

ICO Guidance No. 1
Information Statements: Criteria for Compliance Assessment
1 April 2015

The Information Commissioner's Office (ICO) issues this guidance for public authorities pursuant to sections 7(1)(a), 10 and 51(1) of the Public Access to Information (PATI) Act 2010. The purpose of this Guidance is to provide the criteria the Information Commissioner will use to measure an Information Statement's compliance with section 5 of the PATI Act.

The PATI Act provides public access to records held by public authorities in two ways. First, you are required either to publish or make routinely available certain information about what you do. Second, Bermuda citizens and residents have a right to make a PATI request for records you hold. An **Information Statement** helps the public get access to information in both of these ways.

The PATI Act requires the Information Officer for all public authorities to have available for the public an Information Statement.

The relevant provisions of the PATI Act are:

Part 2
PROVISION OF INFORMATION BY PUBLIC AUTHORITIES

Information Statement

- 5 (1) Every public authority shall prepare an information statement setting out—
- (a) a description of the structure and organization of the authority and the legislation governing the authority;
 - (b) a description of the functions, powers and duties of the authority, including its obligations under this Act;
 - (c) a summary of the services that the authority provides, including ongoing programs of the authority;
 - (d) a description of all classes of records that are held by the authority, in sufficient detail to facilitate the exercise of the right of access under this Act;
 - (e) a description of all manuals used by employees of the authority in administering or carrying out the programs and activities of the authority;

- (f) a description of the policies, rules and guidelines used by the authority to make decisions or recommendations in respect to any person;
- (g) the name and contact information of the person designated by the authority under section 62 [the Information Officer] as the person to whom requests under this Act may be directed;
- (h) any other information that the head of the authority considers relevant for the purpose of facilitating access by the public to information held by the authority; and
- (i) any other information that may be prescribed.

(2) Every public authority shall update its information statement at least once a year, and may do so more frequently.

(3) Every public authority shall cause its information statement, as updated from time to time, to be made available for inspection by the public at reasonable times by—

- (a) keeping copies at its principal office;
- (b) providing a copy to the Bermuda National Library and to the Bermuda Archives; and
- (c) making copies available electronically, including on any website of the public authority.

(4) A public authority shall publish a notice in the Gazette indicating the places where its information statement is available for inspection by the public, including any web address of the public authority on which the statement is published.

(5) Every public authority shall provide a copy of its information statement, as updated from time to time, to the Commissioner.

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Saving for exempt records

11 Nothing in this Part requires a public authority to publish or provide any information that constitutes an exempt record under this Act.

What is the purpose of the Information Statement?

The **Information Statement** is an important tool to help the public exercise their right to access records you hold. Having information available is only valuable to the public if they know what is available and how to access it. In your Information Statement, you should say what your

public authority does, how it acts and makes decisions, what classes of records it holds and how to access information.

People will look at your Information Statement:

- to decide whether to ask your public authority for records because it does the work or handles the topic of interest to them;
- to learn about what classes of records you hold and which ones relate to that work or topic;
- to figure out if the information they want is routinely available to the public without needing to file a request for records under the PATI Act;
- to decide what specific records to request if a PATI Act request is needed, and;
- to learn your Information Officer's name and contact details.

A clear and thorough Information Statement can help people write a clearer request for you. This means that you will have an easier time understanding the request and identifying the specific records sought. A good Information Statement will also help people be more informed and better prepared to speak to you. This will make the public's access to records a more efficient process for everyone.

What should the Information Statement include?

At a minimum, the PATI Act requires eight types of information in your Information Statement:

- **Structure, organization and legislation**

This section tells the public who you are and what you do. It should include the legislation that governs your work. If you have an organizational chart, it should be included but ensure that it is legible and includes all categories of staff. It is important that any abbreviations, acronyms, or specialist description or term used in the organizational chart are explained in plain language.

If your public authority has an advisory body or committee, please provide information about it and its members.

- **Functions, powers and duties**

This section should give the public a plain language description of your work functions and duties. This may already be prepared for your annual report or other publication. Your Mission Statement and any strategic goals or organizational values should be included. Your description of your functions should explain the range and scope of what you do.

When you describe your functions and duties (or your services and programmes below), include a description of your powers. Your description should adequately tell the public about the range and scope of your public authority's power that can affect them. For example, you should explain if your public authority grants licenses, issues approvals, determines benefits, imposes fines, conducts assessments and so on.

Every public authority also has incidental functions and powers to enable it to carry out its business. These include, for example, corporate functions such as human resources, public relations, property management and administering PATI Act requests. It is helpful during the implementation period of the PATI Act to remind the public of these functions. Include the records created to fulfill these functions in the "Classes of records held" section below. As time goes by and the public becomes more familiar with the records held by public authorities, it will no longer be necessary to include classes of records common to all public authorities.

- **Obligations under the PATI Act**

Every public authority's obligations under the PATI Act are the same. The Central Policy Unit's PATI Implementation Team has provided language for this section. It is reproduced in Appendix 1.

- **Services and programmes**

This section should give the public a description of the services and programmes you offer. This information is most likely already included on your website or in brochures, annual reports and other existing publications.

- **Classes of records held**

This section of the Information Statement is critical for helping the public understand what classes of records you hold. It is also likely the most difficult section to complete. You have probably already prepared information about your functions or services for annual reports or brochures.

But you may not have prepared a description of your classes of records before. The PATI Act requires the Minister, in consultation with the Information Commissioner and Archivist, to provide practice codes for records maintenance and management that will assist with this process. As of April 2015, we are drafting these practice codes and they are not yet available.

In the interim, the Information Commissioner will provide guidance for public authorities who are working towards achieving compliance with section 5(1)(d) of the PATI Act.

In reviewing the Information Statements for compliance during the implementation period, the Information Commissioner adopts two approaches for public authorities: one

for those who have their own central or uniform filing system in place, and one for those who do not have a uniform filing system yet.

The compliance standard that each public authority must work towards for section 5(1)(d) is to list the classes, or sets, of all of your operational and administrative records, except for the manuals, policies, rules and guidelines listed in later sections of your Information Statement. For example, you might list a "Policy on Code Violations" as a manual in another section. Here, you should include the classes of operational records created when that policy is enforced. This might be described as a class of "Enforcement Records, including warning letters, violation notices, investigation records, compliance recommendations, sanctions notices, appeals and related records."

To comply with section 5(1)(d), you must list all of your classes, or sets, of records. This must also include the time period covered by those records, or your general records retention and destruction policy so the public knows if you might have what they seek.

Public Authorities with existing central filing systems:

If you have a central or uniform filing system, this section should contain your "top-level" folder descriptions for hard copy and electronic records. The "top-level" folder is at the top of your filing system structure and all other more specific folders are below it. You should give examples of or list the types of documents included in each class of records if needed to make the category clear for the public.

Also, the description should indicate the time period covered by the records and note where older records are kept if they are not destroyed according to your records management plan. Here are examples of hypothetical descriptions of classes of records:

- Student records: report cards, test assessments, school and activities photos, counselor notes, class assignments, course assignments, sports and enrichment program records and related materials. Retained for ten years; older records held by Archives.
- Building permits and related materials, such as maps, drawings, specifications and inspection reports. These contain information about construction companies, building locations, building materials and code violations for residential and commercial buildings. Dated 2000 to current; records prior to 2000 are held by Archives.
- Financial records: records related to the receipt, control and expenditure of public funds, including accounts payable, accounts receivable, grants, contributions and transfer payments, accounting standards and methods, budget submissions and reporting and related records. Records date back ten years; prior records destroyed according to department records management plan.

This section should at least provide descriptions for the top-level folders in the filing structure. You may want to include the descriptions of the second-level folders instead, if you think it would be more helpful to the public and not overwhelming.

The time spent making this section clear and thorough, with helpful descriptions and time periods for the classes of records, will save you time explaining these details to the public. It will also help the public write careful and accurate requests for records under the PATI Act that you can understand more quickly and process more efficiently.

Public authorities without existing central or uniform filing systems:

A central or uniform filing system is likely needed to facilitate compliance with some requirements of the PATI Act efficiently, unless you are very small public authority. These requirements include producing an Information Statement with descriptions of the "classes of records held" and conducting reasonable searches for requested records. It is also necessary for you to conduct an efficient search. Each Information Officer will need to have an overall understanding of the types of records the public authority holds so that you can conduct or direct a search. You can gain this understanding much more quickly and easily with a central or uniform filing system.

A central or uniform filing system is also consistent with the changing understanding that records held by public authorities are now a national resource.

The need to have a central or uniform filing system, however, exists in the context of Bermuda's current economic challenges. The majority of public authorities do not have access to additional staffing, time or financial resources to devote exclusively to this task, which will take a great deal of time and resources.

Taking these considerations into account, the Information Commissioner recognizes that some of the Information Statements will need additional work in order to comply with the requirement to describe the "classes of records held."

For these public authorities, the Information Commissioner will work with the Information Officer to develop an individualized schedule for reaching compliance specifically for that public authority. The goal will be to describe the full range of the broad categories of records held, along with the time period covered by those records. See the description above of the "top-level" folders in a filing system.

The most important thing is that your Information Statement gives the public an understanding of the range of your classes of records.

Records maintenance and management plans, uniform filing systems and the requirements for processing a PATI Act request

When it is time to process a PATI Act request, the PATI Regulations require you to "make reasonable efforts to locate a record that" someone has requested access to. This is sometimes referred to as conducting a "reasonable search."

Also, when deciding whether a request will create an unreasonable interference or disruption of other work, you can consider the time it takes to identify and locate a record "within the public authority's filing systems." But you are not allowed to take into account the time it takes to locate a misfiled record, or the time it takes to locate a record if your filing system "ought reasonably" to have indicated where the file was located, but it did not.

Both of these requirements under the PATI Act are affected by the quality of your records maintenance and management plan, and filing system. For example, a poor or non-existing uniform filing system may not identify where a record is located, even though it "ought reasonably" should have. If so, the burden might be placed on the public authority to devote additional time to locating a record.

The next two sections of your Information Statement reveal to the public what is sometimes called the "hidden law" of a public authority. This includes the administrative and operational manuals, and the decision making documents such as policies, rules and guidelines. Together, these records explain to the public the internal criteria that determine how and why your public authority does what it does. It is the information that assists the public authority in carrying out its functions and exercising its power.

- **Administrative and operational manuals**

This section should include a description or list of your administrative and operational manuals staff use to administer and carry out the programmes and activities of the public authority. This will include procedural manuals, instructions and protocols for delivering your functions and responsibilities.

Administrative manuals refer to manuals for activities common to all public authorities, such as human resources, technology, finance, public relations and administering PATI Act requests. Operational manuals refer to manuals for carrying out activities specific to your mandate or programmes. These will be unique to each public authority.

- **Decision making policies, rules and guidelines**

This section should include the documents that guide decision making. They may include rules, precedents, policy guidance, codes, decision templates, model letters, training packages or checklists.

You should also include any process you have for advice, feedback or consultation with the public when setting your policies and practices.

- **Information Officer's details**

This section provides the name and contact details for the Information Officer.

Some public authorities have included information for "Deputy Information Officers" and other additional personnel. It is fine to include these individuals on the Information Statement. It reflects a commitment to provide adequate support and staffing to comply with the PATI Act.

Just keep in mind that the PATI Act requires a public authority to designate one of its officers as the Information Officer. This individual will be viewed as responsible for the duties of this position, regardless of any delegated responsibilities or work.

- **Other information helpful to the public's right to access information**

This section should include any other information relevant to your public authority that will help facilitate the public's right to access information. This could include any electronic or physical reading room for disclosed records that you have available. If you have not already included information about your annual reports, other regular publications or other information available on your website, you should list it here.

- **Any other information that is prescribed**

Here, you should indicate any other information that you are required under the PATI Act or other laws to make routinely available to the public. This will help the public know what records they can get from you without having to resort to a request for records under the PATI Act.

The PATI Act prescribes that you make certain other information routinely available. When asked, you must provide your quarterly expenditures and your log of the access requests under the PATI Act. It further requires that you publish in the Gazette on a regular basis the details of any contract valued at \$50,000 or more.

Include any other classes of information that you are required to make routinely available to the public under other legislation.

The Information Statement template

It will be helpful if you follow the template for Information Statements provided by the Central Policy Unit PATI Implementation Team. It will promote consistency across public authorities and make it easier for the public to access records.

Taking advantage of the “Introduction”

The PATI Act creates a new culture of openness in our country. It introduces the idea that records held by public authorities are a national resource for all of us. The Introduction to your Information Statement is a chance for you to stress your public authority’s contribution to this shift. You can share your commitment to openness, good governance and transparency. You can explain how your Information Statement is intended to help the public access records that you hold.

You can explain that some information is routinely available, without having to use a request for records under the PATI Act.

You may have chosen to introduce the idea that you may not be able to share some information because it would be likely to cause harm to one of the interests protected under the PATI Act. These interests are listed in the PATI Act’s “exemptions.” Exemptions are the only permissible reasons that allow a record or information to be exempt from the disclosure requirement. You can state that you will apply the exemptions reasonably. And when required, you will carefully consider the “public interest test” to determine if the exemption applies by balancing the benefit to the public’s interest from disclosure against the harm that would be caused.

You can stress your commitment to facilitating the public’s access to information fairly, efficiently and accurately.

What “exempt” information can I leave off the Information Statement?

The PATI Act does not require you to include in your Information Statement any manuals, classes of records or other information that are exempt under the PATI Act. But it is difficult to determine with certainty that a record is exempt prior to receiving requests.

When in doubt, you should include the manual or description of the class of records in your Information Statement. It does not mean that a record will be disclosed when someone files a PATI Act request. But it acknowledges that it is too early to say whether the exemption applies.

The uncertainty is created by the need to apply the “public interest test” to a specific PATI Act request before determining whether an exemption applies. You cannot decide the impact of the public interest test on an exemption in the abstract. You can only decide it in the context of an actual request.

At this time, the classes of records or information that you may omit from your Information Statement are only (1) those to which the PATI does not apply at all or (2) those that are absolutely exempt under the PATI Act. Remember, this is for omitting an entire class of records from even being listed in your Information Statement.

1. Records to which the PATI does not apply at all

First, separate from the use of exemptions, section 4 of the PATI Act states that it does not apply to:

- records related to the exercise of judicial or quasi-judicial functions by any court, tribunal or other body or person, or
- records obtained or created by the following public authorities in the course of carrying out their functions:
 - Office of the Auditor General
 - The Human Rights Commission
 - Office of the Information Commissioner
 - Office of the Ombudsman
 - Department of Public Prosecutions
 - Attorney General's Chambers
 - Department of Internal Audit

The PATI Act does apply, however, to records related to general administration held by these public authorities. No public authority is itself exempt from the PATI Act; only certain records held by that public authority are excluded from the PATI Act's application. Each of these entities does need to prepare an Information Statement.

2. Absolute Exemptions

Second, sixteen exemptions from disclosure are currently available under the PATI Act. Of the sixteen exemptions, twelve are subject to the public interest test to determine whether the exemption is applicable. This means that even if you find that an exemption initially applies to the information, you must then balance the benefit to the public interest against the harm that would be caused by disclosure. If the benefit outweighs the harm, the exemption is inapplicable.

The implications of this process mean that in the abstract, you cannot determine whether or not an exemption would apply unless you are considering one of the four "absolute" exemptions that are not subject to the public interest test. The absolute exemptions are for:

- Records related to international tax agreements, but this does not include some records containing purely statistical, technical or scientific material;
- Cabinet documents, but this does not include some records containing purely statistical, technical or scientific material;

- Records whose disclosure could reasonably be expected to be in contempt of court or contrary to an order made by a court, tribunal or other judicial body, or an infringement of parliamentary privilege; and
- Records whose disclosure is prohibited by any statutory provision other than the PATI Act.

The PATI Act also makes clear that records protected by legal professional privilege held by the Attorney General or the Director of Public Prosecutions are considered exempt records and not subject to disclosure of any kind, to the extent that the PATI Act is applicable to these records at all.

Unless you are dealing with a class of records that are (1) not subject to the PATI Act at all or (2) unquestionably fall within an absolute exemption, you should include a description of the class of records in your Information Statement. This is true even if you think you would rely on an exemption if you received a request under the PATI Act for that record.

For additional information, you may contact the ICO:

Information Commissioner's Office
Contact: Gitanjali S. Gutierrez
gsgutierrez@ico.bm
Tel: 294-9181
Ext: 3397

Appendix 1

Public Authorities' obligations under the PATI Act

To provide an **information statement** for the public and promulgate it [s5],

- To provide **other information** to the public so that the public needs only to have minimum resort to the use of the Act to obtain information [s6]. This includes:
 - General information, e.g., activities of the Authority
 - Log of all information requests and their outcome
 - Quarterly expenditure (upon request) [s6(5)]
 - Contracts valued at \$50,000 or more.
- To **respond to information requests** in a timely manner [s12-16]
- To **track information requests**, and provide this data to the Information Commissioner
- To respond to requests from the Information Commissioner [s9]
- To **amend personal information** held by the Authority that is wrong or misleading following a written request by the person to whom the information relates [s19]
- To conduct an **internal review** if formally requested [part 5]
- To give evidence for **review by the Information Commissioner** [part 6, 47(4)], or for **judicial review** [s49], if required
- To provide an **annual written report** to the Information Commissioner of the status of information requests [s58(3)]
- **To do anything else as required** under the PATI Act and subsequent Regulations [s59, 60], including:
 - **Fees** for Requests for information
 - Management and maintenance of **records**
 - **Procedures** for administering the Act
- To **train staff and make arrangements** so as to facilitate compliance with the Act [s61]
- To **designate one of its officers** to be the person to whom requests are directed [s.62]