

## Decision Notice

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### Decision 19/2022: Department of Communications

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**Records of communications with Premier: failure to decide within statutory timeframe**

**Reference no: 20220609**

**Decision date: 3 August 2022**

## Summary

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On 26 January 2022, the Applicant asked the Department of Communications (**Department**) for records of its communications with the Premier from a certain time period. This Decision has found that the Department failed to decide the Applicant's request for an internal review within the statutory timeframe set forth by the Public Access to Information Act 2010. During this review, the Department issued an internal review decision to the Applicant. The Information Commissioner has not required further action in respect of this Decision.

## Background

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1. This Information Commissioner's Decision is for a 'failure to decide' application for review under Part 6 of the Public Access to Information (**PATI**) Act 2010, which was received by the Information Commissioner's Office (**ICO**) on 9 June 2022. It addresses a public authority's basic obligation to respond to a requester's internal review request within the statutory timeframe, not whether a public authority has properly denied access to a record.
2. In this Decision, relevant dates include:

Date	Action
26 January 2022	The Applicant made a written PATI request to the Department of Communications ( <b>Department</b> ).
9 March 2022	The Department notified the Applicant that it was extending the original period to issue an initial decision to 31 March 2022, as allowed under section 15(1)(a) of the PATI Act.
31 March 2022	The Department issued an initial decision refusing the PATI request under an administrative ground in section 16(1)(c) (substantial and unreasonable interference with or disruption of the Department's other work).
20 April 2022	The Applicant made a timely request for the Head of Authority to conduct an internal review; such request was due within six weeks of the initial decision, i.e. by 12 May 2022.

4 May 2022	The Head of Authority informed the Applicant that they disagree with the initial decision and that they have given the Information Officer six weeks to provide a new initial decision, i.e., by 15 June 2022.
1 June 2022	The statutory deadline passed for the Department to issue an internal review decision, i.e. within six weeks of its receipt of the Applicant's request for one.
9 June 2022	The Applicant requested an independent review by the Information Commissioner.
10 June 2022	The ICO notified the Department of this application for review and invited its comments.
14 June 2022	The ICO received the Department's written submission, which is considered below.
15 June 2022	The Department issued a letter notifying the Applicant of the Information Officer's decision to grant access to the requested records.
16 June 2022	The Department disclosed the requested records to the Applicant, as set out in its letter dated 15 June 2022 from the Information Officer.
15 July 2022	The Head of Authority informed the Applicant that they adopted the Department's letter of 15 June 2022 and disclosures of 16 June 2022 as their internal review decision.

## Information Commissioner's analysis and findings

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### *Internal Review Decision*

- Section 43(1) of the PATI Act requires the head of a public authority to conduct an internal review. Section 43(2) gives the head of the public authority a maximum of six weeks, after the date of receiving a request for an internal review, to complete the internal review. Section 43(2) also requires that the head of the public authority notify the applicant of: the

internal review decision, the reasons for the decision, and the applicant's right to seek an independent review by the Information Commissioner.

4. On 20 April 2022, the Applicant requested an internal review by the Head of Authority, who for purposes under the PATI Act is the Permanent Secretary with supervision of the Department of Communications, as set out in the Schedule to the PATI Act.
5. In response, the Head of Authority emailed the Applicant on 4 May 2022. The email informed the Applicant that the Head of Authority disagrees with the initial decision refusing the PATI request under section 16(1)(c). This section allows public authorities to administratively deny a PATI request if the full processing of such request would cause a substantial and unreasonable interference with or disruption of the Department's other work. The Head of Authority further explained that the Information Officer was given six weeks (i.e., until 15 June 2022) to provide a "new initial decision".
6. On 9 June 2022, the Applicant requested an independent review by the Information Commissioner of the Head of Authority's response to their internal review request. The Applicant explained that they "disagree with the decision, as [they] believe a decision on [their] actual request for records should have been provided, rather than the public authority awarding itself more time to make the decision." The Applicant further explained their view that the approach taken by the Head of Authority seems to be against the timeframes set out in the PATI Act and unnecessarily drags out the process.
7. By letter of 10 June 2022, the ICO invited the Department to make submissions on this review, as the Information Commissioner is required to do under section 47(4) of the PATI Act. The ICO informed the Department that the Head of Authority's 4 May 2022 email to the Applicant did not amount to an internal review decision. Although the email informed the Applicant that the Head of Authority did not uphold the Department's reliance on section 16(1)(c), it did not decide whether access to the responsive records is granted or denied, nor notify the Applicant of their right to apply for an independent review by the Information Commissioner.
8. In its submissions of 14 June 2022, the Department acknowledged that the Head of Authority's 4 May 2022 email to the Applicant did not explain the requester's right to apply for an independent review by the Information Commissioner. The Department maintained, however, that the email was an internal review decision by the Head of Authority because it informed the Applicant of the outcome of the internal review conducted by the Head of Authority, i.e., that the Head of Authority reviewed the Department's processing of the PATI request and disagreed with the initial decision's reliance on the administrative ground in section 16(1)(c).

9. The Department explained the steps taken by the Head of Authority when conducting their internal review. The steps included discussions with the Information Officer and other technical officers, reviewing the sequence of events, assessing the rationale for the initial decision, as well as considering the internal review request and relevant provisions in the PATI Act. The Department further explained that its decision to give the Information Officer an additional six weeks to issue a “new initial decision” was informed by a practice the Information Commissioner has previously used in a number of her Decisions. The Department submitted that the PATI Act does not provide details on the conduct of the internal review process. As such, the Department took an approach that allows the responsive records to be provided to the Applicant, while ensuring compliance with the PATI Act and honouring the Applicant’s rights.
10. On 15 June 2022, the Department’s Information Officer informed the Applicant that access to the emails responsive to the PATI request was granted and that no responsive texts, WhatsApp messages or notes of phone calls existed. The next day, the Department provided the Applicant with 61 records responsive to the PATI request.
11. During a meeting with the ICO conducted on 11 July 2022, the Department raised the additional point that head of authorities cannot be expected to make an internal review decision on whether access to records is granted or denied, if the initial decision resulted in the records not being identified and collated. This occurs when, as in this review, the initial decision relies on an administrative ground in section 16(1) of the PATI Act and responsive records were not located. The Department pointed to the practical reality for government departments where the head of authorities are Permanent Secretaries who are often external to the government departments and do not necessarily have ready access to the department records or record locations. The Department also explained that the Permanent Secretaries do not always have adequate resources to fully process a PATI request (e.g., to locate, examine or redact the records, as appropriate).
12. The Information Commissioner commends the Department for its willingness to have a frank and open discussion with the ICO on its understanding of the requirements of the PATI Act and for working to bring itself into compliance with the missed PATI deadline.
13. The Information Commissioner uses this opportunity to reiterate the internal review process under the PATI Act, first discussed in Decision 1/2016, Customs Department.
14. As explained most recently in Decision 17/2022, Customs Department, an internal review process provides head of authorities with an opportunity to look at the PATI request anew

and make a fresh decision on consideration of all relevant factors<sup>1</sup>. As such, an internal review decision must answer the requester's substantive question of whether the public authority is granting or denying access to the requested record (in addition to addressing any procedural issues or correcting any action or inaction, if applicable). As explained in the beginning of this Decision, the PATI Act gives head of authorities six weeks to conduct an internal review and issue an internal review decision.

15. Section 43(b)(ii) requires head of authorities to inform the requester or third party of their right to seek an independent review by the Information Commissioner of their internal review decision. Under section 45(1)(b), in the event head of authorities fail to issue an internal review decision within the timeframe outlined in the PATI Act, the requester or third party automatically has the right to apply for an independent review by the Information Commissioner.
16. The provisions of the PATI Act, along with the fact that the deadline to issue an internal review decision is not extendable<sup>2</sup>, signal that the decision-making authority for a PATI request begins with the Information Officer (section 14), progresses to the Head of Authority (section 43) and moves to the Information Commissioner (section 48). The Supreme Court then has authority over a judicial review of the Information Commissioner's decision or any application to enforce the Information Commissioner's decisions and accompanying orders (sections 48(3) and 49).
17. The PATI Act does not authorise head of authorities to send a PATI request back to an Information Officer following an internal review decision and require an Information Officer issue a "new initial decision"<sup>3</sup>.
18. The Information Commissioner acknowledges that during an internal review, it is not always practical or reasonable for head of authorities to search for, and even process, responsive records on their own. As rightly pointed out by the Department, a permanent secretary with supervision over a government department is not necessarily part of that government department's organisational structure. In this case, for example, the Permanent Secretary is not a part of the Department's organisational structure<sup>4</sup>.
19. It is a matter of fact, however, that the Schedule to the PATI Act assigns the "Permanent Secretary who has supervision of the department" as the Head of Authority for "every

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<sup>1</sup> Decision 17/2022, [Customs Department](#), para. 10.

<sup>2</sup> Section 15 of the PATI Act allows public authorities to extend the timeline to issue an initial decision, but not an internal review decision.

<sup>3</sup> Decision 17/2022, [Customs Department](#), para. 13.

<sup>4</sup> See the Organisation Chart in the Department's [Information Statement](#) (11 January 2020), accessed 26 July 2022.

department of the Government”<sup>5</sup>. As such, for the purposes of conducting an internal review, the PATI Act treats permanent secretaries as part of the government departments under their supervision. In the future, Parliament may wish to consider whether to amend the Schedule to the PATI Act to designate a different public officer as the head of government departments to facilitate a more efficient and effective PATI process for the benefit of all stakeholders.

20. In the absence of any changes to its Schedule, though, the PATI Act clearly designates the permanent secretary with supervision over the department as that government department’s Head of Authority. Permanent secretaries can, and in most instances should, delegate the tasks to support their processing of the PATI request, as they see fit. This may include asking the department’s Information Officer or other public officers to assist with clarifying the scope of the PATI request with the requester as well as locating and examining records, recommending whether records should be disclosed or withheld, and redacting the responsive records. The degree of delegation for a particular PATI request is dependent on numerous factors internal to each public authority, including the relationship between the permanent secretary and Government department; the permanent secretary’s individual leadership and management style; and the subject and nature of the PATI request.
21. For clarity, even if tasks are appropriately delegated to the Information Officer, the PATI Act requires the head of the authority to issue the internal review decision. This is because when the Head of Authority issues the internal review decision (or fails to do so in a timely manner), it triggers the requester’s right to an independent review by the Information Commissioner.
22. The Department submitted that the approach it took at the internal review stage was informed by the approach used by the Information Commissioner in her previous decisions. It is essential to bear in mind, however, that the nature of the Information Commissioner’s independent review is different from that of the head of authorities’ internal review. The Information Commissioner’s powers under the PATI Act are also strikingly different from those of the head of authorities. Consequently, not every approach used by the Information Commissioner in her reviews can be applied by head of authorities at the internal review stage.
23. By necessity, the Information Commissioner is independent from the public authorities and cannot process records responsive to PATI requests on behalf of public authorities, e.g., locate records and issue a decision on the PATI request on behalf of the public authority.

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<sup>5</sup> Paragraph 12 of the Schedule to the PATI Act.

When public authorities have not located the records during their processing of the PATI requests by the internal review stage and the Information Commissioner disagrees with the public authorities' decisions denying access to the records, the Information Commissioner must send the request back to the public authorities for their processing. The Information Commissioner can do so, as section 48(1)(b) of the PATI Act gives her the authority to "make such other order ... as the [Information] Commissioner considers appropriate." There is no provision in the PATI Act which provides the head of authorities with a similar authority.

24. It is a matter of fact that the Department did not provide the Applicant with an internal review decision within the statutory timeframe. The Information Commissioner is satisfied that the Department failed to comply with section 43(2) of the PATI Act.
25. In their letter of 15 July 2022, the Head of Authority for the Department informed the Applicant that they have adopted the Department's letter of 15 June 2022 and disclosures of 16 June 2022 as their internal review decision. The letter also informed the Applicant of their right to seek an independent review by the Information Commissioner.
26. In light of the Head of Authority's letter, the Information Commissioner is satisfied that, as at 15 July 2022, the Department has issued a valid decision by the Head of Authority under section 43 of the PATI Act, which is capable of independent review under section 45(1)(a) if the Applicant were to make a new application to the Information Commissioner.
27. The Information Commissioner does not require the Department's further action on the Applicant's request for an internal review. The Information Commissioner expresses appreciation to the Department for its responsiveness, discussion and efforts to bring itself into compliance with the PATI Act.

## Decision

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The Information Commissioner finds that the Department of Communications (**Department**) failed to issue a decision on the Applicant's request for an internal review within the timeframe set forth in section 43(2) of the Public Access to Information Act 2010. Since the Department has issued an internal review decision during this review, the Information Commissioner does not require the Department to take any further action in respect of this Decision.

## Judicial Review

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Should the Applicant, the Department, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such appeal must be made within six months of this Decision.



Gitanjali S. Gutierrez  
Information Commissioner  
3 August 2022

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