Neutral Citation Number: [2023] CA (Bda) 6 Civ

Case No: Civ/2022/07

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2020: No. 469

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 24/03/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

THE INFORMATION COMMISSIONER

Appellant

-and-

THE ATTORNEY-GENERAL

Respondent

Ms Monica Carss-Frisk KC instructed by Mr Warren Bank, Cox Hallett Wilkinson, for the Appellant
Mr Paul Harshaw, Canterbury Law Limited, for the Respondent

Hearing date(s): 16 November 2022

- -

APPROVED JUDGMENT

CLARKE P:

Introduction

1. On **14 February 2018** a request ("the Request") was made by a Royal Gazette reporter, Ms Sam Strangeways, under the *Public Access to Information Act 2010* ("the PATI Act") for access to a number of documents indicated by type. These were:

> "a. *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;*
>
> *b. All communications concerning that agreement;*
>
> *c, Records showing how the amounts were calculated;*
>
> *d. The letter received by the Ministry 'before action' in October 2017 pertaining to judicial review of the BHB (Hospital Fees) Amendment Regulations 2017; and*
>
> *e The response and any further communications*."

The above summary is that contained in paragraph 2 of the first affidavit of Ms Gitanjali Gutierres, the Information Commissioner for Bermuda of 17 June 2021.

2. These documents have been referred to as the "*Brown Settlement Record*". They relate to a settlement by the Ministry of Health of litigation with the Brown-Darrell Clinic and Bermuda Healthcare Services in respect of a dispute over the impact of the *Bermuda Hospitals Board (Hospital Fees) Amendment Regulation 2017* in reducing diagnostic imaging fees. In the evidence of Mrs Dill-Francois, the Deputy Solicitor General they are described in the following terms:

> "*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".*

3. Although the agreement is referred to as an agreement with the Ministry of Health, it is, in truth, an agreement with the Government of Bermuda, which for these purposes is a corporation sole (see section 44 of the *Interpretation Act 1951*), acting through the Ministry. The Government is represented by the Attorney General, its principal legal adviser. The documents were said to be created in, or obtained by, the Attorney General's chambers.

4. The judicial review conducted by Subair-Williams J, from whose judgment this appeal is brought, is concerned with documents responsive to the Request, which the Ministry of Health and the Attorney General's Chambers have refused to produce on the ground that they fall outside the scope of application of the PATI Act by virtue of section 4.1. (b) thereof. The request in relation to these documents was rejected on that ground on **10 May 2018** by the Ministry's Information Officer. That decision was upheld on an internal review on **30 July 2018.** Certain documents, with which this appeal is not concerned, were held to be exempt from production under various provisions of the PATI Act. The distinction between documents which fall outside the scope of the PATI Act and those that are exempted from production under the terms of the PATI Act is to be found in the provisions of the Act cited in [16] below.

5. In her decision of **30 July 2018**, the Ministry's Permanent Secretary, Ms Attride-Sterling, provided the following reasons:

> "*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."*

6. Ms Strangeways approached the Information Commissioner (the "Commissioner" or "IC") for an independent review of the Ministry's refusal decision. The Commissioner sought to obtain from the Ministry the records that were said either to fall within section 4.1(b) or to be exempt from production under other provisions of the PATI Act. The Ministry provided a number of documents to the Commissioner; but refused to provide her with copies of the records which it claims fell within section 4.1(b). In a letter dated **4 July 2019** the Commissioner put the Ministry on formal notice that she was progressing an independent review, and requested access to the withheld Brown Settlement Record by 18 July 2019. She said, *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*."

7. The process thereafter was somewhat tortuous. The Judge set it out in her judgment in these terms:

> *"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 Commissioner, 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 statements, 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 ICO'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 ICO restated its requirement for access and noted that it had never before issued a decision without first reviewing the records in question[1]. 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*

[1] In Decision 18/2022, dated 3 August 2022, i.e. after the decision at first instance, the Commissioner considered, *inter alia,* whether documents which the Ministry had not claimed to fall within section 4 (1) (b) in fact did so. She decided that they did, and that it was not, therefore, necessary to consider the exemption relied on. She also considered the claims by the Ministry to be entitled to rely on exemptions in respect of the other documents. She had considered the application of section 4 in several other cases, in which documents said to be excluded by section 4 were provided to her: e.g. Decision 02/2019 [25]; Decision 19/2019 [34]; Decision 27/2019 [19]; Decision 05/2020 [27]; Decision 07/2020 [24]. In all of those cases the decision was that the relevant records did come within section 4 (1) (b).

> *in section 4(2)), the Information Commissioner must have the authority to review all records in question."*

8. The history of events set out in the previous paragraphs suggests that none of the documents set out in [2] above have been produced to the Commissioner; and, at the hearing before us, matters proceeded on that basis. However, in a note provided to the Court by Ms Carss-Frisk KC, dated 25 November 2022, we were informed that not all the records summarised in that paragraph had been withheld from the Commissioner. In fact, the following records, said by the Ministry to fall within section 4.1 (b), had been provided at the following times:

   (a) the agreement of December 8, 2017, which was provided to the Commissioner with the Permanent Secretary's letter of 26 August 2019;

   (b) two other records covered by the request, which were, also provided by the Ministry with that letter.

   Why the Ministry had provided these three documents is unknown. In addition, the Ministry had provided the Commissioner with a substantial number of documents in relation to which the claim was for exemption from production.

9. The letter of 26 August 2019 from the Permanent Secretary also enclosed what she described as the *"Schedule of Records ICO 509 Brown legal agreement 190824*" ("the Schedule").

10. There were 189 records logged in the Schedule. Of those the Permanent Secretary said that she was providing 97 responsive records and that she had transferred 79 to the Attorney General's Chambers and 13 to the Cabinet Office, to which the 79 and the 13 were said to belong. The Schedule is said to have indicated, with regard to each record withheld, the reason for doing so, e.g. that it came within section 4, so that the PATI Act did not apply, or was exempted under the PATI Act from disclosure. The documents included, we were told. correspondence, spreadsheets of hospital work output, data concerning insurance claims, technical and statistical information, materials prepared for Cabinet, minutes of meetings, and details of stances taken by officials

11. On **26 November 2020** the Commissioner issued two summonses pursuant to section 56 of the PATI Act to the Solicitor General and the Acting Permanente Secretary to the Ministry of Health, requiring production of documents by those parties in order that she could perform the function of reviewing the decisions that the Act did not apply to the documents in question or that they were exempt. The documents were identified by their number on the Schedule. By this time the Commissioner had perceived that out of the 79 records which the Ministry had said would be withheld by reference to section 4.1 (b), 3 had in fact already been provided. As a result, the summonses did not seek production of all 79 in respect of which the Ministry had involved section 4.1 (b). The summonses did not, of course, identify the 3 records in this category that had already been provided; and, by the time of the hearing before us both sides appear to have been proceeding on the basis that the records which had not been provided included the settlement agreement.

12. The Commissioner sought these records because it is her standard practice to review the documents about which she is required to make a decision and her evidence is that she has never before issued a decision in reviews involving section 4 without reviewing the records to which her decision relates.

13. The Attorney General applied for a judicial review of the Commissioner's decision to issue these summonses, on the ground that the Commissioner did not have power under the PATI Act to issue a summons in respect of records to which, by virtue of section 4 (1) (b) (vi) thereof, the PATI Act did not apply and which were not records relating to the general administration of the Attorney General's Chambers. The judge, as requested, quashed the Commissioner's decision.

14. The fact that the 3 documents in question were provided to the Information Commissioner by the Ministry in August 2019 means that no summons was needed by her in order to secure them. It does not, of course, mean that the requester is entitled to access to them since, if section 4 applies to them, they are not covered by the Act. The fact that the Information Commissioner has obtained them as part of the documents to be reviewed cannot take them outwith the section.

The provisions of the PATI Act

15. The PATI Act provides individual citizens with the right to request and to be given access to certain records of Bermudian public authorities. Section 2 describes the purpose of the Act as follows:

> ***"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."*

16. Section 4 of the Act describes the scope of the application of the Act as follows:

> "***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)."*

17. As is apparent, the PATI Act excludes from its operation the records of a substantial number of public bodies to which the Legislature has decided that it shall not apply so long as such records do not relate to the general administration of the relevant body.

18. Under Part 3 (sections 12 - 20) section 12 (1) enacts the basic right to request and to be given access to records:

> *"**Access to records***
>
> *(1) Subject to this Act, every person who is a Bermudian or a resident of Bermuda has a right to and shall, on request, be given access to any record that is held by a public authority, other than an exempt record,"*

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*".

19. Section 13 contains provisions as to, *inter alia*, the form of the request. Section 14 provides that the relevant public authority must within six weeks of the receipt of the request decide whether to grant or refuse the request and give reasons for its decision. Section 15 gives the public authority power in certain circumstances to extend the six weeks' limit. Section 17 provides that the authority shall give access to a record under the Act by providing the requester with the information in any of the seven forms or manners set out in the section that it considers appropriate.

20. Part 4 of the Act (sections 21- 40) exempts from disclosure a wide range of exempt records, such as (but by no means limited to) certain personal or commercial information. This exemption is in several respects made inapplicable if disclosure of the relevant record is in the public interest. As is apparent, records falling within Part 4 are records to which the Act applies but which are, subject to its provisions, exempt from disclosure. Such records are to be distinguished from the records to which section 4 applies which are records to which the Act does not apply at all.

21. Part 5 (sections 41 - 44) of the Act makes provision for an internal review by the head of a public authority of a decision by the authority to refuse the requester access to the documents sought. Under section 41:

> *"Internal review by authority*
>
> *A requester or a third party may apply in writing to a public authority for a review by the authority (in this Part referred to as an "internal review") of any decision made by the authority with respect to a request made under Part 3 or of any failure by the authority to take any action that it is required to take under this Act in respect of such request, including:*
>
> *(a) a decision to grant or refuse to grant access to a record;"*

22. Section 42 lays down a time limit for application for internal review. Section 43 provides that an internal review of a decision by a public authority, other than a decision made by the head of a public authority, shall be conducted by the head of the public authority concerned. Section 44 provides that where an application to a public authority for internal review is for review of a decision made by the head of the public authority, the public authority shall refer the application to the Commissioner.

23. Part 6 (sections 45 - 49) then makes provision for an external review of an authority's decision by the Commissioner. Section 45 provides:

> *"**Application for review***
>
> *45 (1) Subject to subsection (2), a requester or a third party may apply in writing to the Commissioner for a review, as the case may be, of—*
>
> *(a) any decision made by the head of a public authority under section 43,*
>
> *within six weeks after being notified of that decision; or*
>
> *(b) any failure by the head of a public authority to make a decision under section 43, within six weeks after the date when the decision was required to be made."*

24. Section 46 provides for a mediation process.

25. Section 47 provides:

> "***Review***
>
> *(1) If the Commissioner decides not to attempt to resolve the matter under section 46 or if any such attempt is not successful, the Commissioner shall commence a review of the matter.*
>
> *(2) Subject to this Act, the Commissioner may determine the procedure to be followed in the conduct of a review under this Part.*
>
> *(3) Every review shall be conducted in private.*
>
> *(4) The Commissioner shall give a reasonable opportunity for the requester, the public authority and any third party concerned to make representations.*

(5) Unless permitted by the Commissioner, no person has a right to be present during representations made to the Commissioner by another person, or the right to have access to, or to comment on, representations made by another person.

(6) The Commissioner shall, as soon as practicable—

(a) complete the review and make a decision with regard to the review; and

(b) notify the requester, the public authority and any third party concerned of the Commissioner's decision and the reasons for that decision."

26. Section 48 provides:

"*Decision by Commissioner*

48 (1) the Commissioner may make a decision to—

(a) affirm, vary or reverse the decision of a public authority that is the subject of review by the Commissioner; or

(b) make such other order, in accordance with this Act, as the Commissioner considers appropriate.

(2) A decision of the Commissioner shall, where appropriate, specify the period within which effect shall be given to the decision.

(3) Subject to section 49, a decision of the Commissioner is binding on all persons affected by it and, upon the decision being filed with the Registrar of the Supreme Court, it shall have the effect of an order of the Supreme Court and shall be enforceable in the same manner as an order of the Court."

27. Section 49 makes provision for a review of the Commissioner's decision by the Supreme Court, which may confirm, vary, remit or set aside the decision.

28. Part 7 of the Act (sections 50 - 58) contains provisions dealing with the Office of Information Commissioner, which is established by section 50. Her mandate is set out in section 51 as being:

"*to promote public access to information in accordance with this Act, including by raising public awareness and understanding of the rights conferred by the Act and*

by providing guidance to public authorities with regard to the obligations imposed on them by the Act".

29. Section 53 provides:

> **"*Obligation to maintain secrecy***
>
> *(1) The Commissioner and every person appointed or engaged under section 52 shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions and shall not communicate any such matter to any person except for the purpose of carrying out their functions under this Act.*
>
> *(2) Information or documents obtained by the Commissioner or any person appointed or engaged under section 52 in the exercise of their functions shall not be disclosed except for the purpose of this Act."*

30. Section 56 provides:

> **"*Powers of Commissioner***
>
> *(1) In conducting a review, the Commissioner has power—*
>
> *(a) to summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath or affirmation, and to produce such documents and things as the Commissioner deems requisite to conduct the review, in the same manner and to the same extent as a judge of the Supreme Court.*
>
> *...*
>
> *(d) to enter any premises occupied by any pubic authority on satisfying any security requirements of the authority relating to the premises;*
>
> *...*
>
> *(f) to examine and obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*
>
> *(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."*

The basic question

31. The question that arises in this case is whether the Commissioner has power to examine records which are said by the relevant public authority to be excluded from the application of the Act by section 4 (1) (b). If she does, it would mean that she could have access to documents such as legal advice given by or to the Attorney General or the DPP, analyses of the prospects of success in relation to current or contemplated prosecutions, and the current identities and addresses of witnesses who are supposed to be protected with new identities under the *Justice Protection Act 2010* ("the 2010 Act"). In the submission of the Attorney General it cannot be right to make someone who is not already privy to such records the arbiter of whether they fall within the "*general administration*" description in section 4 (2)[2]. Those who are already privy are the persons in the best position to make that judgment, and their decision would, itself, be subject to judicial review.

32. The issue arises because, although the Commissioner has, as part of her review of the decision of the head of a public authority, a clear power to call for documents to see whether they should be disclosed, that power arises from Part 4 of the Act; and section 4 of the Act provides that the Act (including, therefore, Part 4 thereof) does not apply to records obtained or created by the authorities there specified in the course of carrying out their function, unless they are records relating to the general administration of the relevant public authority; and the power under section 56 (2) specifically applies only to "*any record to which [the] Act applies*". What then is the position if the Attorney General says that the documents fall within section 4 (1) (b) and the Commissioner either contests that or wishes to check whether that is correct?

33. The problem arises because, so the Attorney General submits, if the Commissioner seeks to rely upon her powers under Part 4, it is necessary for her to show that the documents which she seeks are caught by the PATI Act. She cannot call for a document under section 56 (1) if she cannot examine it under section 56 (2) because it is not a record to which the PATI Act applies. If the relevant document falls within section 4, the power upon which the Commissioner relies to examine them does not exist. As its heading shows, the section is concerned with the "Application" of the Act and, in relation to the records described in section 4 (1) (b), and not within section 4 (2) the Act simply (and plainly) does not apply.

34. If, the Commissioner submits, she is, in practice bound, by the description of the documents given by the authority resisting production, the description may not be accurate, with the result that documents which she ought to be allowed to see in order to see whether they should be disclosed are for ever hidden. If, however, she is not so bound, then, the Attorney General submits, the result

[2] There is a question, which we do not have presently to decide, as to whether, if we were to accept the arguments of the Commissioner, the provisions of section 13 (1) of the 2010 Act ("*The Centre shall be the only approved authority that shall have access to the register and to the ancillary documents*") would, themselves, preclude the Commissioner from having any access thereto. Such an argument would gain some traction from the fact that the 2010 Act was in force since 4 February 2011, whereas the PATI Act was not in force until 1 April 2015.

may well be that she is able to see documents which the Act intended to be outwith her sphere of examination and which she should never have seen in the first place.

35. The judge found [47] that:

> "*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 the record*".

But she also found that the Commissioner's decision to issue:

> "*the two summonses for the production of the Brown Settlement record for her examination [were] 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".*

36. In so doing she derived assistance from the decision of the Information Commissioner in the Irish case *Right to Know CLG and Office of the Data Protection Commissioner/Case Number 160447* in which the relevant public authority denied a request for public access on the grounds that the records sought fell outside the scope of its obligation under the Irish *Freedom of Information Act 2014*, which did not apply to records held or created by the Office of the Data Protection Commissioner, or an officer of that office, save as regards a record concerning the general administration of that Office. In that case the Irish ICO concluded that he had jurisdiction to review the ODPC's decision to refuse the applicant's request on the ground that the records did not concern general administration. But he went on to hold that the ODPC was justified in refusing the request on that ground. He did so without any examination of the refused records. He expressed himself 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*".

37. In the light of that decision the judge held [39] 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)."*

38. In the argument before her the Attorney General had conceded that the Commissioner could review a decision of a public authority that the documents sought fell within section 4 (1) and not within section 4 (2); but contended that she could not review the underlying documents. Before us the Attorney contended that the concession, based on what he submitted was the differently worded Canadian legislation and authority was erroneous. (As will become apparent we do not think that it was).

39. A similar decision was reached by the Irish High Court in *John Deely v The Information Commissioner and the Director of Public Prosecutions* [2001] IEHC 91, which concerned whether the DPP could be compelled to submit records for examination when it was averred that they fell outside the scope of the *Freedom of Information Act 1997*. In his judgment McKechnie J said [26]:

> "*26. Section 46(1)(b) in my view, has both a 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…*

The judge aligned herself with those remarks which, she said, supported her finding that no public authority can be compelled by the Commissioner to produce any records to which the PATI Act does not apply. 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*".

40. In similar fashion the judge was satisfied [41] that the documents described under the Request did not describe matters of general administration. There was, she held, 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.

41. The judge added:

> "*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."*

The Commissioner's submissions

42. The Commissioner submits that in reaching this decision the judge applied a construction which (i) was inconsistent with the plain words of the statute and (ii) rendered toothless a power of review that the Legislature intended to be effective; (iii) created an impractical and unworkable process; (iv) ran contrary to the purposes for which the PATI Act was passed; and (5) contrary to the approach in other jurisdictions.

43. As to (i) above, section 56 (1) makes it clear that the Commissioner has a wide power to issue a summons for documents. Under the section the Commissioner has power to compel persons to "*produce such documents and things as the Commissioner deems requisite to conduct the review, in the same manner and to the same extent as a judge of the Supreme Court*". This power, it is said, includes but is not expressed to be limited to records to which the PATI Act applies. On its plain meaning it clearly includes documents which fall, or are alleged to fall, outside the scope of the PATI Act. It is a power to call for any documents of any sort, from anyone, which the IC deems requisite to conduct the review. The only limitation to this power is the reference to it reflecting those powers that a Supreme Court judge has to compel production.

44. The Court's power to call for the production of documents is set out in Order 24, rule 12 of the Rules of the Supreme Court which provides that:

> "*at any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit."*

45. Order 24, rule 13 (2) sets out the Court's broad power to inspect any document ordered to be produced:

> "*Where on an application under this Order for production of any document for inspection or to the court privilege from such production is claimed or objection is made to such production on any other ground, the court may inspect the document for the purpose of deciding whether the claim or objection is valid".*

46. The latter provision is reflected in section 56 (2) which makes clear that the IC has the power during any review to examine any "*record*" "*to which this Act applies*" "*notwithstanding any other Act or any privilege under the law of evidence".* Further no such record may be withheld from the Commissioner "*on any grounds*".

47. It is plain, it is submitted, that the overall meaning of section 56 (2) is permissive rather than restrictive, and that its purpose is to put beyond doubt that, like the Court, the Commissioner is entitled to inspect, or examine, any records notwithstanding any objection based on any other Act or any privilege under the law of evidence. If section 56 (2) had been intended to be restrictive and to limit the effect of the broad power to call for production of documents in section 56 (1) (A) it would have been expected to say so in plain terms. Further, that this was not the legislative intent is supported by the wording of section 56 (1) (f) – see above – which gives a specific powered to examine records found on any premises and contains no limitation to records to which the PATI Act applies.

48. Accordingly, the Court below wrongly read section 56 (2) as cutting down the effect of the Commissioner's power to call for documents (including records), which on its ordinary meaning is very broad, and actually includes any records alleged by a public authority to fall outside the scope of the PATI Act.

49. In interpreting a Statute, the Court is required "*to identify the meaning borne by the words in question in the particular context*": *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349,396. Given the context of the Commissioner's powers and the statutory task which has been assigned to her, which is to provide an effective review of the public authority's decision, the section 56 (2) formulation – "*records to which the Act applies*" - must extend to records which the requester contends are not within section 4 (1) or in respect of which the Information Commissioner wishes to examine whether they do. It cannot have been the intention of the Legislature that a public authority could simply assert that records fell outside the application of the PATI Act and thereby prevent any examination by the IC. And the PATI Act may, in context, properly be taken to "*apply*" to records to which a requester seeks access and in respect of which the Commissioner wishes to review whether or not they should be made publicly available or fall outside the Act.

50. The Commissioner submits that, unless the construction for which she contends is adopted, there will be no effective power of review by the Commissioner as to whether the documents in question do, in truth, fall within section 4. Since, on this hypothesis, the Commissioner will not have sight of the document, it simply cannot tell. A right to review any refusal of public access to public authority records which precludes the Commissioner looking at them is largely without substance.

51. The common-sense approach is to hold that the Commissioner should be able to look at the document to see whether it does fall within section 4.1 (b) in like manner as the Court does under Order 24. No harm will be done by this since by reason of section 53 (1) of the Act:

> "*the Commissioner and every person appointed or engaged under section 52 shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions and shall not communicate any such matter to any person except for the purpose of carrying out their functions under this Act.*"

And by section 53 (2):

> "*Information or documents obtained by the Commissioner or any person appointed or engaged under section 52 i in the exercise of their functions shall not be disclosed except for the purpose of this Act."*

52. The arguments on the part of the Attorney General raise the question as to whether the Commissioner could ever succeed in showing that the withheld documents ought to have been produced. The Attorney General accepts that the Commissioner could seek a judicial review of the decision to withhold documents. But the likelihood of such a review, brought by someone who, *ex hypothes*i, has never seen the documents being successful seems to me pretty limited.

Canada Broadcasting Corporation v Information Commissioner

53. There are two authorities at the highest level which bear upon the question which we have to decide. In *Canadian Broadcasting Corporation v Information Commissioner of Canada* [2011] FCA 326 the Canadian Federal Court of Appeal ("FCA") had to decide whether the Canadian Information Commissioner had the power to require the production of records which were excluded from the *Access to Information Act* by section 68.1 thereof which reads.

> "*This Act* ***does not apply*** *to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities,* ***other than information that relates to its general administration.****"* [Emphasis added]

54. The power to call for records was contained in section 36, which was phrased in terms very similar to section 56 of the PATI Act, and reads:

> *"(1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power*
>
> > *(a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;*

> *[…]*
>
> *(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine* ***any record to which this Act applies*** *that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds."*

55. The FCA held that the Commissioner was empowered to examine materials which were said by the relevant authority to fall within the exclusion in section 68.1 but not within the "*general administration*" exception.

56. In that case, as in this one, the public authority (the Canadian Broadcasting Corporation) was *"asking the Court to declare, as a matter of principle, that its invocation of the exclusions set out in section 68.1 has the effect of depriving the Commissioner of her power to examine the documents that are the subject of the refusal*" [§14].

57. The FCA held:

> *"[70] In my opinion, the Federal Court judge correctly concluded that, despite the fact that it appears under the heading "exclusions", the exception which section 68.1 embodies requires that recourse be had to the Commissioner's power of examination in order to give effect to this provision. Although Parliament intended that information related to journalistic, creative or programming activities be excluded from the application of the Act, it also wanted that information related to the CBC's general administration – as defined in section 3.1 – not be excluded. Subject to what is said in paragraphs 73 and 74, below, it is the Commissioner's role to initially determine whether the exception applies and to exercise the recommendation power vested in her by the Act.*
>
> *[71] In the event that a recommendation to disclose is made and that the appellant maintains its refusal, it will be open to the appellant to bring the matter before the Federal Court while taking the necessary measures to preserve the confidentiality of the disputed information in the meantime. As explained by the Federal Court judge, it is difficult to see the prejudice that would be caused if the Commissioner was to take cognizance of the records*".

58. The FCA upheld the decision of the judge, who had dismissed the application of the Canadian Broadcasting Corporation for judicial review in the following terms:

> *".. the Commissioner has authority under section 68.1 to order the CBC to disclose records including records that, in the opinion of the CBC, relate to the journalistic, creative or programming activities, in order to determine whether these records*

> *fall under the exception and consequently whether they are subject to the exclusion*".

59. The legislation under consideration in that case was not materially different to the legislation in this case; the reasoning in it is, in my judgment, persuasive and we should adopt the same approach.

Sugar v British Broadcasting Corporation

60. A similar question to that which arises in the present case fell to be considered by the House of Lords in *Sugar v British Broadcasting Corporation* [2009] UKHL 9 in respect of the UK *Freedom of Information Act 2000* ("the Act"). The Act provides for a general right (subject to exceptions) of access to information held by public authorities. The Act makes provision for its enforcement by the Information Commissioner and for a right of appeal from a decision of the Commissioner to the Information Tribunal.

61. Schedule 1 to the Act lists the public authorities to which the Act applies. A small number of these are listed in respect only of certain specified information. One of these is the BBC, which is listed as "*The British Broadcasting Corporation in respect of information held for purposes other than those of journalism, art or literature*".

62. Section 7 (1) of the Act provides:

> *"Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority*".

63. Section 50 of the Act provides:

> *"50 Application for decision by Commissioner*
>
> *(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.*
>
> *(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him–*
>
> Various circumstances are then set out
>
> *(3) Where the Commissioner has received an application under this section, he shall either –*

> *(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or*
>
> *(b) serve notice of his decision (in this Act referred to as a 'decision notice') on the complainant and the public authority.*

64. Section 51(1) provides:

> *"If the Commissioner—*
>
> *(a) has received an application under section 50, or*
>
> *(b) reasonably requires any information—*
>
> *(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or*
>
> *(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,*
>
> *he may serve the authority with a notice (in this Act referred to as 'an information notice') requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified."*

65. Section 57 (1) provides:

> *"Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.*

66. Mr Sugar asked the BBC to provide him with a copy of a report ("the Balen Report") that the BBC had commissioned in respect of its coverage of the Middle East. He contended that the report was held by the BBC for purposes other than journalism, art or literature and that, in consequence, the BBC held it as a public authority and was bound by the Act to communicate its contents to him. The BBC contended that it held the report for the purposes of journalism and not as a public authority and that, in consequence, the Act had no application. The Commissioner upheld the BBC's contention. The Information Tribunal held, contrary to the argument of the BBC, that it had jurisdiction and reversed the Commissioner's decision on the journalism issue, ruling that the BBC held the report for a purpose other than journalism.

67. Davis J upheld the BBC's contention that, in its capacity as a holder of journalistic material, it was not a public authority and not subject to the provisions of the Act. The Commissioner's finding

that the Balen Report was journalistic material meant that, in his eyes, the BBC was not to be considered as a public authority, with the result that section 1 of the Act had no application. The Commissioner had so stated in a decision letter which did not constitute a "decision notice"; and so no appeal lay to the Tribunal. The Court of Appeal dismissed the appeal.

68. As Lord Phillips observed:

> *"Davis J expressed the view that the result that he had reached had practical consequences that were unattractive. I share that view. Under the scheme of the Act an issue as to whether a public authority has complied with the requirements of Schedule 1 falls to be determined initially by the Commissioner, with an appeal to the Tribunal. In a case such as this, that issue turns on whether the information held is public or excluded information. If the Commissioner's jurisdiction turns on precisely the same question, how is he to set about resolving it if, as is likely to be the case, he lacks the necessary information? Section 51 is designed to enable him to require production of the information that he needs to perform his duties, but that section will not apply if the Commissioner has no jurisdiction. Quite apart from this practical problem, if the Commissioner's decision goes to his jurisdiction, whether the decision is positive or negative, the appropriate forum for a challenge will be the administrative court in judicial review proceedings. It is hard to believe that Parliament intended that the issue of the capacity in which a hybrid public authority holds information should have to come before a court rather than the Commissioner and the Tribunal, who would seem tailor made to resolve it."*

69. The BBC's argument was summarised by Lord Neuberger in the following terms [75]:

> *"By virtue of section 3(1)(a) and Part VI of Schedule 1, the Act applies to a hybrid authority, such as the BBC, only insofar as it holds information other than excluded information; accordingly, where a hybrid authority says that the information requested is excluded, the Commissioner has no jurisdiction under the Act to determine if the information is excluded, as, if it is excluded, the authority is not a public authority, and the Act does not apply.*

Accordingly, it was said, the Commissioner, and the Tribunal, had no jurisdiction to determine whether the information which Mr Sugar had requested was discloseable because it was said to be excluded information under section 4.

70. The House of Lords, by a majority (Lords Phillips, Hope and Neuberger), allowed the appeal; and held that the Tribunal did have jurisdiction to make the decision that it did. Lord Phillips observed:

> *"....[S]ection 50 entitles the inquirer to complain to the commissioner if he considers that the public authority has not dealt with his request in accordance with the requirements of Part I. He can make that complaint whether he is right or wrong as to the adequacy of the public authority's response.""*

71. In the course of his speech, Lord Neuberger accepted that there was a powerful case to be made out for the conclusion arrived at by the Court of Appeal, namely that the Commissioner had no jurisdiction. But he described the argument as suffering from a number of fundamental problems including:

(i) it enabled a hybrid authority to be (subject to any judicial review) the judge in its own cause as to whether the information was excluded;

(ii) if the BBC's case was correct the issue as to whether the information was excluded would have to go before the court by way of judicial review, a significantly less appropriate forum for the determination of the issue; and it was hard to see how the Act would work in many cases where there was a serious argument whether the material was excluded;

(iii) it was unlikely that the Legislature intended that the Commissioner should have no statutory jurisdiction to decide that information held by a hybrid authority was excluded given that he plainly had jurisdiction to decide whether an authority's contention that information was exempt under any of the provisions in Part II was well-founded.

72. Lord Neuberger accepted the contention made by Mr Sugar in these terms:

> *"89 The interpretation advanced by Mr Sugar leads to none of these problems of principle, logic and practice. However, it does attribute to section 7(1) a somewhat different, more nuanced, meaning than that which it would most naturally bear if read on its own. Nonetheless, in my view, Mr Sugar's interpretation accords with the overall purpose of the Act, and it does no violence to any of its language, including the language of section 7(1) itself.*
>
> *90 As I see it, Mr Sugar's contention involves accepting that, once a request for information is made under the Act to a hybrid authority, the fact that it claims that the information is excluded does not mean that the authority thereby ceases to be a public authority under the Act. The BBC, like every other hybrid authority, is listed in Schedule 1 as a public authority, and it does not seem to me to conflict with the wording of that Schedule or section 3(1) if a hybrid authority does not cease to be a public authority merely because it claims that the requested information is excluded. The applicant has treated it as a public authority by making a request under section 1 of the Act, and, at least until he accepts, or it is conclusively determined, that the information he seeks is excluded, it appears not only sensible, but not in conflict with those provisions, that the authority should be treated as a public authority subject to the provisions of the Act.*

91 Once a hybrid authority honestly concludes that the requested information is excluded, then it would appear to follow that it should also be able to contend that it need not comply with the obligations in section 1. That seems to me to be consistent with the policy of the Act: a hybrid authority should not have to search for and give details of, information which it honestly believes is excluded, unless and until it is held not to be excluded. However, just as the authority can proceed on the basis that it is right in such a case, so can the applicant proceed on the basis that he is right. Accordingly, if the applicant considers that the information is not excluded, he can apply to the Commissioner for a decision under section 50. That is because he contends that he has made "a request for information ... to a public authority" which has not "been dealt with in accordance with the requirements of Part 1". The Commissioner can then proceed to deal with the application under sections 50 to 53, and if either party is dissatisfied with his decision, they can appeal to the Tribunal under section 57.

....

93 At first sight, this conclusion may appear to conflict with section 7(1), because, as discussed above, it appears to be so worded as to indicate that, if the Commissioner decides that the information is excluded, he would seem to have had no jurisdiction to consider an application in respect of it under section 50 in the first place. In my view, the answer to that point is that, as already explained, ***until it has been accepted by the applicant or determined by the statutorily designated person (i.e. the Commissioner or, on appeal, the Tribunal) that the information requested is excluded, it cannot be treated as excluded for the purposes of section 7(1).*** *I accept that this is not stated in terms in the Act, and that it does not accord with the natural meaning of section 7(1), if read on its own. However, it does not seem to me to conflict with section 7(1), if, as it should be, it is read in its context, with a view to achieving a result which accords with the purpose of the Act and harmonises with all the other relevant provisions of the Act.*

94 On that basis, I consider that it is permissible, indeed appropriate, to read "any other information" in section 7(1) as referring to information which has been (a) claimed by the authority to be excluded and (b) accepted by the applicant, or determined by the Commissioner (or, on appeal, by the Tribunal) to be excluded. In other words, where a hybrid authority is requested to give information which the applicant contends is not excluded and the authority contends is excluded, then, ***until such time as it is agreed by the applicant or determined in accordance with the statutory machinery that the information is excluded, it is not to be treated as excluded for the purposes of section 7(1)****. This involves placing a gloss on the meaning of the words of section 7(1) if it is read on its own, but it does*

> *not give those words a meaning they do not naturally bear. It avoids the problems of the BBC's construction, and gives section 7(1) a meaning which harmonises with the other provisions of the Act, and with the overall purpose of the Act.*
>
> *95 As already explained, in the event of a dispute as to whether information is excluded, unless the authority is to be the statutory judge in its own cause, it is necessary to find some mechanism in the Act for resolving the dispute, and for covering the period until the dispute is resolved. Until such resolution, the hybrid authority is to be treated as a public authority in relation to the information requested, and it is only when and if the information is agreed or determined to be excluded that it ceases to be a public authority in relation to the information requested, and section 7(1) applies".*

73. In the event the appeal was allowed. The BBC then appealed the Tribunal's decision on the journalism issue. On 2 October 2019 Irwin J decided the case in the BBC's favour [2009] EWHC 2349 (Admin); and on 23 June 2010 the Court of Appeal upheld that decision [2010] EWCA Civ 715.

74. The provisions of the Act are obviously not the same as the PATI Act, although the relevant provisions are very similar. But the Attorney General is a form of hybrid authority in that certain of his records are, and a much larger section of them are not, subject to disclosure under the Act.

75. In the light of that decision, and the decision in *Canada Broadcasting Corporation,* and having regard to the context in which, and the purposes for which, the PATI Act was passed[3] I would hold that, until it has been accepted by the requester, or determined by the Commissioner, that the records which are sought are excluded from the operation of the PATI Act (because they fall within section 4 (1) (b) and do not fall within 4 (2)), they cannot be treated as so excluded. Accordingly, Ms Strangeways was entitled, under section 45, to apply to the Commissioner for a review of the decision made by the Permanent Secretary in respect of the records which she sought, and the Commissioner was entitled to commence a review of the matter under section 46

76. I would regard the entitlement of a requester of documents under section 45 of the PATI Act to call for a review by the Commissioner of any refusal to afford her access to documents as extending to a review of records which are said by the relevant authority to come within section 5. For the purposes of her review the Commissioner has, under section 56 (1), the power (not expressed to be limited in any way) to compel the production of such documents as she deems requisite to

[3] The central importance of identifying the purpose of the legislation and interpreting the relevant language in the light of that purpose is emphasised in the decision of the UK Supreme Court in *Kostal v Dunley* [2021] UKSC 47 [30]. I have not forgotten that the PATI Act was designed to exclude an entitlement to production of that which came within section 4 (1) and not within section 4 (2) and that it did so "*in the public interest or for the protection of the rights of others*": section 2 (a). But the overall aims of the Act call, in my judgment, for the Commissioner to be able to determine whether the exclusion in section 4 is validly relied on.

conduct the review; and, to the same extent as a judge of the Supreme Court, she has power under section 56 [2] to examine "*any record to which the Act applies".* The latter phrase should, in context, be treated as including any record in relation to which a question arises as to whether section 4 of the Act applies to it, in the sense that the Act applies to such a record because it is a function of the Commissioner to decide whether or not the requester is entitled to have access to it under the Act or whether it is excluded from the operation thereof.

77. I accept, as did Lord Neuberger in *Sugar v BBC* that this approach does not accord with what, without more, one could regard as the natural meaning of the words in section 4 and section 56 (2). But like him I would not regard it as in conflict with the words of these sections if read in context "*with a view to achieving a result which accords with the purposes of the Act and harmonises with all the other relevant provisions of the Act*". The manifest purpose of the Act was to 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*", to increase transparency; and to eliminate unnecessary secrecy and to increase the accountability of public authorities. These purposes will be defeated if public authorities can prevent production of documents or any review of a decision to do so simply by the relevant authority saying that they fall within section 4 (1) (b) and not within 4 (2). Any review without sight of the documents would be, in many cases, illusory or ineffective.

78. In reaching this decision, I take into account that the PATI Act set up a sophisticated review system. The Commissioner has wide powers of examination of documents, even if for instance, they are said to be covered by privilege. There are very significant safeguards. The review is to be conducted in private, no doubt because the Act envisages that the Commissioner may have to consider highly sensitive documents. The Commissioner, who is independent and not subject to the direction or control of any other person or authority (section 50 (4)), is obliged to maintain secrecy in respect of all matters coming to her knowledge and not to communicate any such matter except for the purpose of carrying out her functions under the Act. Information or documents obtained by her is not to be disclosed except for the purpose of the Act. The fact that she obtains sight of documents does not give the public any entitlement to see them. These factors allay concerns that might otherwise arise (as to dissemination of confidential documents) from the interpretation which I favour.

79. Adoption of that approach removes all the problems that arise under the contrary construction, as listed by Lord Neuberger in *Sugar v BBC* and which apply in like manner to the present case.

80. It would also avoid the absurdity that lies beneath the surface of the construction argued for by the Attorney General. Ms Carrs Frisk put it this way. Under that construction the Commissioner's power to issue a summons and examine records depends on the very matters that her review is intended to determine namely whether the section 4 (i) (b) exception is properly invoked. So, she has a power to call for and examine documents, but cannot know whether it is in fact exercisable in a particular case. Only the public authority can "know" that; and it may be wrong. Alternatively,

she has the power to call for documents but not to examine them if the public authority asserts that they fall outside the scope of the Act.

81. I agree that this borders on the absurd which is a sound reason for adopting a different interpretation. As was said in R *(Edison First Power) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 §§116-117:

> *"The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless…The more unreasonable a result, the less likely it is that Parliament intended it…"*

82. Lastly, in the light of the safeguards set out in the PATI Act and the fact that release to the Commissioner does not automatically mean release to the public there seems to be no sound reason why the Legislature would wish to prevent the Commissioner from examining a document said by a public authority to fall outside the scope of the PATI Act. And if the public authority thinks that the Commissioner has erred in law it can apply for judicial review.

Postscript

83. We were conscious during the hearing of this appeal that some of the records in question appeared on the face of their description alone to fall within section 4, such that there was either practically nothing to review, or that sight of the document might not in fact be necessary. In the light of that concern the Commissioner indicated that she was prepared to accept that she did not need to see the settlement agreement (which had, in fact, already been disclosed to her) or the letter before action and any response to it provided that she received an affidavit confirming that the three limbs of section 4 (1) (b) were satisfied.

84. By a letter dated 25 November 2022 the Commissioner indicated that she would be content to accept an affidavit from an authorised individual, attesting to those matters, in relation to the letter before action and the response thereto. (It was in the course of drafting the letter that the Commissioner realised that information about what had previously been provided to her had not been given to us by the time of the hearing).

85. The fact that the Commissioner has taken this course shows that it may not always be necessary for her to see a document said to be subject to section 4 (1). In an extreme case it might be perverse or irrational of her to demand to do so, e.g. if she demanded sight of a document bearing on national security, or which was obviously within section 4 (1), such as a draft judgment - as opposed, if appropriate, to requiring evidence that the document was, indeed, of that character. In some cases, even that may be inappropriate. If the Attorney General were to ask to be provided with any draft of this judgment, or any communication between the justices in relation to its content, I cannot think that the Commissioner would need me to tell her whether there were drafts, and how many,

or to identify the communications. The Commissioner does not always need to see every document asked for.

86. But that cannot affect the resolution of the question of principle that we have to decide. And in many cases examination of the documents may be essential because the answer may be far from obvious This is particularly likely to be so when a question arises, as in *Canadian Broadcasting Corporation*. as to whether the relevant record falls within the "*general administration* "exception in section 4 (2), or where the record may have several purpose.

87. The correct answer to the question whether or not a document falls within section 4 (1) and not 4 (2) is not necessarily accurately revealed by the description of the document. The describer may be unknown; and his characterisation may be inapposite, unclear, uninformative, or mistaken. Or there may be no description provided by the public authority at all - we were told that it has become apparent to the Commissioner that some public authorities do not consider that there is any obligation to provide descriptions of potentially responsive documents - so that the only description is that of the requester who will not have had access to the documents.

Conclusion

88. Accordingly, I would allow the appeal and set aside the decision of the judge quashing the Commissioner's decision to issue two summonses to the Solicitor General and the Acting Permanent Secretary of the Ministry of Health dated 26 November 2020. When the documents the subject of those summonses have been produced it will then be for the Commissioner to decide whether any of them were records obtained or created by the Attorney General's Chambers in the course of carrying out their functions and whether or not they related to the general administration of those Chambers.

89. If the Commissioner has received, or receives, the affidavit referred to in [83] above in relation to the letter before action and the response thereto, neither the Attorney General nor the Ministry of Health are required to produce those documents pursuant to the Commissioner's summons.

90. The Court will consider the question of costs, if sought, following the receipt of written submission which should be provided within 14 days

KAY JA

91. I agree.

BELL JA

92. I, also, agree.