

Decision Notice

Decision 05/2020: Human Rights Commission

Minutes of the Commissioners' meetings

Reference no: 20190709

Decision date: 30 June 2020

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Human Rights Commission (**HRC**) for meeting minutes of its Commissioners discussing matters related to the Applicant. The HRC denied access to the requested records under section 4(1)(b)(ii) of the PATI Act because the HRC created the records in the course of carrying out its functions and, as a result, the PATI Act does not apply to the records.

The Information Commissioner has affirmed the HRC's denial of access on the grounds that the PATI Act is inapplicable to the records, in accordance with section 4(1)(b)(ii) of the PATI Act.

Relevant statutory provisions

Public Access to Information (**PATI**) Act 2010: section 4 (application).

Human Rights Act 1981: section 14 (functions of the Commission).

The full text of the statutory provisions cited above are reproduced in Appendix 1 to this Decision. The Appendix forms part of this Decision.

Background

1. The request under the Public Access to Information (**PATI**) Act considered in this review arises out of a long-standing dispute between the Applicant and the Human Rights Commission (**HRC**) concerning the HRC's handling of the Applicant's human rights complaint and the Applicant's subsequent grievances about the HRC's handling of the complaint.
2. On 26 March 2019, the Applicant made a request to the HRC for a copy of the Human Rights Commissioners' (**HRC Commissioners**) official minutes related to their deliberation of the Applicant's grievance letters.
3. The HRC did not provide the Applicant with an initial decision.
4. On 22 May 2019, the Applicant asked for an internal review.
5. On 2 July 2019, the HRC issued its internal review decision and denied access to the records the Applicant requested on the grounds that the PATI Act did not apply to the records, in accordance with section 4(1)(b)(ii) of the PATI Act.

6. The Applicant submitted a request for an independent review by the Information Commissioner, challenging the HRC's internal review decision.

Investigation

7. The application was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid 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.
8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the HRC to determine whether its reliance on section 4(1)(b)(ii) of the PATI Act was justified.
9. On 16 July 2019, the Information Commissioner's Office (**ICO**) notified the HRC of the Applicant's valid application. The HRC provided the ICO with unredacted copies of the relevant records.
10. Section 47(4) of the PATI Act requires the Information Commissioner to give all parties to the review a reasonable opportunity to make representations. The ICO invited the Applicant and the HRC to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The HRC was further asked specific questions to justify its reliance on section 4(1)(b)(ii) of the PATI Act. Both the Applicant and the HRC made submissions.

Information Commissioner's analysis and findings

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

Applicability of the PATI Act – section 4(1)(b)(ii)

12. Section 4(1)(b) states that the PATI Act does not apply to records obtained or created by specified public authorities in the course of carrying out their functions. One of these public authorities is the HRC, as stated in section 4(1)(b)(ii).
13. In accordance with section 4(2), records which relate to the general administration of these public authorities still fall within the scope of the PATI Act.

14. Section 4 does not mean that the public authorities listed in section 4(1)(b) are excused from complying with the requirements of the PATI Act. As explained in the 2005 Government discussion paper¹, complete exclusion of an authority from the scope of the PATI Act would limit the public's ability to hold that entity accountable. Section 4(2) ensures that authorities can still be held accountable for their administrative activities, while acknowledging that certain records of these authorities related to their statutory functions are not appropriate for disclosure through a public access regime.
15. Administrative records are related to activities that are common to all public authorities and include, for example, records involving facilities or buildings, property, finances, equipment and supplies, human resources or personnel, and IT or information systems. All public authorities would be expected to hold records that fall within these categories. In contrast, records that are developed during the course of carrying out a public authority's statutory or constitutional duties, which are unique to that public authority, do not fall within this category of records.
16. As the Information Commissioner set out in her previous decisions, including Decision 02/2019, Office of the Governor, paras. 17-24, and Decision 19/2019, Department of Internal Audit, para. 20, for a record to be excluded from the scope of the PATI Act under section 4(1)(b), the following must be considered:
 - [1] Was the record obtained or created by the public authorities listed in section 4(1)(b)?
 - [2] Was it obtained or created in the course of that public authority carrying out its functions?
 - [3] Does the record relate to that public authority's general administration?

Public authority's submissions

17. The HRC explained that all of the requested records contain information which relate to the functions, powers and statutory duties imposed on the HRC by the Human Rights Act 1981 (**HRA**). The records were created in the course of carrying out the HRC's functions in accordance with sections 14(b), 14(c), and 14(f) of the HRA.

¹ Public Access to Information (PATI): A Discussion Paper Presented to the Legislature by the Premier the Honourable W. Alexander Scott, JP, MP, 2005, part 2.4. Available from https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uk/bermuda/pati_bermuda.pdf

18. Specifically, the HRC officers and Commissioners attending the relevant meetings have duties under the HRA to promote an understanding and acceptance of the HRA (section 14(b)); to ensure that the members of the public, companies, organisations and the Government of Bermuda are in compliance with the HRA (section 14(b)); to aid in the development of policies and procedures addressing the elimination of discriminatory practices (section 14(b) and (c)); and to address complaints or grievances arising out of unlawful discrimination (section 14(f)).
19. According to the HRC, the meeting minutes were created during a forum to allow authorised persons to discuss and make decisions on confidential matters falling within the HRC's remit.
20. The HRC also referred to the Information Commissioner's Decision 02/2019, Office of the Governor, to assert that the requested records do not relate to the HRC's general administration because the records do not contain information that concerns personnel, pay matters, recruitment, accounts, information technology or similar details.

Applicant's submissions

21. The Applicant provided extensive background details and documents concerning the history of the dispute with the HRC that led to the filing of this PATI request. The Applicant made a number of allegations of wrongdoing on behalf of the officers of the HRC, particularly with respect to how the Applicant's grievance letters were handled.
22. The Applicant specifically asserted that an HRC officer compiled and presented false and misleading information about the Applicant's grievance letters. The Applicant further argued that this conduct should be viewed as falling outside of the HRC's statutory functions. The Applicant reasoned that the meeting minutes containing this false and misleading information constituted an administrative record that falls within the scope of the PATI Act, in accordance with section 4(2) of the PATI Act.
23. The Applicant argued that the PATI Act was not enacted to conceal or validate wrongdoing, nor could the PATI Act supersede constitutional fairness protections.
24. The Applicant also acknowledged that it was outside the remit of the Information Commissioner to address the substance of the underlying grievance, but they shared it to provide context to the HRC's refusal of the Applicant's PATI request.

Discussion

[1] *Were the records obtained or created by the public authorities listed in section 4(1)(b)?*

25. The Information Commissioner is satisfied that the requested meeting minutes were created by the HRC, a public authority listed in section 4(1)(b)(ii) of the PATI Act.

[2] *Was it obtained or created in the course of the HRC's carrying out of its functions?*

26. The HRC referred to its functions outlined in section 14 of the HRA to promote an understanding of, acceptance of, and compliance with the HRA (section 14(b)); develop, conduct, research, and arrange education programmes to eliminate discriminatory practices (section 14(c)); and conciliate or settle any complaints or grievances arising out of unlawful discrimination, or institute prosecutions for contraventions of the Act (section 14(f)).
27. After carefully reviewing the requested meeting minutes, the Information Commissioner is satisfied that these meeting minutes were created in the course of the HRC carrying out its statutory functions under sections 14(b), 14(c) and 14(f) of the HRA, apart from small portions that refer to staff recruitment and the physical office space, which are not responsive to the PATI request. The meetings of the authorised persons included the HRC officers and Commissioners. The meetings were conducted to facilitate their discussions on matters relating to the HRC's statutory functions.

[3] *Do the records relate to that public authority's general administration?*

28. As explained above, the records were created during meetings of the HRC Commissioners and relate to the HRC's discussions concerning its fulfilment of its statutory functions.
29. The Information Commissioner acknowledges the Applicant's arguments that (a) an officer of the HRC presented false and misleading information during the meetings, and (b) if proven, this conduct would constitute activities outside the HRC's statutory mandate. The Applicant asserts that this causes the meeting minutes to become administrative records that are subject to the PATI Act, in accordance with section 4(2) of the PATI Act.

30. As the Applicant has correctly acknowledged, it is not for the Information Commissioner to make findings on whether an officer of the HRC compiled or presented false or misleading evidence during the meetings. The Supreme Court explained in Furbert v. Department of Human Resources and Information Commissioner², the Information Commissioner's jurisdiction is limited to reviewing a decision made by the head of a public authority under the PATI Act and, if appropriate, to ordering the production of documents which come within the scope of the PATI Act. Here, the Information Commissioner's jurisdiction is even more limited to only reviewing a determination made by a head of a public authority that the PATI Act is not applicable to certain categories of the public authority's records.
31. Regardless of whether the HRC officer adequately or inadequately communicated information during the meetings of the HRC Commissioners, the officer's meetings and interactions with the HRC Commissioners occurred during the course of fulfilling the statutory mandates in section 14 of the HRA. It was not an activity outside this statutory mandate.
32. This means that the meeting minutes do not constitute administrative records under section 4(2) of the PATI Act.
33. The Information Commissioner recognises Parliament's determination that for the public authorities listed in section 4(1)(b), public access to records created or obtained while carrying out their statutory functions is inappropriate. Instead, many of these entities are accountable through means that preserve their independence from outside influence. This includes, for example, through judicial review that enables an independent court to evaluate an authority's actions against its statutory mandate.
34. In accordance with section 4(1)(b)(ii) of the PATI Act, the PATI Act is inapplicable to the meeting minutes of the HRC Commissioners when those meeting are conducted during the course of fulfilling the HRC's statutory mandate in section 14 of the HRA.

Conclusion

35. The Information Commissioner is satisfied that the HRC was justified in relying on section 4(1)(b)(ii) to determine that the PATI Act is inapplicable to the requested meeting minutes.

² [2019] SC (Bda) 19 Civ (15 March 2019), at paras. 17-18.

Decision

The Information Commissioner finds that the Human Rights Commission (**HRC**) was justified in determining that the Public Access to Information (**PATI**) Act 2010 is not applicable to the requested meeting minutes, in accordance with section 4(1)(b)(ii) of the PATI Act.

In accordance with section 48(1) of the PATI Act, the Information Commissioner affirms the HRC's internal review decision.

Judicial Review

The Applicant, the Human Rights Commission, or any party aggrieved by this Decision has 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
30 June 2020

Appendix 1: Relevant statutory provisions

Public Access to Information Act 2010

Application

4 (1) Subject to subsection (1), 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—

...

(ii) the Human Rights Commission;

...

(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).

Human Rights Act 1981

Functions of the Commission

14 The Commission shall be responsible to the Minister for the administration of this Act and shall—

...

(b) promote an understanding of, acceptance of and compliance with this Act;

(c) develop, conduct, research and arrange educational programmes designed to eliminate discriminatory practices;

...

(f) in accordance with this Act, use its good offices for the conciliation and settlement of any complaints or grievances arising out of acts of unlawful discrimination and, where in its opinion such good offices are inappropriate, institute prosecutions for contraventions of this Act.

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