



Decision Notice

Decision 06/2022: Attorney General's Chambers

Records related to legal costs

Reference no: 20190710

Decision date: 23 February 2022

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Attorney General's Chambers (**AG's Chambers**) for records related to the costs associated with the legal challenge against same-sex marriage at the Court of Appeal. AG's Chambers denied the request on the grounds that the PATI Act does not apply to the responsive records in accordance with section 4(1)(b)(vi), because the records were created or obtained by AG's Chambers in the course of carrying out its functions.

The Information Commissioner has found that AG's Chambers was justified in relying on section 4(1)(b)(vi) to deny access to the requested records.

Relevant statutory provisions

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

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

Background

1. This PATI request arises out of litigation beginning in 2018 challenging Bermuda's Domestic Partnership Act 2017 (**DPA**). Specifically, in Ferguson v The Attorney General [2018] SC (Bda) 46 Civ (6 June 2018), the applicants brought a successful constitutional challenge to the DPA's replacement of same-sex marriage with civil unions and prohibition on future same-sex marriages.
2. The Attorney General appealed the decision. In addition to counsel from the Attorney General's Chambers (**AG's Chambers**), the Attorney General was represented by James Guthrie QC of 3 Hare Court, a London-based law firm. In Attorney General v Roderick Ferguson et al [2018] CA (Bda) 32 Civ (23 November 2018), the Court of Appeal dismissed the appeal. The Government announced its intention to seek leave to challenge the dismissal in the Privy Council.
3. On 30 November 2018, the Minister of Home Affairs (**Minister**) stated that the cost to the Government for the services of James Guthrie QC totalled \$61,188.01, with \$53,339.80 of this amount being for legal costs and the rest, \$7,848.21, for travel and accommodations. The Government also announced that it was not yet aware of any

costs filed by the opposing counsels. The Minister further committed to providing the final figure to the public once it was determined¹.

4. On 14 December 2018, the Premier informed the House of Assembly that “the cost borne to the public purse” in relation to the Court of Appeal proceedings was “£41,750, which equates to about \$52,000 or \$53,000, depending on the exchange rate”. The Premier also announced that the costs for “the drafting of the grounds of appeal and provisional advice to the Privy Council” stood at £11,250 as of that date².
5. On 6 February 2019, the Applicant made the following Public Access to Information (**PATI**) request to AG’s Chambers:

I am interested in documentation related to costs associated with the legal fight against same-sex marriage.

...

I am interested in:

1. The total amount spent by Government on the Court of Appeal case (**item 1**).
2. The amount paid directly to James Guthrie QC (**item 2**).
3. The total amount paid to other employees of 3 Hare Court (**item 3**).
4. The total amount paid for other legal advice, consultation, or other legal services not paid to Mr. Guthrie or employees of 3 Hare Court (**item 4**).
5. Information related to any and all legal costs in the Court of Appeal case contributed by non-Government organisations including:
 - a. the name(s) of any and all organisations who contributed to legal costs; and
 - b. the total financial contributions of any and all organisations to the Court of Appeal case (**item 5**).

¹ QC in Same Sex Marriage Appeal Cost \$61k, [Bernews](https://bernews.com/2018/11/qc-in-same-sex-marriage-appeal-cost-61k/), 30 November 2018, available at <https://bernews.com/2018/11/qc-in-same-sex-marriage-appeal-cost-61k/> (quoting a Government press release).

² Official Hansard Report, House of Assembly, 14 December 2018, at 435-436.

6. AG's Chambers issued an initial decision to the Applicant on 21 February 2019. The initial decision informed the Applicant that their PATI request was denied because the PATI Act did not apply to the records being sought, by virtue of section 4(1)(b)(vi). In the alternative, the records were exempt under the legal professional privilege exemption in section 35(3).
7. On 13 March 2019 in the House of Assembly, Minister Kim Wilson announced on behalf of the Minister of Legal Affairs that the estimated cost for counsel for the Government to date was between \$120,000 and \$150,000, although the cost to appeal to the Privy Council and the cost to respond to the appeal had not been finalised. Because the costs might be subject to adjustment, the Minister deferred providing further details³.
8. The Applicant asked for an internal review. On 3 July 2019, AG's Chambers issued an internal review decision upholding its initial decision⁴.
9. The Applicant made a timely application for an independent review by the Information Commissioner on 10 July 2019.
10. The Attorney General appealed to the Privy Council, and Attorney General for Bermuda v Ferguson and others, JCPC 2019/0077, was heard on 3 and 4 February 2021⁵. At the time of this Decision, the Privy Council's ruling is pending.

Investigation

11. 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 issues the Applicant wanted her to review.
12. 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 of the PATI Act was justified.

³ Official Hansard Report, House of Assembly, 13 March 2019, at 1091.

⁴ The internal review decision was issued in response to the Information Commissioner's Decision 13/2019, Attorney General's Chambers.

⁵ See Judicial Committee of the Privy Council, Case details, Attorney General for Bermuda (Appellant) v Ferguson and others (Respondents) (Bermuda), at <https://www.jcpc.uk/cases/jcpc-2019-0077.html>.

13. The Information Commissioner's Office (**ICO**) notified AG's Chambers of the valid application and requested AG's Chambers to provide a copy of the withheld records. AG's Chambers provided seven records on 31 July 2019 and additional records on 6 and 20 September 2019. In total, there were 12 records provided to the ICO⁶.
14. The Decision only considers AG's Chambers' refusal to grant public access to records 1-4, 6, 7 and 9-12, because record 5 is available in the public domain and record 8 is not responsive to the PATI request.
15. When providing the first set of withheld records, AG's Chambers informed the ICO that it did not hold records responsive to items 3 and 5 of the PATI request. Having reviewed the available withheld records and given the information available in the public domain about the litigation, the Information Commissioner has no reason to doubt this representation.
16. 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. AG's Chambers and the Applicant were invited to comment on this application and to make submissions to the Information Commissioner for consideration in this review.
17. The Applicant made submissions. AG's Chambers did not respond to the opportunity to make submissions, but the Information Commissioner considered AG's Chambers' internal review decision as well as its other correspondence with the ICO.

Information Commissioner's analysis and findings

18. 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 as well as the information provided by AG's Chambers in its internal review decision and correspondence with the ICO. She is satisfied that no matter of relevance has been overlooked.

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

19. As Puisne Judge Williams explained in Attorney General v Information Commissioner [2022] SC (Bda) 6 Civ (25 January 2022), para. 24, the "scope of the application of the

⁶ AG's Chambers provided copies of the withheld records prior to the recent Supreme Court decision in Attorney General v Information Commissioner [2022] SC (Bda) 6 Civ (25 January 2022). In Attorney General v Information Commissioner, Puisne Judge Williams decided that the Information Commissioner did not have a right to examine records for which AG's Chambers asserted the application of section 4(1)(b)(vi) of the PATI Act.

PATI Act may be determined by section 4 which lists the classes of material to which the legislation does not apply.” In accordance with section 4(1)(b), the PATI Act does not apply to records obtained or created by specified public authorities in the course of carrying out their functions. AG’s Chambers is one of those public authorities, as set out in subsection 4(1)(b)(vi).

20. Although the PATI Act does not define the ‘functions’ of a public authority, section 7 of the Interpretation Act 1951 defines ‘functions’ as “powers conferred, or duties imposed, on the authority or officer by or under any provision of law”.
21. Records that relate to the general administration of these specified public authorities, however, continue to fall within the scope of the PATI Act by virtue of section 4(2). In Attorney General v Information Commissioner, para. 37, Puisse Judge Williams adopted the definition of ‘general administration’ set out by the Irish Information Commissioner, i.e., records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures and the like. Puisse Judge Williams further agreed that records related to matters concerning the core business of the relevant public authority are not records relating to general administration⁷.
22. In sum, for a record to be removed from the scope of the PATI Act by virtue of section 4(1)(b), the following must be considered:
 - [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

23. Although AG’s Chambers did not make submissions, its internal review decision and other correspondence with the ICO explained its view that the requested records

⁷ See Attorney General v Information Commissioner, at para. 40. In Decision 02/2019, Office of the Governor, para. 20, the Information Commissioner adopted this definition of ‘general administration’ applied by the Irish Information Commissioner. See also Decision 09/2021, Human Rights Commission, para. 17; Decision 05/2020, Human Rights Commission, at para. 15; and Decision 19/2019, Internal Audit Department, at para. 19.

relate to matters concerning its core functions and do not relate to its general administrative records.

24. AG's Chambers explained its understanding of 'general administration' in section 4(2)(b) as being records that relate to the management of public authorities, such as records relating to personnel, organisational charts, office procedures and similar matters.

Applicant's submissions

25. The Applicant asserted that the requested records relate to the costs borne by the public purse for the same-sex marriage legal challenge. The request seeks records on the financial aspect of pursuing the challenge, and not substantive details of the case. As such, they should be considered as relating to AG's Chambers' general administration.
26. The Applicant referred the ICO to AG's Chambers' Information Statement, which states in section D that its accounting records and administrative contracts are accessible to the public. The Applicant also pointed to a reference in the Information Statement to "budgetary records" and the statement that "the public can make specific requests to the financial comptroller for accounting records which are then handled on a case by case basis".
27. The Applicant argued that, assuming the cost of the litigation came out of AG's Chambers' budget, the PATI request is a specific request for a budgetary record.
28. The Applicant expressed frustration because a Cabinet Minister informed the public in a 30 November 2018 press release that the final figure relating to the same-sex marriage appeal cost will be released to the public, as noted in paragraph 3 above.

Discussion

29. The Information Commissioner considers AG's Chambers' reliance on section 4(1)(b)(vi) to deny the Applicant's request for records 1-4, 6, 7 and 9-12.

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

30. The Information Commissioner accepts that these records were obtained or created by AG's Chambers.

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

31. In accordance with section 71 of the Bermuda Constitutional Order 1968, the Attorney General is the principal legal advisor to the Government.
32. Retaining external counsel to represent the Government is part of AG's Chambers' constitutional functions. The Information Commissioner is satisfied that records 1-4, 6, 7 and 9-12 were obtained or created by AG's Chambers 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)?

33. The Information Commissioner is satisfied that records 1-4, 6, 7 and 9-12 are records that relate to AG's Chambers' core functions, rather than general administration. As stated by Puisne Judge Williams, the "core business of [AG's Chambers] is in its legal professional services which entails the provision of legal advice and representation for the benefit of its clients who may engaged at any particular stage of the litigation process"⁸.
34. The Applicant is correct that the records created and obtained by AG's Chambers relate to the costs of litigation paid by the public purse. It is equally true that these case-specific costs arise out of the unique constitutional functions of AG's Chambers to advise and represent the Government. Accordingly, the records in question relate to AG's Chambers' legal professional services for the same-sex marriage litigation and do not relate to, for example, payroll matters, accounts and similar budgetary matters that are common to all public authorities.
35. The Applicant raises concerns about accountability for the expenditures for this litigation. Section 4(1)(b)(vi) of the PATI Act preserves AG's Chambers' constitutional independence in determining the appropriateness of pursuing any given litigation by removing litigation records from the scope of the PATI Act. This includes litigation records related to litigation costs and not simply records related to the substantive legal advice.
36. The Information Commissioner notes that the limitations of section 4(1)(b)(vi), which prevent these records from being disclosed in response to a PATI request, do not mean that the public does not have appropriate recourse for accountability

⁸ See Attorney General v Information Commissioner, at para. 40.

concerning AG's Chambers' stewardship of public funds. The PATI Act touches upon these broader public-spending questions by requiring that quarterly expenditures remain available to the public when asked for under section 6(5) of the PATI Act. The public can also access the annual Government of Bermuda Approved Estimates of Revenue and Expenditures, commonly referred to as the 'Budget Book', which provides some indication of the public funds spent on all professional services by AG's Chambers.

37. Finally, nothing in the PATI Act prevents the Government or another public authority from proactively disclosing the costs of public litigation throughout appeals or at its conclusion as a matter of good governance, which has happened in this case and with other recent constitutional or public law cases.

Conclusion

38. The Information Commissioner is satisfied that AG's Chambers properly engaged section 4(1)(b)(vi) of the PATI Act to refuse public access to records 1-4, 6, 7 and 9-12, because they were created or obtained by AG's Chambers in the course of carrying out its functions and do not relate to its general administration.

Decision

The Information Commissioner finds that the Attorney General's Chambers (**AG's Chambers**) was justified in denying public access to records 1-4, 6, 7 and 9-12 in accordance with section 4(1)(b)(vi) of the Public Access to Information (**PATI**) Act 2010 because they were obtained or created by AG's Chambers in the course of carrying out its functions.

In accordance with section 48 of the PATI Act, the Information Commissioner upholds AG's Chambers' internal review decision.

Judicial Review

The Applicant, the Attorney General's Chambers, 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.



Gitanjali S. Gutierrez
Information Commissioner
23 February 2022

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—

(i) the Office of the Auditor General;

(ii) the Human Rights Commission;

(iii) the Office of the Information Commissioner;

(iv) the Office of the Ombudsman;

(v) the Department of Public Prosecutions which, for the purposes of this section, includes the Justice Protection Administrative Centre;

(vi) the Attorney General's Chambers;

(vii) the Department of Internal Audit;

(viii) the Financial Policy Council.

(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).

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