In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 469

BETWEEN:

THE ATTORNEY GENERAL

Applicant

-v-

INFORMATION COMMISSIONER

Respondent

JUDGMENT

Application for Judicial Review against Decision of the Information Commissioner to issue summonses for the production of records obtained or created by the Attorney-General's Chambers - Whether the Information Commissioner has a right to review a public authority's refusal to disclose a record on the grounds that the Public Access to Information Act 2010 does not apply - Whether the Information Commissioner has a right to examine a record to which the Public Access to Information Act 2010 does not apply

Dates of Hearing: 08 December 2021
Date of Judgment: 25 January 2022

Counsel for the Applicant: Mr. Paul Harshaw (Canterbury Law Limited)
Counsel for the Respondent: Mr. Craig Rothwell (Cox Hallett Wilkinson Limited)

JUDGMENT of Shade Subair Williams J

Introduction:

1. This is the first occasion on which this jurisdiction of Court has been required to resolve a dispute about the boundaries and scope of the powers of the Information Commissioner to examine records as part of the review process under Part 6 of Public Access to Information Act 2010 (the "PATI Act"). The present application is made by way of judicial review.

2. The onset of these proceedings arises out of a request (the "Request") to the Ministry of Health Headquarters (the "Ministry") for access under the PATI Act to specific records created in the Attorney-General's Chambers. The Request was made by a Royal Gazette reporter ("the Requestor"). The Ministry, via its relevant officers in a two-part process, refused the Request on the grounds that the PATI Act does not apply, as per section 4(1)(b)(vi).

3. The Request was for a record of documents which were particularised on a Request Form dated 14 February 2018 as follows:

   "…
   -The agreement reached on December 8, 2017 between the Ministry and the Brown-Darrell Clinic and Bermuda Healthcare Services regarding payments of $120,000 and $480,000, respectively;

   -All communications concerning that agreement;

   -Records showing how the amounts were calculated;

   -The letter received by the Ministry 'before action' in October 2017 pertaining to judicial review of the BHB (Hospital Fees) Amendment Regulations 2017; and

   -The response and any further communications."

4. I shall refer to the above-requested record as the "Brown Settlement Record".

5. Following the Ministry's refusal to provide public access to the Brown Settlement Record, the Requestor applied to the Information Commissioner, Ms. Gitanjali S. Guitierrez, ("the IC") for an independent review of the Ministry's refusal. In commencing a review of that refusal, the IC notified and corresponded with the Ministry and the Attorney-General's Chambers seeking their production of the Brown Settlement Record for her examination. However, the IC's request for examination was refused.

6. Against that background, on 26 November 2020 the IC issued various summonses, two of which are the subject of challenge in these proceedings. The first summons for the production of the Brown Settlement Record was made to the Ministry and the second was made to the Solicitor General. These summonses (the "two summonses") triggered the Attorney-General's commencement of these proceedings.

7. On 8 December 2021 the application for judicial review was heard before me. Mr. Harshaw appeared for the Attorney-General and the Information Commissioner was represent by Mr. Rothwell. At the close of the hearing, having received the benefit of Counsel's most ably made submissions, I reserved judgment which I now provide with the reasons below.

The Applicant's Pleaded Case:

8. Having been granted leave to apply for judicial review on the grounds and relief outlined in the Applicant's Form 86A, dated 17 December 2020, a Notice of Motion was filed by the Applicant's Counsel pursuant to Order 53/5 of the Rules of the Supreme Court ("RSC") on 27 January 2021. The decisions in respect of which relief is sought is pleaded as follows:

   "*The decision of the Information Commissioner and summonses issued by her to the Solicitor General and the Acting Permanent Secretary of the Ministry of Health dated 26 November 2020 to require the production of records that are excluded from the ambit of the Public Access to Information Act 2010 by virtue of section 4(1)(b)(vi) of that Act and which are not records relating to the general administration of the Attorney General's Chambers*."

9. By way of relief, the Applicant seeks the following order of this Court:

   "*An order quashing the said decision and the summonses directed to the Solicitor General and the Acting Permanent Secretary of the Ministry of Health dated 26 November 2020*."

The Evidence:

10. The evidence before this Court was filed in the form of affidavits, none of which were challenged on the facts. The Applicant's supporting evidence was sworn by the Deputy Solicitor General, Mrs. Shakira Dill-Francois and Crown Counsel Ms. Lauren Sadler-Best. The IC provided affidavit evidence sworn in her own name in response to the Applicant's evidence.

11. On Mrs. Dill-Francois' evidence, the following description of the Brown Settlement Record was provided [5]:

"*I should also explain at the outset that the records in issue in this matter consist exclusively of the settlement agreement between the Government, on the one hand, and Bermuda Health Care Services Ltd., Brown-Darrell Clinic Limited and Hamilton Medical Center Ltd (companies said to be owned and/or controlled by Dr. Ewart Brown), on the other hand, and the exchange of correspondence (both internal and external) leading to that agreement resolving the dispute over the impact of the Bermuda Hospitals Board (Hospital Fees) Amendment Regulation 2017 in reducing diagnostic imaging fees. Those records are compendiously referred to in the correspondence (conveniently, if inaccurately) as the "Brown legal agreement"*."

12. In the IC's evidence she explained that the Ministry issued an initial decision to refuse access in a written notice to the Requestor dated 10 May 2018 (the "Initial Refusal"). The Initial Refusal was made by the Ministry's Information Officer, Ms. Eshe Coleman. Relevant to these proceedings, the Information Officer's response to the Request was as follows, *inter alia*:

"*In addition, as previously communicated, there are records the Ministry holds that we are not authorized to release or are not subject to the PATI Act. Specifically these are:*

…

ii. Records obtained or created by the Attorney General Chambers- the PATI Act does not apply to such records in accordance with s.4 and s.35(3)."

13. The IC also produced a copy of the Ministry's 30 July 2018 decision on its internal review (the "Internal Review") of the Initial Refusal. In its relevant portions, the Internal Review, which is signed by the Ministry's Permanent Secretary, Ms. Attride-Stirling, provides:

"…

Decision and reasons for decision

After a thorough review of the records associated with this request, and discussions with Legal Counsel at the Attorney Generals Chambers, it is my decision to uphold the decision of the information officer

The agreement between the Ministry of Health and the Brown Darrell Clinic and Bermuda and the Brown Darrell Clinic and Bermuda Healthcare Services as well as "the letter before action" are both confidential documents drafted by the Attorney General's (AG's) Chambers. For this reason the request for these documents must be denied based on s. 4(b)(vi) of the Act, which states that the Act does not apply to records "created by" the AG's Chambers "in the course of carrying out their functions". Similarity [sic] 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 grounds as the Act does not apply to records

"obtained" by the AG's Chambers in the course of carrying out their functions. Legal and professional privilege also apply to these records in accordance with s.35(3) of the Act."

14. Following the Permanent Secretary's Internal Review, on 4 July 2019 the IC put the Ministry on formal notice that she would embark on an independent review, thereby requesting access to the withheld Brown Settlement Record by 18 July 2019. In the 4 July letter the IC wrote, *inter alia*:

"*For the records over which the Ministry is asserting either section 4(1)(b)(vi) or section 35(3) of the PATI Act, the requirement to provide the Information Commissioner with access can be satisfied by allowing her to examine the records on site*."

15. On 19 August 2019 PS Attride-Stirling wrote to the IC's office advising that the Attorney-General's Chambers would respond directly to the IC in answer to her request for on-site access. She wrote:

"…
Records over which the Ministry is asserting section 4(1)(b)(vi) or section 34(3)
This assertion has been made on the advice of the Attorney General's Chambers who are the holders of the records for the purposes of these sections. Therefore, Attorney General's Chambers will respond to your request directly under separate cover. The Ministry does not have jurisdiction over these records."

16. In a subsequent letter dated 26 August 2019 the Permanent Secretary reiterated her request for the IC to liaise directly with the Attorney-General's Chambers. However, by letter dated 13 September 2019, Investigation Officer, Ms. Answer Styannes (the "IO"), on behalf of the IC, responded to PS Attride-Stirling asserting that the Brown Settlement Record was being held by the Ministry, notwithstanding that they were created, owned or also held elsewhere. The IO suggested that this meant that the Ministry was required to afford the IC access and examination of the Brown Settlement Record in accordance with section 56(2) of the PATI Act. She added;

"*The Information Commissioner's authority under section 56(2) is notwithstanding "any other act or any privilege under the law of evidence."… … Given the legally binding nature of the Information Commissioner's decisions, she must consider the facts and circumstances surrounding that particular request. This requires examination of the actual records to allow the Information Commissioner to assess whether reasons used by a public authority to refuse a PATI request, including the provisions under Part 4 and in section 4 of the PATI Act, are engaged…*"

17. A deadline of 4 October 2019 was accordingly fixed for the IC's receipt of the Brown Settlement Record, failing which she would consider invoking her powers under section 56(1)(a) to issue a summons requiring the appearance and oral evidence of any non-compliant person.

18. On behalf of the Attorney-General, the Deputy Solicitor General, Mrs. Dill-Francois wrote to the IO on 25 September 2019 stating that the Brown Settlement Record is not an exempt record but is instead excluded from the operation of the PATI Act. The Deputy Solicitor General further explained that the IC's powers under section 56 did not apply because the requested material related to the functions of the Attorney General's Chambers, as opposed to its general administration.

19. Over a year later, in a further letter to the Ministry dated 6 October 2020, copied to the Deputy Solicitor General, the IO acknowledged Mrs. Dill-Francois' letter but made the following statement, *inter alia*:

"*… I particularly note the Ministry's 'transfer' of the responsive records to Attorney-General's Chambers and the Cabinet Office, mentioned in the Ministry's letter of 26 August 2019.*

As I have explained in my letter of 13 September 2019, the Information Commissioner's Office (ICO) will continue to consider the responsive records as part of this review because the records were held by the Ministry at the time of the PATI request. Given the pending review by the Information Commissioner, the Ministry is legally required to retain the responsive records.

To progress this matter, the Information Commissioner requires access to the remaining records listed on the Schedule of Records, dated 26 August 2019…

The ICO acknowledges that our office and the Attorney-General's Chambers appear to disagree on the authority of the Information Commissioner to review a public authority's decision that the PATI Act is not applicable to a record, in accordance with section 4(1) of the PATI Act.

If the Ministry is unable to provide such access, due to the legal position of the Attorney-General's Chambers of otherwise, the Information Commissioner shall issue a summons in accordance with section 56 of the PATI Act for the production of the records…"

20. Maintaining the position of the Attorney-General's Chambers, Mrs. Dill-Francois replied by letter dated 6 November 2020. There, in material part, she wrote:

"*It is accepted that this exclusion does not relate to the Attorney-General's Chambers' 'general administration' documents, but as noted in Right to Know CLG and Office of the Data Protection Commissioner / CASE NUMBER: 160447:*

'*…the term "general administration" refers to records which have to do with the management of an FOI body such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organization, office procedures and the like. Whatever else the records at issue might be in this case, I am satisfied, having regard to the ODPC's explanation of the nature and subject matter of the relevant lobbying activities and to my understanding of the term, that they do not concern the general administration of the ODPC.*'

It is clear that 'the nature and subject matter' of the records, namely a legal agreement, do not relate to the general administration of the Attorney-General's Chambers and thus do not come within the ambit of the Act. Therefore, it is not necessary for the ICO to review the documents to ascertain whether they are general administration records, especially since the ICO has been provided with an explanation of same.

The Attorney-General's Chambers asserts its 'ownership' of the records in issue, and thus the Ministry should not be required to disclose any copies of the records it may have in its physical possession. Further, the position that the Ministry must provide the documents because they are 'held by' the Ministry would make a nullity of the exclusions outlined section 4; the 'held by' requirement is not applicable, as the starting point is that the Act does not apply to the records…"

21. Without yielding, the IO's final word before issuing the two summonses was conveyed to the Deputy Solicitor general in a short letter dated 13 November 2020. Confirming that formal action would be taken, the IO restated its requirement for access and noted that it had never before issued a decision without first reviewing the records in question. This standard approach was confirmed by the IC in her affidavit evidence filed in these proceedings where she deposed [15]:

"*For the Information Commissioner to determine whether certain records were created or obtained by any of the public authorities listed in section 4(1)(b) in the course of carrying out their function, and whether they relate to the general administration (and thus fall within the scope of the exclusion in section 4(2)), the Information Commissioner must have the authority to review all records in question.*

Analysis and Findings

22. The purpose of the PATI Act is expressly stated under section 2:

"***Purpose***

2 The purpose of this Act is to—

(a) give the public the right to obtain access to information held by public authorities to the greatest extent possible, subject to exceptions that are in the public interest or for the protection of the rights of others;
(b) increase transparency, and eliminate unnecessary secrecy, with regard to information held by public authorities;
(c) increase the accountability of public authorities;
(d) inform the public about the activities of public authorities, including the manner in which they make decisions; and
(e) have more information placed in the public domain as a matter of routine.

23. An "exempt record" under the Interpretation section is said to mean "*a record that is exempt from disclosure under this Act by virtue of a provision of Part 4*".

24. The scope of the application of the PATI Act may be determined by section 4 which lists the classes of material to which the legislation does not apply. Section 4 provides:

"*Application*
4 (1) Subject to subsection (2), this Act does not apply to—

(a) records relating to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person; or

(aa)records relating to the Justice Protection Investigative and Protective Agency, held by the Bermuda Police Service in accordance with the Justice Protection Act 2010;

(b) records obtained or created by any of the following public authorities in the course of carrying out their functions—
(i) the Office of the Auditor General;
(ii) the Human Rights Commission;
(iii) the Office of the Information Commissioner;
(iv) the Office of the Ombudsman;
(v) the Department of Public Prosecutions which, for the purposes of this section, includes the Justice Protection Administrative Centre;
(vi) the Attorney General's Chambers;

(vii) the Department of Internal Audit;
(viii) the Financial Policy Council.

(2) The reference to records in subsection (1) does not include records relating to the general administration of—

(a) any court, tribunal or other body or person referred to in subsection (1)(a); or
(b) any public authority referred to in subsection (1)(b)."

25. Section 4(1)(b)(vi) may be construed on a plain and literal reading of its wording. Save for records relating to the general administration of the Attorney-General's Chambers, any record obtained or created by the Attorney-General's Chambers is outside of the scope of the application of the PATI Act. Otherwise put, the PATI Act does not apply to records obtained or created by the Attorney-General's Chambers, so long as such records do not relate to the general administration of the Attorney-General's Chambers. The non-application of the PATI Act to such records is not to be confused with records which are afforded an exemption under Part 4.

26. Part 6 of the PATI Act outlines the review process which may be carried out by the IC after the following two stages have been completed. Those first two steps of the application for access to public records under the PATI Act entail:

(i) an initial stage in accordance with section 14 of Part 3 whereby a decision on a request will first made by the relevant public authority named on the Information statement pursuant to section 5(1)(g) (That officer, to whom requests are directed in the first instance, is designated under section 62.) and

(ii) a second stage which is an internal review governed by Part 5 which allows a requestor or third party to apply for the decision made under section 14 to be reviewed.

27. Once that two-part process has been exhausted, an application for review by the IC may be triggered by section 45 of the PATI Act. Section 46 contemplates a mediation approach by the IC under which it is open to her to resolve the application by "*negotiation, conciliation, mediation or otherwise*." Where mediation does not occur or occurs unsuccessfully, the IC is required to conduct a review and may determine the procedure for doing so, so long as it is done in private and the requestor and the public authority (and any relevant third party) are given a reasonable opportunity to make representations.

28. The statutory powers conferred on the IC, for the purposes of conducting a review, are specified under section 56 of the PATI Act. Under that section the IC is empowered to summons and enforce the appearance of persons who may be compelled to give written or oral evidence on oath. The IC may also enter the premises occupied by any public authority and examine the records relevant to the investigation.

29. Mr. Rothwell, on behalf of the IC, argued that the production of a record for examination by the IC for the purpose of a review under Part 6 is not to be treated as a disclosure of the same record to the public. He urged this Court to refrain from intervening in the process which can only be completed once the IC makes a final determination. In his written submissions Mr. Rothwell contended [13-14]:

"*13. ICO as part of the PATI review process is quite distinct from a request to <u>disclose</u> the same records, as it appeared that the Ministry had mistakenly concluded that releasing the requested records to the ICO was somehow equivalent to 'disclosure' of such documents to the public, and this was clearly a fallacious view. Furthermore, the Ministry also appeared to fortify this misapprehension by maintaining reasons for refusing to disclose certain documents that are exempt from disclosure under Part 4 of the PATI Act. The concepts of the ICO's review jurisdiction and disclosure should neither be conflated nor confused.*

14. In other words, the ICO simply required to have sight of the relevant records so as to confirm their alleged exemption as part of the review, but the Ministry refused, maintaining that its decision under section 4(1) of the PATI Act simply falls outside the scope of the ICO's review powers."

30. Illustrating wide-spread support of his submission, Mr. Rothwell pointed to a number of examples in previous Irish and Canadian cases where the Information Commissioners of those jurisdictions had examined the records as part of its review process of the refusal of the public authority.

31. However, section 56(2) provides:

"(2) *Notwithstanding any other Act or any privilege under the law of evidence, the Commissioner may, during the conduct of a review under this Act, examine any record to which this Act applies that is under the control of a public authority, and no such record may be withheld from the Commissioner on any grounds*."

32. Plainly, section 56(2) limits the IC's power to examine records to which the PATI Act applies. This means that the IC's powers to examine records will apply both to records which are susceptible to being made available to the public under the Act and to records which are subject

to an exemption under Part 4. That is because both of these classes of records are records to which the PATI Act applies.

33. What is also clear from subsection (2) is that the IC does not possess a right of examination over any records which do not apply to the PATI Act. Records which do not apply to the PATI Act are listed under section 4. This is not to be confused with records which are entitled to an exemption from public disclosure by the operation of Part 4 of the PATI Act. In this case, the Applicant asserts that the Brown Settlement Record is not an exempt record under Part 4 but instead falls outside of the scope of the statute altogether because section 4(1)(b)(vi) says so. The only qualification to section 4 applies to records held by the Attorney General's Chambers which relate to the general administration of the Attorney-General's Chambers. That qualification does not arise, says the Applicant without any real contention from Mr. Rothwell.

34. During the course of the hearing, I was referred to previous written decisions made by the Information Commissioner in Ireland governed by the Freedom of Information Act 1997 ("FOIA 1997") which was later repealed by the Freedom of Information Act 2014 ("FOIA 2014"). Section 46 of the FOIA 1997 was subtitled "Restriction of Act" and section 46(1)(b) provided, similarly to section 4 of the PATI Act, that records held or created by the Attorney General do not apply to the FOIA 1997, save for records concerning the general administration of the office. Under the FOIA 2014, section 42 contains the "Restriction of Act" whereunder records held or created by the Attorney General but not relating to general administration continue to fall outside of the scope of the Act.

35. Against that statutory background, Mr. Harshaw relied on the decision earlier cited by Mrs. Dill-Francois in her correspondence with the IC, namely *Right to Know CLG and Office of the Data Protection Commissioner / CASE NUMBER: 160447*. In that case, the public authority denied a request for public access on the grounds that the records sought fell outside the scope of its obligations under the legislation. Similar to the provisions concerning records held or created by the Attorney General's Chambers, the FOIA 2014 does not apply to records held or created by the Data Protection Commissioner or an officer of that office, save as regards a record concerning the general administration of that Office.

36. The public authority asserted that the Information Commissioner had no right of review since the records in question were not within the application of the Act. (I would pause here to observe that in the present proceedings before me, insofar as I have been made to understand, the Applicant's complaint is not so much that the IC does not have a right to conduct an review of its decision, but more so that the IC does not have a right to examine the records in the course of the review since it is plainly obvious that the PATI Act does not apply to the Brown Settlement Record.)

37. The Information Commissioner in *Right to Know CLG* was thus concerned to determine whether he was dispossessed of a right to review the refusal of access decided by the Office of the Data Protection Commissioner ("ODPC"). In his written decision he said:

"*Following an exchange of correspondence, the ODPC refused the request on the basis that any records of the categories described in the request fall outside the scope of its obligations under the FOI Act in relation to access to records because they do not concern the general administration of the ODPC. On 16 September 2016, the applicant sought an internal review of that decision.*

In its response dated 7 October 2016, the ODPC outlined its position that no right of internal review arose as the records sought concern matters for which it is not a public body for the purposes of the Act. Without prejudice to that position, however, it went on to provide a detailed explanation of why it considered that records relating to each of the eight specific lobbying register entities did not concern the general administration of the ODPC and it affirmed the original decision to refuse the request. On 17 October 2016, the applicant sought a review by my Office of that decision.

I have decided to conclude this review by way of a formal, binding decision. In conducting the review, I have had regard to the correspondence between the ODPC and the applicant as described above. I have also had regard to the correspondence between this Office and both the ODPC and the applicant on the matter.

Scope of the Review
While the ODPC engaged with my Office in relation to the review, it has maintained its position that I have no jurisdiction to review its decision to refuse a request on the ground that the records sought concern matters for which the ODPC is not a public body for the purposes of the Act. Therefore, the first question I must consider is whether I have the jurisdiction under the FOI Act to review the ODPC's refusal of the request. If I find that I have, I will then proceed to consider whether the ODPC was justified in refusing the request on the ground that the records sought do not concern the general administration of that Office.

Analysis and Findings
Jurisdiction to Review
…
…
The position of the ODPC is that it is a public body for the purposes of the Act only in respect of records concerning the general administration of the Office, and that it is therefore subject to the obligations that apply to FOI bodies under the Act only where the records sought concern the general administration of the Office. Essentially, its argument is that none of the

provisions of the FOI Act apply where the records sought do not concern the general administration of the ODPC.

During the course of the review, my Office explained to the ODPC that accepting its position would essentially allow it to throw a blanket over all of its records without external independent oversight by me ad that it would result in the possible withholding of information that the Oirechtas clearly intended should be released under the Act... ...

As an FOI body, I consider that the ODPC must make a "decision" under section 13 in relation to an access request made under section 11; in making that decision, it may look to the relevant provisions of the Act, including Part 1 of Schedule 1, in deciding whether or not to grant access, but it must otherwise adhere to the requirements of the Act, including in relation to the statutory rights of review. Any decision to refuse access on internal review under section 21 of the FOI Act is in turn subject to review by my Office under section 22(1)(b) of the FOI Act. Accordingly, I find that I have the jurisdiction under the FOI Act to review the ODPC's decision to refuse the applicant's request on the basis that Part 1(f) of Schedule 1 applies.

Refusal of Request

The question I must now consider is whether the ODPC was justified in refusing the request on the ground that the records sought do not concern the general administration of its Office. While the term "general administration" is not defined in the Act, my Office has previously considered what types of records are captured by the term. In Case 160055 (Mr. X and the Office of the Attorney General), Stephen Rafferty of my Office stated the following:

"While the Act is silent on the meaning of general administration, this Office considers that it clearly refers to records which have to do with the management of the AG's Office such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organization, office procedures and the like. I am satisfied that it does not refer to records relating to matters concerning the core business of the Office, such as advising on legislation or litigation."…"

38. The Information Commissioner also commented on the irrelevance of the public's interest in the matter before upholding the ODPC's decision not to disclose the records:

"*Finally, I note that the applicant informed my Office of an investigation being undertaken by the ODPC in relation to contraventions of the data protection law and argued that there is a clear public interest in accessing lobbying information where the lobbyist is subsequently the subject of an investigation. The question of whether or not such a public interest exists is of no*

relevance to the question of whether or not the records come within the scope of the FOI Act by virtue of the fact that they concern the general administration of the ODPC."

39. I am assisted by the decision in *Right to Know CLG* on two fronts. Firstly, the decision reinforces my assessment that the IC has a right and duty to review any refusal of public access to records by a public authority under Part 5 of the PATI Act where an application for her to do so arises. However, the right to review will not always be tantamount to a right to examine records as the IC is restricted from examining records to which the PATI Act does not apply. This finding of law is grounded on section 56(2). I also note that Information Commissioner, Mr. Peter Tyndall, did not examine the refused records in *Right to Know CLG* in making his final determination that the FOIA 2014 did not apply to those records.

40. The second point to be taken from the Irish Commissioner's written judgment is in respect of the meaning of "general administration". No serious conflict arose on the construction of this term. Indeed, I agree with the description of "general administration" as it was put by Mr. Stephen Rafferty in an earlier decision from the Irish Commissioner's Office. The core business of the Attorney General's Chambers is in its legal professional services which entails the provision of legal advice and representation for the benefit of its clients who may be engaged at any particular stage of the litigation process. The fact that the clients of the Attorney General's Chambers are public bodies or public authorities, or that a litigious matter is resolved by way of an out-of Court settlement does not convert the related litigation record into a matter of general administration.

41. In my judgment, the documents described under the Request do not describe matters of general administration. The Request seeks a record of a settlement agreement in respect of a litigious matter which would have otherwise been resolved by the Court in judicial review proceedings. As I see it, there is no reasonable possibility that any of the documents particularised in the description of the Request would qualify as matters relating to the general administration of the Attorney General's Chambers. It thus follows, that this Court finds that the Brown Settlement Record does not apply to the PATI Act and that the IC has no right of examination of this record on a plain and literal construction of section 56(2).

42. Mr. Harshaw also pointed to the Irish High Court's decision in *John Deely v The Information Commissioner and the Director of Public Prosecutions* 2000. No.95MCA where the Court was sitting in appeal of the decision of the Information Commissioner and the DPP appeared as a Notice Party. In that judgment Mr. Justice McKechnie was concerned with whether the DPP could be compelled to submit records for examination when it was averred that such records fell outside the scope of the FOIA 1997 in accordance with section 46. McKechnie J said [26]:

"*26. Section 46(1)(b) in my view, has both a stand alone* [stand-alone] *independent existence as well as having a direct relationship with Section 2(1). Under the former heading, the introductory words of the Section are in my opinion clear beyond any dealt* [sic] [doubt], *uncertainty or ambiguity. "The Act does not apply to ……". This can only mean that the provisions of the 1997 statute, obviously to include Section 6(1), have no application to the documents listed therein save only as to the qualification contained within such listing. In my view those words can have no other meaning. Subsection (1)(b) expressly includes a "record", held or created by the DPP or his office, unless that record relates to the only qualification mentioned, namely the general administration of that office. If this be correct it must follow that the Act, by virtue of this Section alone can have no application to the relevant record in this case, it not being one covered by general administration. It must also follow therefore that since the Act does not apply, the head of the public body concerned, in this case the DPP, cannot be compelled to abide by any Section thereof and that accordingly he can refuse a request for such documents made to him under Section 7…*"

43. I align myself with these remarks from McKechnie J which support my finding that no public authority can be compelled by the IC to produce any record to which the PATI Act does not apply. Again, for the avoidance of doubt, "exempt records" under Part 4 are governed by the PATI Act. However, records which are said under section 4 not to fall within the application of the legislation are not governed in any way by the IC. After all, the IC's statute-born powers are limited to the operation of the PATI Act.

44. So, how might a public authority be prevented from abusively asserting a right to withhold records from the review process of the IC? Well, most often the question as to whether the PATI Act applies will be answerable by reference to the description of the documents requested. The description of the documents provided by a Request will usually suffice as a clear indication as to whether the records fall entirely outside the scope of the Act. In the present proceedings, the IC has not provided this Court with any sufficient basis or reason for her insistence on examining the Brown Settlement Record in order to satisfy herself that it is a record obtained or created by the Attorney General's Chambers which is not a record relating to the general administration of those Chambers. Instead, the IC's Counsel suggested that her practice of examining any and every single record which is the subject-matter of a review should be permitted by this Court to stand, even in respect of records to which the PATI Act does not apply. Respectfully, such a notion is misguided.

45. Section 49 envisages that a public authority may be aggrieved by a decision made by the IC and provides for a process of challenge to the impugned decision by way of judicial review. I see no reason why the Applicant should be faulted for having availed itself of this statutory process. The IC's decision to issue the two summonses for the production of the Brown

Settlement Record was *ultra vires* for the reasons I have outlined in this judgment. Accordingly, the application for judicial review of that decision must succeed.

46. Having said that, it would be remiss of this Court not to acknowledge the public sensitivities which inevitably result from a public authority's non-disclosure of records on matters which are of considerable public interest. The purpose of the PATI Act, as suggested by section 2(a), is to increase public access to public information to the greatest extent possible. However, section 2(a) also recognises that this is subject to exceptions that are either in the public interest or for the protection of the rights of others. In this case, it is more so the latter which applies.

Conclusion

47. The IC has a statutory right to review the Attorney General's Chambers' decision not to disclose the Brown Settlement Record on the grounds that the PATI Act does not apply to that record. However, I find, as a Declaration of this Court, that the IC's decision to issue the two summonses for the production of the Brown Settlement Record for her examination was *ultra vires* because section 56(2) does not permit the IC to examine records which fall outside the scope of the application of the PATI Act. Accordingly, the decision resulting in the two summonses issued by the IC is hereby quashed.

48. Unless either party files a Form 31D to be heard on the issue of costs within 14 days of the date of this judgment, I award the Applicant its costs of this action on a standard basis to be taxed by the Registrar if not agreed.

Wednesday 25 January 2022

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT