



## Decision Notice

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**Decision 12/2021: Ministry of Legal Affairs and Constitutional Reform  
Headquarters**

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**Record on legal representation: failure to decide within statutory timeframe**

**Reference no: 20201015-01**

**Decision date: 21 October 2021**

## Summary

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On 6 July 2020, the Applicant asked the Ministry of Legal Affairs and Constitutional Reform Headquarters (**Ministry**) for a copy of an application to withdraw a Privy Council appeal that supported a payment processed by the Legal Aid Office for the Applicant's counsel. The Information Commissioner has found that the Ministry did not violate the timeframe to issue an internal review decision as set forth by the Public Access to Information Act 2010. The Information Commissioner has further found that the Ministry now has notice of the internal review request and has ordered the Ministry to issue an internal review decision.

## Background

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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 2010 that was received by the Information Commissioner's Office (**ICO**) on 15 October 2020.
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 timeframe.
3. Relevant dates include the following:

Date	Action
October/ November 2018	The Applicant made a PATI request to the Ministry of Legal Affairs and Constitutional Reform Headquarters ( <b>Ministry</b> ) for records of payments made to the Legal Aid Counsel assigned to the Applicant from a specific time period. The Ministry acknowledged the PATI request and informed the Applicant that the Ministry "includes the Legal Aid Office".
	The Ministry later disclosed some records responsive to this PATI request, including an invoice from the Applicant's counsel sent to the Legal Aid Office for the preparation and filing of a notice to abandon an application for leave to appeal to the Privy Council.

6 July 2020	As a follow-up to the disclosure of the invoice, made by the Ministry in 2018, the Applicant made another written PATI request to the Legal Aid Office within the Ministry.
	The Applicant did not receive an initial decision within six weeks of the Ministry's receipt of the PATI request, i.e., by 17 August 2020.
31 August 2020	The Applicant submitted a request for an internal review to the Chairperson of the Legal Aid Committee. The Ministry was unaware of the Applicant's internal review request at the time.
	The Applicant did not receive an internal review decision within six weeks of the Legal Aid Committee's receipt of the request for one, i.e. by 12 October 2020.
15 October 2020	The Applicant requested an independent review by the Information Commissioner.
22 October 2020	The ICO notified the Ministry in writing that an application had been received from the Applicant. The Ministry was asked to comment on the application.
5 November 2020	The Ministry provided submissions to the Information Commissioner for consideration in this review.

## Background

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4. The Applicant is an inmate at a local correctional facility. Prior to filing the request considered in this review, the Applicant filed a PATI request to the Ministry in 2018 for records relating to payments made by the Ministry's Legal Aid Office to the Applicant's former Legal Aid Counsel (**2018 PATI request**). The Ministry's acknowledgment letter informed the Applicant that the Ministry "includes the Legal Aid Office". The Ministry later granted the Applicant access to the responsive records.
5. This Decision does not assess the Ministry's response to the 2018 PATI request. The factual information concerning the 2018 PATI request and the Ministry's response to it, however, is material to the matter considered in this Decision.

6. As background, the Applicant received a decision dated 23 May 2018 from the Privy Council refusing permission to appeal their conviction, having considered the written submissions from the parties. Through the 2018 PATI request disclosures from the Ministry, the Applicant also found an invoice from their prior counsel to the Legal Aid Committee for charges related to the preparation of the appeal and the later filing of the notice to withdraw the appeal. Some of the charges on the invoice were dated from 30 May 2018 to 8 June 2018, after the Privy Council's refusal. The invoice also included charges from March 2017 to withdraw the appeal. Approval for the payment was authorised by the Chairperson of the Legal Aid Committee. The approval was copied to the Ministry's Legal Aid Office for processing of the payment from the Government of Bermuda Consolidated Fund.
7. As a follow-up to the disclosures received in their 2018 PATI request, on 6 July 2020 the Applicant filed a new PATI request to the Legal Aid Office within the Ministry for the withdraw application by their former Legal Aid Counsel.
8. The Ministry did not provide an initial decision on the Applicant's PATI request within six weeks.
9. On 31 August 2020, the Applicant emailed the Chairperson of the Legal Aid Committee attaching their request for an internal review of the Ministry's failure to respond to the PATI request. The Applicant also spoke with the Chairperson about the internal review request.
10. The Applicant made a timely application on 15 October 2020 for an independent review by the Information Commissioner.

## **Investigation**

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11. Because the Applicant did not receive an initial decision from the Ministry, they were unaware of the procedures for asking for an internal review. This resulted in the Applicant sending the internal review request to the Chairperson of the Legal Aid Committee. The internal review request was not copied to the Ministry's Information Officer or any other individual within the Ministry. Based on the facts of this case, nothing would have made the Applicant aware that the internal review request had not been sent to the correct public authority and that the Ministry would not complete the internal review.
12. Having considered all of the submissions and the factual circumstances of this case, the Information Commissioner is satisfied that the Applicant's 31 August 2020 correspondence was a valid request for an internal review under section 41 of the PATI Act. This gives the

Information Commissioner the authority to consider and decide this review under Part 6 of the PATI Act.

13. The Information Commissioner notified the Ministry of the Applicant's valid application on 22 October 2020. The Ministry provided its submissions on 5 November 2020.
14. During this review, the ICO spent considerable time assisting the Applicant, an individual who is incarcerated, with attempting to obtain the responsive record from other sources and resolve the Applicant's concerns. The ICO had several discussions with the Ministry concerning the Applicant's PATI request and the relationship between the Ministry and the Legal Aid Committee. The ICO also informed the Legal Aid Committee of the pending review and encouraged the Legal Aid Committee to provide clarity to the Applicant as to whether it holds the responsive record. In the alternative, the Legal Aid Committee was encouraged to explain whether it ordinarily holds the record being sought or if it had knowledge on any public authority holding the record. The Legal Aid Committee did not respond to the ICO's correspondence.

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

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15. 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.
16. The PATI Act does not require a PATI requester to submit an internal review request directly to the head of authority, as doing so would be too impractical.<sup>1</sup> However, the internal review request will have to be sent to an individual within the Ministry for the six-week timeline in the PATI Act to start.
17. In this case though, the PATI request was directed to the Legal Aid Office within the Ministry, and the Applicant did not receive an initial decision. The Applicant then sent a timely internal review request to the Chairperson of the Legal Aid Committee. The Applicant did not copy the Ministry's head of authority (being the Permanent Secretary), the Ministry's Information Officer, or anyone else within the Ministry on their correspondence. The Chairperson of the Legal Aid Committee did not forward the Applicant's internal review request to the Ministry.

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<sup>1</sup> Decision 03/2017, Department of Public Prosecutions, para. 13.

18. Given this, the Information Commissioner accepts that the Applicant made a timely request for an internal review but sent it to the wrong individual and that, as a result, the Ministry did not initially receive the internal review request.
19. The Information Commissioner is satisfied that the Ministry did not violate section 43 of the PATI Act because it did not receive the request for an internal review prior to the Information Commissioner's review.
20. As the Ministry pointed out, it became aware of the Applicant's internal review request as of 22 October 2020, when it received the notice letter from the ICO.
21. The Ministry did not issue an internal review decision during the Information Commissioner's review because it questioned whether the responsible head of authority to respond to the Applicant's request for an internal review would be the Permanent Secretary for the Ministry (which includes the Legal Aid Office) or the Chairperson of the Legal Aid Committee. The Ministry also provided background on its administrative challenges.
22. The Information Commissioner agrees with the Ministry that the relationship between the Ministry and the Legal Aid Committee is complicated and has undergone recent revisions. These complications and revisions, however, should not undermine the public's and the Applicant's rights under the PATI Act to access public records, particularly when individuals are incarcerated and may face more logistical challenges when seeking access to public records.
23. Regardless of the division of responsibilities under the Legal Aid Act 1980 and other relevant statutory instruments, the Applicant's PATI request seeks records held by the Ministry, if any. The PATI request was made to "Legal Aid" in response to billing records the Applicant received from the Ministry's Legal Aid Office. In the absence of receiving an initial response from the Ministry to the PATI request advising of how to seek an internal review, the Applicant sent the request for an internal review to the wrong individual, the Chairperson of the Legal Aid Committee, as noted above. This does not change the fact that the Applicant is seeking records held by the Ministry.
24. Further, the Ministry's Information Statement states that the records it holds include the Legal Aid Office's client files, including client billing files. This is consistent with the Ministry's communication with the Applicant in the 2018 PATI request. The billing records that the Applicant received as a result of the 2018 PATI request were held by the Ministry, including billing records from the Legal Aid Committee that were copied to and held by the Legal Aid Office within the Ministry.

25. The Information Commissioner is satisfied that, for purposes of deciding an internal review on this Applicant's PATI request, the Permanent Secretary for Legal Affairs is the correct head of authority for the Ministry, which includes the Legal Aid Office. The Information Commissioner is further satisfied that the Ministry is now on notice of the Applicant's request for an internal review. Having received this clarification and notice, the Ministry must now respond to the request for an internal review.
26. The Information Commissioner is concerned by the seemingly unnecessary obstacles experienced by the Applicant in their attempt to obtain the responsive record and an internal review decision. This occurred despite the PATI Act's requirement to provide reasonable assistance to individuals in connection with their requests, and despite the fact that the Applicant had limited access to communication due to their incarceration.

## Decision

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The Information Commissioner finds that the Ministry of Legal Affairs and Constitutional Reform Headquarters (**Ministry**) did not violate the timeframe for issuing a decision on the Applicant's request for an internal review, as set forth in section 43(2) of the Public Access to Information Act (**PATI**) 2010. The Information Commissioner further finds that the Ministry has now received notice of the Applicant's request for an internal review which must be decided by the Permanent Secretary for the Ministry, in accordance with section 43 and the Schedule to the PATI Act.

As set forth in the accompanying Order, and in accordance with section 48 of the PATI Act, the Information Commissioner orders the Ministry to provide a decision on the request for an internal review to the Applicant in accordance with section 43 of the PATI Act, with a copy to the Information Commissioner, **on or before Thursday, 2 December 2021**.

## Judicial Review

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Should the Applicant, the Ministry, 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.

## 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 Ministry 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  
21 October 2021



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