

ICO

INFORMATION
COMMISSIONER'S
OFFICE FOR BERMUDA

Information Commissioner's Reviews

A guide for applicants and third parties



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Overview

1. The Information Commissioner's Office has prepared this guide to give you important information about what to expect when we process your application for review.
2. Any requester, or third party, who is not happy how a public authority has handled your request for an internal review has a right to ask the Information Commissioner for an *independent* review (an appeal). You can also ask the Information Commissioner for an independent review if the public authority fails to decide within the required timeframe.
3. For the Information Commissioner to have the legal power to hear your application, you must first ask the public authority for an *internal* review by its head. Once you get the decision from the head or the head fails to act in time, the Information Commissioner can accept your application.
4. When we receive a valid application for review, the Information Commissioner will initially assess the appropriateness of 'early resolution'. This is an informal process that may lead to resolving and settling all, or some, of the issues you have raised.
5. If resolution is unsuccessful or inappropriate, the Information Commissioner will start the review process. As part of the review we will conduct an investigation. We will provide you, any concerned third party, and the public authority the opportunity to comment on matters raised by the application.
6. The ICO takes a resolution based approach to reviews. If appropriate, we will continue to consider the suitability of resolution up until the Information Commissioner issues her decision.
7. The Information Commissioner is not an advocate for the applicant or a concerned third party. We are not a government department with Ministerial oversight. Instead, we are an independent public office that provides a neutral and legally enforceable decision on your application. Our work is guided by the values of independence, integrity, and fairness.
8. We do, however, have a mandate to safeguard the rights and obligations created by the PATI Act when carrying out our work.
9. We hope this guide will address many of the questions you may have about the review and investigation process.

The steps in the review: what happens after I submit my application?

Part 1 – Initial application and early resolution

10. The Information Commissioner’s Office will take the following steps with your application once it is received by us:
 - i. Acknowledgment
 - ii. Validation
 - iii. Notice of valid application (to public authority and third party/original requester)
 - iv. Consider early resolution
11. These initial steps must be done before the Information Commissioner can proceed with a review and investigation under the PATI Act. They are explained in more detail below.

Acknowledgment

12. Within five working days of receiving your application, we will send you an acknowledgment letter, confirming that we received your application and any relevant documents you sent us. We will also send you a copy of this guide.
13. To help us work on your application, please check if you have sent us copies of the following documents:
 - i. Your PATI request
 - ii. The decision from the information officer
 - iii. Your request for an internal review
 - iv. The decision from the head of the public authority on the internal review, if you received one (If the head of the authority failed to decide in time, you won’t have a decision and that is okay.)
14. If these items are not included in your application, don’t worry. We will ask you for copies during the next stage of the process, ‘validation’.

Validation

15. During validation, we will make sure that the Information Commissioner has the legal power to decide your application and that we understand what you are asking us to consider.
16. First, we will make sure your application meets the requirements of the PATI Act for a valid application to the Information Commissioner. The requirements are:

- i. The application must be in writing;
 - ii. You must have asked for an internal review from the head of the public authority;
and
 - iii. You submitted your application to us within the six week deadline from the decision (or failure to decide) that you want us to review. The Information Commissioner has the discretion to accept an application out of time if you have missed your deadline.
17. Second, we will make sure we understand what you want the Information Commissioner to review. You may want the Information Commissioner to review all aspects of the head of the public authority's decisions or actions, or you may only want us to consider some of them.
18. During this stage, we may ask you for copies of any relevant documents not included in the application, or for additional information or clarification to help us validate your application.
19. If your application is not valid, we will send you a letter explaining reasons why your application cannot be legally accepted. The letter will also explain how to make a valid application in future. We may, for example, explain how to make a request for internal review to the head of the public authority, if you had not already done so.
20. If we find that you have made a valid application to the Information Commissioner, we will send you a validation letter. This letter will explain what points we think you are asking the Information Commissioner to consider. We will ask you to confirm in writing that we correctly understand what you are asking for.
21. We will take the time to work with you to get this right, because it helps forms the scope of our review and investigation going forward.

Notice of valid application

22. Once we have confirmed with you that we understand the issues you raised in your application, we will notify the public authority of your valid application.
23. We will also notify any 'concerned third party' who was given notice of your request or of the internal review by the public authority. They would have been notified by the public authority because they gave the requested information to the public authority or the information in the requested records relates to them.
24. If you are a concerned third party, and filed the application for review to the Information Commissioner, we will notify the original requester of your application at this time.

25. The notice letter we send will list the issues you are challenging and indicate whether the Commissioner has identified that early resolution is appropriate.

Early resolution

26. As mentioned above, the Commissioner may consider that early resolution and settlement are appropriate for your application. In most applications, early resolution would be recommended for technical issues, like challenges to access fees.

27. In other circumstances, it may be clear from the outset that the issues you raise are covered by an earlier decision by the Information Commissioner, so the Commissioner may encourage early resolution on this basis.

28. If the Information Commissioner finds that early resolution is appropriate, we will discuss this with you in more detail so that you can make an informed decision about how to participate. The resolution process is voluntary for you, any concerned third party/original requester, and the public authority. Any party can decide at any time to ask the Information Commissioner to move to the review stage, discussed below.

29. Resolution remains an option throughout a review and may be considered again at any point up until the Information Commissioner issues a decision. This is discussed further in 'Resolution/settlement', below.

Part 2 - Review and investigation (section 47)

30. If your application cannot be resolved at the outset, or if the Commissioner decides early resolution is not appropriate, the case will move on to a review. This involves an investigation and leads to a decision by the Commissioner—unless resolution is reached later or the application is withdrawn or abandoned. It is during the review stage that the Commissioner will exercise her full powers under section 56 of the PATI Act.

Notice of review and obtaining the withheld records

31. We will notify you, the public authority, and any concerned third party/original requester that your application has progressed to the review and investigation stage.

32. In most applications, at this stage we will also ask the public authority to send us all of the withheld information. It is important for our investigation for us to see the withheld material to assess the public authority's actions and decision making. For confidentiality reasons we cannot discuss the content of the withheld material with you.

Applicant and concerned third party/original requester's opportunity to comment

33. Once you have sent us your application and the validation process is done, the PATI Act does not require you to do anything more. The burden is on the public authority to explain and justify its decisions, actions, or inactions.
34. Under the PATI Act, though, you have an *opportunity* to give us any additional comments, information, or other evidence that you want the Information Commissioner to consider. You might find it useful, for example, to say why the public interest, or 'public good', would be furthered by the disclosure of the record(s) you are asking for.
35. If you are a concerned third party involved in the request (or the original requester) and did not submit the application, you have a chance now to give us any relevant information that you want the Information Commissioner to consider.
36. After we have assessed the withheld records from the public authority and any further information you, or a concerned third party, have given us we will ask the public authority for a formal submission.

Public authority's submission

37. Once the ICO is clear about the grounds of the application and, where relevant, about the withheld information, the ICO will send a letter to the public authority seeking its formal submission.
38. We will ask the public authority to provide detailed arguments and/or evidence to explain why it has withheld records from you, or why it believes it does not hold the records you requested. For example, the public authority may use the exemption in section 22 for protecting the "health or safety of an individual", because it asserts that disclosure would endanger the mental health of an individual. If so, the ICO would expect to see evidence from a mental health professional to support this claim, and not simply the statement of a lay person.
39. If your application included any other matter—for example, the failure of the public authority to provide you with advice and assistance—we will ask the public authority to explain its decisions or actions in relation to your request.
40. In all applications, we will examine the public authority's submission to see whether it raises new issues requiring further submission, evidence, or answers.

The ongoing investigation

41. Once the public authority's submission is received, the ICO will determine if any further information is needed before the application is decided.
42. Any missing information will be obtained from the public authority, applicant, or any concerned third party.
43. If any relevant new exemptions or matters are raised, the ICO will give the other parties an opportunity to comment. If this happens, we may contact you again to ask about your views or for background information about the application.
44. We will also let you know if the public authority decides that the record(s) should be withheld under any other provisions of the PATI Act than the ones they originally told you about. If that happens, we will usually give you a chance to give us your views on the public authority's arguments, if you would like to do this.
45. We will keep you updated on the progress of your application. You are also welcome to email or call us to request an update on your application.

Resolution/settlement

46. The ICO will take a resolution-based approach throughout the review, not just in the beginning. Any appropriate opportunity for full or partial 'settlement' of the application will be encouraged and pursued, up until the point when the Information Commissioner issues a decision.
47. 'Full settlement' would normally mean that you withdraw your application for review and the Information Commissioner would not issue any decision. A 'partial settlement' means that some, but not all, of the issues are resolved and the Information Commissioner will decide the remaining unresolved issues. Any concerned third party/original requester would be included in the resolution and settlement process.
48. If ICO staff propose a settlement to you that the public authority is offering, we will discuss the offer with you fully before taking any action. If a settlement offer comes to you directly from the public authority, you should tell us so that we can discuss your options before you accept.
49. Sometimes a settlement offer from the public authority could ask you for some sort of compromise. For example, a public authority may offer you access to some of the records but not others, or a public authority may offer to let you view a record but not allow you to

keep a copy and may refuse to make it publicly available. In exchange for its settlement offer, a public authority might ask you to withdraw your application for a decision from the Information Commissioner.

50. In such cases, your options may be: to accept the settlement outright; to ask us to discuss your options with you; to ask us to help negotiate a settlement on your behalf; and/or you may decide that you still want the Information Commissioner to reach a decision on your application.
51. If, however, you settle a case directly with the public authority and without the ICO's involvement, please let us know as soon as possible.

Keeping you informed during the review

52. Our aim is to complete a review within four months of receiving the application, whenever possible. It might take longer if your application is complex, but we will keep you informed about its progress.
53. You can ask us how your application is coming along at any time.
54. The ICO will ask the public authority to provide submissions in your case, as explained above. We cannot share the actual submissions with you because they often contain specific references to the information that has been withheld. It is contrary to the Information Commissioner's obligations under the PATI Act to disclose this to you. Whenever possible, however, we will tell you the arguments being considered and give you an opportunity to comment.

The Information Commissioner's decision

55. Once the investigation is concluded, and if resolution and settlement are not reached, the Information Commissioner will issue a decision. The Information Commissioner will decide your application based upon the PATI Act and Regulations, all of the submissions, and the ICO's own research and investigation.
56. The Information Commissioner must decide whether the public authority, through the decision of its head, has complied with the PATI Act in dealing with your request. The Information Commissioner will generally consider the following questions, where they apply to your case:
 - i. Whether the public authority was wrong to withhold records from you under the exceptions or exemptions in the PATI Act?

- ii. Whether the public authority complied with the PATI Act in other ways, for instance, whether it replied to you within the time allowed; whether any fees payable were calculated correctly; or whether the public authority provided you with the advice and assistance required by the PATI Act?

57. The Information Commissioner cannot decide matters that are not covered by the PATI Act.
58. When the Information Commissioner's decision is issued, it will be sent by courier or registered mail to the applicant, the public authority, and any concerned third party/original requester.
59. Decisions are also published on our website. Before this occurs, we will ask you if you want the publicly available decision to name you as an applicant, or if you would like us to 'anonymise' the public version of the decision. We anonymise the public version of the decision by removing your name as the applicant and all other identifying information. This ensures that no remaining information in the application can indirectly reveal your identity.
60. If the Information Commissioner finds that the public authority was correct to withhold the record(s) from you, and met its other obligations under the Act, the decision will state this. If so, we will explain what this means to you. We will also inform you of your right to appeal the Information Commissioner's decision to the Supreme Court.
61. If the Information Commissioner finds that the public authority failed to comply with the PATI Act in other ways (such as failing to reply to you within the deadlines), the decision will explain whether she requires the public authority to take any further action to put this right, or to make sure it does not happen again.

After the decision

Understanding the decision

62. We will do our best to write a decision that is clear and easy to understand. But the decision looks at the legal basis for the way the public authority dealt with your request. We aim to keep legal jargon to a minimum, however, we understand it may still be difficult to follow the decision. If you have questions about what the decision means, please contact us and we can explain it to you.
63. Please remember that we cannot discuss the rights and wrongs of the Information Commissioner's decision with you. The decision cannot be changed.

64. The Information Commissioner's decision is legally binding, and the public authority must take any steps she orders. The only exception is where the public authority successfully appeals against the Information Commissioner's decision, as explained below.

Enforcement

65. If the public authority fails to take steps outlined in the Information Commissioner's decision within the set timeframe, the Information Commissioner can file her decision with the Supreme Court and seek its enforcement in the same manner as an order of the Court.

Appeal

66. Any person, including the public authority, the applicant, or a concerned third party/original requester, who is aggrieved by the Information Commissioner's decision, may seek judicial review in the Supreme Court of the decision. The Information Commissioner's decision does not need to be filed in the Supreme Court for enforcement purposes in order for you to seek judicial review.

67. If you want to appeal, the Information Commissioner's Office cannot help you make an appeal; you should take independent legal advice about the process.

What to do now?

68. You may receive a letter from us asking you for more information so we can complete the validation process. Please reply as soon as possible, so that the handling of your application is not delayed.

69. Once your application is validated, it will move through the process described above.

70. If we find that your application is invalid, we will advise you whether you can take steps to make your application valid.

More information

71. It is important that you reply to any letters or email we send you, and that you let us know about anything that will affect the review—for instance, if the public authority sends you some or all of the information you asked for during the investigation, or if you decide you do not want to continue with your application. If you do not reply to our letters or emails, the Information Commissioner may decide that you have abandoned your application and will close your application without issuing a decision on it.

72. The Information Commissioner's decisions are subject to judicial review. Because of this, we use a formal process for investigating and making decisions. We will not have 'off the record' conversations with applicants, public authorities, or third parties/original requesters about a review or any of our other work.
73. We are happy to answer your questions about the review process in phone calls, emails, and, where necessary, meetings. We will always log our communications in our confidential records.
74. If you have any questions about your application, or the investigation and review of your case, please do not hesitate to contact us.

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