist is essential to fulfilling the purposes of the PATI Act. The reasonableness of a public authority’s efforts to assist must be viewed in light of those purposes and, in particular, to give the public the right to access information held by public authorities to the greatest extent possible, subject to the provisions of the Act.
49. As discussed above, where a public authority receives a PATI request and it holds records responsive to the request, the public authority should process the request.
50. In addition, where the original public authority is aware that another public authority also holds records responsive to the request, the duty to assist in connection with PATI requests requires a public authority to share that information with the requester. The requester may then choose to make a further PATI request to the other public authority.
51. In this case, therefore, the Department, should have processed the PATI request with respect to the records it holds, as well as informed the Applicant that additional records related to the Applicant’s request may be held by the Ministry.

### ***Conclusion***

52. In conclusion, the Information Commissioner is not satisfied that the Department complied with section 13(5) of the PATI Act when it transferred the request to the Ministry. In such circumstances, the Department was under an obligation to process the PATI request, i.e. to conduct a reasonable search for records responsive to the request and to issue a decision either granting or refusing access to the responsive records.
53. Had the Department processed the PATI request, the Information Commissioner is satisfied that the duty to assist in section 12(2)(a) would have required the Department to inform the Applicant that the Ministry also holds records responsive to the request.
54. To address the inadequate handling of this PATI request by both the Ministry and Department, and consistent with the purpose of the PATI Act, which is primarily to “give the

public the right to obtain access to information held by public authorities to the greatest extent possible”, the Information Commissioner requires both the Ministry and the Department to process the PATI request, i.e., to conduct a reasonable search for records responsive to the PATI request, and to issue initial decisions to the Applicant on whether to grant access or refuse access to the records held by each authority.

55. The decisions should be decisions in respect of, but not limited to, the records held by the Ministry and by the Department located during the course of this review.

## Decision

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The Information Commissioner finds that the Accountant General’s Department (**Department**) was not justified in transferring the request in accordance with section 13(5) of the Public Access to Information (**PATI**) Act 2010.

In accordance with section 48(1)(b) of the PATI Act, the Information Commissioner requires that:

- The Department conduct a reasonable search for additional records responsive to the PATI request, and issue an initial decision to the Applicant on whether to grant access or refuse access to the records located during this review along with any additional records located; and
- The Ministry of Finance Headquarters conduct a reasonable search for additional records responsive to the PATI request, and issue a new initial decision to the Applicant on whether to grant access or refuse access to the records located during this review along with any additional records located

That is consistent with this Decision and accompanying Order and the instructions set out in the cover letters to the Department and the Ministry **on or before Monday, 9 September 2019**.

## Enforcement

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This decision has been filed with the Supreme Court, according to section 48(3) of the PATI Act. If the Department and the Ministry fail 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.

## Judicial Review

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The Applicant, the Accountant General's Department, the Ministry of Finance Headquarters, or any person aggrieved by this Decision have the right to seek and apply for judicial review to the Supreme Court according to section 49 of the PATI Act. Any such application must be made within six months of this Decision.



Gitanjali S. Gutierrez  
Information Commissioner  
25 July 2019

### Public Access to Information Act 2010

#### Section 12 – Access to records

- (1) ...
- (2) Public authorities shall make every reasonable effort to-
  - (a) assist persons in connection with requests; and
  - (b) respond to requests completely, accurately and in a timely manner.

#### Section 13 – Request for access

- (5) Where a request under this section is received by a public authority and any record requested is not held by that authority but, to the knowledge of that authority, is held by one or more other public authorities, the public authority that received the request shall, not later than five working days after receipt of the request cause a copy of the request to be given—
  - (a) to that other public authority; or
  - (b) in the case of more than one other public authority, to the authority whose functions are, in the opinion of the head of the public authority that first received the request, most closely related to the subject matter of the request.

### Public Access to Information Regulations 2014

#### Regulation 5 – Reasonable search

- (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.

### **Regulation 8 – Transfer**

- (1) As soon as practicable after receipt by the public authority of an application the information officer shall make a determination under section 13(5) of the Act as to whether the application should be referred to another public authority.
- (2) Where an application is transferred to another public authority under section 13(6), the information officer shall within five working days dispatch correspondence to the applicant indicating that the public authority has transferred the application to the appropriate public authority, naming the authority.

**Information Commissioner for Bermuda  
Valerie T. Scott Building  
60 Reid Street  
Hamilton, HM 12  
[www.ico.bm](http://www.ico.bm)  
441-294-9181**