

## Decision Notice

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### Decision 09/2021: Human Rights Commission

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#### Meeting minutes of the Human Rights Commissioners

**Reference no:** 20190704-01

**Decision date:** 22 September 2021

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Human Rights Commission (**HRC**) for minutes of the Commissioners' meetings in July 2018 to March 2019. In its initial and internal review decisions, the HRC refused the request in full, on the basis that the records did not fall within the scope of the PATI Act under section 4(1)(b)(ii), because the HRC created them while carrying out its statutory functions and, as referred to in section 4(2)(b), the records did not relate to its general administration.

The Information Commissioner has upheld, in part, the HRC's decision that the records fall outside the scope of the PATI Act, in accordance with section 4(1)(b)(ii). The Information Commissioner has found that some parts of the records relate to the HRC's general administration and come within the scope of the PATI Act by virtue of section 4(2)(b). The Information Commissioner has annulled the HRC's decisions with respect to the parts of the records related to its general administration, and has ordered the HRC to issue a new initial decision, in accordance with the provisions of the PATI Act, on those parts of the records.

## Relevant statutory provisions

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

Human Rights Act 1981: section 13B (function of the Selection and Appointment Committee); section 14 (functions of the Commission); section 30A (annual report).

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. The Human Rights Commission (**HRC**) is a statutory body with remit to protect and promote human rights under the Human Rights Acts, 1981. The Commission's mandate is to both educate and promote the principles of non-discrimination and equality and to investigate and endeavour to settle allegations of discrimination.<sup>1</sup>

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<sup>1</sup> See [www.humanrights.bm/about-us/#duties](http://www.humanrights.bm/about-us/#duties).

2. The HRC is comprised of a Board of Commissioners “responsible for adjudicating complaints of discrimination by serving on tribunals and serving as educators and advocates in the promotion and protection of human rights”, along with a team of technical officers in the HRC Office who “are responsible for the daily operation of the Commission” and administrative support for human rights tribunals<sup>2</sup>.
3. The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the HRC on 19 March 2019, asking for the minutes of the meetings of the Commissioners, from 1 July 2018 to date (**item 1**), and the minutes of meetings of the HRC’s officers, from 1 July 2018 to date (**item 2**).
4. On 24 April 2019, the HRC refused the request on the basis that the PATI Act did not apply to the records requested, in accordance with section 4(1)(b)(ii), which removes certain records of the HRC from the scope of the PATI Act.
5. The Applicant sought an internal review by the head of the HRC on 25 April 2019.
6. On 6 June 2019, the HRC issued an internal review decision affirming the refusal on the basis of section 4(1)(b)(ii) after giving consideration to section 4(2), which maintains the applicability of the PATI Act to records of general administration. The internal review decision explained that the records requested did not relate to general administration according to the Information Commissioner’s explanations in Decision 02/2019, Office of the Governor.
7. The Applicant made a timely application on 4 July 2019 for an independent review by the Information Commissioner.

## Investigation

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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 issue the Applicant wanted her to review.
9. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine whether its reliance on section 4(1)(b)(ii) was justified.

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<sup>2</sup> See [www.humanrights.bm/about-us/#duties](http://www.humanrights.bm/about-us/#duties).

10. The Information Commissioner's Office (**ICO**) notified the HRC of the Applicant's valid application on 12 July 2019 and requested a copy of the withheld responsive records. On 12 August 2019, the HRC provided to the ICO the two records withheld under section 4(1)(b)(ii): the Commissioners' meeting minutes dated 6 September 2018 (**record 1**) and 15 November 2018 (**record 2**). In response to the ICO's questions about the completeness of the records, the HRC confirmed that no other responsive records were located during its searches.
11. In December 2020, item 2 of the PATI request, the meeting minutes of the HRC's officers, was removed from this review and is now addressed in a separate review. This occurred after the HRC revised its position to no longer rely on section 4(1)(b)(ii) for its response to item 2. Item 2 is not considered further in this Decision.
12. 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. The HRC and the Applicant were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review. The HRC was specifically asked questions related to its reliance on section 4(1)(b)(ii) as well as the applicability of section 4(2)(b) of the PATI Act.
13. Both the HRC and Applicant made submissions. In its submissions, the HRC accepted that, with two exceptions, section 4(2)(b) applied to some parts of its records identified by the ICO as potentially relating to the general administration of a public authority.

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

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

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

15. Section 4(1)(b) of the PATI Act 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. The HRC is one of the listed public authorities, as stated in section 4(1)(b)(ii). In accordance with section 4(2)(b), records that relate to the general administration of these public authorities continue to fall within the scope of the PATI Act.

16. The PATI Act and PATI Regulations 2014 do not define ‘functions’ or ‘general administration’. Section 7 of the Interpretation Act 1951, however, defines ‘functions’ as “powers conferred, or duties imposed, on the authority or officer by or under any provisions of law”.
17. As stated above, section 4(2) creates an exception to the removal of records from the scope of the PATI Act. Section 4(2)(b) ensures that the PATI Act will still apply to records related to the general administration of the listed public authorities. 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, IT or information systems, and other common management processes. All public authorities would be expected to hold records that fall within these categories. In contrast, records that are obtained or created 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 the category of administrative records.<sup>3</sup>
18. As a result of being listed in section 4(1), independent offices and other bodies may avoid improper external influence on their decision making, which helps to ensure that their decision making is determined by their mandate. This does not mean, however, that these public authorities are unaccountable to the public. Section 4(2)(b) acknowledges that these public authorities remain accountable to the public for their administrative matters. For offices such as the HRC, the ICO and the Office of the Ombudsman, public accountability is further supported by the tabling of an annual report before Parliament. On its website, the HRC emphasises this form of public accountability:

#### Accountability

The Commission is committed to ensuring transparency as relates to our function as a public body, while upholding our statutory obligation to confidentiality in our dealings with matters of individual complaints and investigations. Each year the Human Rights Commission prepares an Annual Report featuring examples of the Commission’s engagement over the year, inclusive of key metrics related to intakes and investigations together with educational activities. . . . The Annual

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<sup>3</sup> See Decision 02/2019, Office of the Governor, at para. 20; Decision 19/2019, Internal Audit Department, at para. 19; and Decision 05/2020, Human Rights Commission, at para. 15.

Report also references all Human Rights Tribunal decisions. Please note the decisions are available to the public and can be accessed on our website or via a request to the Office.<sup>4</sup>

19. From a good governance perspective, the PATI Act strikes a balance between the protection of independent offices and the importance of public accountability and transparency; see, for example, Decision 19/2019, Internal Audit Department.
20. Further, although section 4 excludes certain records of the listed public authorities from the scope of the PATI Act, it does not excuse a public authority from complying with the PATI Act. In other words, section 4 does not exclude a public authority, only certain records, from the PATI Act's scope. Complete exclusion of an authority from the scope of the PATI Act would limit the public's ability to hold that entity accountable<sup>5</sup>. 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 framework.
21. For a record to be removed from the scope of the PATI Act's application by virtue of section 4(1)(b), the following must be considered<sup>6</sup>:
  - [1] Was the record obtained or created by one of the public authorities listed in section 4(1)(b)?
  - [2] Was the record obtained or created by that public authority in the course of carrying out its functions?
  - [3] Does the record relate to that public authority's general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

#### *Public authority's submissions*

22. The HRC submitted that records 1 and 2 were created "during a forum established to provide authorised persons with the opportunity to discuss and make decisions on

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<sup>4</sup> See [www.humanrights.bm/about-us/#duties](http://www.humanrights.bm/about-us/#duties).

<sup>5</sup> This is explained in the Government's PATI discussion paper. See Public Access to Information (PATI): A Discussion Paper Presented to the Legislature by the Premier the Honourable W. Alexander Scott, JP, MP (2005), pt. 2.4, available at [www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_papers/uk/bermuda/pati\\_bermuda.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uk/bermuda/pati_bermuda.pdf).

<sup>6</sup> See Decision 02/2019, Office of the Governor, at paras. 17-24; Decision 19/2019, Internal Audit, at para. 20; and Decision 05/2020, Human Rights Commission, at paras. 12-16.

confidential matters”, while the HRC performed its statutory functions under section 13B(2), 14(b), 14(c), 14(f) and 30A(1) of the Human Rights Act 1981 (**HR Act**).

23. The contents of the records were not in a format that would permit for public disclosures allowable under either section 30(3) of the HR Act for increasing public awareness of human rights issues, or section 30(5) for non-identifying statistical and educational data. Further, the ‘authorised persons’ were bound to preserve confidentiality as required by section 30(1) of the HR Act.
24. After discussions with the ICO, the HRC agreed that some parts of record 1 identified by the ICO related to its general administration, and thus fell within section 4(2)(b).
25. The ICO also identified some parts of record 2 that appeared to fall within section 4(2)(b). With two exceptions, the HRC accepted that these parts come within section 4(2)(b) because the information related to its general administration.
26. The HRC maintained that certain parts of record 2 fell within section 4(1)(b)(ii) and were excluded from the PATI Act. This included a part involving the HRC’s statutory function under section 30A of the HR Act, related to its annual report.
27. It also included a part that referenced the Commissioners’ discussion about an activity for which the HRC reasoned that the Commissioners are not responsible. The HRC argued that although this would appear to be related to general administration, it was not because the Commissioners were not responsible for the activity. Rather, the HRC argued, the discussion actually related to a function or duty that was not expressly set out within the HR Act, although the nature of the function or duty was not specified.

#### *Applicant’s submissions*

28. The Applicant expected that the Commissioners would carry out general administration during their meetings, which should be recorded and accessible under section 4(2) of the PATI Act. In the Applicant’s view, while some of the HRC’s minutes of its meetings will relate to “specific confidential duties”, much of the content will not.
29. The Applicant believed that the HRC probably decided that all minutes would automatically fall under section 4(1)(b)(ii). The Applicant expected that the HRC would first have identified which parts of the records would fall under section 4(2). Then, the HRC would determine whether those parts could be released. If the HRC decided parts should be withheld, then it should have cited the relevant exemptions in the PATI Act.

30. The Applicant argued that the public could reasonably expect access to the HRC's administrative records, for example, about its management processes and financials, considering its public funding of some \$1.2 million.

*Discussion*

[1] Was the record obtained or created by one of the public authorities listed in section 4(1)(b)?

31. The Information Commissioner is satisfied that records 1 and 2 were created by the HRC, a public authority listed in section 4(1)(b)(ii) of the PATI Act.

[2] Was the record obtained or created by that public authority in the course of carrying out its functions?

32. Having carefully reviewed the withheld records, the Information Commissioner is satisfied that records 1 and 2 were created by the HRC in the course of the HRC carrying out its statutory functions, including to:

- a. establish the criteria for the selection of its Commissioners [section 13B(2)];
- b. promote an understanding of, acceptance of, and compliance with the HR Act [section 14(b)];
- c. develop, conduct, research and arrange educational programmes designed to eliminate discriminatory practices [section 14(c)];
- d. conciliate and settle any complaints or grievances arising out of acts of unlawful discrimination [section 14(f)]; and
- e. provide an annual report on its activities to the Minister [section 30A].

33. The two meetings, involving the Executive Officer and the Commissioners, were convened for the purpose of facilitating their discussion on confidential matters arising from the HRC's statutory functions. Most parts of records 1 and 2 capture their discussion on topics that fall squarely within the statutory functions listed in the previous paragraph.

[3] Does the record relate to that public authority's general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

34. With the exceptions discussed below, during this review, the HRC accepted that parts of records 1 and 2 identified by the Information Commissioner contain information



about the routine, administrative work of public authorities. With a plain reading, these parts cannot be classified as relating to any operational function unique to the HRC, and come within the scope of the PATI Act by virtue of section 4(2)(b). Because of the HRC's agreement, these parts are not discussed further.

35. The Information Commissioner also accepts that parts of records 1 and 2 related to the statutory functions identified in paragraph 32 above, clearly do not relate to the HRC's administrative functions. This includes the HRC's functions related to its annual report, in accordance with section 30A of the HR Act.
36. Regarding the remaining areas of disagreement, and as noted above, the HRC continued to maintain that parts of the records referencing the specific activity mentioned in paragraph 27 did not relate to a general administrative function, because these parts did not actually relate to the HRC's practices concerning that activity.
37. Having carefully reviewed these parts of the withheld records, the Information Commissioner views the information as related to the general administrative functions of a public authority. Such information could arise within any organisation addressing the matters discussed within the records. Although the discussion arises in the context of the HRC, the general issue involved is not unique to the HRC.
38. Second, the Information Commissioner is of the view that section 4(2)(b) applies to the general details of the meeting minutes, which would include administrative information such as the title of the minutes, the attendees, the approval of prior minutes, the next meeting date, and certain entry and exit notes. Such administrative information is routine for any public authority maintaining formal meeting minutes.
39. Of course, the fact that some parts of a record fall within section 4(2)(b) does not mean that they have to be disclosed to the public. It only means that these parts of a record come within the records to which the PATI Act applies. The public authority must then consider and decide whether an exemption or ground for an administrative denial may be applicable, or whether the parts of the record may be disclosed, in the normal manner.

### ***Conclusion***

40. The Information Commissioner is satisfied that, in accordance with section 4(1)(b)(ii) of the PATI Act, the PATI Act does not apply to parts of records 1 and 2 because they were created by the HRC in the course of carrying out its functions and do not relate to the HRC's general administration. The Information Commissioner is further

satisfied that the remaining parts of the records relate to the HRC's general administration and properly fall within the scope of the PATI Act by virtue of section 4(2)(b).

## Decision

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The Information Commissioner finds that the Human Rights Commission (**HRC**) was not justified, in part, in deciding that the Public Access to Information (**PATI**) Act 2010 did not apply to records 1 and 2, by virtue of section 4(1)(b)(ii) of the PATI Act. Specifically, the Information Commissioner finds that parts of records 1 and 2 fall with the scope of the PATI Act by virtue of section 4(2)(b) of the PATI Act, because they relate to the general administration of the HRC.

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

- upholds, in part, the HRC's decision that the PATI Act does not apply to records 1 and 2, in accordance with section 4(1)(b)(ii) of the PATI Act;
- annuls, in part, the HRC's decision refusing the PATI request under section 4(1)(b)(ii) for those parts of the records where section 4(2)(b) is applicable, as identified in the Confidential Annex, which forms part of this Decision; and
- orders the HRC to re-process those parts of records 1 and 2 where section 4(2)(b) is applicable and to issue a new initial decision to the Applicant according to the provisions of the PATI Act and Regulations.

The Information Commissioner requires that the HRC issue the new initial decision, as directed by this Decision and the accompanying Order, on or before **Wednesday, 3 November 2021**.

## Judicial Review

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The Applicant, the HRC, 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

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This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the HRC 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.



Gitanjali S. Gutierrez  
Information Commissioner  
22 September 2021

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Application

- 4 (1) Subject to subsection (2), 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

#### Function of the Selection and Appointment Committee

- 13B ...
- (2) The criteria for selection of Commissioners shall be prescribed by the Minister, in consultation with the Executive Officer and the department responsible for Human Rights.

#### 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.

**Annual report**

30A (1) The Commission shall as soon as may be and in any case not later than six months after the end of each calendar year make a report to the Minister on the activities of the Commission.

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