

Decision Notice

Decision 17/2021: Ministry of Education Headquarters

Legal settlement agreement

Reference no: 20190813

Decision date: 21 December 2021

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Education Headquarters (**Ministry Headquarters**) for records of a legal settlement. The Ministry Headquarters transferred the request in whole to the Attorney-General's Chambers (**Chambers**), under section 13(5) of the PATI Act because it had decided it did not hold the requested records.

The Information Commissioner has found that the Ministry Headquarters' decision to transfer the request was justified, although it failed to transfer the request within the statutory deadline during the initial handling of the request, or within an otherwise reasonable timeframe during the internal review process.

Relevant statutory provisions

Public Access to Information Act 2010: section 3(3) (held by); section 13 (transfer of requests).

Public Access to Information Regulations 2014: regulation 5 (reasonable search); regulation 8 (transfer of requests).

The full text of each statutory provision cited above is reproduced in the Appendix to this Decision. The Appendix forms part of this Decision.

Background

1. On 7 February 2019, the Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Education Headquarters (**Ministry Headquarters**) for records of a legal settlement reached between a former Commissioner of Education (**CoE**) and the Government of Bermuda.
2. In particular, the Applicant asked for the (a) total amount paid to the CoE in connection with the settlement (**item 1**), (b) the justification, if any, for the CoE's termination provided by the Government as part of the settlement (**item 2**), and (c) the legal costs incurred by the CoE that were paid for by the Government, if any (**item 3**). The PATI request noted the background as the CoE having "launched legal action against the Governor . . . and the Government after he was fired from the post in October 2017".

3. The Applicant did not receive an initial response to the PATI request. On 7 May 2019, the Applicant requested an internal review because they had not received an initial decision within the statutory timeframe, i.e., by 21 March 2019. The Ministry Headquarters acknowledged the internal review request by letter dated 8 May 2019.
4. On 22 July 2019, the Ministry Headquarters issued an internal review decision dated 6 June 2019¹. The decision explained that the record responsive to the request was the settlement agreement and that this record was not held by the Ministry Headquarters. The letter identified that the correct public authority holding the record was the Attorney-General's Chambers (**Chambers**). As a result, the Ministry Headquarters considered the request as transferred to Chambers as of 7 June 2019.
5. The Applicant made a timely application on 13 August 2019 for an independent review by the Information Commissioner.

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 issues the Applicant wanted her to review.
7. The Information Commissioner invited the Ministry Headquarters to engage in early resolution under section 46 because the only issue was the Ministry Headquarters' transfer of the request.
8. The Information Commissioner's Office (**ICO**) separately encouraged the Applicant to pursue Chambers for any substantive decision on access to any actual record held by Chambers, given that Chambers' handling of the transferred PATI request was not subject to this Information Commissioner's review.
9. The Ministry Headquarters completed the transfer of the PATI request by emailing Chambers on 3 September 2019. The actual transfer was prompted by the ICO's communication with Chambers on 23 August 2019, during which the ICO was notified that Chambers had not received the transferred PATI request, and subsequently by the ICO's follow-up with the Ministry Headquarters.
10. The Ministry Headquarters did not respond to the offer to engage in early resolution of this case. Accordingly, the ICO notified the Ministry Headquarters on 7 November

¹ See the Information Commissioner's Decision 21/2019, [Ministry of Education Headquarters](#).

2019 that the Information Commissioner had commenced a review and investigation pursuant to section 47 of the PATI Act.

11. Section 47(4) of the PATI Act requires the Information Commissioner to give a public authority and an applicant a reasonable opportunity to make representations. The ICO invited the Ministry Headquarters and the Applicant to make representations to the Information Commissioner for consideration, including specific questions for the Ministry Headquarters about its original search and steps taken to transfer the request. The Ministry Headquarters made submissions on 7 October 2021. The Applicant notified the ICO on 26 October 2021 that they declined to make submissions.

Information Commissioner's analysis and findings

12. In coming to a decision on this matter, the Information Commissioner considered all of the relevant submissions, or parts of submissions, made by the public authority. She is satisfied that no matter of relevance has been overlooked.

Transfer of request – section 13 and regulations 5 and 8

13. 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.
14. 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.
15. The Information Commissioner has set out the process for transferring a PATI request in Decision 11/2018, Bermuda Police Service². In sum, before making a transfer, the original public authority must consider:

² 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; and 03/2020, Ministry of Education Headquarters.

- [1] whether the original public authority holds any record responsive to the request; and, if not,
 - [2] whether the original public authority knows that one or more other public authorities hold records responsive to the request?
- 16. If the public authority is satisfied, after taking reasonable steps, that it does not hold the 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.
- 17. 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.
- 18. 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 conducted³. The specific circumstances of each case will inform the extent of the reasonableness of these efforts.
- 19. Notably, regulation 5 of the PATI Regulations 2014 (**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.
- 20. Time limits are imposed on the original public authority when transferring a PATI request. Sending the request (in whole or in part) to the public authority that is likely

³ See Decision 02/2018, Department of Human Resources, paras. 49-51.

to hold the responsive record must be completed within five working days of receipt of the request, in accordance with section 13(5) of the PATI Act. This statutory transfer timeframe seeks to protect the requester's right to timely access to non-exempt records. The six-week initial decision timeframe begins afresh when the new public authority receives the transferred request, in accordance with section 13(7) of the PATI Act. This includes complying with section 13(4) of the PATI Act for the new public authority to give the requester an acknowledgement letter within five working days of the transfer.

21. Under section 13(6) and regulation 8(2), an additional timeframe is imposed on the original public authority to then notify the requester within five working days of having transferred the request, including to name the second public authority.
22. As advised by the Minister's PATI Practice Code, meeting a public authority's duty to assist means consulting the requester⁴. This can mean explaining that the requested record is held by a different public authority. It could also mean affording the requester a chance to object to the transfer and withdraw the PATI request before the transfer of the request is completed, in the event that the PATI requester does not want another public authority to know that they made a PATI request.
23. Until the transfer is complete, the original public authority is not relieved of its normal duties under the PATI Act and the PATI Regulations, such as the duty to assist the requester, which continue to apply even when it holds none of the records requested⁵.
24. 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

25. The Ministry Headquarters submitted that the requested information was contained in the settlement agreement. This responsive record was not held by the Ministry Headquarters in any form in any location, from the date of the request (7 February 2019) until the time the internal review decision had been issued to the Applicant (22

⁴ See the Minister's PATI Practice Code (2020), sections 16.2 and 16.5; available at <https://www.gov.bm/sites/default/files/PATI-Administrative-Code-of-Practice.pdf>

⁵ See Phillip Coppel, *Information Rights Law and Practice* (4th ed. 2014), p. 428.

July 2019). The responsive record was held by Chambers. On this basis, the Ministry Headquarters transferred the request to Chambers.

26. When processing the request, the Ministry Headquarters considered whether a Cabinet paper shared by Chambers, which referenced information for an agreement, would be a responsive record. The Ministry Headquarters also considered its files related to the legal matter, which included email exchanges with Chambers. The Ministry Headquarters decided that its files did not contain any of the information in the PATI request and were not responsive.
27. In terms of how the PATI request was handled, the Ministry Headquarters explained the timing as follows:
 - a. The Ministry Headquarters received the request on 7 February 2019.
 - b. The transfer did not occur within the statutory timeframe of five working days. The Ministry Headquarters made “no decision in February of a transfer”.
 - c. The Applicant emailed the head of the authority, the Permanent Secretary, on 7 May 2019, informing her that no initial decision had been received and asking for an internal review of the failure to issue an initial decision.
 - d. The head of the authority replied to the Applicant on 8 May 2019, committing to issuing an internal review decision within six weeks.
 - e. The head of the authority issued an internal review decision dated 6 June 2019 and “advised the request *would be* transferred”.
 - f. The transfer deadline would have been five working days from when the internal review decision was made by the head of the authority, i.e., 13 June 2019. Due to an “unintended oversight”, the transfer’s “statutory timeline of 13 June 2019” was not met.
 - g. The head of the authority was on leave intermittently between 7 June 2019 and the latter part of August.
 - h. After the ICO emailed the head of the authority on 3 September 2019 because Chambers had not received a transferred request, the head of the authority realised the “oversight to transfer the request back in June and immediately followed up in writing with the transfer to Chambers on 3 September 2019”.
28. The Ministry Headquarters also accepted that “[it] perhaps should have informed the requester that the transfer did not occur until 3 September due to an oversight”.

Applicant's submissions

29. The Applicant sought a review of the decision to transfer the request and declined to make further submissions to the Information Commissioner.

Discussion

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

30. In assessing whether the Ministry Headquarters held the responsive record at the time of its decision to transfer, the Information Commissioner considers the reasonableness of its search to determine if it held the responsive record.

The quality and nature of the public authority's initial analysis of the request

31. It is reasonable to accept that the PATI request sought final information, i.e., the amount actually spent by the Government and the justifications actually stated as part of the settlement. The request did not seek proposed information or records related to the process leading to the settlement agreement, which might have been contained within some email exchanges referenced by the head of the authority. The PATI request also was not stated in broad terms. For instance, it was not seeking 'all records related to the settlement' for any of the items of the request, nor 'any record containing any justification for the CoE's termination' for item 2 of the request.
32. Rather, the items sought in the request were tied squarely to the final settlement agreement.
33. In light of the specific records sought by the PATI request, the Information Commissioner is satisfied that the Ministry Headquarters' understanding of the request was accurate, complete and adequate.

The scope of the search made on the basis of that analysis

34. The Ministry Headquarters identified the scope of its search as including consideration of a potentially responsive record, which had been shared by Chambers, as well as a potential record location, being its files containing email exchanges with Chambers. The Ministry Headquarters also broadly described the contents of the specified email exchanges within its submissions to the Information Commissioner.
35. The Information Commissioner accepts that, considering the Ministry Headquarters' organisational structure, the specified email exchanges and the Cabinet paper shared by Chambers were held by the Ministry Headquarters because they had been received

by the Permanent Secretary. Given the sensitivity of the matter (i.e., litigation arising from a human resources matter with significant management and financial consequences), the email account or electronic files of the Permanent Secretary would reasonably be the only digital locations, within the Ministry Headquarters' control, that would hold records relating to the settlement agreement.

36. On balance, the Information Commissioner is satisfied that the scope of the Ministry Headquarters' search was reasonable.

The rigour and efficiency with which the public authority conducted its search

37. Considering the scope of the search above, the Ministry Headquarters provided an expanded explanation during this review on the rigour of its search. It included assessment of potential locations and a potentially responsive record. The Permanent Secretary expressly stated to the ICO that the Ministry Headquarters held no copy of the settlement agreement, as the only responsive record, at the relevant time in any location, i.e., in print or electronic form. In light of the overall completeness of the Ministry Headquarters' submissions, the Information Commissioner finds it would not be proportionate to require other evidence verifying whether the Ministry Headquarters held the settlement agreement at the relevant time.
38. The Information Commissioner notes that the PATI Act does not require the public authority to confirm with exact and perfect certainty whether it holds a record. Rather, a public authority must take all reasonable steps under the circumstances when conducting its search. At the initial decision stage, the timeframe within the PATI Act for deciding on a transfer within five working days also means that the assessment of the rigour and efficiency of a public authority's search prior to transferring a request must take into consideration the time available to engage in a search. Here, however, the transfer did not occur until the internal review decision, and the Ministry Headquarters acknowledged that it did not take any initial action upon receipt of the PATI request. While generally it should be relevant to assessing the rigour of a search prior to a transfer, the statutory timeframe has no bearing in this case.
39. The Information Commissioner finds no basis to dispute the submission of the Permanent Secretary, being the Ministry of Education Headquarters' most senior public officer, in relation to the rigour of the search carried out prior to the request being transferred.
40. On balance, the Information Commissioner is satisfied that, at the relevant time, the Ministry Headquarters took reasonable steps in reviewing its existing files, thinking

about existing records and concluding that its files contained no responsive records, in relation to the head of the authority's analysis of the request. In all the circumstances and on the balance of probabilities, the Information Commissioner is satisfied that a reasonable search had taken place and that the responsive records – in particular, a copy of the settlement itself – were not held by the Ministry Headquarters.

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

41. Chambers was the public authority representing the Government in the legal matter. Based on this, it is reasonable to accept the Ministry Headquarters' explanation that Chambers was the public authority holding the responsive record. The Information Commissioner has no reason to doubt that the Ministry Headquarters' knowledge was incorrect or otherwise unreasonably formed.
42. In sum, the Information Commissioner is satisfied that the Ministry Headquarters was justified in transferring the PATI request in whole to Chambers because, prior to the 3 September 2019 transfer, it took reasonable steps to determine that it did not hold the requested records and had a reasonable basis for its knowledge that Chambers held records responsive to the request.

Procedural requirements for transferring a request – section 13(5) and regulation 8(2)

43. As set out above, section 13(5) of the PATI Act and regulation 8(2) of the PATI Regulations establish various procedural requirements once it has been determined that a transfer is appropriate. These include statutory timeframes for a timely transfer and notifying the requester about the transferred request and the new public authority.
44. Although the Ministry Headquarters' substantive decision to transfer the request was justified, its handling of the PATI request failed to meet these requirements.
45. The Ministry Headquarters' submissions show that it failed to meet the statutory timeframe for transferring the request to Chambers within five working days of the Ministry Headquarters having received the request, in accordance with section 13(5) of the PATI Act.
46. It is also a matter of fact that the Ministry Headquarters failed to notify the requester of the transfer to Chambers within five working days of having made the transfer, in accordance with regulation 8(2) of the PATI Regulations. The Ministry Headquarters

has acknowledged that, as part of its duty, the requester should have been updated as well.

47. The Ministry Headquarters was also incorrect to have claimed to the Information Commissioner that the head of the authority's statutory deadline for transferring the request was five working days from the date of its issuance of an internal review decision. The PATI Act assumes that all transfers will occur at the initial stage following receipt of the request, and does not explicitly provide for a head of the authority being able to reset the clock on the timeframe in the event of considering a transfer at the internal review stage.
48. As this case demonstrates, however, instances may arise when a head of the authority realises that all or part of a PATI request should have been transferred but, for whatever reason, this had not been done at the initial decision stage⁶. In such a scenario, a head of the authority is obligated to complete the transfer process promptly during the internal review stage and notify the requester of the transfer, preferably following receipt of the request for an internal review.
49. Here, the internal review decision indicated a transfer was intended in the near future. The transfer was actually completed during the Information Commissioner's review, despite the head of the authority's intention to have done so by way of their internal review decision. This resulted in the Applicant's PATI request starting afresh with Chambers seven months after it was first submitted to the Ministry Headquarters.
50. In any of these scenarios, the Ministry Headquarters (or any public authority finding itself in this position) would benefit by embedding certain checks within its initial five working days of having received an internal review request. These checks could mirror certain steps the Information Officer is obligated to take at the initial decision stage, including the following: acknowledging receipt to the requester⁷; checking that the request is valid (i.e., that it was made on time and for a decision listed in section 41 of the PATI Act)⁸; and considering whether a transfer might be necessary based on a plain reading of the request and their knowledge of the public authority's records as related to its functions. The Ministry Headquarters is also strongly encouraged to

⁶ The Minister's PATI Practice Code describes the transfer process at section 16.1, with a sample letter as appendix III. The ICO's internal Guidelines for Responding to PATI Requests describes transfers at paragraphs 36-40 and 113-117.

⁷ See the ICO's internal Guidelines for Responding to PATI Requests, para. 139(a).

⁸ See the ICO's internal Guidelines for Responding to PATI Requests, paras. 135-136.

identify early in the internal review process whether clarity may be needed from the requester, in the upcoming weeks, to better understand their disagreement.

51. The Information Commissioner is not satisfied that the Ministry Headquarters met the statutory timeframes related to transferring the request to Chambers as required by section 13(5) of the PATI Act and regulation 8(2) of the PATI Regulations. Further, transferring the request to Chambers nearly three months after the internal review decision was made was not reasonable.

Conclusion

52. The Information Commissioner finds that the Ministry Headquarters was justified in transferring the request in whole to Chambers because it did not hold any responsive record, and it was aware that Chambers held the record the Ministry Headquarters identified as being responsive to the request.
53. The Information Commissioner further finds that the Ministry Headquarters failed to meet the statutory timeframes and other procedural requirements related to transferring the request to Chambers as required by section 13(5) of the PATI Act and regulation 8(2) of the PATI Regulations, and otherwise failed to transfer the PATI request within a reasonable timeframe upon receiving the request for an internal review.

Decision

The Information Commissioner finds that the Ministry of Education Headquarters (**Ministry Headquarters**) was justified in transferring the request made under the Public Access to Information (**PATI**) Act 2010 in whole to the Attorney-General's Chambers (**Chambers**) because it did not hold any responsive record, and it was aware that Chambers held the record the Ministry Headquarters identified as being responsive to the request. The Information Commissioner further finds that the Ministry Headquarters failed to meet the statutory timeframes and other procedural requirements related to transferring the request to Chambers as required by section 13(5) of the PATI Act and regulation 8(2) of the PATI Regulations 2014, and otherwise failed to transfer the PATI request within a reasonable timeframe upon receiving the request for an internal review.

Because the Ministry Headquarters has since transferred the request and the Applicant has been sufficiently notified of it, the Information Commissioner does not require the Ministry Headquarters to take any further action on this matter.

Judicial Review

The Applicant, the Ministry 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
21 December 2021

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Interpretation

- 3 ...
- (3) In this Act, a reference to a record that is held by a public authority includes a record that is in the possession or custody of, or is under the control of, that authority.
- ...

Request for access

- 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; or
 - (b) in the case of more than one other public authority, to the authority whose functions are, in the opinion of the head of the public authority that first received the request, most closely related to the subject matter of the request.
- (6) The head of the public authority that first received the request shall inform the requester in writing of the other public authority or authorities to whom a copy of the request has been given.
- (7) A public authority to whom a copy of a request has been given under subsection (5) shall, for the purposes of this Act, be deemed to have received the request at the time of the receipt by that authority of the copy, and subsections (4), (5) and (6) shall apply in respect of the request that has been copied to the authority.

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.
- ...

Transfer of requests

- 8 (1) As soon as practicable after receipt by the public authority of an application, the information officer shall make a determination under section 13(5) of the Act as to whether the application should be referred to another public authority.
- (2) Where an application is transferred to another public authority under section 13(6), the information officer shall within five working days dispatch correspondence to the applicant indicating that the public authority has transferred the application to the appropriate public authority, naming the authority.

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