

Decision Notice

Decision 37/2023: Ministry of Health Headquarters

Records related to payment agreements

Reference no: 20180904-02

Decision date: 27 October 2023

Summary

This Decision involves the second set of records responsive to the Applicant's request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Health Headquarters (**Ministry Headquarters**) for records relating to an agreement between the Government of Bermuda and the Brown-Darrell Clinic and Bermuda Healthcare Services. In [Decision 18/2022](#), the Information Commissioner varied and reversed, in part, the Ministry Headquarters' reliance on exemptions to withhold 58 records, in whole or in part, in response to this PATI request. The present Decision reviews the Ministry Headquarters' decision that the PATI Act does not apply to 77 other records by virtue of section 4(1)(b)(vi) because the records were created or obtained by the Attorney General's Chambers while carrying out its functions as the legal advisor to the Government.

The Information Commissioner has affirmed the Ministry Headquarters' decision in part, finding that it was justified to deny access to most of the records or parts of records under section 4(1)(b)(vi). She has also reversed, in part, the Ministry Headquarters refusal of the remaining records or parts of records on the grounds that these records do not fall within section 4(1)(b)(vi) and must be processed in accordance with the provisions of the PATI Act.

The Information Commissioner has ordered the Ministry Headquarters to process the records and parts of records that fall within the PATI Act and to issue a new initial decision, in accordance with this Decision and the accompanying Order.

Relevant statutory provisions

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

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

Background

1. The background on the agreement between the Government of Bermuda (**Government**) and the Brown-Darrell Clinic and Bermuda Healthcare Services for payments that gave rise to this PATI request is set out in [Decision 18/2022](#), Ministry of Health Headquarters, paragraphs 1-6, and is not repeated here.
2. On 14 February 2018, the Applicant made a Public Access to Information (**PATI**) request to the Ministry of Health Headquarters (**Ministry Headquarters**), asking for:

- a. the agreement reached on 8 December 2017 between the Ministry Headquarters and the Brown-Darrell Clinic and Bermuda Healthcare Services regarding payments of \$120,000 and \$480,000, respectively (**item 1**);
 - b. all communications concerning that agreement (**item 2**);
 - c. records showing how the amounts were calculated (**item 3**); and
 - d. the letter received by the Ministry Headquarters “before action” in October 2017 pertaining to judicial review of the Bermuda Hospitals Board (Hospital Fees) Amendment Regulations 2017 as well as the response to the letter and further communications (**item 4**).
3. On 10 May 2018, the Ministry Headquarters issued an initial decision that found some records fell outside the scope of the PATI Act by virtue of section 4(1)(b)(vi) because the records were created or obtained by the Attorney General’s Chambers (**AG’s Chambers**) while carrying out its constitutional functions as the legal advisor to the Government. The Ministry Headquarters also granted access to many records and parts of records. The Ministry Headquarters denied access to the remaining records or parts of records by relying on various exemptions in Part 4 of the PATI Act.
 4. Following the Applicant’s request for an internal review, the Ministry Headquarters issued an internal review decision on 30 July 2018 upholding its initial decision.
 5. On 4 September 2018, the Applicant made a timely application for an independent review by the Information Commissioner of the Ministry Headquarters’ internal review decision.

Investigation

6. 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.
7. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because the Information Commissioner had to consider the Ministry Headquarters’ reliance on section 4(1)(b)(vi).
8. On 5 October 2018, the Information Commissioner’s Office (**ICO**) notified the Ministry Headquarters of this review and asked for a copy of the records withheld under the

various provisions referred to in the internal review decision, including those records refused by virtue of section 4(1)(b)(vi).

9. As explained in [Decision 18/2022, Ministry of Health Headquarters](#), paragraphs 16-20, the Ministry Headquarters refused to provide the Information Commissioner with copies of records which it claimed to fall outside the scope of the PATI Act by virtue of section 4. This led to a protracted effort by the Information Commissioner to obtain copies of the records and resulted in the Attorney General applying for judicial review of the Information Commissioner's powers to examine records claimed to fall under section 4.
10. In light of the judicial review application, the Information Commissioner split her review of the Ministry Headquarters' internal review decision to proceed with assessing records that were refused under an exemption in Part 4 of the PATI Act¹ and records that were refused under section 4(1)(b)(vi).
11. On 24 March 2023, the judicial review concluded with a decision by the Court of Appeal, [Information Commissioner v Attorney General](#) [2023] CA (Bda) 6 Civ², which confirmed that the Information Commissioner has the power to examine records that public authorities claim to fall outside the scope of the PATI Act by virtue of section 4. The Court of Appeal also clarified that, for the purposes of her review, the Information Commissioner could exercise her discretion to determine whether copies of the actual records were required, or whether she would accept a sufficient description of the records or some other evidence to enable her review of the public authority's internal review decision³.
12. The Ministry Headquarters provided the ICO with a Schedule of Records containing descriptions of the records. On 11 April 2023, the Attorney General also submitted an affidavit to the ICO confirming that certain records were obtained or created by the AG's Chambers in the course of carrying out its functions and that they did not pertain to the general administration of the AG's Chambers (**AG's Chambers' Affidavit**).
13. The Information Commissioner sought copies of certain records, for which the description was insufficient, to allow her to determine the Ministry Headquarters' reliance on section 4(1)(b)(vi).

¹ This part of the review was dealt with in [Decision 18/2022, Ministry of Health Headquarters](#).

² The Court of Appeal overturned the Supreme Court's ruling in [Attorney General v Information Commissioner](#) [2022] SC (Bda) 6 Civ (25 January 2022). The Court of Appeal decision has not been appealed by the Attorney General.

³ [Information Commissioner v Attorney General](#), at paras. 85-87.

14. The Ministry Headquarters provided the ICO with copies of those records, except for five records that could no longer be retrieved. The Ministry Headquarters also provided an additional six records that had been identified during this review. In total, this review considers the application of section 4(1)(b)(vi) to 77 records, namely: 1, 4, 6-11, 16-37, 41, 46, 47, 50, 53, 58, 64, 74, 76, 77, 84, 86-91, 93-100, 102-108, 119, 122, 125, 127, 129, 131, 137, 143, 169 and 190-195.
15. 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 Headquarters and the Applicant responded to the invitation to make submissions during this review.

Information Commissioner's analysis and findings

16. In coming to this Decision, the Information Commissioner considered all the relevant submissions, or parts of submissions, from the Ministry Headquarters and the Applicant. She is satisfied that no matter of relevance has been overlooked.
17. The 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)(b)(vi)

18. Sir Christopher Clarke explained in [Information Commissioner v Attorney General](#), paragraph 17, that the “PATI Act excludes from its operation the records of a substantial number of public bodies to which the Legislature has decided that it shall not apply so long as such records do not relate to the general administration of the relevant body”. Among these records are those obtained or created by the AG’s Chambers while carrying out its functions, as set out in section 4(1)(b)(vi) of the PATI Act.
19. The provision in section 4(1)(b) does not mean that the public does not have a right to ask for records that were obtained or created by these public authorities. The public can (and does) make PATI requests for those records, and public authorities must respond to their request in accordance with the provisions of the PATI Act. As part of this process, a PATI requester who disagrees with a public authority’s reliance on section 4(1)(b) has a right to an independent review by the Information Commissioner of the public authorities’ internal review decision. 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)(b).

20. As Sir Clarke confirmed in [Information Commissioner v Attorney General](#), at para. 75, “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 [of the PATI Act], 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”.
21. Section 4(2) provides that records relating to the general administration of the public authorities listed in section 4(1)(b) 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. 40, 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.⁴ This finding was not disturbed by the Court of Appeal decision.
22. In sum, for a record to be excluded from the scope of the PATI Act by virtue of section 4(1)(b)(vi), the following must be considered:

[1] Was the record obtained or created by the AG’s Chambers?

[2] Was the record obtained or created by the AG’s Chambers in the course of carrying out its functions?

[3] Does the record relate to the general administration of the AG’s Chambers’ and come within the scope of the PATI Act by virtue of section 4(2)(b)?

Public authority’s submissions

23. The Ministry Headquarters took the view that any records held by the AG’s Chambers would fall outside the scope of the PATI Act by virtue of section 4(1)(b)(vi).

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.

24. The Ministry Headquarters explained in its internal review decision that the relevant agreement between the Government and the Brown-Darrell Clinic and Bermuda Healthcare Services as well as the letter before action were both confidential documents drafted or obtained by the AG's Chambers. The Ministry Headquarters further claimed that all correspondence and communications relating to the agreement and letter before action held by the AG's Chambers were redacted and withheld on the same ground, because the PATI Act does not apply to records obtained by the AG's Chambers in the course of carrying out their functions.
25. The Ministry Headquarters submitted that all emails where the names of the AG's Chambers staff appear and the relevant responses fell within the scope of section 4(1)(b)(vi) and thus were excluded from the application of the PATI Act. The Ministry Headquarters submitted that section 4(1)(b)(vi) also applies to any correspondence involving the Acting Attorney General.
26. The Ministry Headquarters explained that the Government and the Ministry Headquarters, specifically, are clients of the AG's Chambers. The Ministry Headquarters prepared the relevant information based on the advice and questions received from the AG's Chambers in relation to the pending litigation. It further explained that the final answer would have been forwarded to the AG's Chambers, but the discussions between the technical officers were how the Ministry Headquarters and the AG's Chambers reached the final answer. Therefore, although the AG's Chambers was not openly copied on some of the emails, the responses were direct results of the advice provided and thus would be considered legally privileged.

Applicant's submissions

27. The Applicant believed that many of the requested records would not fall under section 4 of the PATI Act and, therefore, should be subject to the provisions of the Act.

Discussion

28. The Information Commissioner considers the Ministry Headquarters' reliance on section 4(1)(b)(vi) to records 1, 4, 6-11, 16-37, 41, 46, 47, 50, 53, 58, 64, 74, 76, 77, 84, 86-91, 93-100, 102-108, 119, 122, 125, 127, 129, 131, 137, 143, 169 and 190-195.

[1] Was the record obtained or created by the AG's Chambers?

29. The Information Commissioner acknowledges the Ministry Headquarters' argument in paragraph 26 above, that some of these records involved internal discussions of the Ministry Headquarters about how to respond to the AG's Chambers or discussions based on its advice, and that legal professional privilege may attach to this communication. The

Ministry Headquarters' internal discussions, however, do not fall within the scope of section 4(1)(b)(vi) because these records were not "obtained or created by" the AG's Chambers. The test for section 4(1)(b)(vi) is not the same as a showing that legal professional privilege attaches to the communication.

30. The Information Commissioner is not satisfied that records 21, 103, 169 and 192-195, as well as certain parts of records 7, 17, 90, 95, 96, 105, 106, 122, 125, 127, 129, 137 and 143, were obtained or created by the AG's Chambers, because neither the Attorney General nor her staff sent or were copied in on the correspondence.
31. The Ministry Headquarters reliance on section 4(1)(b)(vi) for these records or parts of records is not considered further.
32. Having reviewed the remaining withheld records provided to the ICO and the information that was made available, including the Ministry Headquarters' Schedule of Records and the AG's Chambers' Affidavit, the Information Commissioner is satisfied that records 1, 4, 6, 8-11, 16, 18-20, 22-37, 41, 46, 47, 50, 53, 58, 64, 74, 76, 77, 84, 86-89, 91, 93, 94, 97-99, 100, 102, 104, 107, 108, 119, 131, 190 and 191, as well as certain parts of records 7, 17, 90, 95, 96, 105, 106 and 122, were obtained or created by the AG's Chambers.

[2] Was the record obtained or created by the AG's Chambers in the course of carrying out its functions?

33. This question is considered for the records or parts of records identified in paragraph 32 only. The Information Commissioner is satisfied that, apart from record 98, these records or parts of records were obtained or created by the AG's Chambers while carrying out its functions as the legal advisor to the Ministry Headquarters.
34. Although the AG's Chambers was included in the correspondence in record 98, the Information Commissioner is not satisfied that this record was obtained by the AG's Chambers in the course of carrying out its functions. This was because the relevant correspondence occurred after the settlement agreement was finalised and the correspondence involved discussions about the technical aspects of implementing the settlement agreement. The AG's Chambers was no longer providing advice or otherwise carrying out its functions when copied as a matter of routine on the correspondence.

[3] Does the record relate to the AG's Chambers' general administration and come within the scope of the PATI Act by virtue of section 4(2)(b)?

35. This question is considered only for records 1, 4, 6, 8-11, 16, 18-20, 22-37, 41, 46, 47, 50, 53, 58, 64, 74, 76, 77, 84, 86-89, 91, 93, 94, 97, 99, 100, 102, 104, 107, 108, 119, 131, 190

and 191 as well as parts of records 7, 17, 90, 95, 96, 105, 106 and 122. The Information Commissioner is satisfied that these records or parts of records did not relate to the AG's Chambers general administration. Rather, they relate to the AG's Chambers core constitutional functions as the legal advisor to the Government. The exception in section 4(2)(b) does not apply.

Conclusion

36. The Information Commissioner is satisfied that the Ministry Headquarters was justified to refuse access to records 1, 4, 6, 8-11, 16, 18-20, 22-37, 41, 46, 47, 50, 53, 58, 64, 74, 76, 77, 84, 86-89, 91, 93, 94, 97, 99, 100, 102, 104, 107, 108, 119, 131, 190 and 191 as well as parts of records 7, 17, 90, 95, 96, 105, 106 and 122 because they fall outside the scope of the PATI Act by virtue of section 4(1)(b)(vi).
37. She is not satisfied that the Ministry Headquarters was justified to refuse access to records 21, 98, 103, 169 and 192-195, as well as parts of records 7, 17, 90, 95, 96, 105, 106, 122, 125, 127, 129, 137 and 143 under section 4(1)(b)(vi) because they were not obtained or created by the AG's Chambers while carrying out its functions.

Decision

The Information Commissioner finds that the Ministry of Health Headquarters (**Ministry Headquarters**) was justified, in part, in relying on section 4(1)(b)(vi) of the Public Access to Information (**PATI**) Act 2010 to refuse access to some of the responsive records or parts of records.

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

- affirms the denial of access for records 1, 4, 6, 8-11, 16, 18-20, 22-37, 41, 46, 47, 50, 53, 58, 64, 74, 76, 77, 84, 86-89, 91, 93, 94, 97, 99, 100, 102, 104, 107, 108, 119, 131, 190 and 191, as well as parts of records 7, 17, 90, 95, 96, 105, 106 and 122 because they fall outside the scope of the PATI Act by virtue of section 4(1)(b)(vi);
- reverses the decision that records 21, 98, 103, 169 and 192-195 as well as parts of records 7, 17, 90, 95, 96, 105, 106, 122, 125, 127, 129, 137 and 143 fall outside the scope of the PATI Act by virtue of section 4(1)(b)(vi); and
- orders the Ministry Headquarters to process (i.e. decide whether to disclose or withhold), in accordance with the PATI Act, records 21, 98, 103, 169 and 192-195 as well as the relevant parts of records 7, 17, 90, 95, 96, 105, 106, 122, 125, 127, 129, 137 and 143, as set out in the Confidential Annex to this Decision, and to issue a new initial decision to the Applicant on these records or parts of records, with a copy to the Information Commissioner.

The Information Commissioner requires the Ministry Headquarters' compliance as directed by this Decision and the accompanying Order, on or before **Friday, 8 December 2023**.

Judicial Review

The Applicant, the Ministry of Health 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.

Enforcement

This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Ministry of Health Headquarters fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.

Gitanjali S. Gutierrez
Information Commissioner
27 October 2023

Appendix I: Relevant statutory provisions

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—
 - ...
 - (vi) the Attorney General’s Chambers;
 - ...
- (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).

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