Information Commissioner's Office

MONTHLY ROUNDUP

Volume II, Issue 10 NOVEMBER/DECEMBER 2019

"Access to information equips citizens, the media, advocacy groups and others with information through which they can scrutinize the myriad decisions and actions taken by public authorities at all levels. So, while the right to information has necessary and appropriate limits under freedom of information laws, once liberated information aids us in holding those in power to account for their actions."

Gill Bull, Director of Freedom of Information Complaints and Compliance at the Information Commissioner's Office in the UK

WELCOME!

The Information Commissioner's Office (ICO) welcomes you to our final November/December 2019 issue of our Monthly Roundup! The ICO is an independent, public office that promotes and oversees the use of the Public Access to Information (PATI) Act 2010 in Bermuda.

Following our Right to Know Week of events and subsequent outreach in September and October, we have had a number of community groups express an interest in the ICO conducting a presentation on the rights protected under the PATI Act and its benefits to the community.

Book a Presentation with the ICO team!

Are you involved with a local charity, school, programme or organization?
Are you interested in further empowering your community?
Do you know of any local organizations that would benefit from understanding their rights under the PATI Act?

The ICO encourages you to schedule a time for the ICO to deliver a presentation about how the PATI Act can benefit you.

Send us an email at info@ico.bm!

IN THIS ISSUE:

- Recent Information Commissioner's decisions and resolutions
- Our monthly recap: Statistics for our cases
- 2019 ICO Annual Return: Taking a closer look at gazetting contracts
- Information Commissioner's December Quarterly Briefing

DECISIONS ISSUED

In November and December, the Information Commissioner received two new applications, and issued ten decisions. In December, the Supreme Court granted leave to seek judicial review of the Information Commissioner's **Decision 24/2019**. The case is listed as Bermuda Hospitals Board v Information Commissioner, Case 492/2019. Highlights from the decisions are below.

What does a good response to a PATI request start with? A reasonable search. In **Decision 26/2019**, the requester sought records related to the Ministry of Education's Adopt-a-School programme. The requester sought an Information Commissioner's review of the Ministry's decision, which disclosed some records but stated that no other records related to the programme were held. During the Information Commissioner's review, the Ministry agreed to conduct additional searches and was able to locate additional responsive records.

The Information Commissioner held that the Ministry did not conduct a reasonable search in its original handling of the PATI request, but was satisfied that the additional search conducted during the review was reasonable. The Information Commissioner required the Ministry to process the records responsive to the PATI request and issue a new initial decision denying or granting access to the records in accordance with the PATI Act within six weeks.

Can private physicians' professional information be disclosed? Read Decision 27/2019 to find out what happened in this case. In **Decision 27/2019**, the Information Commissioner considered the Bermuda Health Council's (Health Council) decision to refuse a PATI request for records relating to communications between the Health Council and the Chief Medical Officer regarding two physicians. With respect to one of the physicians, the Health Council maintained that no records existed (section 16(1)(a)), which was affirmed by the Information Commissioner. She was satisfied that the Health Council had conducted a reasonable search for records in accordance with section 12 of the PATI Act and had provided sufficient evidence of its searches in accordance with regulation 5 of the PATI Regulations.

The Information Commissioner found that the Health Council was correct to withhold six of the seven responsive records under section 37 of the PATI Act because their disclosure is prohibited by section 18 of the Bermuda Health Council Act 2004. This section requires confidentiality for records related to the affairs of the Health Council unless disclosure is necessary for the performance of the Health Council's functions. The Information Commissioner concluded that none of the Health Council's functions required disclosure of the records.

With regard to the one record that did not fall within section 37, the Information Commissioner considered the Health Council's reliance on the exemptions under the PATI

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DECISIONS ISSUED, cont.

Act for operations of a public authority (section 30), commercial interests (section 25) and information received in confidence (section 26). The Information Commissioner found that the Health Council did not justify its reliance on these exemptions and ordered the Health Council to disclose that record.

Is third party notification important at the internal review stage? Yes, but keep in mind the statutory timeframe to issue an internal review decision. In Decision 28/2019, the Information Commissioner considered the failure of the Bermuda Business Development Agency (BDA) to issue an internal review decision within the statutory timeframe. Since the BDA issued an internal review during the Information Commissioner's review, it was not ordered to take further action.

The Decision also emphasized that public authorities have to keep in mind the statutory timeframe to issue an internal review decision if it decides to notify third parties at the internal review stage. As stated by the Information Commissioner, "the BDA was correct to point out that it may be in the interest of fairness for a public authority to notify a third party and invite their submissions at the internal review stage, even though section 39 of the PATI Act does not require public authorities to do so. When it chooses to notify a third party at that stage, however, the public authority is still required to issue an internal review decision within the six week timeframe set out in the PATI Act."

For further guidance on third party notifications, see paragraphs 6-9 of Decision 28/2019 and the Information Commissioner's June 2019 Quarterly Briefing presentation available through the Publications tab on www.ico.bm.

When is correspondence between States made in confidence and properly withheld? Look at the content, nature, and circumstances. In Decision 29/2019, the Acting Information Commissioner considered the internal review decision of the Ministry of Finance Headquarters (Ministry) on request for correspondence between the Bermuda Government and the United Kingdom relating to the redevelopment of the L. F. Wade International Airport. The Ministry issued the internal review decision in accordance with the Information Commissioner's Decision 13/2018 and accompanying Order, which required the Ministry to process the responsive records it had not previously considered.

The Acting Information Commissioner affirmed the Ministry's internal review decision refusing access to the records because they contained information communicated in confidence by a State and are exempt under section 32(1)(b). In the Decision, the Acting Information Commissioner emphasized that a record will not be exempt merely because it

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DECISIONS ISSUED, cont.

consists of correspondence between two States. The content and nature of the records, as well as the circumstances of the communications, should be taken into account in deciding whether they were communicated in confidence and thus fall within the section 32(1)(b) exemption.

When is a PATI request frivolous or vexatious? Read Decisions 30/2019, 31/2019 and 32/2019 to find out! The Applicant had sought, through a series of related PATI requests, to obtain information about the number of applications for medical cannabis import licenses, along with details for the physicians supporting the applications and their practice areas. In **Decisions 30/2019** and **31/2019**, the Information Commissioner considered the Ministry of Health's refusals to grant access to the records. The Information Commissioner found in **Decision 30/2019** that the Ministry was correct to deny access to the applications under the personal information exemption. In **Decision 31/2019**, however, she found that it was incorrect for the Ministry to conclude that it did not have the records. The Ministry did have responsive records, but those records were exempt under section 23 of the PATI Act as personal information.

In a continuing effort to receive some non-personal and non-identifying information, the Applicant made an additional PATI request. In **Decision 32/2019**, the Information Commissioner considered the Ministry's refusal on the grounds that, in light of the prior requests, the request in this case was frivolous or vexatious under section 16(1)(e) of the Act.

The Information Commissioner explained that the provision on frivolous or vexatious request is aimed at "preventing abuses by requesters of the processes set out under the PATI Act." A request may be frivolous or vexatious if it was made in bad faith, or when the requester's pattern of conduct is such that it amounts to an abuse of process.

In **Decision 32/2019**, the Information Commissioner explained that a request is made in bad faith if it is made with an illegitimate or dishonest purpose, which may be evidenced by the requester's unwillingness to cooperate with a public authority. The Information Commissioner highlighted that even though a request may be used in a manner which may be disadvantageous to the public authority, this does not imply that it was made in bad faith. The Information Commissioner also set out a non-exhaustive list of relevant factors which may be considered in determining if a pattern of conduct amounts to an abuse of the right of access. She emphasized that a large number of requests alone is not an indication of abuse.

The Information Commissioner considered each factor for this request and determined that it was not frivolous or vexatious. Because the Ministry had incorrectly decided the

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DECISIONS ISSUED, cont.

Applicant's earlier PATI request, the Applicant attempted to modify the third request to allay the Ministry's concerns, as the Ministry had previously invited the Applicant to do. The Information Commissioner varied the Ministry's decision and denied the request because it was personal information.

The remaining decisions in December were the following:

Decision 34/2019 affirmed the Bermuda Police Service's refusal to disclose its records of correspondence with a particular company. The Information Commissioner agreed with the Bermuda Police Service that disclosure could reasonably be expected to prejudice the commercial interests of the company and is thus exempt under section 25(1)(c) of the PATI Act.

In **Decision 35/2019**, the Information Commissioner considered the reasonableness of the search conducted by the Ministry of Finance Headquarters in response to a request for records relating to the work of the National Anti-Money Laundering Committee (NAMLC). Because the Ministry inappropriately limited the scope of the Applicant's PATI request, the Information Commissioner concluded that its search was unreasonable. She also emphasized that the duty to assist in the PATI Act requires the Ministry to explain the NAMLC's procedures and processes with the Applicant so that the Applicant may identify alternative records that may satisfy the PATI request. The Ministry was ordered to fulfil its duty to assist and to conduct additional searches.

In **Decision 33/2019**, the Information Commissioner found that the Department of Child and Family Services failed to issue an internal review decision within the statutory time frames for a PATI request seeking records related to Glen Mills Schools in Pennsylvania. United States. The Information Commissioner ordered the Department to issue a decision.

ICO Statistics as of 31 December 2019

(from 1 April 2015)

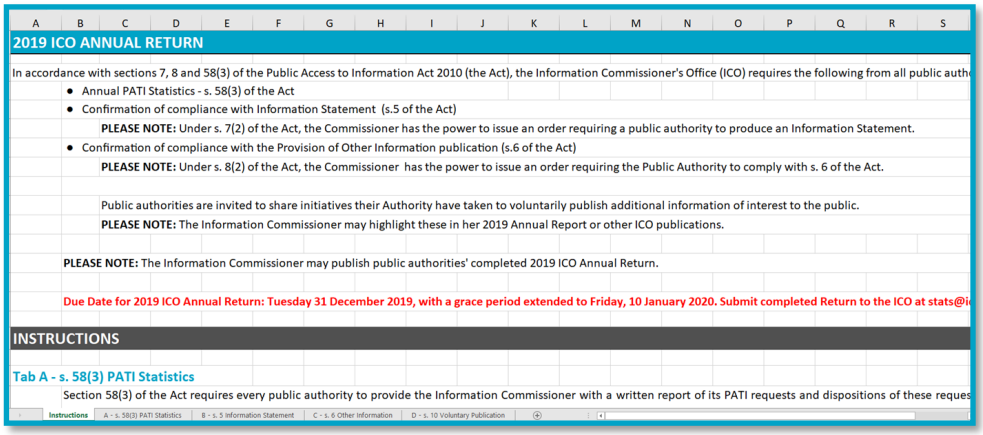
Total applications for independent review by the Information Commissioner ……..132	Closed: Decided ……..……...……59
Pending investigations ..……..33	Closed: Resolved ……..……..14
Applications pending validation …… . 1	Closed: Abandoned ……..…… 7
	Closed: Invalid ……..…… 18

Information Commissioner's Office

I WANT TO KNOW!

REMINDER: 2019 ICO ANNUAL RETURNS

The ICO has completed the distribution of the 2019 ICO Annual Return package to public authorities. If you have not received an email from us, please email stats@ico.bm and we will provide you with a copy. The PATI Act requires the 2019 ICO Annual Return to be **submitted by Tuesday, 31 December 2019, with the ICO extending a grace period to Friday, 10 January 2020**. Completed Returns should be submitted to the ICO at stats@ico.bm. ICO Project Officer Sheena Bassett is also available to answer any questions that you may have about the Annual Return, if needed.



2019 ICO ANNUAL RETURN

In accordance with sections 7, 8 and 58(3) of the Public Access to Information Act 2010 (the Act), the Information Commissioner's Office (ICO) requires the following from all public auth

- Annual PATI Statistics - s. 58(3) of the Act
- Confirmation of compliance with Information Statement (s.5 of the Act)
  - **PLEASE NOTE:** Under s. 7(2) of the Act, the Commissioner has the power to issue an order requiring a public authority to produce an Information Statement.
- Confirmation of compliance with the Provision of Other Information publication (s.6 of the Act)
  - **PLEASE NOTE:** Under s. 8(2) of the Act, the Commissioner has the power to issue an order requiring the Public Authority to comply with s. 6 of the Act.

Public authorities are invited to share initiatives their Authority have taken to voluntarily publish additional information of interest to the public.

PLEASE NOTE: The Information Commissioner may highlight these in her 2019 Annual Report or other ICO publications.

PLEASE NOTE: The Information Commissioner may publish public authorities' completed 2019 ICO Annual Return.

Due Date for 2019 ICO Annual Return: Tuesday 31 December 2019, with a grace period extended to Friday, 10 January 2020. Submit completed Return to the ICO at stats@i

INSTRUCTIONS

Tab A - s. 58(3) PATI Statistics

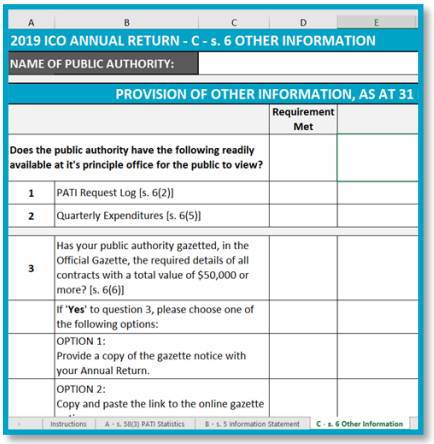
Section 58(3) of the Act requires every public authority to provide the Information Commissioner with a written report of its PATI requests and dispositions of these reques

Instructions | A - s. 58(3) PATI Statistics | B - s. 5 Information Statement | C - s. 6 Other Information | D - s. 10 Voluntary Publication

As preliminary submissions are processed, there is one frequently queried topic: gazetting of contracts with a total value of $50,000. The requirement to gazette the details of contracts with a total value of $50,000 or more arose when the PATI Act 2010 came into effect on 1 April 2015.

As a result, from that date forward, your public authority must gazette the details of any contracts that your public authority entered into with a total value of $50,000 or more. Contract details that you should gazette include the name of the contractor, the monetary value of the contract, the goods and services to be provided under the contract and the completion/delivery date of the contract.

For clarification, section 6(6) of the PATI Act specifies that contracts with a ***total value*** of $50,000 or more must be gazetted. Please keep this in mind when considering your public authority's contracts because the total value of a contract may change over time. This may widen the scope of contracts that you may or may not be considering for gazetting purposes.



2019 ICO ANNUAL RETURN - C - s. 6 OTHER INFORMATION

NAME OF PUBLIC AUTHORITY:

PROVISION OF OTHER INFORMATION, AS AT 31

		Requirement Met	
Does the public authority have the following readily available at it's principle office for the public to view?			
1	PATI Request Log [s. 6(2)]		
2	Quarterly Expenditures [s. 6(5)]		
3	Has your public authority gazetted, in the Official Gazette, the required details of all contracts with a total value of $50,000 or more? [s. 6(6)]		
	If '**Yes**' to question 3, please choose one of the following options:		
	OPTION 1: Provide a copy of the gazette notice with your Annual Return.		
	OPTION 2: Copy and paste the link to the online gazette		

Instructions | A - s. 58(3) PATI Statistics | B - s. 5 Information Statement | C - s. 6 Other Information

As a friendly reminder, the Government's Official Gazette is now online on www.gov.bm and held in hard copy at the Library. Past gazette notices are also available for the public to view.

Information Commissioner's Office

QUERO SABER (I WANT TO KNOW!)

Operating within a multi-cultural community, inevitably our office will have the opportunity to interact with members of the community whose first language is not English. Under the PATI Act, there is a duty to assist persons in connection to a PATI request. In support of this obligation, we have translated our informational know-your-rights brochure into Portuguese. We took the opportunity to launch this brochure at the recent Portuguese street festival held on Saturday 2 November, as part of the weekend long celebration marking the 170th anniversary of the arrival of the first Portuguese immigrants. If you are interested in obtaining a copy or a few to share, please stop by our office on Reid Street.

Information Commissioner Gitanjali Gutierrez and Investigation Officer Answer Styannes at the block party on Reid Street, held during the recent Portuguese anniversary celebrations.

DECEMBER 2019 INFORMATION COMMISSIONER'S QUARTERLY BRIEFING

The Information Commissioner's Quarterly Briefing was held on 4 December with 30 attendees. The Information Commissioner reviewed the four commercial information exemptions in section 25 in depth. Recent cases were discussed, along with the questions a public authority should consider when applying each of the exemptions. Participants had extensive questions and a good discussion was held. The December briefing presentation, with presenter's notes, is available on our website, www.ico.bm under **Publications**.

"Relatable breakdown for better understanding"

"Case studies were helpful for illustration"

Participants' feedback

SAVE THE DATE

Information Commissioner's Quarterly Briefing
Wednesday, 11 March 2020
Proactive Publication under Part 2 of the PATI Act and PATI Requirements for Statutory Boards and Committees

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