

## Decision Notice

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### Decision 08/2022: Bermuda Medical Council

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**Records related to medical misconduct and individual physician: failure to decide within statutory timeframe**

**Reference no: 20211118**

**Decision date: 24 March 2022**

## Summary

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On 27 May 2021, the Applicant asked the Bermuda Medical Council (**Council**) for records related to medical misconduct proceedings and an individual physician. This Decision has found that the Council failed to decide the Applicant's request for an internal review within the statutory timeframe set forth by the Public Access to Information Act 2010. During this review, the Council issued an internal review decision. The Information Commissioner has not required further action in respect of this 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 18 November 2021.
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
27 May 2021	The Applicant made a written PATI request to the Bermuda Medical Council ( <b>Council</b> ), which was assigned no. 636.
3 June 2021	The Applicant was informed by the Ministry of Health Headquarters ( <b>Ministry Headquarters</b> ) that the designated Information Officer for the Council had asked another Information Officer within the Ministry Headquarters to handle PATI request no. 636.
8 July 2021	The Applicant was notified that the Council was extending the original period by another six weeks, as allowed under section 15(1)(a) of the PATI Act. The new deadline for the Council to issue its initial decision was 19 August 2021.

20 August 2021	The Council issued an initial decision, granting partial access to the responsive records.
1 September 2021	The Applicant requested an internal review be conducted by the head of the public authority.
	The Applicant did not receive an internal review decision by the Council's Head of Authority within six weeks of the Council's receipt of the internal review request, i.e. by 13 October 2021.  This was despite the Acting Permanent Secretary of the Ministry Headquarters' review of the Council's initial decision, which was sent to the Applicant on 12 November 2021 in response to the Applicant's misdirected request of 30 September 2021.
18 November 2021	The Applicant requested an independent review by the Information Commissioner.
10 January 2022	The ICO notified the Council in writing that an application had been received from the Applicant. The Council was asked to comment on the application.
21 January 2022	The Council made submissions to the Information Commissioner, which are considered below.
23 March 2022	The Council issued an internal review decision to the Applicant, copied to the ICO.

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

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### *Internal Review Decision*

- 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. Section 43(2) also requires that the head of the public authority notify the applicant of: the internal review decision, the reasons for the decision, and the applicant's right to seek an independent review by the Information Commissioner.

5. The Schedule to the PATI Act designates the Chairperson as the head of the public authority for the Council, not the relevant Permanent Secretary, for purposes under the PATI Act. The PATI Act also does not require a request for an internal review to be sent directly to the head of the public authority, as doing so would be impractical. The internal review request must have been sent to any individual within the public authority for the six-week timeline in the PATI Act to start. Ideally, an internal review request reaches the head of the public authority on the same day the public authority receives it.
6. On 1 September 2021, the Applicant emailed the Information Officer assigned to PATI request no. 636 about their wish to ask the head of the public authority to conduct an internal review. The Applicant was informed that their request should be made to the Acting Permanent Secretary of the Ministry Headquarters. The Applicant then emailed the Acting Permanent Secretary on 30 September 2021, asking for an internal review of the decision in response to PATI request no. 636.
7. On 12 November 2021, the Acting Permanent Secretary issued a substantive response to the Applicant about access to the records. The Council's Head of Authority was not copied in on, or referred to within, this correspondence.
8. On 18 November 2021, the Applicant requested an independent review by the Information Commissioner. After making informal inquiries with the public authority, the ICO notified the Applicant on 7 January 2022 that the scope of the Information Commissioner's review must be limited to the Council's compliance with the statutory timeframe, because the letter of 12 November 2021 had not issued by the Council's Head of Authority, as designated by the Schedule to the PATI Act.
9. In this matter, the Information Commissioner was satisfied that the Applicant's email of 1 September 2021 was a valid request for an internal review made to the correct public authority by way of the assigned Information Officer. The proper due date for the Council's Head of Authority to have issued an internal review decision was by 13 October 2021. This was irrespective of the fact that, due to procedural errors, the Council's Head of Authority had not been notified at the relevant time.
10. By letter of 10 January 2022, the ICO invited the Council to make submissions on this review, as required by section 47(4) of the PATI Act. In its submission of 21 January 2022, it was accepted that the Council had not carried out an internal review decision within the statutory timeframe. The Council explained that an error was made where the request for review had been sent to the Office of the Chief Medical Officer (**CMO**) and therefore to the Acting Permanent Secretary, and not to the Council's Chairperson. Upon receiving the ICO's

letter, the Council completed its internal review of the initial decision and issued such decision to the Applicant on 23 March 2022.

11. Unfortunately, the Ministry Headquarters' good faith efforts hindered an independent review moving ahead on the substantive issue of whether public access to the records had been properly denied. The errors made show what can go wrong even when parties want to get things right. For instance, had the PATI request been previously transferred by the Council to the Ministry Headquarters under section 13(5), the letter of 12 November 2021 would have been a valid internal review decision in response to PATI request no. 636.
12. The Information Commissioner is also satisfied that the Applicant had submitted their PATI request according to the Council's publicly stated contact details. The potential for confusion, though, is understandable. Requesters are directed on the Council's Information Statement to contact it on PATI matters via [officeofcmo@gov.bm](mailto:officeofcmo@gov.bm).<sup>1</sup> The Council's appointed Information Officer is the CMO, and the Office of the CMO falls under the Ministry Headquarters for purposes of the PATI Act. The Council's Information Statement does not indicate who the Council's Head of Authority is.<sup>2</sup> At the same time, the CMO has certain statutory responsibility for Council matters. According to the Ministry Headquarters' Information Statement, the Office of the CMO holds certain records for statutory bodies, such as their minutes, reports and communications.<sup>3</sup>
13. Despite some apparent overlap, the Council and the Ministry Headquarters (including the Office of the CMO) are separate public authorities with different heads of the public authority in relation to PATI requests.<sup>4</sup> It is therefore incorrect to understand that where the Office of the CMO has some responsibility for the Council, by providing administrative support or otherwise due to the CMO's standing as an ex-officio Council member, the internal reviews are to be conducted by the Head of Authority for the Ministry Headquarters. While the Office of the CMO may hold the statutory entity's records on its

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<sup>1</sup> See pages 4-5 of the Council's Information Statement, available at [gov.bm/pati](http://gov.bm/pati).

<sup>2</sup> Public authorities are not required under the PATI Act to state on their Information Statement who their designated head of public authority is and to provide their contacts. Such contact information is required by law only for the public authority's designated Information Officer, under section 5(1)(g). The public can view the ICO's public authority lists, which give the names of the heads of public authorities in accordance with column 1 of the Schedule to the PATI Act (based as the latest version received by the ICO); see [ico.bm/public-authorities-list](http://ico.bm/public-authorities-list).

<sup>3</sup> See pages 5-6 of the Information Statement for the Office of the CMO (PDF pages 35-36), available at [gov.bm/pati](http://gov.bm/pati). Note, separate sections within the Ministry Headquarters (e.g. the Office of the CMO, and the Office of the Permanent Secretary) maintain their own Information Statement, and the set is then combined into one document for the Ministry Headquarters as a whole.

<sup>4</sup> The Information Commissioner issued Decision 04/2016, [Bermuda Medical Council](#), some years ago. Paragraph 15 made it clear that the Council's Head of Authority is the Chairperson.

behalf, it is the Chairperson who serves as the designated Head of Authority for purposes of the PATI Act.

14. It is common that practical matters arise for statutory bodies whose records are, in fact, held by another public authority. As the Information Commissioner has pointed out, “[o]ften, a government department holds the statutory board or committee’s electronic or physical records, and does so in the absence of records management policies or procedures clarifying responsibility for storing, disclosing, retaining or destroying records.”<sup>5</sup> Given what it means for a public authority to hold a record under the PATI Act, records held by the Council are its own, and such requests for them made to the Council must be processed by the Council, not as records held by the Ministry Headquarters via the Office of the CMO – unless, perhaps, the request has been properly transferred under section 13.
15. None of this precludes that designated persons and locations within the Ministry Headquarters may be relied on by the Council for the processing of PATI requests for the Council’s records. This happened here when a different Information Officer than the Council’s designated Information Officer stepped in. Ideally, such assistance has been laid out in clear terms in a formal, written agreement between the public authorities. Further, a PATI requester is not prevented under the PATI Act from making the same request for records to different public authorities, e.g. both to the Ministry Headquarters and the Council at the same time, should the requester find it useful to do so.
16. In this case, it is a matter of fact that the Council did not provide the Applicant with an internal review decision for PATI request no. 636 within the statutory timeframe. The Information Commissioner is satisfied that the Council failed to comply with section 43(2) of the PATI Act.
17. During the course of this review, the Council provided the Applicant with the Head of Authority’s internal review decision on the substantive question of public access to the requested records.
18. The Information Commissioner does not require the Council to take any further action at this time in relation to the Applicant’s request for an internal review. The Information Commissioner commends the Council for its cooperation to bring itself into compliance with the PATI Act, as well the Ministry Headquarters for its efforts to uphold the Applicant’s (and the public’s) rights under the PATI Act to access non-exempt public records.

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<sup>5</sup> See the Information Commissioner’s [PATI Implementation Report and Recommendations 2021](#), page 24; available at [ico.bm/annual-reports](http://ico.bm/annual-reports).

## Decision

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The Information Commissioner finds that the Bermuda Medical Council (**Council**) failed to issue a decision on the Applicant's request for an internal review within the timeframe set forth in section 43(2) of the Public Access to Information (**PATI**) Act 2010. Since the Council has issued an internal review decision during this review, the Information Commissioner does not require the Council to take any further action in respect of this Decision.

## Judicial Review

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Should the Applicant, the Council, 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.



Gitanjali S. Gutierrez  
Information Commissioner  
24 March 2022

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