Information Commissioner's Office

MONTHLY ROUNDUP

Volume IV, Issue 9 OCTOBER 2021

WELCOME

The Information Commissioner's Office (ICO) welcomes you to the October 2021 issue of our Monthly Roundup. The ICO is an independent public office that promotes and enforces the Public Access to Information (PATI) Act 2010 in Bermuda.

The ICO's Monthly Roundup offers helpful information about PATI rights and practice for both the public and public authorities.

In this issue, we take a closer look at the Information Commissioner's recently issued decisions and offer PATI practice tips in our Q&A and Tips Corners. Check out the Investigator's Insight as we discuss working with public authorities to support their compliance with the PATI Act. We also highlight the awardees of the 2021 Information Commissioner's Award for outstanding service as an Information Officer and the Information Commissioner's community engagements in October.

Finally, the ICO is expanding our team. To support our increasing work, the ICO is hiring an additional Investigation Officer. Details for how to apply are also shared in this issue.

"Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation and indignation."

- Atifete Jahjaga, Former President of Kosovo

IN THIS ISSUE:

- Information Commissioner's recent decisions
- Monthly statistics for ICO cases
- *Investigator's Insight* - Working with the public authorities
- *Q&A Corner* with the ICO
- *Tips Corner* for public authorities & PATI requesters
- 3rd annual Information Commissioner's award
- Community outreach

DECISIONS ISSUED

During October, the Information Commissioner received 4 new applications and issued 2 decisions. Highlights are below.

Does the PATI Act give public authorities the option to hold off on making a decision to disclose a record until there is a change in circumstance? Read Decision 11/2021 for some clarification.

During this 'failure-to-decide' review, the ICO learned that the Head of the Office of the Tax Commissioner (OTC) had received the request for an internal review, properly understood the statutory timeframe for completing it, and intended to carry it out and issue a timely decision to the PATI requester. In fact, the OTC had met all prior timeframes when processing this PATI request at the initial decision stage. However, the Head of Authority paused on completing the internal review and issuing a decision to the requester once notified that, during the 6-week internal review period, the company who was the subject of certain records sought in the PATI request had initiated Court proceedings against the government.

Once the ICO made it clear that the PATI Act statutory timeframe was firm, the Head of Authority moved ahead with issuing an internal review decision during the Information Commissioner's review. As a result, an order by the Information Commissioner was not needed.

This Information Commissioner's review highlights a useful practice lesson for public authorities. Sometimes a public authority wants to make the information available, but the timing is not right for disclosing the records. The Information Commissioner reminds public authorities that the PATI Act contains many provisions to accommodate a variety of situations when this might arise. For instance, if the public authority intends to proactively publish the information within three months, and disclosing it before the intended date might be too burdensome, then the request can be administratively denied under section 16(1)(f). Or, if a court case has arisen where disclosing the identified records could reasonably be expected to impact the impartial adjudication of the case, then the public authority can decide to apply the law enforcement exemption in section 34(1)(c).

Each PATI request can present an opportunity for refreshing a public authority's understanding of what the PATI Act requires. Nothing in the PATI Act prevents a public authority from voluntarily disclosing the records at a later time when circumstances have changed, as a matter of good customer service.

ICO STATISTICS AS OF 31 OCTOBER 2021

(from 1 April 2015)

Total applications for independent review by the Information Commissioner ……..183	Closed: Decided ……..…….….88
Pending investigations ..……45	Closed: Resolved ……..……20
Applications pending validation ……0	Closed: Abandoned ……..……...7
	Closed: Invalid ……..…… 23

DECISIONS ISSUED...cont.

What should public authorities keep in mind when responding to PATI requests filed by persons with limited access to communication? Decision 12/2021 offers some suggestions.

The PATI Act requires public authorities to make every reasonable effort to assist individuals in connection with PATI requests. What amounts to 'reasonable effort' depends on the circumstances of each case. This duty to assist is even more crucial in circumstances where the persons filing the PATI requests have limited access to communication, as emphasised by the Information Commissioner in her recent **Decision 12/2021,** Ministry of Legal Affairs and Constitutional Reform Headquarters (Ministry).

The Information Commissioner found that the Ministry did not fail to meet the 6-week timeline to issue a decision on the Applicant's internal review request. The Applicant had sent it to the Legal Aid Committee, though intended for the Ministry; therefore, the Ministry actually had not received the request.

The Ministry is now aware of the request, and the Information Commissioner has ordered the Ministry to issue an internal review decision to the Applicant. The Information Commissioner took into account the unique circumstances in this case, including the fact that the Applicant is incarcerated and has limited access to means of communication. In addition, the Applicant had not received an initial decision from the Ministry and was not informed of how to seek an internal review. This was complicated by a lack of clarity about the relationships between the Ministry, the Legal Aid Office within the Ministry, and the Legal Aid Committee, which raised a question on whether the Permanent Secretary for the Ministry was the one responsible for issuing the internal review decision.

While she acknowledged the lack of clarity, the Information Commissioner emphasised that it should not prejudice the Applicant's and the public's right of access to non-exempt records. The Information Commissioner expressed concerns that, in this case, the Applicant experienced seemingly unnecessary obstacles in their attempt to obtain a response from the relevant public authority and to access the record sought. Further, the Applicant was seeking documentation and clarity on whether the contracted Legal Aid Counsel had actually provided the services listed in an invoice for which the Legal Aid Office had processed payment. Prior PATI disclosures to the Applicant raised potential questions about whether the services were actually rendered. The Information Commissioner also highlighted that the Ministry's Information Statement explicitly noted that the Ministry holds the Legal Aid Office's client files and that the Applicant had previously obtained records and received responses from the Ministry on a PATI request related to legal aid.

To read the full **Decision** and others by the Information Commissioner, visit **www.ico.bm**.

WORKING WITH THE PUBLIC AUTHORITIES

The Information Commissioner independently reviews public authorities' internal review decisions on PATI requests. To perform this function effectively, the PATI Act grants the Information Commissioner robust enforcement powers. While conducting reviews, she may issue summons, compel relevant parties to give evidence, enter any premises occupied by public authorities, and examine records found at those premises. Since her appointment in 2015, the Information Commissioner has exercised these powers only on few occasions.

The first approach in her independent reviews is to work collaboratively with public authorities and give them chances to bring themselves into compliance with the PATI Act. The Information Commissioner has recognised that when it came into effect, an access to information regime was a novel concept for Bermuda and that limited local resources had been available to public authorities during those early years of the PATI Act.

When conducting her independent reviews, sometimes the Information Commissioner recommends that resolution is suitable for the parties to engage in. The Information Commissioner can make this offer before she commences a formal review under section 47 of the PATI Act. We usually refer to this as 'early resolution'. Throughout her review, however, the parties can always propose resolution. When this process takes place after the Information Commissioner has commenced a formal review, we call it 'facilitated resolution'.

During the resolution process, public authorities have the chance to reconsider their positions and, if necessary, to take further actions that would bring them into compliance with the PATI Act. For example, conducting additional searches to locate other records responsive to the PATI request based on parameters they might have missed initially. The ICO ensures that the Applicant is informed of any progress made during the process.

When engaged in a resolution, the Information Commissioner is mindful to not compromise the applicant's and the public's rights to non-exempt records. If resolution is not attempted or unsuccessful, the Information Commissioner will conduct a formal independent review via an investigation, unless the applicant withdraws their request. She will invite the parties to make submissions on the matter. Instead of sending a general letter inviting public authorities to explain their positions, the Information Commissioner provides a set of questions, which are meant to assist public authorities in fleshing out their arguments.

For instance, there have been several cases where a public authority invoked the commercial information exemption to withhold certain records (section 25(1)(c)). In these cases, the Information Commissioner would ask the public authority to first identify the relevant entity whose commercial interests are at stake.

Continued on next page

WORKING WITH THE PUBLIC AUTHORITIES...cont.

Next, the public authority would have to explain the relevant commercial interests of that entity and specify the potential relevant adverse effect to the identified commercial interests caused by disclosure. In addition, the likelihood of that adverse effect occurring must be examined. Finally, the public authority must explain how they considered the public interest. These detailed questions are meant to inform public authorities of the factors that the Information Commissioner will take into account when considering the parties' submissions.

The Information Commissioner wishes to see public authorities succeed in meeting their PATI obligations and believes in giving public authorities the opportunities to comply with the requirements of the PATI Act. To avoid any element of surprise, the Information Commissioner attempts to explain her thought process to public authorities as clearly as possible. The Commissioner's focus is to safeguard the public's rights under the PATI Act, and not in playing a game of 'gotcha!' with public authorities.

The Information Commissioner's decisions are not ordinarily punitive. They lay out the Information Commissioner's understanding of the PATI Act and the application of its provisions, to inform and educate both the public and public authorities. Decision cover letters, addressed only to the public authorities, often provide practice notes for the public authorities' future consideration.

Both during and outside the Information Commissioner's review process, the ICO's Investigators are available to assist public authorities if they have questions about the provisions of the PATI Act. The Investigators are unable to provide advice on the handling of specific PATI requests by public authorities, but we are happy to assist with general enquiries on the PATI Act and the Information Commissioner's review procedures. Public authorities and members of the public who have general questions about the PATI Act may contact the ICO team at 543-3700 or **info@ico.bm**.

OUR TEAM IS GROWING!

Q&A CORNER WITH THE ICO

Highlights of some of the ICO's recent responses to enquiries.

I Want to Know about the PATI request form…

Q: When asking for public records, must I use the PATI request form available on the government's website?

A: No. The standard form is an administrative convenience to help public authorities handle the request. As long as the written request has the right information, it is sufficient for a PATI request. Written can mean an email or a letter.

I Want to Know about timeframes…

Q: Does the public authority have to wait the whole 6-week period before giving a PATI requester their decision and access to the records?

A: No. A public authority always has the choice of acting sooner, while accounting for the rights of third parties. The longest period of time the public authority can take for making a decision and for notifying the requester is 6 weeks, unless the time is extended under section 15 of the PATI Act.

SAVE THE DATES

Instagram Live interview with Bermuda Youth Connect
Thursday, 18 November 2021, 5:30pm
Commissioner Gutierrez will be interviewed by Veronica DeGraff and Tierrai Tull on the Bermuda Youth Connect Instagram page
Follow us on IG: icobermuda.You don't want to miss this one!

Information Commissioner's *Virtual* Quarterly Briefing
Thursday, 9 December 2021, 10:00am - 11:00am
Topic: ICO 2021 Annual Return
ICO Briefings are for public authorities only
Registration details will be sent directly to public authorities

ICIC Wednesday Webinar
Theme: Access to Information for a Changing World - Using Technology to Promote Inclusion

Wednesday, 24 November 2021, 11:00am
Topic: Interplay between data protection and access to information
This session will be streamed live on the **ICIC's YouTube Channel**

TIPS CORNER FOR PUBLIC AUTHORITIES & PATI REQUESTERS

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

Tip for Information Officers: Build your toolbox of handy resources, and keep them accessible to support your PATI practice.

Why it makes sense?
At her latest Quarterly Briefing, the Information Commissioner offered tips for public authorities on processing PATI requests. Even if you attended live, review the presentation notes to reinforce and refresh your learning. Mark up your copy with your own observations. The latest and all past presentations are available **here**.

Kudos to those public officers who regularly register, attend and participate.

Tip for PATI requesters: If asking for a review or appeal, be clear about why you are asking for it.

Why it makes sense?
Requesting an internal review by the head of authority and appealing to the Information Commissioner are parts of the process provided for in the PATI Act. They empower the public. While the PATI Act protects requesters from having to justify their PATI request, in most cases being clear about the reasons for review will help the reviewer to understand upfront any points of disagreement or specific concerns a requester has about the original response received. This can help to focus their resources on bringing resolution.

Kudos to those requesters who participate cooperatively in the process.

Join the Information Commissioner for her first Instagram Live hosted by Bermuda Youth Connect!

Follow us on Instagram at **icobermuda**

3RD ANNUAL INFORMATION COMMISSIONER'S AWARD

The Information Commissioner's Award honours individuals who have excelled in their role as Information Officers in one or more of the following areas: Communication, Innovation, Leadership and Service. This year, two Information Officers received the Award: Mr. Shaun Dill of the Office of the Ombudsman, and Sergeant Travis Powell of the Bermuda Police Service (BPS).

Information Commissioner Gitanjali Gutierrez stated, "These Information Officers' commitment to good governance and transparency is critical when as a country we are facing challenges on many fronts. This year's award recipients exemplify the best qualities of Information Officers who are diligently serving the public. In addition to working well with PATI requesters, they are also encouraging their organisations and colleagues to understand the PATI Act and implement it as effectively as possible. We celebrate their courage and contributions to good governance and public access to information in Bermuda".

Information Officer
Mr. Shaun Dill
Office of the Ombudsman

Mr. Shaun Dill is recognized for the professional and effective manner in which he fulfilled his obligations under the PATI Act. In carrying out his role, Mr. Dill embodies the integrity, courage and commitment to service that the Information Commissioner hopes to find in all Information Officers. His leadership inspires his colleagues to learn more about the rights and obligations under the PATI Act. Mr. Dill's selection for the Information Commissioner's Award reflect his commitment to the PATI Act and good governance on behalf of the Office of the Ombudsman.

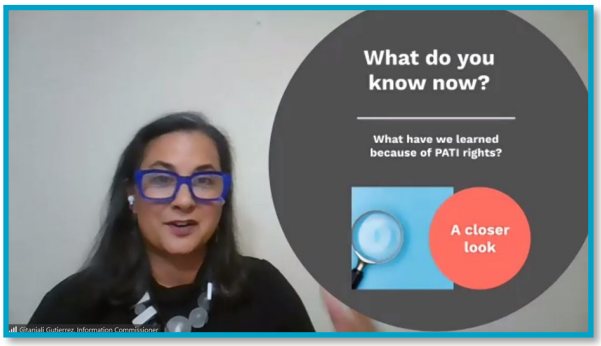
Information Officer
Sergeant Travis Powell
Bermuda Police Service

Sergeant Travis Powell is acknowledged for excelling in his responsibilities as an Information Officer across all of the areas considered. In addition to handling the highest volume of PATI requests of any Information Officer, Sergeant Powell has been a catalyst and change leader for ongoing improvements within the BPS's policies and practices under PATI. His steadfast commitment to fulfilling his role in a professional, effective and pragmatic manner has benefitted not only the BPS as an organization but also the public it serves.

COMMUNITY OUTREACH

An important part of the Commissioner's mandate is to raise awareness about PATI rights and how the public can use them. The Commissioner is often invited by organizations who wish to have a PATI presentation for their immediate team or alternately for the wider community group that they serve.

Recently, the ICO had the pleasure of providing PATI presentations to the Pembroke Rotary Club, Regulatory Authority of Bermuda, West Pembroke School PTA and Bermuda College management team. These opportunities to speak with audiences in this way has allowed for attendees to get real-time responses to PATI-related queries, while providing the ICO team the opportunity to share insights and useful resources.



If your community group would like to schedule the ICO for an outreach session or virtual education event, please contact Sheena Bassett at **sbassett@ico.bm** or call 543-3700. For health and safety reasons, the ICO is currently offering virtual presentations only.

ICO 2021 ANNUAL RETURN

The ICO will soon commence distribution of the 2021 Annual Return package to all public authorities. The Annual Return enables the Information Commissioner to monitor public authorities' compliance with the requirements to make certain information available to the public without having to make a PATI request.

The Commissioner's Quarterly Briefing on 9 December will focus on the 2021 Annual Return package and provide an opportunity for representatives from public authorities to ask the Commissioner and her team specific questions that they may have about completing the return. All completed returns should be submitted to the ICO at stats@ico.bm. Project Officer Sheena Bassett is available to answer any questions that you may have about the Annual Return process.

Information Commissioner's Office
Maxwell Roberts Building, 4th Floor
One Church Street
Hamilton HM11
441 543 3700
info@ico.bm
www.ico.bm

Information Commissioner's Office

WHAT DO YOU KNOW NOW?