

Decision Notice

Decision 04/2023: Department of Health

Laboratory health and safety records

Reference no: 20220531-03

Decision date: 30 March 2023

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Health (**Department**) for specific health and safety reports and details on any complaint received about the Histology Laboratory. The Department denied the request in full on the basis that the PATI Act did not apply to the responsive records under section 4(1)(a), because they related to the exercise of a court's judicial functions.

The Acting Information Commissioner has found that the Department was justified, in part, in denying the request under section 4(1)(a) of the PATI Act and, where not justified, has ordered the Department to issue a new initial decision.

Relevant statutory provisions

Public Access to Information Act 2010: section 4(1)(a) (application).

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

Background

1. On 15 February 2022, the Applicant filed a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Health (**Department**), asking for:
 - a. the Department's May 2019 Occupational Health and Safety Visit report on the Histology Laboratory at the King Edward VII Memorial Hospital (**KEMH**) (**item 1**);
 - b. the Department's December 2019 investigation report on KEMH's Histology Laboratory (**item 2**);
 - c. any follow-up reports about KEMH's compliance with the Department's recommendations (**item 3**); and
 - d. details of any health and safety complaints about the Histology Laboratory from 2018 to date (**item 4**).
2. The Department's initial decision of 29 March 2022 refused the PATI request in full under various exemptions, and the Applicant asked for the Head of Authority's internal review.
3. On 26 May 2022, the Department issued an internal review decision, upholding the refusal though for a different reason: the Department found that the responsive records

related to the court's exercise of judicial functions and, as such, the PATI Act did not apply to them by virtue of section 4(1)(a). The internal review decision stated that the records were "related to a matter still pending before the courts" but did not explain more.

4. On 31 May 2022, the Applicant made a timely application for an independent review by the Information Commissioner, challenging the Department's internal review decision.

Investigation

5. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issue the Applicant wanted her to review.
6. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because the Department's submissions were required to determine whether its reliance on section 4(1)(a) was justified.
7. On 29 June 2022, the Information Commissioner's Office (**ICO**) notified the Department of the Applicant's valid application. The Department submitted a Schedule of Records, which described certain records responsive to the PATI request. It also explained that the Department no longer relied on section 4(1)(a) to refuse item 4 of the PATI request. The Department has not yet informed the Applicant of its revised position on item 4.
8. At the time, the Information Commissioner did not require the Department to grant her access to the responsive records, given the decision in [Attorney General v Information Commissioner](#) [2022] SC (Bda) 6 Civ (25 January 2022). In that case Puisne Judge Shade Subair Williams had found that the Information Commissioner did not have the power to examine records that a public authority claimed to fall outside the scope of the PATI Act by virtue of section 4(1).
9. On 24 March 2023, before this review was concluded, the Court of Appeal overturned the Supreme Court's decision¹. Even so, the Information Commissioner did not require the Department to submit the records responsive to items 1 and 2. This was because, by

¹ In [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ (24 March 2023), the Court of Appeal overturned Justice Subair Williams's ruling and found that the Information Commissioner has the power to examine records that public authorities claim to fall outside the scope of the PATI Act under section 4(1). The Court of Appeal did not disturb Justice Subair Williams's findings on the meaning of records relating to general administration and their distinction with records related to the functions of those public authorities, bodies and persons listed in section 4.

the time of the Court of Appeal's decision, the Department had provided sufficient information on these records for the Information Commissioner to decide on the Department's reliance on section 4(1)(a). The Information Commissioner had requested the Department to submit a brief affidavit on whether all records responsive to item 3 of the PATI request were, in fact, adduced into evidence for the cited legal proceeding. The Department did not submit an affidavit as requested.

10. 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 Department and the Applicant were invited to make submissions during this review.
11. The Department made submissions to support its reliance on section 4(1)(a). Though the Applicant did not respond to the ICO's formal invitation to make submissions, they commented on the Department's reliance on section 4(1)(a) in earlier correspondence with the ICO.

Acting Information Commissioner's analysis and findings

12. In coming to this Decision, the Acting Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the Department and the Applicant. She is satisfied that no matter of relevance has been overlooked.
13. The Acting Information Commissioner strives to provide as full a public explanation of her reasoning and Decision as possible. Section 53(2) of the PATI Act, however, prevents discussion of the withheld records. As a result, the analysis below cannot be as detailed as would otherwise be preferred.

Applicability of the PATI Act – section 4(1)(a)

14. Justice Subair Williams explained in [Attorney General v Information Commissioner](#), para. 24, that the "scope of the application of the PATI Act may be determined by section 4 which lists the classes of material to which the legislation does not apply". Under section 4(1)(a), the PATI Act does not apply to "records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body of person". Relevant to this review are records relating to the exercise of a court's judicial functions.
15. The provision in section 4(1)(a) does not mean that the public does not have the right to ask for records relating to the exercise of a court's judicial functions. The public can make a PATI request for those records, and public authorities must respond to their requests

in accordance with the provisions of the PATI Act². A public authority is justified to deny public access to those records if it can show that the records fall under the category prescribed in section 4(1)(a).

16. Though the PATI Act and the Interpretation Act 1951 do not define ‘judicial functions’, it is well-established that ‘judicial functions’ include a court’s adjudicative functions (i.e., making an official decision about who is right between disagreeing parties)³.
17. Not all records related to legal proceedings, which are held by a public authority, are excluded from public access through the PATI Act by virtue of section 4(1)(a). The phrase ‘relating to the exercise of judicial functions by a court’ (as opposed to, for example, ‘relating to judicial proceedings’) suggests that, for section 4(1)(a) to apply, the records ought to have some relation to the courts, either directly or indirectly. Section 4(1)(a) would likely apply to records including, but not limited to, those filed with the court for legal proceedings, correspondence issued between parties under a court’s instruction, order or direction, as well as records on administering the court’s adjudicative functions, such as cover letters to the court or between parties.
18. In contrast, a public authority’s internal correspondence discussing a pending legal proceeding might not fall within the scope of section 4(1)(a). In these circumstances, unless another provision in section 4(1)(b) applies, the PATI Act would be applicable. Public authorities then would justify their decision to not disclose those records under an exemption in Part 4 of the PATI Act.
19. Section 4(2) provides that records relating to the court’s general administration continue to fall within the scope of the PATI Act. In interpreting the scope of section 4(2), Justice Subair Williams in [Attorney General v Information Commissioner](#), para. 37, adopted the definition of ‘general administration’ set out by the Irish Information Commissioner, i.e.,

² Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ, at para. 75: “I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act ... they cannot be treated as so excluded. Accordingly, [the PATI requester] was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the [Head of Authority] in respect of the records which she sought, and the Commissioner was entitled to commence a review of the matter” under section 47.

³ See [Decision 08/2021, Police Complaints Authority](#), at para. 15.

records relating to personnel, pay matters, recruitment, accounts, information, technology, accommodation, internal organisation, office procedures and the like.⁴

20. In sum, for a record to be excluded from the scope of the PATI Act by virtue of section 4(1)(a), the following must be considered:

[1] What or who is the relevant court, tribunal or other body or person whose functions are being considered?

[2] What is the relevant exercise of a judicial or quasi-judicial function to which the record relates?

[3] Does the record relate to the general administration of the court, tribunal or other body or person and come within the scope of the PATI Act by virtue of section 4(2)(a)?

Public authority's submissions

21. The Department explained that its reliance on section 4(1)(a) was on the basis that the responsive records related to the exercise of judicial functions of a court, particularly the Supreme Court.

22. The Department described the relevant legal proceeding for the ICO, including the parties' names and the Court's case number. The Department explained that the legal matter was pending with the Supreme Court at the time of its internal review.

23. The Department explained that the requested records directly related to the Court, in that they formed part of the evidence submitted to the Supreme Court in the identified legal proceeding. According to the Department, the fact that the Supreme Court will hand down its official decision on the dispute between the disagreeing parties was itself confirmation that the relevant records related to the Supreme Court's performance of its judicial functions.

24. The Department submitted that the responsive records did not relate to the Supreme Court's general administration, because they were not records commonly held by other public authorities, such as those about facilities, human resources or the like.

⁴ In [Decision 02/2019, Office of the Governor](#), para. 20, the Information Commissioner adopted this definition of 'general administration' as applied by the Irish Information Commissioner. See also [Decision 09/2021, Human Rights Commission](#), at para. 17; [Decision 05/2020, Human Rights Commission](#), at para. 15; [Decision 19/2019, Internal Audit Department](#), at para. 19; and [Decision 21/2022, Office of the Governor](#), at para. 13.

Applicant's submissions

25. The Applicant submitted that they were not aware of a court matter in which these records were filed and, at that time, could not find information on it. The Applicant contended that, even if a court matter were pending, not all the responsive records would fall under section 4(1)(a).

Discussion

26. The Acting Information Commissioner considers section 4(1)(a) of the PATI Act for items 1-3 only, because the Department abandoned its reliance on section 4(1)(a) to refuse item 4 of the PATI request.

[1] What or who is the relevant court whose functions are being considered?

27. The Acting Information Commissioner accepts the Department's submission that the Supreme Court was the relevant court whose functions it considered when relying on section 4(1)(a).

[2] What is the relevant exercise of a judicial or quasi-judicial function to which the record relates?

28. Having considered the Department's submission, the Acting Information Commissioner accepts that the records responsive to items 1 and 2 of the PATI request formed part of the evidence filed for a cited legal proceeding before the Supreme Court, which was pending at the time of the internal review. Items 1 and 2 each sought a specific report that, more probably than not, related to the pending litigation. The Acting Information Commissioner is satisfied that these records related to the Court's adjudicative function.
29. However, the Department has not submitted sufficient evidence to persuade the Acting Information Commissioner that its reliance on section 4(1)(a) to refuse item 3 of the PATI request was justified. As noted in paragraph 1, item 3 asked for a category of records. The request's description of item 3 did not indicate the number or type of potentially responsive records, nor their content with any specificity. In the absence of more information from the Department, the Acting Information Commissioner cannot conclude whether it was more probable than not that records responsive to item 3, if any, were related to the pending litigation.
30. The Acting Information Commissioner does not need to further consider the Department's reliance on section 4(1)(a) to justify its refusal of item 3.

[3] Does the record relate to the general administration of the court and come within the scope of the PATI Act by virtue of section 4(2)(a)?

31. The Acting Information Commissioner agrees with the Department that the records responsive to items 1 and 2 of the PATI request were not records commonly held by other public authorities. As such, these records did not relate to the Supreme Court's general administration and did not fall within the scope of the PATI Act by virtue of section 4(2)(a).

Conclusion

32. The Acting Information Commissioner is satisfied that the Department properly relied on section 4(1)(a) of the PATI Act to refuse public access to records responsive to items 1 and 2 of the PATI request. This is because these records related to the exercise of the Supreme Court's judicial functions and did not relate to its general administration.
33. In the absence of adequate submissions from the Department, the Acting Information Commissioner is not satisfied that the Department properly relied on section 4(1)(a) of the PATI Act to refuse item 3 of the PATI request under section 4(1)(a) of the PATI Act. As noted at paragraph 26, the Department's original reliance on this provision to refuse item 4 was not considered.

Decision

The Acting Information Commissioner finds that the Department of Health (**Department**) was justified in denying access to certain records by virtue of section 4(1)(a) of the Public Access to Information (**PATI**) Act 2010, because they related to the exercise of the Supreme Court's judicial functions. The Acting Information Commissioner finds that the Department was not justified in refusing items 3 and 4 of the PATI request under section 4(1)(a).

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

- affirms the Department's internal review decision to deny access to the records responsive to items 1 and 2 of the PATI request under section 4(1)(a);
- annuls the Department's internal review decision to deny items 3 and 4 of the PATI request under section 4(1)(a); and
- orders the Department to re-process items 3 and 4 of the PATI request and to issue a new initial decision to the Applicant.

The Acting Information Commissioner requires the Department to issue its new initial decision on items 3 and 4 of the PATI request, as directed by this Decision and the accompanying Order, on or before **Thursday, 11 May 2023**.

Judicial Review

The Applicant, the Department or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

Enforcement

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



Answer Styannes
Acting Information Commissioner
30 March 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Application

- 4 (1) Subject to subsection (2), this Act does not apply to—
- (a) records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person; or
 - ...
- (2) The reference to records in subsection (1) does not include records relating to the general administration of—
- (a) any court, tribunal or other body or person referred to in subsection (1)(a); or
 - ...

**Information Commissioner for Bermuda
Maxwell Roberts Building
4th Floor
One Church Street
Hamilton, HM 11
ico.bm
441-543-3700**