

## Decision Notice

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**Decision 01/2023: Ministry of Legal Affairs and Constitutional Reform  
Headquarters**

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### **Report on misconduct allegations**

**Reference no: 20210914**

**Decision date: 28 February 2023**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Legal Affairs and Constitutional Reform Headquarters (**Ministry Headquarters**) for the full report on allegations of misconduct against the Director of Child and Family Services. The Ministry Headquarters denied the request, stating the requested record did not exist, while it also transferred the request to the Ministry of Social Development and Seniors Headquarters.

The Information Commissioner has found that the Ministry Headquarters was justified in administratively denying the request under section 16(1)(a) of the PATI Act, but its decision to transfer the request under section 13(5) was not.

The Information Commissioner does not require the Ministry Headquarters to take any further action in relation to this Decision.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 13(5) (transfer of request); section 16(1)(a) (record does not exist).

Public Access to Information Regulations 2014: regulation 5 (reasonable search).

The Appendix provides the text of these statutory provisions and forms part of this Decision.

## Background

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1. This review relates to two prior reviews decided in July 2019 and July 2021 by [Decision 19/2019](#), [Department of Internal Audit](#) and [Decision 05/2021](#), [Ministry of Legal Affairs and Constitutional Reform Headquarters](#), respectively. Each prior Decision Notice arose from one part of the same PATI request, as described below in paragraph 13. The background to this PATI request is extensive. The more detailed account offered below is helpful for assessing the issues arising in this review.

2. An advocate wrote the Ministry of Social Development and Sports Headquarters<sup>1</sup> on 10 August 2018, with allegations of misconduct against certain staff of the Department of Child and Family Services (**DCFS**), including the Director (**allegation letter**).<sup>2</sup>
3. Sometime in August 2018, the Ministry of Social Development and Sports Headquarters referred the matter to the Department of Internal Audit (**Internal Audit**).<sup>3</sup>
4. On 5 September 2018, the Minister of Social Development and Sports commented during a media interview on the government’s initial response to the allegation letter.<sup>4</sup> The Minister stated that an “internal investigation” “[was] being conducted by this ministry to prove or disprove those allegations”. He disclosed that the DCFS Director “[had] been placed on administrative leave until this investigation [was] complete, based on the allegations of disobeying or disregarding court orders”. When asked who was conducting the investigation, the Minister replied that they were “looking for an independent person but that person [had] not been identified as yet”.
5. On 6 September 2018, the Department of Communications responded to a media query—as provided to the Information Commissioner’s Office (**ICO**)—and stated that “[a] thorough investigation into this particular matter has commenced. If any claims are substantiated following the investigation, immediate steps will be taken to remedy the situation”.
6. Sometime in September 2018, a special engagement was agreed to for Internal Audit to investigate the allegations made against the DCFS Director, resulting in a report to be issued to the responsible Permanent Secretary, the Head of Public Service and the Secretary to the Cabinet.<sup>5</sup>

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<sup>1</sup> The Ministry of Social Development and Sports Headquarters had responsibility for the Department of Child and Family Services at the time and until 31 October 2018.

<sup>2</sup> See Politica, ‘[Children allege neglect and abuse by child protection agency](#)’ (5 September 2018); ‘[Government goes silent on DCFS child abuse probe](#)’ (30 September 2018). The ICO is aware that articles on Politica.think.bm may no longer be accessible to non-members.

<sup>3</sup> See [Decision 19/2019, Department of Internal Audit](#), at paras. 22, 23 and 43.

<sup>4</sup> See Politica’s transcribed interview notes with the Minister of Social Development and Sports, linked to ‘[Government goes silent on DCFS child abuse probe](#)’ (30 September 2018).

<sup>5</sup> See [Decision 19/2019, Department of Internal Audit](#), at paras. 22 and 24.

7. On 1 October 2018, the media reported that a spokesperson from the Ministry of Social Development and Sports Headquarters replied to their query, stating that:

An investigation is underway into allegations against the Director of Child and Family Services, who is currently on administrative leave . . . In accordance with the Government of Bermuda Conditions of Employment and Code of Conduct, an internal investigation is being conducted. It should be stated clearly and unequivocally that the Minister of Social Development and Sports is not involved in conducting the investigation. Should the investigation lead to disciplinary action, the procedure set out in the Public Service Commission Regulations 2001 will be followed. The Government does not comment publicly on human resources matters.<sup>6</sup>

8. On 1 November 2018, the Cabinet was shuffled, the Ministry of Social Development and Sports Headquarters was disbanded, and responsibility for DCFS was moved to the Ministry of Legal Affairs Headquarters.<sup>7</sup>
9. On 6 November 2018, the Minister of Legal Affairs interviewed with the media, stating that “it’s important to dispel the false narrative regarding the Child and Family Services investigation. The investigation is ongoing. The Department of Internal Audit is engaged in determining whether the Department’s policies and procedures are followed, and their findings will be provided to the Permanent Secretary”.<sup>8</sup> This seems to have been a first public acknowledgement of Internal Audit’s lead in the investigation.
10. On 14 December 2018, the Premier responded to a parliamentary question, stating that:

There are three officers being investigated. And the investigations are at various stages. . . . [I]nvestigations into various matters at DCFS are ongoing, and, as it has been in the public domain, there are two separate lines—one with the Department of Internal Audit and one with the

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<sup>6</sup> See Politica, ‘[Government goes silent on DCFS child abuse probe](#)’ (30 September 2018).

<sup>7</sup> The Ministry of Legal Affairs Headquarters held responsibility for DCFS from 1 November 2018 until the portfolio was moved to the Ministry of Social Development and Seniors Headquarters on 9 November 2020. At the same time, the Ministry of Legal Affairs Headquarters became the Ministry of Legal Affairs and Constitutional Reform Headquarters.

<sup>8</sup> See the Bermuda Broadcasting Company’s [evening newscast](#) on 6 November 2018 for the first story reported at timestamp 4:42.

Ministry itself—handling items which may be considered against the conditions of employment and Code of Conduct.<sup>9</sup>

11. On the same day, Internal Audit issued its report to the Permanent Secretary for the Ministry of Legal Affairs Headquarters in relation to the misconduct allegation about the DCFS Director (**Internal Audit Report**)—a record which the Information Commissioner has decided falls outside the scope of the PATI Act’s application.<sup>10</sup>
12. On 25 January 2019, the Ministry of Legal Affairs Headquarters announced that the “allegations from an external party [which] stated that the Director had not performed his role in accordance with the Ministry’s policies and procedures as they relate to the care and safety of children in Residential Treatment Services”, and allegations that the Director “did not follow Financial Instructions”, were “claims” that “were not substantiated”.<sup>11</sup>
13. Following these events, the Applicant made a PATI request on 30 January 2019 to the Ministry of Legal Affairs Headquarters. Relevant to this review was item 1 of the PATI request only, which asked for:

The full report into allegations of misconduct against [the Director of Child and Family Services], which was conducted by the Ministry of Legal Affairs and Department of Internal Audit. [The Director] was placed on paid administrative leave on August 23, 2018 and returned to work on January 28, 2019.

14. On 26 February 2019, the Ministry of Legal Affairs Headquarters issued a statement related to the investigation arising from the allegation letter:

In response [to a press release by the Shadow Minister of Legal Affairs], a spokesperson stated, “The Children’s Act 1998 clearly lays out the framework under which investigations are conducted. Likewise, the [Public Service Commission] Regulations Schedule 2 also gives specific guidance on internal investigations. All of which are rigorously adhered to. It must be clearly stated that legally a Minister cannot undertake a disciplinary

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<sup>9</sup> See House of Assembly, [Official Hansard Report](#), 14 December 2018, at page 431.

<sup>10</sup> See [Decision 19/2019, Department of Internal Audit](#), at paras. 24 and 37.

<sup>11</sup> See Government of Bermuda, ‘[Director of the Department of Child and Family Services returns to duty](#)’ (25 January 2019).

investigation of Public Officers. That can be done only be a Head of Department.”

“Equally as a matter of confidentiality, information cannot and will not be shared about minor children with the public, the media or third parties. In order to provide further clarity, here are the facts: A full and thorough investigation was carried out about allegations made against the Director of Child and Family Services. A part of the investigation was carried out by the Internal Audit Department. In accordance with their Act the only recipient of the report is the Permanent Secretary responsible for the Department under review. These reports are not made public.”

The spokesperson continued, “The other part of the investigation was carried out by the Permanent Secretary responsible for DCFS. As stated in a press release issued on 25 January 2019, and restated here for the record: ‘The investigation revealed that there was no misconduct by the Director. . . . The investigation involved a series of interviews with staff members, a detailed review of the department’s practices and procedures, and a review of the financial activities within the Department.’”<sup>12</sup>

15. On 27 February 2019, the Ministry of Legal Affairs Headquarters transferred to Internal Audit the part of item 1 of the PATI request asking for the report “by Internal Audit”<sup>13</sup>.
16. In light of this transfer, what remained for the Ministry of Legal Affairs Headquarters’ response to the PATI request was the portion of item 1 asking for “the full report . . . conducted by the Ministry of Legal Affairs”.

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<sup>12</sup> See Bernews, ‘[Shadow Minister, Ministry on DCFS investigation](#)’ (27 February 2019). The ICO was unable to retrieve a copy of the Ministry of Legal Affairs Headquarters’ official statement, through online searches, and has relied on how it was reproduced by Bernews and in the Department of Communications’ email reply of 26 February 2019 to a media query (as provided to the ICO), confirming the content of what Bernews attributed as the Ministry of Legal Affairs Headquarters’ statement as issued on 26 February 2019.

<sup>13</sup> The Information Commissioner reviewed Internal Audit’s internal review decision in [Decision 19/2019](#). The Commissioner upheld that section 4 of the PATI Act properly applied, which meant the public was not granted a right of access under the PATI Act to the Internal Audit Report. This was the first of the Commissioner’s reviews in a series of six reviews arising from item 1 of the original PATI request: four substantive ones (challenging access to the records or administrative denials), and two failure-to-decide ones (where the public authority missed the statutory timeframe to issue an internal review decision). The last review in this series is decided in [Decision 02/2023](#).

17. On 13 March 2019, the Ministry of Legal Affairs Headquarters issued its initial decision, relying on section 38 of the PATI Act to refuse to disclose whether any such records existed. It explained that “to reveal such, on its own, would add unnecessary confusion to misinformation which [was] already present in the media and public domain”.
18. On 18 April 2019, the Applicant asked for an internal review. On 21 June 2019, the Ministry of Legal Affairs Headquarters issued its internal review decision, affirming the initial refusal to say whether a record existed. The internal review decision explained that statements by the [Department of Communications], referred to in the Applicant’s internal review request, did not “[confirm] the existence of a record which [was] responsive to” the remaining part of item 1.
19. By Decision 05/2021<sup>14</sup> on 23 July 2021, the Information Commissioner annulled the Ministry of Legal Affairs Headquarters’ internal review decision, finding that its reliance on section 38 had not been justified. The Information Commissioner ordered the Ministry of Legal Affairs and Constitutional Reform Headquarters to issue a new initial decision for item 1, which should specifically reveal whether a responsive record existed.
20. On 3 September 2021, the Ministry of Legal Affairs and Constitutional Reform Headquarters issued a new initial decision, made by the Head of Authority, in which it transferred the PATI request to the Ministry of Social Development and Seniors Headquarters<sup>15</sup>, now referred to as the transfer decision.
21. On 14 September 2021, the Applicant made a timely application for an independent review by the Information Commissioner of the Ministry of Legal Affairs and Constitutional Reform Headquarters’ transfer decision.<sup>16</sup>

## Investigation

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22. The application to the Information Commissioner was accepted as valid. Because the Ministry of Legal Affairs and Constitutional Reform Headquarters’ decision was made by the Head of Authority, and the intention of the parties was for the Information

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<sup>14</sup> The Information Commissioner reviewed the Ministry of Legal Affairs Headquarters’ internal review decision in [Decision 05/2021](#)—the third of the Commissioner’s reviews in this series. In that review, the Applicant challenged the public authority’s response on item 1 only, excluding its earlier transfer decision as described in paragraph 15.

<sup>15</sup> Responsibility for DCFS was moved from the Ministry of Legal Affairs Headquarters to the Ministry of Social Development and Seniors Headquarters with effect on 9 November 2020; see the Official Gazette, [GN1052/2020](#).

<sup>16</sup> The Applicant asked for a separate review of the Ministry of Social Development and Seniors Headquarters’ decision on the transferred request; see Decision 02/2023.

Commissioner to issue a decision on this matter, the Information Commissioner deemed that a referral of the Applicant’s internal review request to her had taken place in accordance with section 44 of the PATI Act. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.

23. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required.
24. The Information Commissioner notified the Ministry of Legal Affairs and Constitutional Reform Headquarters of this review on 30 September 2021.
25. After correspondence with the Information Commissioner about its compliance with the related [Decision 05/2021](#), the Ministry of Legal Affairs and Constitutional Reform Headquarters issued a supplemental new initial decision during this review. That decision invoked section 16(1)(a) to administratively deny the focused request, on the basis that no record, as described by the Applicant, existed to its knowledge. This is referred to as the administrative denial decision.
26. On 22 October 2021, the ICO updated the Ministry of Legal Affairs and Constitutional Reform Headquarters that its reliance on section 16(1)(a) would also be considered, and the parties agreed.
27. During this review, the ICO requested for a Permanent Secretary to submit a sworn affidavit. As explained below, this Permanent Secretary was considered to hold crucial evidence because of their personal work knowledge of the PATI request topic as well as their substantive involvement when originally responding to the PATI request and in making prior submissions to the ICO on the public authority’s behalf.<sup>17</sup> On 29 September 2022, the Permanent Secretary submitted the requested affidavit to the Information Commissioner, which addressed certain factual questions arising from the ICO Investigation Officer’s preliminary view on the non-existence of any responsive record (**affidavit evidence**).

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<sup>17</sup> To sum, this Permanent Secretary had received the Internal Audit Report in December 2018; was the Head of Authority when the Ministry of Legal Affairs Headquarters received the PATI request in January 2019; had made the original internal review decision in June 2019; and had made several relevant submissions on the public authority’s behalf during the Information Commissioner’s review in [Decision 05/2021](#). In addition, this same Permanent Secretary was the Head of Authority who made the internal review decision on the transferred request—considered in [Decision 02/2023](#)—as they were assigned to the Ministry of Social Development and Seniors Headquarters from 17 August 2021 until 2 November 2022.



28. 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. Both the Ministry of Legal Affairs and Constitutional Reform Headquarters and the Applicant were invited to comment on the issues under review and made submissions.

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

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29. In coming to this Decision, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Ministry of Legal Affairs and Constitutional Reform Headquarters and the Applicant, as well as by other public authorities in related prior reviews. She is satisfied that no matter of relevance has been overlooked.

### ***Records do not exist – section 16(1)(a)***

30. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it.
31. Regulation 5 of the PATI Regulations 2014 (**PATI Regulations**) requires public authorities, through their Information Officers, to make reasonable efforts to locate records responsive to a PATI request. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate any record.
32. When a public authority denies a PATI request under section 16(1)(a) because a record does not exist or cannot be found, the Information Commissioner's review does not determine to a point of certainty if a record does not exist or is lost. Rather, the Information Commissioner is required to assess whether the public authority took all reasonable steps to find the record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration.<sup>18</sup>
33. In assessing the reasonableness of the public authority's search, the Information Commissioner considers the following factors<sup>19</sup>:

[1] the quality of the public authority's analysis of the request;

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<sup>18</sup> See [Decision 08/2021, Police Complaints Authority](#), at para. 92.

<sup>19</sup> See [Decision 04/2017, Department of Health](#), at para. 49, and more recently [Decision 20/2022, Department of Public Lands and Buildings](#), at para. 17.

[2] the scope of the search made on the basis of that analysis; and

[3] the rigour and efficiency with which the public authority conducted its search.

34. The specific circumstances in each case will inform the Information Commissioner's assessment.
35. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.

*Public authority's submissions*

36. In submissions to the ICO in this and related reviews, the public authorities have consistently maintained that the record sought by the Applicant, as described in the PATI request in paragraph 16 above, never existed, as a matter of fact. This was supported by several statements in prior submissions and the affidavit evidence based on the Permanent Secretary's personal work knowledge while carrying out their official duties.
37. Provided at the request of the ICO, the Permanent Secretary stated in the affidavit evidence that the only record ever produced, which met the description of item 1 of the original PATI request, was the Internal Audit Report: the one report that "concerned the allegations against the Director". The Permanent Secretary emphasised their understanding that the Internal Audit Report did not come within the scope of the PATI Act by virtue of section 4 of the Act, and noted the Information Commissioner's [Decision 19/2019, Internal Audit](#) that affirmed this position.
38. The Ministry of Legal Affairs and Constitutional Reform Headquarters submitted that it was incorrect for the Applicant to believe that a "part of the investigation was carried out by the Permanent Secretary responsible for DCFS", although a government official was quoted in the media as having said this. The Ministry of Legal Affairs and Constitutional Reform Headquarters had previously explained that the investigation into the misconduct allegations "was not part of any separate disciplinary process at the Ministry". The only documentation held by the Ministry of Legal Affairs Headquarters when originally processing the PATI request was with respect to the Internal Audit investigation and findings.
39. In support of this factual position, the Ministry of Legal Affairs and Constitutional Reform Headquarters relied upon the affidavit evidence confirming the Permanent Secretary's personal knowledge for the period beginning 18 November 2018, when they assumed responsibility for the then-Ministry and "inherited the process" of the Internal Audit review.

40. In the affidavit evidence, the Permanent Secretary affirmed, based on their personal knowledge, that the Ministry of Legal Affairs Headquarters itself was never involved in any investigation into DCFS matters apart from the two investigations carried out by Internal Audit, which resulted in separate reports dated 14 December 2018 (addressing the allegation against the DCFS Director) and 14 January 2019 (a follow-up on Internal Audit's 2015 report on DCFS operations).

*Applicant's submissions*

41. To the Applicant, the issue that item 1 of their PATI request meant to answer was: where is the report, and is there any reason it cannot be released to the public? The Applicant believed the government's answer was still outstanding almost four years after making their PATI request.
42. The Applicant maintained that the government had officially disclosed the existence of the requested report, for some investigation or inquiry as conducted by the Ministry of Social Development and Sports Headquarters or the Ministry of Legal Affairs Headquarters prior to or separate from the one by Internal Audit. The Applicant maintained that there were two reports on the allegations against the DCFS Director.
43. In support, the Applicant pointed to certain statements, including the Premier's statement on 14 December 2018, the government's press release on 25 January 2019 as well as the Department of Communications' email replies to media queries on 6 September 2018 and 26 February 2019.

*Discussion*

44. The Information Commissioner notes from the outset how this review involved assessing public authorities' submissions that raised questions on apparent inconsistencies with prior public statements about the nature of reports into the misconduct allegations, which arose in the context of services provided to some of Bermuda's most vulnerable population.
45. In light of the need to resolve these apparent inconsistencies, the Information Commissioner required the Ministry of Legal Affairs and Constitutional Reform Headquarters to submit affidavit evidence in support of its factual position—a form of evidence not usually required during reviews. As explained below, the Information Commissioner places great weight on the Permanent Secretary's evidence, arising from their personal work knowledge of the events as they had taken place in 2018-2019, when contrasted with other statements by public officials which, on their face, presented inconsistent detail.

[1] The quality of the public authority's analysis of the PATI request

46. The Information Commissioner accepts that the Ministry of Legal Affairs and Constitutional Reform Headquarters has correctly understood the remaining part of item 1 of the PATI request as seeking any document that recorded the outcome of any inquiry undertaken by either the Ministry of Social Development and Sports Headquarters or the Ministry of Legal Affairs Headquarters, in response to the misconduct allegation about the DCFS Director. This understanding was stated clearly in its administrative denial decision.
47. This understanding is consistent with the Applicant's expectation—drawing from the Premier's statement in Parliament on 14 December 2018, as noted above in paragraph 10—that the remaining part of item 1 of the PATI request would include any final report on the outcome of any inquiry undertaken by the Ministry of Legal Affairs Headquarters "handling items which may be considered against the conditions of employment and Code of Conduct" in relation to the DCFS Director, i.e., as a "separate" "line" of investigation from the "one with the Department of Internal Audit".
48. The PATI request was specific and clear. It sought records related only to the allegations of misconduct against the DCFS Director. Records based on the outcomes of any disciplinary inquiry under the Public Service's Conditions of Employment and Code of Conduct, for those allegations against other DCFS officers<sup>20</sup>, besides the Director, would not have come within this request.
49. The PATI request also plainly sought "the full report" in response to the allegation about the DCFS Director, and, for example, did not seek all records related to initiating, progressing, concluding and following up on actions carried out in response to the allegation letter. The Ministry of Legal Affairs and Constitutional Reform Headquarters reasonably understood the focused request to mean a report in its final version. It had no cause to read the request more broadly.
50. It would not have been reasonable for the Ministry of Legal Affairs and Constitutional Reform Headquarters to have read the straightforward PATI request as including, for example, drafts, notes or other working documents that a reasonable person could

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<sup>20</sup> The Premier stated in Parliament that three officers were being investigated, though did not also say whether this count included the DCFS Director; see House of Assembly, [Official Hansard Report](#), 14 December 2018, at page 431.

expect a public authority's working investigation file to hold. It was also not reasonable to expect that the PATI request would have generated notes, if any, penned by the Permanent Secretary or the Minister of Social Development and Sports to reflect any discussion with DCFS staff prior to the Internal Audit referral, if any such contact had been made as the media reported.<sup>21</sup> The Ministry of Social Development and Sports Headquarters' correspondence with Internal Audit on initiating the special engagement also would not have been responsive.

51. The Permanent Secretary's affidavit evidence acknowledged that the Ministry of Legal Affairs Headquarters held a marked-up hard copy of the Internal Audit Report, which included their fact-checking notes—and was subsequently destroyed once no longer required. The Information Commissioner agrees with the Ministry of Legal Affairs and Constitutional Reform Headquarters that this record could not reasonably have reflected any separate investigation by the Ministry of Legal Affairs Headquarters, nor could the Permanent Secretary's notes on the Internal Audit Report be considered as a final version of any separate inquiry.
52. The quality of the Ministry of Legal Affairs and Constitutional Reform Headquarters' analysis of the request was adequate.

[2] The scope of the search that it decided to make on the basis of that analysis

53. The Ministry of Legal Affairs and Constitutional Reform Headquarters did not provide written submissions to evidence the scope of the search it undertook when re-processing the remaining part of item 1 of the PATI request in July-October 2021. The Information Commissioner accepts that its effort was limited to relying on the Permanent Secretary's personal knowledge that the Ministry of Legal Affairs Headquarters never separately investigated the matter in 2018-2019 and, therefore, no such record ever existed.
54. Although the Ministry of Legal Affairs and Constitutional Reform Headquarters did not make a record of its search efforts, as required by regulation 5(2) of the PATI Regulations, it has demonstrated a reasonable scope of its search under the circumstances by complying with the Information Commissioner's request for affidavit evidence to clarify some factual gaps as highlighted during this review. In light of the representations in the affidavit evidence, no reasonable justification existed for expanding the scope of the search that the Ministry of Legal Affairs and Constitutional Reform Headquarters undertook.

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<sup>21</sup> See Politica, '[Government goes silent on DCFS child abuse probe](#)' (30 September 2018).

55. The Information Commissioner acknowledges that the Permanent Secretary's affidavit evidence expressly stated that their personal work knowledge could only speak to the investigation of the allegation about the DCFS Director after they "inherited" the process on 18 November 2018. The allegation letter was received in August 2018 and, at some point later that month, the matter was referred to Internal Audit, after which Internal Audit initiated a formal investigation in September 2018, as described above in paragraphs 3-11.
56. In light of this, the Information Commissioner considers whether it would have been reasonable to require the Ministry of Legal Affairs and Constitutional Reform Headquarters to have identified locations for and searched the records of the Permanent Secretary assigned to the Ministry of Social Development and Sports Headquarters when the allegation letter was received. This step would have answered without any doubt whether this first Permanent Secretary, and before Internal Audit's formal engagement began in September 2018, had initiated an investigation into the allegation against the DCFS Director that would have been documented by a separate report.<sup>22</sup>
57. It is more reasonably likely, though, that if the Ministry of Social Development and Sports Headquarters had completed a separate report in August/September 2018, the existence of that report would have been either acknowledged by Internal Audit or made known to the Permanent Secretary who inherited the process. The Permanent Secretary's affidavit evidence described the Internal Audit Report as "comprehensive", which they verified through their subsequent fact-checking.
58. Further, as shown in [Decision 19/2019](#) at paragraph 26, the ICO received submissions from Internal Audit that it did not hold any documentation for any separate investigation undertaken by any permanent secretary responsible for DCFS at the relevant time, or by any other public authority, on the allegation against the DCFS Director. This submission addressed the period from when Internal Audit's engagement was requested in August 2018 until the report was issued to the Permanent Secretary conveying the investigation outcome, i.e., August to 14 December 2018.
59. Based on this, expanding the scope of the search undertaken during this review was unlikely to locate any responsive 'final investigation report created in August/September 2018' which was unknown to both the Permanent Secretary and Internal Audit. Requiring the Ministry of Legal Affairs and Constitutional Reform Headquarters to expand the

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<sup>22</sup> As a reminder, the allegation letter was received on 10 August 2018 by the Ministry of Social Development and Sports Headquarters. Once disbanded on 1 November 2018, the Ministry of Legal Affairs Headquarters became responsible for DCFS and continued to be at the time of the Internal Audit Report, issued on 14 December 2018.

scope of the search to the records of the first Permanent Secretary, who had retired from the Public Service, would not have been proportionate under these circumstances.

60. The Information Commissioner appreciates that the Applicant, based on official statements alone, reasonably understood that the government's response to the allegation letter involved two separate lines of investigation on the Director, one of which was conducted by way of the Internal Audit Report. This was simply not the case. Based on this review, the allegation against the DCFS Director involved one line of investigation, resulting in the final and full report by Internal Audit dated 14 December 2018.
61. The Applicant pointed to the Premier's statement of 14 December 2018 as support for their view and as confirming the existence of a second report by the responsible Ministry into the allegation about the DCFS Director. The Information Commissioner agrees with the Ministry of Legal Affairs Headquarters' original decision that the Premier's statement did not confirm the existence of an investigation and report by either the Ministry of Social Development and Sports Headquarters or the Ministry of Legal Affairs Headquarters in response to the allegation letter in relation to the DCFS Director. It is unclear whether the Premier was referring to the responsible Ministry's investigation into other DCFS officers arising from the allegation letter, if any.
62. Unfortunately during this review, the Ministry of Legal Affairs and Constitutional Reform Headquarters has not provided clarification about how to appropriately understand the parts of the Premier's 2018 statement in Parliament and the Ministry of Legal Affairs Headquarters' 2019 statement, referring to a separate line of investigation, which appear to have led to misunderstanding within the public.
63. The Information Commissioner is satisfied that the scope of Ministry of Legal Affairs and Constitutional Reform Headquarters' search during this review was adequate.

[3] The rigour and efficiency with which the search was then conducted

64. In light of the above, the Ministry of Legal Affairs and Constitutional Reform Headquarters conducted its search by relying on the personal work knowledge of the Permanent Secretary, which was confirmed during this review in the affidavit evidence.
65. The Ministry of Legal Affairs and Constitutional Reform Headquarters has adequately shown that the requested record was known to have never existed, as a matter of the personal work knowledge of the most senior public officer within the then-responsible public authority, the Permanent Secretary. Further, the ICO had received a similar

submission from another senior public officer, the Director of Internal Audit, in the related prior review in [Decision 19/2019](#).

66. Under the circumstances, the Ministry of Legal Affairs and Constitutional Reform Headquarters conducted its search with adequate rigour and efficiency.

*Conclusion*

67. The Information Commissioner is satisfied that the Ministry of Legal Affairs and Constitutional Reform Headquarters has justified its reliance on section 16(1)(a) in refusing the remaining part of item 1 of the original PATI request, seeking any full report produced by the responsible Ministry on misconduct allegations against the DCFS Director. This is because the Ministry of Legal Affairs and Constitutional Reform Headquarters took all reasonable steps to find a responsive record before concluding that none existed.

***Transfer of request – section 13 and regulations 5 and 8***

68. Section 13(5) of the PATI Act requires a public authority to transfer a PATI request when the record requested is not held by that authority but, to the knowledge of that authority, is held by another public authority; or in the case of more than one public authority, to the one whose functions more closely connect to the request's subject matter, in the opinion of the head of the public authority that originally received the request.
69. In accordance with section 3(3) of the PATI Act, a record is 'held by' a public authority if it is in the possession or custody, or is under the control, of that authority. With this definition of 'held by' in mind, the public authority must take reasonable steps under the circumstances to locate the responsive records and ensure that it has reasonable grounds to justify the transfer.
70. The Information Commissioner has set out the process for transferring a PATI request in [Decision 11/2018, Bermuda Police Service](#).<sup>23</sup> In sum, before making a transfer, the original public authority must consider:

[1] whether the original public authority holds any record responsive to the request; and, if not,

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<sup>23</sup> To date, the Information Commissioner has discussed the transfers of PATI requests in [Decisions 11/2018, Bermuda Police Service](#); [20/2019, Ministry of Finance Headquarters and Accountant General's Department](#); [03/2020, Ministry of Education Headquarters](#); and [17/2021, Ministry of Education Headquarters](#).



[2] whether the original public authority knows that one or more other public authorities hold records responsive to the request.

71. If the public authority is satisfied, after taking reasonable steps, that it does not hold any responsive record and it is aware that the record is held by one or more public authorities, then the public authority should transfer the PATI request to the more appropriate public authority.
72. To satisfy the first part of the test, a public authority must have a reasonable basis for determining that it does not hold the record. This may be achieved by conducting a reasonable search, as discussed in [Decision 04/2017, Department of Health](#), or by otherwise verifying that the record is not held by it, such as an Information Officer confirming in writing with the head of the public authority that no such records are held. An unverified assumption that a public authority does not hold categories of records is not sufficient.
73. When assessing the reasonableness of a public authority's determination that it does not hold the record, the Information Commissioner will consider the steps taken to search for the records. This includes an evaluation of (a) the quality of the public authority's analysis of the request, (b) the scope of the search that it decided to make on the basis of that analysis, and (c) the rigour and efficiency with which the search was then conducted.<sup>24</sup> The specific circumstances of each case will inform the extent of the reasonableness of these efforts.
74. Notably, regulation 5 of the PATI Regulations requires a public authority to "make reasonable efforts to locate a record", which is not the same thing as requiring a public authority to prove the existence or non-existence of a responsive record to the point of certainty. Further, having knowledge that another public authority holds the requested record is a lesser standard than requiring the original public authority to prove that the public authority receiving a transferred request holds the responsive record. Such a burden of proof exceeds what could reasonably be expected of one public authority regarding its knowledge about the record-keeping practices of another public authority.
75. Finally, a public authority bears the burden of demonstrating that, on the balance of probabilities, it has properly transferred a PATI request in accordance with section 13(5) of the PATI Act.

*Public authority's submissions*

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<sup>24</sup> See [Decision 02/2018, Department of Human Resources](#), at paras. 49-51.

76. The Ministry of Legal Affairs and Constitutional Reform Headquarters decided to transfer the request on 3 September 2021, on the basis that the Ministry of Social Development and Seniors Headquarters would hold any institutional records on the subject of the PATI request, due to a restructuring that changed ministerial responsibility for DCFS from the Ministry of Legal Affairs Headquarters to the Ministry of Social Development and Seniors Headquarters with effect on 9 November 2020.
77. As the Head of Authority for the Ministry of Legal Affairs and Constitutional Reform Headquarters, the Acting Permanent Secretary believed they had no authority to speak on behalf of another ministry and would be intervening with another department's matter if they were to make a decision on whether such a record existed, due to the change in ministerial responsibility. The transfer to the Ministry of Social Development and Seniors Headquarters was made to allow the responsible Ministry to decide the PATI request.

*Applicant's submissions*

78. The Applicant asserted that one of the public authorities responsible for DCFS must have held such a report on the inquiry into the DCFS Director's conduct. They maintained that, in refusing and transferring their PATI request, the government had led them on a "merry go round" that made a mockery of the PATI Act, while ensuring that the report did not "see the light of day".

*Discussion*

[1] Whether the original public authority holds any record responsive to the request

79. As concluded above, the Ministry of Legal Affairs and Constitutional Reform Headquarters was justified in concluding that it did not hold any responsive record for the PATI request when re-processing it in July-October 2021, in compliance with the Information Commissioner's [Decision 05/2021](#), as summarised in paragraph 67.

[2] Whether the original public authority knows that one or more other public authorities hold records responsive to the request

80. The Ministry of Legal Affairs and Constitutional Reform Headquarters' conclusion that no record existed in 2021, as a matter of fact, also meant that no record ever existed in 2019, in light of the reasoning given in paragraphs 54-61. No historical record could have existed amongst any institutional files related to DCFS, which would have been

transferred to the Ministry of Social Development and Seniors Headquarters after the restructuring in November 2020.

81. The Ministry of Legal Affairs and Constitutional Reform Headquarters had no factual basis to support a claim under section 13(5), that it knew the Ministry of Social Development and Seniors Headquarters held a responsive record. The Ministry of Legal Affairs and Constitutional Reform Headquarters, in fact, had the opposite knowledge as a result of the personal work knowledge of the Permanent Secretary for the then-Ministry of Legal Affairs Headquarters.
82. It appears that the Ministry of Legal Affairs and Constitutional Reform Headquarters sought to refer the PATI decision to the current portfolio holder. This approach, however, was not consistent with the requirements of section 13(5) of the PATI Act.
83. Requiring some basis for knowledge on behalf of the transferring public authority, that the receiving public authority holds a record, helps to ensure the PATI framework does not lead to a request bouncing from authority to authority while a requester awaits a substantive request—as happened with this request.

#### *Conclusion*

84. For the reasons above, the Information Commissioner is not satisfied that the Ministry of Legal Affairs and Constitutional Reform Headquarters was justified in transferring the PATI request to the Ministry of Social Development and Seniors Headquarters.

#### *Conclusion*

85. The Information Commissioner is satisfied that Ministry of Legal Affairs and Constitutional Reform Headquarters was justified in denying the PATI request under section 16(1)(a) of the PATI Act, because a responsive record did not exist. The Information Commissioner is not satisfied, however, that the Ministry of Legal Affairs and Constitutional Reform Headquarters was justified in transferring the request to the Ministry of Social Development and Seniors Headquarters under section 13(5) of the PATI Act.
86. The Information Commissioner does not require the Ministry of Legal Affairs and Constitutional Reform Headquarters to take any further steps with respect to this Decision. Although the Ministry of Legal Affairs and Constitutional Reform Headquarters was not justified in transferring the PATI request, it also issued a decision administratively denying the PATI request under section 16(1)(a). Generally, when the Information Commission annuls a transfer decision under section 13(5), she then issues an order

sending the PATI request back to the public authority to issue a fresh decision. Here, the Ministry of Legal Affairs and Constitutional Reform Headquarters has already issued such a decision, and the Information Commissioner has upheld it. Nothing further is required.

87. The Information Commissioner agrees with the Applicant's view that item 1 of their original PATI request has cycled between public authorities unnecessarily. This is of particular concern because the Permanent Secretary's affidavit evidence in this review made it clear that a straightforward answer could have been provided to the Applicant in the first instance in the original response to the PATI request in January 2019, which could have included a more fulsome explanation from the Ministry of Legal Affairs Headquarters to clarify any confusion within the public about the process for handling the misconduct allegations. Instead, the confusion lingered on and this Decision seeks to provide as much as clarity as possible within the confines of this review.
88. Notably, the PATI request sought a record that was expected to detail the process taken by the responsible Ministry to address allegations against the head of a department servicing some of Bermuda's most vulnerable population. As [Decision 05/2021](#) emphasised in paragraph 45, the role of the Director of Child and Family Services is critical for our community, and the need for transparency concerning the government's treatment of this population cannot be understated. Originally, the Ministry of Legal Affairs Headquarters relied on the fact that there was misinformation in the public domain about how the government had handled the allegations, as a reason for not explaining matters more clearly when responding to the PATI request. This was a missed opportunity.
89. The express purposes of the PATI Act in section 2(d) include informing the public about public authorities' activities, including how they make decisions. This PATI request fell squarely within this and other purposes, such as increasing accountability. It was clear to the Information Commissioner, through the Applicant's challenge to the public authorities' various responses to the PATI request, that more clarity was needed.
90. Here, it appears that some elected officials and official media statements publicly characterised the government's action using certain terms, which led the media to report things in a way that, in some respects, was a mischaracterisation. Even though official media statements were probably technically correct, when read alongside comments from some elected officials and coupled with the media's own sources, the narrative became muddled. A PATI request was made in this convoluted context to seek clarity, and, unfortunately, the PATI request responses contributed to the confusion, rather than providing clarity. It should not have taken several Information Commissioner's decisions for the PATI requester to receive a complete and accurate response on a matter of

significant public interest. It raises a question of whether an opportunity was missed for the public authorities involved with this PATI request to have strengthened public trust by offering greater transparency at the outset of this process.

91. The opportunity to strengthen public trust through greater transparency is likely to arise again. PATI rights enable requesters to more fully understand the context in which public authorities and elected officials make public statements. When confusion arises, as it did here, exercising PATI rights can be an effective means to access original records. With this information in hand, the public can test the veracity and source the support for what the government chooses to share about its activities. The result should be a greater understanding by the public of what decisions public authorities have made and how those decisions have been reached.

## Decision

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The Information Commissioner finds that the Ministry of Legal Affairs and Constitutional Reform Headquarters (**Ministry Headquarters**) was justified in administratively denying the request, in accordance with section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010. The Information Commissioner further finds that the Ministry Headquarters was not justified in transferring the request under section 13(5) of the PATI Act.

In accordance with section 48 of the PATI Act, the Information Commissioner affirms the internal review decision to deny the request under section 16(1)(a) and annuls the decision to have transferred it. For the reasons above, the Information Commissioner does not require the Ministry Headquarters to take further steps with respect to this Decision.

## Judicial Review

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The Applicant, the Ministry of Legal Affairs and Constitutional Reform Headquarters, 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  
28 February 2023

## Appendix: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Transfer of requests

13 ...

(5) Where a request under this section is received by a public authority and any record requested is not held by that authority but, to the knowledge of that authority, is held by one or more other public authorities, the public authority that received the request shall, not later than five working days after receipt of the request cause a copy of the request to be given—

(a) to that other public authority

...

#### Refusal of request on administrative grounds

16 (1) A public authority may refuse to grant a request if —

(a) the record requested does not exist or cannot be found after all reasonable steps have been taken to find it;

...

### Public Access to Information Regulations 2014

#### Reasonable search

5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

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