Information Commissioner's Office

MONTHLY ROUNDUP

Volume III, Issue 7 OCTOBER/NOVEMBER 2020

WELCOME

October and November were busy months for the ICO, with our work cutting across all areas of the Information Commissioner's mandate. In this Monthly Roundup, you can read about the public awareness videos series we launched in October. We are pleased to shared that the videos have been widely viewed since their launch. The ICO continues to steadily receive applications for independent reviews by the Information Commissioner. Learn more in this issue about the Information Commissioner's recent decisions, which highlight circumstances when a public authority can properly withhold records to prevent prejudice to procedures used for their investigations and which consider a claim that a PATI request is vexatious. The ICO 2020 Annual Return process has also started. The ICO 2020 Annual Return enables the Information Commissioner to oversee the requirements of the PATI Act, including the need for public authorities to gazette the details for their contracts for goods or services with a total value of $50,000 or more.

The ICO Investigation Officers also share their insights about the importance of fairness in the ICO review processes. Finally, we share some tips for public authorities and PATI requesters as they navigate the PATI process. Turn the page for insights and learnings about PATI rights and requirements.

"Information is a basic human right and the fundamental foundation for the formation of democratic institutions." – Nelson Mandela, Former South African President and political activist

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DECISIONS ISSUED

During October and November 2020, the Information Commissioner received 8 new applications, issued 3 public decisions and issued a decision letter on an invalid application. Highlights from the decisions are below.

Want to learn more about when a PATI request is or is not frivolous or vexatious? Read Decision 14/2020.

In **Decision 14/2020**, Ministry of Health Headquarters, the Ministry argued that the Applicant's behaviour was unreasonably persistent and their latest request overlapped significantly with the Applicant's prior requests, which already resulted in the Ministry disclosing voluminous records. The Ministry also decided that another of the Applicant's earlier requests was frivolous or vexatious, therefore asserting a pattern of conduct which became an unreasonable burden to the Ministry.

In **Decision 14/2020**, the Information Commissioner explored various factors which public authorities may consider when deciding to apply section 16(1)(e). The Commissioner reminded public authorities to carefully balance the public's rights with the resource needs of the public authority. If a public authority receives multiple PATI requests on the same topic, it is important to carefully review each part of the request and ensure that the new parts of the request are processed in full. If related requests continue to be filed, the public authority may need to continue responding to the new aspects of each request. Making multiple, related requests does not, by itself, mean the requests are frivolous or vexatious. In **Decision 14/2020**, the Information Commissioner annulled the Ministry's decision to deny the request under section 16(1)(e) of the PATI Act, as she was not satisfied with the Ministry's justifications that the Applicant's PATI request was vexatious.

Could the ongoing nature of a disciplinary investigation impact a request for related records? This was an important factor in Decision 15/2020.

The PATI Act gives Bermudians and residents the right to ask for records relating to them held by a public authority. However, a public authority may legitimately refuse such a request. One reason is if disclosure of the responsive records could reasonably prejudice a public authority's procedures for conducting an investigation. In **Decision 15/2020**, the Information Commissioner reviewed a decision by the Bermuda Police Service (BPS) on a PATI request for email correspondence between senior management that related to the Applicant. The Applicant, a police officer, made the PATI request while going through their disciplinary investigation. The BPS disclosed some records to the Applicant, but withheld ten responsive records under the exemption in section 30(1)(a) of the PATI Act because disclosure of the ten records could prejudice the effectiveness of its ongoing and future disciplinary investigations. The BPS also argued that disclosure could prejudice the effectiveness of the procedures used in its disciplinary investigations, which are set out in detail in the Police (Conduct) Orders 2016 (Conduct Orders).

DECISIONS ISSUED, *cont.*

The Information Commissioner found the BPS did not provide sufficient reasons to support its argument that disclosure could prejudice its ongoing and future disciplinary investigations. But she was satisfied that disclosure could prejudice the effectiveness of the disciplinary investigation procedures in the Conduct Orders.

The Conduct Orders give the BPS the discretion to determine whether certain information or documents should not be provided to an officer under a disciplinary investigation. Disclosure of the responsive records under the PATI Act would circumvent such decision making authority and make the procedures in the Conduct Orders less effective. Furthermore, because the PATI request was made when the Applicant's disciplinary investigation was ongoing, disclosure would undermine the timelines specifically set out in the Conduct Orders.

The Information Commissioner found that the public interest would be better served by non-disclosure, instead of disclosure, of the responsive records. She acknowledged that there is a public interest in ensuring that police officers under disciplinary investigation are provided with relevant information and documents to allow them to make meaningful representations and sufficiently defend themselves. But the Information Commissioner was satisfied that this public interest has been met by the procedures under the Conduct Orders, which include the right to appeal to the Public Service Commission and the availability of judicial review. The public has an interest in safeguarding the orderly administration of the BPS's disciplinary process, which was ongoing at the time the PATI request was filed.

Balancing an ongoing search with issuing a timely internal review decision: lesson from a failure to decide case

Decision 16/2020 considers the failure of the Department of Public Lands and Buildings to issue an internal review decision within the PATI Act's statutory timeline. The Department explained its internal review decision was made out of time because it was conducting extensive searches to locate the responsive record.

Decision 16/2020 is a good reminder for all public authorities that the timeline to issue an internal review decision is not extendable. While there is nothing in the PATI Act requiring the public authority to stop conducting a search at a particular point, there is an obligation for public authorities to issue an internal review decision within six weeks after their receipt of internal review requests. By doing so, it allows applicants to make an informed decision on whether an application for the Information Commissioner's independent review is needed.

Public authorities are welcome, if they are willing to do so, to conduct further searches after an internal review decision has been issued and even during the Information Commissioner's reviews.

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DECISIONS ISSUED, *cont.*

The Information Commissioner commended the Department for making efforts to locate the responsive record while considering its internal review.

Decision letter on invalid application: Bermuda Bar Association's status under the PATI Act

The Information Commissioner has determined that the Bermuda Bar Association is not a public authority for the purpose of the PATI Act. This determination was made in response to an application she received from a member of the public, who filed a request for records to the Bar Association earlier this year.

Although the Bar Association is established by a statutory provision, the Bermuda Bar Act 1974, the Information Commissioner was not satisfied that it is governmental or quasi-governmental in nature, which would classify it as a public authority under paragraph 13 of the Schedule to the PATI Act. The Bar Association's authority and powers are limited to only those which directly relate to the governing of the legal profession in Bermuda. The Bar Association does not receive public funding and is funded by annual dues and fees from its members and is accountable only to its members. Furthermore, it has no obligation to report or be held accountable to the general public and is not required to act in the public interest.

The Information Commissioner also found that the Bar Association does not fall within the definition of 'public authority' in paragraph 14 of the Schedule to the PATI Act. The Bar Association is neither owned nor controlled by the Government. Because the Bar Association is self-funded, the Information Commissioner was satisfied that it was not substantially funded by the Legislature.

The Commissioner's determination that the Bar Association is not a public authority under the PATI Act means the request for records made to the Bar Association was not a PATI request. Consequently, the Information Commissioner found the application made by the Applicant was invalid. The Commissioner did not issue a public decision notice on this matter.

ICO STATISTICS AS OF 30 NOVEMBER 2020

(from 1 April 2015)

Total applications for independent review by the Information Commissioner ……...150	Closed: Decided ……..……..….75
Pending investigations ..……..28	Closed: Resolved ……..……..17
Applications pending validation ……..3	Closed: Abandoned ……..…….. .7
	Closed: Invalid ……..…… 20

Information Commissioner's Office

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ICO HAS BEGUN THE 2020 ANNUAL RETURN PROCESS, PUBLICATION OF ANNUAL RETURN GUIDANCE

The ICO has distributed the 2020 ICO 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. This includes the publication of details about all contracts for goods or services with a total value of $50,000 or more.

With this year's return, there is a noteworthy amendment. The Information Commissioner now requires the signature of the public authority's Accounting Officer, Chief Financial Officer or Treasurer, when confirming whether or not the requirement to gazette the details of contracts for goods or services with a total value of $50,000 or more has been met. Section 6(6) of the PATI Act requires all public authorities to gazette any qualifying contracts. As a result, over the next several months, the public should expect to see an increase in gazette notices published on the Government's Official Gazette, available at www.gov.bm. In addition, hard copies of past gazette notices are available at the National Library.

The Commissioner's Quarterly Briefing on 7 December focused on the roll-out of the 2020 Annual Return package and provided an opportunity for representatives from public authorities to ask the Commissioner and her team specific questions that they had about completing the return.

For any public authority that has not received an email from us, please email stats@ico.bm and we will provide you with a copy of this year's Annual Return package. Completed returns should be submitted to the ICO at stats@ico.bm. Project Officer Sheena Bassett is also available to answer any questions that you may have about the Annual Return process.

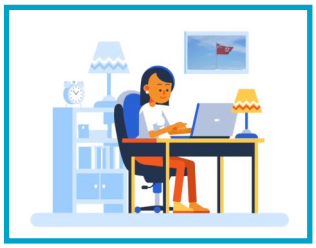
> The free access to information is not a privilege,
> but a necessity for any free society.
>
> — Ed Asner, American actor
> and a former president of Screen Actors Guild

ICO LAUNCHES PUBLIC AWARENESS VIDEO SERIES

During the month of October, the ICO released four new public awareness videos to encourage Bermudians and residents to use their right to know by making PATI requests. Three videos in the series highlight how making a PATI request may be helpful to families, business owners or anyone who wants to know more about public decisions because they want to be informed, included and involved. The fourth video in the series explains how easy it is to make a PATI request. All videos are available on the **ICO's website**, **Facebook** and **YouTube** pages.

Views to date for this series of videos:
FB views: 7,412
YouTube views: 142

Click the images below to watch each video!
Enjoy!



In case you missed it, Information Commissioner Gutierrez was also interviewed by David Fox of the Bermuda Broadcasting Company.
Click on the image below to watch the full interview!

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TIPS CORNER FOR PUBLIC AUTHORITIES & PATI REQUESTERS

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

Tip for Information Officers:

Before looking for email records using Outlook's search function, check the settings to see whether it will search the 'subject field and message body'. By default, Outlook search is usually set to search only the 'subject field'. Choosing the 'subject field and message body' option requires the user to make a simple, one-click change in Outlook.

Why it makes sense?

The public authority's search efforts must be reasonable, to meet the PATI standard. Whether an email's subject field contains the right keyword is usually a matter of personal habits. If the goal is to process all responsive records, then checking your email search settings is a simple way to ensure the effort you put into the search will actually produce the results you seek.

Kudos to those information officers who seek out ways to improve their electronic searches and share their knowledge with peers.

Tip for PATI Requesters:

When asking for email records related to a topic you have been discussing with the public authority, consider whether or not you want the records disclosed to you to include your emails with the public authority.

Why it makes sense?

If you want to confirm that the public authority has a copy of your email exchanges, then it makes sense to specify that your request should include them. But if you already have such confirmation, i.e. because the public authority replied and you continue to have access to the exchange in your own email account, then it might make sense to specify in your PATI request that the public authority may exclude from the records to be processed a copy of your emails with the public authority.

Kudos to requesters who actively work with public authorities to specify search terms and other parameters that can reduce the burden of searching for records and lead to a successful PATI process for everyone.

APPLYING THE PRINCIPLE OF FAIRNESS IN THE INFORMATION COMMISSIONER'S REVIEWS

In conducting its work, the ICO is guided by three core values, one of which is fairness. As an independent decision maker with considerably robust powers and authorities, the Information Commissioner is required by law to apply and uphold the principle of fairness in her work, including when conducting her independent reviews. This obligation exists regardless of the absence of any specific provision in the PATI Act requiring her to do so.

When interacting with public authorities and members of the public who are parties in an independent review, the Information Commissioner and her office are neutral, independent and unbiased. As explained in the August Monthly Roundup, the Information Commissioner and her staff do not take on the role of an advocate for any party in a review. There is no favouritism. Throughout the ICO reviews and other oversight activity, the ICO staff treat members of the public and officers or employees of public authorities with the same respect, courtesy and professionalism. The ICO applies the same law and policies to every public authority and individual.

Also embedded in the principle of fairness is the Information Commissioner's duty to comply with procedural fairness, sometimes also called 'natural justice'. When conducting her review, the Information Commissioner has to ensure that all relevant parties are given a reasonable opportunity to be heard. This does not only include the members of the public (as the applicant in the review) or the relevant public authority, but also any third party whose interest might be affected by disclosure of public records, such as small business owners, patients of health service providers, corporate firms, etc.

During the Information Commissioner's independent review, public authorities sometimes raise a new argument or invoke an additional ground to justify withholding certain records. When this happens, the ICO informs the other parties in the review of the new argument or ground and invites them to comment on it.

The principle of fairness requires the Information Commissioner to take all relevant submissions into account when making her decision. The Information Commissioner attempts to address the parties' comments or views in her published decisions as much as possible, although this might not always be possible or appropriate, given the Information Commissioner is also bound by the secrecy provision in the PATI Act.

Although parties may disagree with the Information Commissioner's decisions, hopefully they will have confidence that they were heard through a fair process. When fairness is married with independence and integrity, the ICO stands as an institution that respectfully upholds the rights of all Bermudians and residents under the PATI Act.

In case you missed it, the first installment of the Investigator's Insight series premiered in the **August 2020 Monthly Roundup**.

Information Commissioner's Office ICO

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