

Decision Notice

Decision 38/2023: Department of Child and Family Services

Overseas placement records

Reference no: 20200826-01

Decision date: 31 October 2023

Summary

The Applicant submitted a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Child and Family Services (**Department**) for records about Utah-based residential treatment centres. The Department denied access to certain records under section 37(1) of the PATI Act.

The Information Commissioner has affirmed the Department's decision, finding that the records were exempt by virtue of section 37(1) of the PATI Act because their disclosure was prohibited by other legislation, namely section 11 of the Children Act 1998. The Information Commissioner also noted that section 37(1) has required an outcome in this Decision that is inconsistent with the PATI Act's purposes and is ripe for legislative attention.

Relevant statutory provisions

Public Access to Information Act 2010: section 12 (access to records); section 37 (disclosure prohibited by other legislation).

Children Act 1998: section 11 (disclosure of information).

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

Background

1. This is one of a series of Public Access to Information (**PATI**) requests made to the Department of Child and Family Services (**Department**) related to the placement of Bermuda's young people in residential treatment centres overseas. They were made amidst concerns at the time about the capacity of agencies in Bermuda to monitor for the risk of abuses in such overseas facilities¹. This particular request focused on Utah-based centres and was made shortly after the death of a Bermudian teenager while in the care of one such facility.
2. On 29 November 2019, the Applicant made a PATI request to the Department, asking for:

¹ See, for example, Nonprofit Alliance of Bermuda, '[Campaigners call for alternative approach](#)' (16 December 2019).

- a. any contract between the Bermuda Government and any Utah-based youth residential treatment centre, regarding placement of Bermuda youth from 2014-present (**item 1**);
 - b. the total amount paid to each Utah-based youth residential treatment centre from 2014-present (**item 2**); and
 - c. the total number of Bermudian children placed in any Utah-based youth residential treatment centre from 2014-present, and if this data existed, for it to be broken down by year and receiving facility (**item 3**).
3. On 21 February 2020, the Department issued an initial decision. It denied access to the facility contracts (item 1) under section 37 of the PATI Act 2010 because disclosure was prohibited by section 11 of the [Children Act 1998 \(Children Act\)](#). It also responded with full information for item 2 and provided the total number of children placed for item 3, without a breakdown by year and facility.
4. On 21 June 2020, the Applicant asked for an internal review out-of-time, explaining that they were late as they appreciated how busy the Department would be due to the COVID-19 pandemic. The Department accepted the late request on 1 July 2020, triggering the Department's statutory deadline for issuing the outcome of its internal review.
5. The Department issued an internal review decision on 12 August 2020 upholding its initial decision.
6. On 26 August 2020, the Applicant made a timely application for an independent review by the Information Commissioner of the Department's internal review decision.

Investigation

7. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.
8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate, because access to the records was required to determine whether the Department's reliance on the exemption was justified.
9. On 15 October 2020, the Information Commissioner's Office (**ICO**) notified the Department of this review and asked for a sample of the withheld records. The

Department provided a sample of nine facility contracts from eight different Utah-based facilities. It provided a record schedule, which included notes on why section 37 of the PATI Act was applied to all contracts in full. The Department also explained that client files containing contracts for four other facilities were stored in Archives and would take more time to retrieve. Finding the sample records sufficient, the ICO did not require retrieval of the additional contracts.

10. After carefully reviewing the sample contracts, the ICO narrowed the responsive records to the admission agreements only, i.e., the contract, and not the other documents accompanying the contracts, such as medical checklists or activity forms.
11. 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 responded to the invitation to make submissions during this review.

Information Commissioner's analysis and findings

12. In coming to this Decision, the Information Commissioner considered all the relevant submissions, or parts of submissions, from the Department and the Applicant. She is satisfied that no matter of relevance has been overlooked.

Complete response – section 12(2)(b)

13. Section 12(2)(b) of the PATI Act requires a public authority to make every reasonable effort to respond to requests completely.
14. This provision does not mean that a public authority must ensure that every single record responsive to a PATI request is located and processed. Section 12(2)(b) is also not concerned with whether the information captured in a record is a complete documentation of an issue, nor does section 12(2)(b) require public authorities to provide information which the requester considers to be necessary to fill gaps in the existing records.
15. Instead, section 12(2)(b) requires an assessment of whether the public authority's efforts to provide a complete response to the PATI request were reasonable, and not whether the information contained in the record itself is 'complete'.

Public authority's submissions

16. The Department explained that, for item 3 of the PATI request, given the format of its historical data, no record existed to give an accurate breakdown by year and facility for the requested period (2014-2019). The facility information was mixed during any given year because children would transfer to and from facilities within the same year to receive different services and participate in specialised programmes.
17. Though not relevant to the period at issue, the Department offered that a fresh response could be provided to the Applicant by year and facility for 2021 and 2022, as that information was more straightforward.

Applicant's submissions

18. The Applicant did not accept that the Department had not kept its records in a way that would allow it to show where it sent children and how many children went to each facility each year, emphasising the Department's responsibility. They had no information on the Department's efforts to try and collate the information they believed could have been gathered and shared. They submitted that this information was in the public interest to know.

Discussion

19. The Information Commissioner accepts the Department's explanation during this review, that the format of its historical data prevented it from breaking down the total number of youths per year per facility. The Department did not maintain, for example, a standalone spreadsheet of this historical data; instead, the information was contained in individual client files.
20. The Department has given similar explanations for other PATI requests about historical information contained within its client files that were managed only in a hard-copy format. Even though the Department's initial and internal review decisions for this PATI request did not directly address this part of item 3, the Information Commissioner finds it unnecessary under the circumstances of this review to require the Department to take any other steps to search its hard-copy client files for the purpose of demonstrating that item 3 was responded to completely. This is particularly the case where the underlying records would fall within the scope of the section 37(1) exemption, as discussed below.

Conclusion

21. The Information Commissioner is satisfied that the Department met the requirement in section 12(2)(b) to make every reasonable effort to respond to item 3 of the PATI request completely.

Disclosure prohibited by other legislation – section 37(1)

22. Section 37(1) of the PATI Act allows a public authority to refuse public access to a record whose disclosure is prohibited by a statutory provision other than the PATI Act.
23. The mandatory nature of a prohibition in a provision may be indicated by the use of the word ‘shall’ and an accompanying provision setting out penalties for unauthorised disclosures. If the relevant statutory provision only applies when a particular function or duty of a public authority is engaged, the public authority must identify that function or duty and explain how the record falls within the prohibition.
24. The exemption in section 37(1) is not subject to the public interest test.
25. In sum, to rely on section 37(1), a public authority must consider the following²:
 - [1] What is the statutory provision creating the mandatory prohibition on disclosure?
 - [2] Does the record fall within this statutory provision?
 - [3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?
26. A public authority bears the burden of showing that, on the balance of probabilities, it has provided sufficient support to justify applying the exemption.

Public authority’s submissions

27. The Department submitted that disclosing the facility contracts was prohibited by the Children Act. The relevant duties of the Director (and their delegated officer) being performed were to investigate abuse and neglect allegations about a child and to arrange for the delivery of services for that child and their placement (section 9).
28. The Department also explained that placement and treatment overseas for any child in the Director’s care (section 25) happened under an order of the Court (section 84). Family

² See the Information Commissioner’s updated [Guidance: Disclosure prohibited by other legislation \(section 37\)](#) (January 2023).

Court matters were private and limited to parties in the matter (e.g., the children and their parents or legal guardians, their attorneys, their appointed litigation guardians and the Department), with the public excluded (section 17).

29. The Minister or Director's discretion to release information was exercised to grant access to the parent or guardian, or to the child if of legal age (section 11(1)(b)). Discretion not to release information might be exercised if it was professionally determined that the information would harm the child or recipient's health.
30. The Department explained that each contract was executed as part of the Department's duty to have a child accepted and enrolled in a treatment facility. In practice, this statutory duty included negotiating overseas admission agreements.
31. The Department further submitted that the prohibition on disclosure in the Children Act aimed to protect the confidentiality and privacy of personal information related to very sensitive and serious family matters. The residential facility contracts contained personal information of both parents and children. Such personal information, including a referral to an overseas centre, would never be released to the public. The Department explained that, if it had released these contracts to the public, there would have been a high probability to identify who was placed at a particular facility and reasons for their placement, based on some information in the contracts and due to the limited number of children the Department placed overseas.
32. The Department submitted that it has never released information in facility contracts to the public, besides what was required for the annual gazetting of any contracts that exceeded \$50,000.
33. Further, the Department explained that redacting the facility contracts was not considered when handling this PATI request, primarily because each record was part of the child's personal file, i.e., not a part of a regular file for service providers or a general contract between the Government and the facilities. Hence, the contracts were also considered to be exempt personal information of the relevant child.

Applicant's submissions

34. The Applicant questioned why a redacted facility contract could not be released to satisfy their request, by removing any parts that fell within the prohibition. They did not believe the entire contract should be withheld under section 37.
35. The Applicant further queried if the Department was reading section 11 of the Children Act to mean that no information could be released under the PATI Act, meaning that the Department itself would be exempt. They believed this would be incorrect and raised

that, since the Department has shared some information in response to other PATI requests, it was not clear to them why some, but not other, information could be shared.

36. The Applicant emphasised that they were not seeking any personal or confidential information about the children themselves.

Discussion

[1] What is the statutory provision creating the mandatory prohibition on disclosure?

37. The Department identified a relevant statutory prohibition on disclosure set out in section 11 of the Children Act. When read together with the Director's duties in section 9 as they relate to overseas placements under section 84 and the privacy of court matters under section 17, section 11 creates a mandatory prohibition on the disclosure of overseas placement records. Contravening this duty to not communicate in section 11 would be an offence, liable to a monetary fine on summary conviction under section 11(2) of the Children Act.
38. Further, section 11 was in effect before the PATI Act came into operation. This means that section 37 preserved its statutory prohibition on the disclosure of information even though the Children Act does not specifically reference the PATI Act³.

[2] Does the record fall within this statutory provision?

39. The records fell squarely within the broad scope of the statutory prohibition in section 11 of the Children Act because each admission agreement was obtained during the Department's performance of its duty to have a child under its care accepted and enrolled in a treatment facility.
40. It was also not possible to avoid the scope of section 11 by removing the enrolled child's identifying information (e.g., their name, date of birth, race, parent/guardian's details) and other individualised information (e.g., the enrolment period and agreement date). Doing so would have created, in essence, a generic contract for the various facilities⁴.

³ If a statutory provision that prohibits disclosure is made after the PATI Act came into operation on 1 April 2015, section 37(5) states that it "shall not have effect unless it provided specifically that it is to have effect notwithstanding" the PATI Act.

⁴ The Information Commissioner notes that some Utah-based facilities have published their admission agreement template online, though not all relevant ones. See, for instance, [New Haven Residential Treatment Center](#) and [Liahona Academy for Youth](#).

41. Although the Department emphasised that section 11 of the Children Act was meant to protect the personal (often sensitive) information of affected children, the language in section 11 is written more broadly and contains no such limitation. Based on a plain reading of section 11, all information within the facility contract—i.e., not only the children’s identifying information—comes with the meaning of “information obtained in the performance of [the Director’s] duties under this Act,” and specifically the duties under sections 25 and 84 of the Children Act. The contracts as a whole fell within the statutory prohibition on the disclosure of information contained in section 11.

[3] Does the record fall within any exception or gateway to public disclosure that is contained in the statutory provision?

42. Section 11 does not have any provisions creating a gateway to public disclosure related to the Director’s statutory duties. Section 11(1) sets out two exceptions to the prohibition on children’s officers and persons employed in administering the Children Act: when giving evidence before the courts, and when authorised by the Director or Minister. The Department reasonably understood the Director’s discretionary power granted by section 11(1)(b) as allowing the Director to consider releasing information to the parent or legal guardian, or a child of legal age, but not to the public, in the context of a PATI request. This exception is defined and restricted by the Director’s duties, which in turn are defined by the Children Act.

43. By the plain language of the Children Act, the Director (or his delegate) should not disclose information outside of the specific circumstances for performing his duties as defined in the Children Act, which upholds secrecy to protect children and their families.

Conclusion

44. The Information Commissioner is satisfied that the Department justified its reliance on the exemption in section 37(1) to deny access to the records responsive to item 1 of the PATI request, because section 11 of the Children Act was a statutory prohibition on disclosure of the requested information.

Conclusions

45. The Information Commissioner is satisfied that the Department met the requirement of section 12(2)(b) and was justified in relying on section 37(1) to deny access to the requested records, with respect to items 1 and 3 of the PATI request.

46. The Information Commissioner notes, though, that the plain reading of section 37 of the PATI Act and section 11 of the Children Act leads to an outcome that appears contrary to the purpose of the PATI Act, as the Applicant argued. It allows for unnecessary secrecy

surrounding the care, protection and treatment of one of our country's most vulnerable populations. The individual officers within the Department are recognised for their efforts to provide information in response to PATI requests. The impact of section 37 of the PATI Act and section 11 of the Children Act may eliminate the capacity of the Department and the public to promote transparency and further accountability on these matters. This unintended consequence makes section 37 ripe for legislative attention to further the purposes of the PATI Act.

47. The Information Commissioner's 2021 [Report and Recommendations on the Implementation of the PATI Act](#) touched on this precise concern: that the plain language of section 37 would unintentionally transform a confidentiality provision, originally intended as a condition of employment to prevent unauthorised disclosures by employees, into a statutory prohibition preventing the public authority from disclosing records that may be appropriately disclosed in response to a PATI request.
48. This review highlights concerns about section 37 that were previously raised during the Parliamentary debate on the PATI legislation in 2010, as discussed below. During that debate, the Government of the day declared its intention to harmonise the PATI Act with existing confidentiality provisions and mitigate these unintended consequences. Such a legislative review remains outstanding, and a contrary reading of the statutory language is beyond the authority of the Information Commissioner.
49. As explained in the Information Commissioner's 2021 [Report and Recommendations](#):

The issue associated with section 37 of the PATI Act is summarized well in the [Centre for Law and Democracy \(CLD\)](#) report:

A first issue here is the relationship between the PATI Act and other laws which provide for secrecy. Better practice is to protect all secrecy interests in the RTI law [i.e., PATI], even if in a rather general way, subject to a harm test and a public interest override, and then provide that if secrecy provisions in other laws go beyond this, the RTI law shall override them. Under such an approach, other laws may elaborate on secrecy interests recognised in the RTI law, but not extend them (including by failing to include a harm test or public interest override).

The PATI Act does not take this approach. Instead, section 37(1) clearly preserves secrecy provisions in other laws, regardless of how they are worded. Furthermore, pursuant to section 40(2), the 30-year time limit for information that is rendered secret under most exceptions does not apply to section 37. The problem with

preserving secrecy provisions in other laws is that many of these provisions may have been drafted a long time ago and did not have the goal of achieving an appropriate balance between openness and secrecy. [...]

This approach is mitigated somewhat in two ways. First, sections 37(2)-(4) allow for the Minister, by order subject to affirmative resolution by Parliament, to repeal or amend secrecy provisions in other laws. Experience in other countries where this approach has been taken suggests that such repeals are rare and, to the best of our knowledge, no secrecy provision has so far been repealed on this basis in Bermuda. Second, section 37(5) provides that subsequent secrecy provisions [those enacted after April 2015] shall only have effect if they provide specifically that they apply notwithstanding the PATI Act. While positive, this does not address the main weakness with preserving secrecy provisions in other laws, namely that many were drafted earlier and did not seek to establish an appropriate balance between openness and secrecy.

A number of concerns arise out of this issue. To begin with, it must be noted that neither the CLD nor the ICO were the first to take note of this problem in the PATI Act. In fact, it was identified quite early in the development of the PATI Act as a matter requiring attention. The [2005 PATI Discussion Paper](#) acknowledged the following:

A number of Bermuda laws prevent certain information from being released to the public. The Government intends to conduct a thorough review of such legislation to determine which of these laws should remain in place, and which should be amended or repealed if they are no longer necessary and not in keeping with the spirit of PATI legislation.

Hansard records indicate that when the parliamentary debate on the PATI Bill occurred in 2010 this very issue was raised and discussed on [23 July 2010](#). The Hon. John Barritt, JP, MP, . . . reiterated, at p.1020, col.2:

As I said earlier in my opening remarks, one of the things we have greatest difficulty with is the fact that (this is clause 37 now, Mr. Chairman) a record is exempt in its disclosure if its disclosure is prohibited by any statutory provision other than this Act. Again, we think that this is wrong. Everything should be subject to disclosure

unless it is shown that otherwise it would not be in the public interest.

But I note, Mr. Chairman, that the Minister is given the power by order to repeal any of those provisions in any of those Acts that might apply, and will do so under the affirmative resolution procedure. So I suppose there is an opportunity there, once this legislation gets up off the ground, to change and add to it. But as a starting principle, we would have liked to have seen it done differently.

The Hon. E. Grant Gibbons, JP, MP, stated, at p.1022, col.1:

Let me just start with clause 37. My honourable colleague, Mr. Barritt, touched on it and, I think, made the point. This is disclosure prohibited by other legislation. Clause 37(1) says, "A record is exempt if its disclosure is prohibited by any statutory provision, other than this Act". Just to piggyback on what my honourable colleague said, clearly there must be a slew of other Acts that are currently in place that prohibit disclosure. And I guess the question I have for the Honourable Member is ... and this is obviously a catchall provision here. Will the Government start to work on this prior to the commencement day? Or is this going to take years to sort of work through all these things, and we have to come back to the House every time there is something which requires some other piece of old legislation that prevents disclosure? Is there going to be any proactive approach here, or is this likely just going to be a discovery process over time?

Former Premier, Dr. The Hon. E. F. Brown, JP, responded at p.1022, col.2:

The first thing is that I would like to reassure Members of the House who need it that we are going to move as quickly as we can to review other legislation that has an impact on this. No, we are not going to sit and wait until we get the impact one by one on other legislation.

Unfortunately, we are not aware of any follow-through on this commitment by the government of the day or its successors, and we are therefore by default doing what the former Premier promised would not happen: we are simply waiting until the impact of each provision on the public right of access is felt, as evidenced by the numerous decisions of the

Information Commissioner noted above. Even having now been felt, however, there is still no sign of any intention on the part of government to address the issue.

The harm that results from this ongoing issue is that the PATI Act's legislative scheme is effectively undermined in a substantial way. One of the bright spots in the PATI Act as identified by the CLD is the presence of a strong public interest test that is applicable to most exemptions. With so many pre-existing statutory provisions taking precedence over the PATI Act, there is no opportunity to apply that public interest lens where those statutes apply.

Furthermore, many of the statutory provisions that pre-date the PATI Act were simply intended to serve as confidentiality requirements for staff and officers of public authorities, and were never intended to operate in a post-PATI world, where the default is access and the exception is secrecy. Finally, as catch-all confidentiality provisions they are extremely broad, and in some cases could be unnecessarily preventing the disclosure of information that may otherwise be in the public interest to disclose. The only reasonable conclusion is that the PATI Act that was envisioned for the people of Bermuda in 2010 cannot be said to have been fully realized until this issue is addressed.

50. As this Decision illustrates, the need for a legislative review to harmonise section 37(1) with existing confidentiality provisions is urgent. The Information Commissioner would welcome the opportunity to consult on such an effort. Any future amendment will not impact the outcome of this review but will further the promise of the PATI Act for Bermudians and residents.

Decision

The Information Commissioner finds that the Department of Child and Family Services (**Department**) met the requirement of section 12(2)(b) and was justified in relying on section 37(1) of the Public Access to Information (**PATI**) Act 2010 to deny access to the requested records. In accordance with section 48 of the PATI Act, the Information Commissioner affirms the internal review decision by the Department.

Judicial Review

The Applicant, the Department of Child and Family Services, 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
31 October 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

- 12 ...
- (2) Public authorities shall make every reasonable effort to—
- ...
- (b) respond to requests completely, accurately and in a timely manner.
- ...

Disclosure prohibited by other legislation

- 37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.
- ...

Children Act 1998

Disclosure of information

- 11 (1) No children's officer or person employed in the administration of [the Children Act] shall communicate or allow to be communicated information obtained in the performance of his duties under this Act except where—
- (a) giving evidence in any court; or
- (b) authorized by the Director or the Minister.
- (2) Any person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding \$2000.

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