Information Commissioner's Office

MONTHLY ROUNDUP

Volume IV, Issue 5 JUNE 2021

WELCOME

The ICO's June Monthly Roundup focuses on issues that can strengthen Bermudians and residents' right to know. Everyday, people are asking for the public information that may linger just beyond the headlines. What impacts whether this information is brought to light? Read on to learn about how the 'public interest' can influence the disclosure of records. In Bermuda and internationally, questions about remote work and public record keeping also are critical. What happens when public records are stored on personal computers or mobile phones? PATI requesters and public authorities can also learn about emails and record keeping from this month's Tips Corner.

This month, we celebrate the Bermudians and residents striving to be informed and engaged, embodied by the recent views of Mr. Ryan Robinson Perinchief, a Masters in Public Policy candidate at Oxford University's Blavatnik School of Government and founder/director of Future Leaders Bermuda:

The most important things people can do are to ask questions, get educated, build community and speak up – both on the political process and in the areas in which we want to effect change. There are many passionate people out there in the community who have meaningful insights to contribute but because many of us either act in isolation or are unaware of the way government actually works, our energy is sometimes misdirected, which can cause us to become exhausted without even making a dent. My advice would be to understand how decisions are truly made so that we know how the process can be reformed. - Royal Gazette, 'Grassroots campaigning to mainstream party - is it a step too far? (7 July 2021)

"The free exchange of information between the government and the people who create that government, the people who elect that government, is absolutely crucial to the democratic process. One of our greatest freedoms is to have a right to know what our government is doing."

Courtney Cox, 2005, Attorney

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I WANT TO KNOW!

UNDERSTANDING THE 'PUBLIC INTEREST' FOR PATI

The PATI Act gives Bermudians and residents the right to request access to records held by public authorities. While public authorities are allowed to deny public access to records if the records fall within one of the exemption categories in the PATI Act, it is important to note that in some cases public authorities may still be required to disclose the records if doing so is in the public interest.

There is no single definition of 'public interest' in the PATI Act. The PATI Regulations set out a number of examples of factors, which authorities have to take into account when considering whether a disclosure of records is in the public interest. For example, before deciding to disclose or withhold certain exempt records, public authorities have to ask themselves whether disclosure would promote greater public understanding of their process or decisions, facilitate public participation in the Government's decision making, or reveal wrongdoing or maladministration.

As Investigators, there are two main clarifications about the public interest that we often see are needed when assisting the Information Commissioner with conducting independent reviews of public authorities' decisions on PATI requests. The first is that the public interest is different than just what is interesting to the public. While there might be an overlap between these two, it is important to remember that it is not always the case. Just because a topic is widely discussed in the community does not necessarily mean disclosure of the records relating to that topic would be in the public interest.

Take the issues relating to the release of sex offenders back into the community and the sex offenders' registry as an example. These issues are no doubt interesting to and evoke emotionally driven responses from Bermudians and residents. There were numerous articles published along with widespread public discussions on the matter. But, as the Information Commissioner found in her **Decision 10/2019**, Department of Corrections, from a PATI Act perspective, disclosure of the records on the released sex offenders as requested was not in the public interest.

The Information Commissioner accepted there can be a strong public interest in the public being notified of the release of a sex offender where that offender presents a significant risk to the community. But, this public interest can be met by other means, including by public notification in accordance with the Government's 'Protocol on the Disclosure of Information Identifying Sex Offenders'.

The other common clarification about the public interest involves whether disclosure of a record pertaining to a single individual only relates to a private interest, or can be important to the broader public interest.

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ICO INVESTIGATOR'S INSIGHT

UNDERSTANDING THE 'PUBLIC INTEREST' FOR PATI...cont.

The Investigators have seen public authorities argue that when the requested records are those personal to the PATI requesters, such as human resources-related records or records on complaints involving the requesters, there are no public interests to consider. But the fact that the records are of a personal nature, on its own, is not sufficient to dismiss a claim that their disclosure is in the public interest. For example, disclosure of personnel records would be in the public interest if it would reveal a public authority's maladministration or wrong doing.

One important rule to remember when considering the public interest test is that it should be applied on a case-by-case basis. If you are interested in learning more, the Information Commissioner has issued a Guidance on the public interest test and published a number of relevant decisions (for example, **Decision 02/2019**, Office of the Governor and **Decision 15/2020**, Bermuda Police Service), available on **www.ico.bm**.

In case you missed it, check out our Investigator's Insight series in these past Monthly Roundups:

Principle of fairness (October/November 2020)

Principle of integrity (April 2021)

Learning about the right of access through the Information Commissioner's reviews (May 2021)

ICO STATISTICS AS OF 30 JUNE 2021

(from 1 April 2015)

Total applications for independent review by the Information Commissioner ……..170	Closed: Decided ……..…….….79
Pending investigations ..……..41	Closed: Resolved ……..…….20
Applications pending validation ……..1	Closed: Abandoned ……..……...7
	Closed: Invalid ……..…… 22

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TIPS CORNER FOR PUBLIC AUTHORITIES

This section highlights useful tips for effective ways to participate in a PATI request process.

More and more, public authorities rely on emails to document their decision making. Beyond the message body, email is also used widely to share other important documents, such as reports and memos, between colleagues. Good practices for managing emails are essential to support public authorities' duty to respond completely and accurately to requests for public records.

These tips aim to help public authorities respond to PATI requests within the legislated time frames. Following them should limit efforts required to process responsive records, by reducing the number of pages that will need to be processed through flagging duplicates and removing personal or unrelated information.

Tip #1: **Retain the essentials.**

- Public authorities must retain emails that record matters of business value, i.e. those records that provide a complete story of the public authority's decision making. This helps to ensure that when processing a PATI request, the public authority is in the best position to respond with complete and accurate details.
- Emails of business value should be stored in the correct designated location. For instance, many public authorities maintain subject files on a shared drive. A subject file in an officer's email account, beyond being a transitory file, is usually not sufficient to meet good records management standards.
- Officers should make a routine of filing emails at least weekly, e.g. 'every Wednesday afternoon, update the policy revision file'.
- Keep in mind, though, that simple keyword searches of email accounts may not scan information within the body of emails, nor the file names of any attachments or even the attachments' contents. Regular filing is probably better to ensure records are properly retained where they're expected to be stored.

Tip #2: Purge regularly.

- Once messages of business value are properly saved in the correct location, then consider deleting them from officers' email accounts – guided by the public authority's document retention and disposal policy.
- Emails with 'important-in-the-moment' details only should be deleted regularly from inboxes and sent boxes. For instance, your message notifying a colleague that a spreadsheet has been updated as draft 2, along with your colleague's 'noted with thanks' reply, when the spreadsheet itself (saved in the correct location) includes these version-tracking details.
- Resist the urge to subscribe to any email list or create an online account using your business email for any purpose besides business.

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TIPS CORNER FOR PUBLIC AUTHORITIES...cont.

- Always keep personal messages separate from messages of business value. Be in the habit of deleting personal messages from business email accounts on a daily basis. Take every precaution to avoid having personal messages captured as part of processing a PATI request.
- Remember to empty the 'deleted items' folder regularly.
- Keep in mind that records, including emails, cannot be deleted after a PATI request has been made.

Tip #3: Limit duplication.

- Include links to where documents are in their designated location, instead of attaching copies of them to emails – especially during 'all hands' editing sessions. Not only does this take up less space on the network, it also helps ensure complete responses to PATI requests through efficient version control.
- For this to work well though, first get serious about practices for creating and keeping track of versions of the same document. Consider existing tools, such as the 'tracked changes' feature in Word in lieu of saving a new document each time a new person edits the document.
- No need for every officer receiving an important email to save it in the designated location. Stick to a good practice; usually, the email sender is responsible for saving the message in the designated location.

Tip #4: Make searches easier.

- Honor 'one email string = one subject' whenever possible. Resist the urge to communicate with colleagues on an unrelated matter within an email string that is already underway. Instead, take the extra minute to find and 'reply' using the relevant email string.
- Use descriptive subject lines that appropriately describe the contents of the email, e.g. a reference number or widely used abbreviation or acronym. This helps to narrow searches for responsive records, whether electronic or paper. Be careful about typos though; an email subject line 'govermnent' probably won't turn up in a search for 'government'.

Tip #5: Get familiar with the standards.

- Review the public authority's records management policies and procedures to ensure a uniform understanding and adherence to storing emails of business value.
- If no records management standards have been outlined in writing yet, consider advocating for this to happen, as a practical matter of importance for helping the authority meet its duties under the PATI Act.
- When in doubt, seek guidance. Contacting the Cabinet Office's PATI/PIPA team is a good start; also check out the **Cabinet Office's PATI Administrative Code of Practice**.

*Adapted from the Information Commissioner of Canada's **'9 Tips for ATIP-Friendly Email Management'**.*

ICIC ADOPTS RESOLUTION ON PROACTIVE PUBLICATION OF INFORMATION RELATING TO THE COVID-19 PANDEMIC

The International Conference of Information Commissioners (ICIC) held its 12th annual conference virtually on 23-24 June. During the closed session for Information Commissioners and accredited observers, the ICIC passed a resolution affirming the importance of proactive publication relating to the COVID-19 pandemic. The resolution states that:

> As *the global pandemic continues, the importance of transparency and the right to access information remains.*
>
> *Recognising the role that access to information has in building trust in our global community during times of crisis and beyond, Information Commissioners around the world highlight the importance of the proactive disclosure of information held by governments or public institutions.*

The resolution goes on to urge governments and public authorities to uphold the principles of proactive disclosure and the important of public engagement in government decision making. This includes "the critical importance" of the public's right of access to information for the effectiveness of the response to COVID-19 and its impact on public health, civil liberties and economic participation.

The ICIC resolution also highlights two important principles of access to information for Bermuda. First, information held by government and other public authorities should be managed for public purposes and be regarded as a national resource. Second, particularly concerning the response to COVID-19, information held by public authorities should be published promptly and proactively to the greatest extent possible, without the need for a PATI request. This is consistent with the purposes set out in section 2 of the PATI Act, which seek to strengthen accountability and engagement in public decision making for Bermudians and residents.

Part 2 of the PATI Act also requires Bermuda's public authorities to proactively publish an up-to-date information statement, maintain a PATI request log, have quarterly expenditures readily available for the public and publish in the Official Gazette details of all of its contracts for goods and services with a total value of $50,000 or more.

The ICIC resolution, Proactive Publication of Information Relating to the COVID-19 Pandemic (24 June 2021) is available in full here in English, French and Spanish.

BLURRED BOUNDARIES IN ACCESS TO INFORMATION: HOME OFFICES AND PUBLIC RECORDS MANAGEMENT

The fact is that around the world many employees of public authorities while working from home often use their own personal devices and systems to generate and store public records. Remote work in the public sector is here to stay. The panelists on the ICIC webinar series on 28 June reminded public officers that the responsibility for recording decision making and preserving public records does not cease during a crisis or while working from home.

At the same time, the changing working environments initiated during the COVID-19 pandemic, acerbated difficulties with information management in the public sector that were problematic before COVID-19. This topic is timely for Bermuda. During a recent Information Commissioner's Quarterly Briefing, Information Commissioner Gutierrez facilitated a discussion on managing public records as public officers returned to work after stay-at-home public health orders.

Highlights of the recent ICIC panelists' comments include:

- The issue is not necessarily with the technologies and the use of personal devices. Rather, the focus is on the policies and structures surrounding these tools to ensure that appropriate information is captured for the public record and does not go missing.
- Remote work environments demonstrate how under-resourced information management is in the public sector. This has a direct impact on access to public information.
- "What records and information are necessary to store for purposes of recording decision making and ensuring the capacity for accountability?" Public records are being generated or stored digitally in multiple home office locations. Faced with this reality, public authorities must consider which information and records must be preserved for the public.

The diverse panel discussed numerous other issues, including public officials and departments' use of Twitter and Facebook accounts, and the storage of public records in private propriety systems (e.g., Twitter) or cloud-based storage system (e.g., Google docs) that may need to be searched in response to a PATI request. One panelist stated that home and remote working environments are an 'ecosystem' that needs efficient systems and processes to keep government moving at a good pace. At the same time, these public bodies need to be held accountable for the decisions that they make.

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BLURRED BOUNDARIES IN ACCESS TO INFORMATION: HOME OFFICES AND PUBLIC RECORDS MANAGEMENT...cont.

Valuing information management and capture—and properly resourcing information management units and enforcing policies—will facilitate the capability to hold public bodies to account and for citizens to assert their PATI rights.

Want to learn more?
The recorded webinar is available on the
ICIC YouTube Channel.

How is this relevant for Bermuda?

- The pre-COVID-19 Bermuda Government Reform Plan emphasised the need to improve information management across public authorities to facilitate efficient public services and increase public trust in Government. A culture shift is required in the public sector to support valuing information management.
- Public offices are increasingly moving to digital records. Updated policies, structures and resources are needed in order to manage this information efficiently.
- Poor public records management risks impeding Bermudians and residents' right to access public information and creates added administrative burdens when PATI requests are processed.
- Like other countries, Bermuda's public authorities often hold more information that can be humanly managed, and are working to determine what records must be preserved for purposes of public records management and access to information.

The ICIC will host these free open sessions throughout 2021, as online webinars. Each session will bring together experts and professionals from around the world to discuss themes around transparency and access to information.
Check out the *Save the Date* section for a full list of upcoming webinars in the series.

SAVE THE DATES

Information Commissioner's *Virtual* Quarterly Briefing
Friday, 16 September 2021
10:00am - 11:00am
ICO Briefings are for public authorities only.
Registration details will be sent directly to them.

International Right to Know Day
Tuesday, 28 September 2021

ICIC Wednesdays – Schedule of Webinars
Theme: Access to Information for a Changing World
Using Technology to Promote Inclusion

28 July - Privacy and transparency in health issues

25 August - Access to information and freedom of press

29 September - Challenges of transparency in the digital governments: Transparency of public administration in the use of artificial intelligence

27 October - State secrecy

24 November - Interplay between data protection and access to information

8 December - Environmental information and P10

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