Information Commissioner's Report and Recommendations on the Implementation of the Public Access to Information Act 2010

March 2021

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Introduction

Public authorities sometimes indicate that they find the work of the PATI Act burdensome, and they have expressed that this burden is further increased when a PATI decision is under review by the Information Commissioner's Office (ICO). The requesters who are on the other end of the PATI request process find it equally frustrating at times, with long delays and a needlessly bureaucratic process. The 730 PATI requested filed in the first six years of the PATI Act (2015-2020), led to 153 applications for an independent review by the Information Commissioner. In some cases, a single PATI request actually generated two Information Commissioner's reviews, occurring when an initial review addressed procedural issues and a second review considered the substantive denial of public access to the records. Having such a high percentage of all PATI requests lead to Information Commissioner's reviews unnecessarily consumes public authorities' resources and the public's patience.

It is time to identify some of the key pitfalls that have led to this. In doing so, I hope to identify a way forward that will result in a more user-friendly law that can be implemented in a more efficient and effective manner to better serve the public, the key stakeholders for the PATI Act. If my recommendations are followed, I believe future administration of the PATI Act will be less burdensome to public authorities, leading to fewer complaints and review applications to the ICO, and a more satisfied public who will receive access to the information they are entitled to in a timelier manner.

Consideration of the PATI Act must also keep at the forefront the purposes set out in section 2 of the Act.
In the 21st century, any country laying claim to the mantle of democracy must have the standard accoutrements of that status, such as free and fair elections, an independent judiciary, freedom of the press, freedom of speech, association and assembly, and protections for fundamental human rights. In the past thirty years, a broad international consensus has emerged that a strong, legislated public right of access to information is also one of those defining characteristics of any truly democratic country.

This consensus has emerged on the basis that to be fully participant in the democratic process, citizens must have the means to inform themselves about the workings of government to the greatest extent possible without unduly interfering with or impairing the ability of the government to function in the public interest. Whether this information is made available proactively or through a PATI request, and whether it is brought to the attention of the public through the efforts of individual citizens, the media or political actors, the important consideration is that it becomes accessible in the public realm for discourse and debate, and it ultimately informs the democratic process. In that sense, the right of access to information is an

enabling right, because it strengthens other core democratic rights, including the right to participate in the electoral process, by ensuring that voters have the information they need to make informed decisions.

It should rightly be celebrated, therefore, that in this country the right of access to information was established with the proclamation of the PATI Act in April of 2015, and in so doing Bermuda raised itself to the standard achieved by other democratic countries in the international community.

In passing the PATI Act into law, members of the legislature understood that it would represent a significant culture shift for Bermuda, particularly within public authorities themselves. This understanding is reflected in the inclusion, at section 57, of a requirement for the Information Commissioner to investigate and issue a Report on the operation of the Act — essentially taking stock of how well PATI has served the people of Bermuda. This Report represents the culmination of that review, and it is issued in accordance with section 57(1) of the Public Access to Information Act 2010 (PATI):

> *57 (1) The Commissioner shall keep the operation of this Act under review and shall, not later than two years after this section comes into operation, carry out an investigation into practices and procedures adopted by public authorities generally for the purposes of compliance with the provisions of this Act.*

Although the PATI Act has been in force since April 2015, its practical implementation evolved slowly. By 2019, with the PATI Act in effect for five years, many Heads of Public Authorities, Information Officers and other employees had accumulated valuable experience (sometimes through trial and error). The Cabinet Office published the Minister's *Public Access to Information: Administrative Code of Practice for Public Authorities* (*PATI Practice Code*) in January 2020. I believe we can now say that public authorities in Bermuda have had sufficient experience with the Act for me to reflect on how well the promise set out in the PATI Act's stated purpose has been realized, and to make recommendations accordingly through this Report.

Timeline of the development of the PATI Act

- 2003 – In the Throne Speech, the Former Premier, the Hon. W. Alexander Scott JP, MP, outlined the Government's intention to consider proposals for public access to information (PATI) legislation.

- 2004 – A project team at the Cabinet Office's Central Policy Unit developed proposals for a policy on public access to information through international research, stakeholder consultation and input from an external Advisory Committee.
- 2005 – *Public Access to Information (PATI): A Discussion Paper Presented to the Legislature by The Premier The Honourable W. Alexander Scott, JP, MP* issued.
- 2008 – The plan for public access to information was further articulated by the Cabinet Office's Sustainable Development Unit's report, *Charting our Course: Sustaining Bermuda*.
- 2009 – Draft PATI Bill and *Companion Guide to the Consultation Draft of the Public Access to Information Bill* issued to help inform the public about proposals for public access to information in Bermuda.
- 2010 – The PATI Act introduced by the Former Premier, Dr. The Honourable E. F. Brown, JP, and passed unanimously by the legislature.
- 2014 – The Public Access to Information Amendment Bill passed.
- 2015 – The first Information Commissioner was appointed in March and the PATI Act went into force on 1 April.
- 2020 – Minister's PATI Practice Code for public authorities issued by the Cabinet Office.

Reviewing the PATI Act and its implementation

As explained above, PATI is a rights-based statute. How far those rights extend can be measured by analyzing both the statute itself and by assessing, on a practical level, whether those statutory rights are fully available to Bermudians and residents of Bermuda to use and enjoy. In preparation for this Report, the ICO engaged two highly respected, independent organizations with deep experience and expertise in conducting analyses and assessments of the legislation as written and as implemented.

Among its various projects, the Canadian-based Centre for Law and Democracy (CLD) administers the Right to Information (RTI) Rating program, launched in 2011. It is continuously updated and now covers 128 national RTI laws from around the world. It is the leading tool for assessing the strength of the legal framework for the right to information and is regularly relied upon by international authorities. The Centre for Law and Democracy was engaged by the ICO to review the PATI Act against international standards and to report on its strengths and weaknesses.

The Carter Center is a well-known US-based human rights and humanitarian organization that was founded by former President Jimmy Carter and former First Lady Rosalynn Carter. The Carter

Center is involved in a number of international initiatives aimed at preventing and resolving conflicts, enhancing freedom and democracy, and improving health. As part of its programming aimed at supporting the rule of law, the Carter Center has developed an Implementation Assessment Tool (IAT) for access to information laws that evaluates the practical implementation of that law and assesses the performance of public authorities. The IAT highlights successes as well as provides a roadmap for improvement. The Carter Center has been conducting the IAT since 2009. The Carter Center is also no stranger to Bermuda: it was one of the parties consulted in the creation of the PATI Act, as acknowledged when the PATI legislation was introduced in the legislature on May 7, 2010. The ICO engaged the Carter Center to apply its IAT to Bermuda's PATI Act to inform my recommendations for this Report.

Legislative improvements

The Center for Law and Democracy issued its report on Bermuda in March 2019. It is annexed to this Report and is available on the Global RTI website, https://www.rti-rating.org/news-reports/bermuda-time-to-update-the-access-to-information-act/. The report assessed the PATI Act in seven different areas: right of access; scope of the law (what organizations and records it covers); requesting procedures; exceptions and refusals; appeals; sanctions and protections; and promotional measures. The report conducted an assessment of the PATI Act using the same criteria in its RTI Rating system with which it has analyzed 128 other countries. It determined that the PATI Act was tied for 45th place in the world, sharing that position with similar laws in the nations of Georgia, Ghana, South Korea and Uganda. The CLD noted, however, that the PATI Act does not fare nearly as well when compared to other recently enacted laws, which tend to be more robust. The CLD recommended that the PATI Act be reviewed for the purpose of strengthening its provisions with the aim of bringing the right of access to information in Bermuda into alignment with the many countries whose laws currently outshine our own.

The CLD report highlighted a number of areas for improvement, however for the purpose of this Report, I will focus on a few of the most pressing areas.

Simplifying the process for filing a PATI request

The process for filing a request was one that was singled out by the CLD. The amount of personal information that is required to be provided to make a request, as well as the fact that public authorities have, at times, required individuals to present in person at the offices of the public authority to which they wish to file a request, are both unnecessary deterrents to the exercise of the right of access. Moreover, they add little or nothing of benefit to the public authorities administering the statute. This was, in fact, understood at the outset by those who initiated the

PATI Act. The *Public Access to Information (PATI): A Discussion Paper Presented to the Legislature by The Premier The Honourable W. Alexander Scott, JP, MP* (2005 PATI Discussion Paper) indicated on page 5 that one of the guiding principles behind the establishment of the PATI Act was that "In most cases, the identity of the requester and the reasons for the request should be irrelevant." The exception to this, of course, would be a request for one's own personal information, in which proof of identity would be necessary, or a request for personal information of another person, on that person's behalf, where again it would be necessary to provide information to establish the appropriateness of such a disclosure. These requirements are anticipated to be superseded when the Personal Information Protection Act 2016 (PIPA) comes into full force, as requests for one's own personal information will fall under that statute.

Other than being unnecessarily bureaucratic, this process also significantly impacts the anonymity of requesters that the PATI Act purports to guarantee to a limited extent in section 12. All of my annual reports since 2015 have discussed the issue of anonymity for requesters, including examples where requesters indicated that their identity had been disclosed unnecessarily within public authorities, and cases where employees of a public authority indicated that a supervisor learned that they had filed a request and they were concerned about facing direct or indirect repercussions.

As a step in the right direction, the January 2020 PATI Practice Code, p. 32, acknowledges that PATI requests may be submitted by email. Yet, public authorities still seek the identifying information set out in Schedule 1 of the PATI Regulations, and this could imply the emailing of identification, which is not good practice from a privacy and security standpoint.

It should also be recognized that whenever citizens interact with their governments, no matter how well intentioned that government might be, there is a real power imbalance at play. Decisions by government officials can have major and permanent impacts on the lives of individuals. A person may depend on those officials to protect the most vulnerable members of their families through administrative oversight, financial disbursements or program delivery. Such an individual could very likely be deterred from filing a PATI request for fear of retribution impacting those family members, particularly where a request might shine a light on maladministration by public officials. The need to allow the filing of anonymous PATI requests is the message we have been hearing since our first year of operation and it is a message I have been delivering to the legislature through my annual reports. Now the CLD, arguably one of the foremost international experts on access to information law, has weighed in on this issue. The CLD report makes two recommendations addressing this:

- *When making a request for information, applicants should only be required to provide an address for delivery of the information rather than details such as their names, emails and physical addresses.*
- *The law should make it clear how a request for information may be lodged, which should include the possibility of filing them electronically.*

As a comparable example, the Cayman Islands Freedom of Information law allows requests to be made by email with only a name and an email address. Furthermore, the identity of the requester is only required to be confirmed if the request is for personal information, meaning that a request for general government information can be made using a pseudonym. The Cayman Islands Information Commissioner published a *Position Paper on Anonymity & Fees, FOI Law Review, 2010* (January 2011), in which she explained on page 5 that:

> *[I]n a small community like Cayman where "everyone knows your business", it is especially important to ensure that applicants do not feel intimidated into refraining from applying for access to government records by having to reveal their actual name, and face possible public exposure and/or retribution.*

The Cayman Islands Information Commissioner's conclusion emphasised the negative impact of abolishing anonymity, a critique that is equally and powerfully applicable to the current state of the PATI Act:

> *The abolition of "anonymity" would increase the administrative burden on Information Managers, thereby increasing the cost of [Freedom of Information (FOI)] and causing delays in the provision of information under the Law. It would undermine the reality and perceptions of fairness of the FOI process, and have an overall chilling effect on the willingness of the general public—particularly disadvantaged and vulnerable individuals—to use FOI to obtain the information they need.*
>
> *Therefore, it is the Information Commissioner's opinion that abolishing "anonymity" would be ineffective and unworkable, and would be counter-productive to the intentions of the Law, i.e. to increase government's accountability, transparency, and to encourage public participation in decision making. An applicant's name is, and should remain, irrelevant to the determination of whether to disclose information or not.*

Removing the citizenship or residency requirements for PATI requesters is in fact very much consistent with government's vision as outlined in the 2019 *Government Reform Strategic Plan*

(*2019 Government Reform Plan*), issued by the Cabinet Office and tabled in the Legislature on 17 May, 2019. If the requirement were removed for PATI requesters to present at a public authority with identification to file a request, the PATI process could transition to a primarily online one. In its *2019 Government Reform Plan*, the government has listed among its objectives to move towards 100% paperless processing by 2023 and to transition 50% of current services performed through self-service options by 2022. The PATI request process is low-hanging fruit for implementation of these objectives.

Hanging onto residency or citizenship requirements for PATI requesters reflects twentieth-century thinking, focused on maintaining barriers and unnecessary bureaucracy. It clearly clashes with the vision outlined in the *2019 Government Reform Plan*. In a wired world, maintaining those barriers is of limited value compared with the benefits of eliminating them and moving the process online. The fears of prospective PATI requesters about repercussions for filing requests will be eliminated, and the application process will be electronic, which will streamline processing. Dropping unnecessary requirements (such as collection of needless information in a paper form) aligns with the agile vision for government reform that has been articulated in the 2019 Plan, and it supports government's intention to transition towards digital services and improve customer offerings.

This modification is also consistent with the future state Target Operating Model envisioned in the 2019 Government Reform Plan which sees a "… set of administrative processes and policies which are fit for purpose and focus on internal efficiency and effectiveness." One of the goals listed in the technology future state Target Operating Model is to see "Technology applications connect the Public Service with the people of Bermuda through comprehensive, secure, and accessible digital services." Another goal calling for citizen-centric customer offerings envisions a future state Target Operating Model which "Embraces the digital age. Access to information and service delivery are digital first and mobile by default." Clearly, there is an easy win within sight by making PATI requests a primarily online process which facilitates anonymity of requesters.

Such a move would also dovetail well with the pending implementation of PIPA. The requirement to adequately protect personal information against security breaches is more easily met when a public authority only collects the minimum amount of personal information necessary for the intended purpose. In the case of the PATI request process, if the collection of personal information is minimized, the risk of exposure to privacy breaches is also minimized.

Eliminating unnecessary secrecy

Another issue identified by the CLD is that of the exemptions within the PATI Act. The CLD report concluded that this area of the PATI Act is "relatively weak" by international standards and offered detailed recommendations to bring the PATI Act in line with these international standards. One that bears highlighting here relates to section 37 of PATI, which is as follows:

> **Disclosure prohibited by other legislation**
>
> *37 (1) Subject to subsection (6), a record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.*
>
> *(2) The Minister may by order repeal, revoke or amend any statutory provision referred to in subsection (1).*
>
> *(3) An order under subsection (2) may make any modifications that are consequential upon or incidental to the repeal, revocation or amendment of the relevant statutory provision, and an order may contain any transitional provisions and savings that are appropriate.*
>
> *(4) An order under subsection (2) is subject to the affirmative resolution procedure.*
>
> *(5) Where a statutory provision made after the coming into operation of this section prohibits the disclosure of a record, the provision shall not have effect unless it provides specifically that it is to have effect notwithstanding this Act.*
>
> *(6) For the avoidance of doubt a record held by the Attorney General or the Director of Public Prosecutions, that is the subject of legal professional privilege, shall be an exempt record and shall not be subject to public disclosure of any kind.*

I have had the occasion to address the application of section 37 in numerous decisions, including Decision 05/2017, Bermuda Monetary Authority; Decision 12/2018, Ministry of Finance Headquarters; Decision 12/2019, Bermuda Monetary Authority; Decision 27/2019, Bermuda Health Council; Decision 07/2020, Office of the Governor; Decision 08/2020, Bermuda Monetary Authority; Decision 09/2020, Bermuda Health Council; and Decision 10/2020, Bermuda Monetary Authority. I have also issued guidance on the application of section 37, available on the ICO website.

The issue associated with section 37 of the PATI Act is summarized well in the CLD report:

> *A first issue here is the relationship between the PATI Act and other laws which provide for secrecy. Better practice is to protect all secrecy interests in the RTI law [e.g., PATI], even if in a rather general way, subject to a harm test and a public interest override, and then provide that if secrecy provisions in other laws go beyond this, the RTI law shall override them. Under such an approach, other laws may elaborate on secrecy interests recognised in the RTI law, but not extend them (including by failing to include a harm test or public interest override).*
>
> *The PATI Act does not take this approach. Instead, section 37(1) clearly preserves secrecy provisions in other laws, regardless of how they are worded. Furthermore, pursuant to section 40(2), the 30-year time limit for information that is rendered secret under most exceptions does not apply to section 37. The problem with preserving secrecy provisions in other laws is that many of these provisions may have been drafted a long time ago and did not have the goal of achieving an appropriate balance between openness and secrecy.* […]
>
> *This approach is mitigated somewhat in two ways. First, sections 37(2)-(4) allow for the Minister, by order subject to affirmative resolution by Parliament, to repeal or amend secrecy provisions in other laws. Experience in other countries where this approach has been taken suggests that such repeals are rare and, to the best of our knowledge, no secrecy provision has so far been repealed on this basis in Bermuda. Second, section 37(5) provides that subsequent secrecy provisions* [*those enacted after April 2015*] *shall only have effect if they provide specifically that they apply notwithstanding the PATI Act. While positive, this does not address the main weakness with preserving secrecy provisions in other laws, namely that many were drafted earlier and did not seek to establish an appropriate balance between openness and secrecy.*

A number of concerns arise out of this issue. To begin with, it must be noted that neither the CLD nor the ICO were the first to take note of this problem in the PATI Act. In fact, it was identified quite early in the development of the PATI Act as a matter requiring attention. The 2005 PATI Discussion Paper acknowledged the following:

> *A number of Bermuda laws prevent certain information from being released to the public. The Government intends to conduct a thorough review of such legislation to determine which of these laws should remain in place, and which should be*

amended or repealed if they are no longer necessary and not in keeping with the spirit of PATI legislation.

Hansard records indicate that when the parliamentary debate on the PATI Bill occurred in 2010 this very issue was raised and discussed on 23 July. 2010. The Hon. John Barritt, JP, MP, stated at p.1015, col.1:

The other provision that is still in there which gives us trouble on this side, and did right from the very beginning, is that the right to information … Other secrecy laws that respect information that ought to be, can be, kept secret under other statutes override this Act. We think that is wrong. This Act ought to override and say that the information laws should prevail over any other inconsistent secrecy law.

Mr. Barritt reiterated, at p.1020, col.2:

As I said earlier in my opening remarks, one of the things we have greatest difficulty with is the fact that (this is clause 37 now, Mr. Chairman) a record is exempt in its disclosure if its disclosure is prohibited by any statutory provision other than this Act. Again, we think that this is wrong. Everything should be subject to disclosure unless it is shown that otherwise it would not be in the public interest.

But I note, Mr. Chairman, that the Minister is given the power by order to repeal any of those provisions in any of those Acts that might apply, and will do so under the affirmative resolution procedure. So I suppose there is an opportunity there, once this legislation gets up off the ground, to change and add to it. But as a starting principle, we would have liked to have seen it done differently.

The Hon. E. Grant Gibbons, JP, MP, stated, at p.1022, col.1:

Let me just start with clause 37. My honourable colleague, Mr Barritt, touched on it and, I think, made the point. This is disclosure prohibited by other legislation. Clause 37(1) says, "A record is exempt if its disclosure is prohibited by any statutory provision, other than this Act". Just to piggyback on what my honourable colleague said, clearly there must be a slew of other Acts that are currently in place that prohibit disclosure. And I guess the question I have for the Honourable Member is … and this is obviously a catchall provision here. Will the Government start to work on this prior to the commencement day? Or is this going to take years to sort of work though all these things, and we have to come back to the House every time

> *there is something which requires some other piece of old legislation that prevents disclosure? Is there going to be any proactive approach here, or is this likely just going to be a discovery process over time?*

Former Premier, Dr. The Hon. E. F. Brown, JP, responded at p.1022, col.2:

> *The first thing is that I would like to reassure Members of the House who need it that we are going to move as quickly as we can to review other legislation that has an impact on this. No, we are not going to sit and wait until we get the impact one by one on other legislation.*

Unfortunately, we are not aware of any follow-through on this commitment by the government of the day or its successors, and we are therefore by default doing what the former Premier promised would not happen: we are simply waiting until the impact of each provision on the public right of access is felt, as evidenced by the numerous decisions of the Information Commissioner noted above. Even having now been felt, however, there is still no sign of any intention on the part of government to address the issue.

The harm that results from this ongoing issue is that the PATI Act's legislative scheme is effectively undermined in a substantial way. One of the bright spots in the PATI Act as identified by the CLD is the presence of a strong public interest test that is applicable to most exemptions. With so many pre-existing statutory provisions taking precedence over the PATI Act, there is no opportunity to apply that public interest lens where those statutes apply.

Furthermore, many of the statutory provisions that pre-date the PATI Act were simply intended to serve as confidentiality requirements for staff and officers of public authorities, and were never intended to operate in a post-PATI world, where the default is access and the exception is secrecy. Finally, as catch-all confidentiality provisions they are extremely broad, and in some cases could be unnecessarily preventing the disclosure of information that may otherwise be in the public interest to disclose. The only reasonable conclusion is that the PATI Act that was envisioned for the people of Bermuda in 2010 cannot be said to have been fully realized until this issue is addressed.

It would be much simpler if this issue was primarily about pre-PATI legislation, but it is not. The general public might be surprised to learn that there have been seventeen new laws or amendments to laws passed since the PATI Act came into force which override the PATI Act in whole or in part. With seventeen carve-outs in a mere six years, it is fair to say that the PATI Act has been frequently and routinely whittled away at. While there may be limited circumstances

justifying some of these, in the majority of cases it is my view that there has been a failure to assess the new statutory scheme or amendment against the PATI Act as it already exists. The PATI Act's existing exemptions provide protection from disclosure in areas such as the financial and economic interests of Bermuda, international relations, international tax agreements, law enforcement, legal professional privilege, commercial information and information received in confidence. Apart from the narrow Casino Gaming Amendment Act 2016, I have seen little to no evidence with these amendments to demonstrate that the PATI Act's existing exemptions would not suffice to protect information that should be exempt from disclosure. The seventeen laws passed since 2015 are listed below:

- Proceeds of Crime Amendment Act 2015
- Casino Gaming Amendment Act 2016
- USA-Bermuda Tax Convention Amendment Act 2017
- International Cooperation (Tax Information Exchange Agreements) Amendment Act 2017
- Tax Reform Commission Act 2017
- Companies and Limited Liability Company (Beneficial Ownership) Amendment Act 2017
- Partnership, Exempted Partnerships and Limited Partnership (Beneficial Ownership) Amendment Act 2018
- Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018
- Charities Amendment Act 2018
- Debt Collection Act 2018
- Economic Substance Act 2018
- Criminal Code (Sex Offender Management) Amendment Act 2018
- Incorporated Segregated Accounts Companies Act 2019
- Bermuda Monetary Authority Amendment Act 2019
- Public Access to Information Amendment Act 2019
- Registrar of Companies (Supervision and Regulation) Act 2020
- Trade Union and Labour Relations (Consolidation) Act 2021

In 2010, the Government committed to the legislature that pre-existing laws would be reviewed quickly in light of the PATI Act. The intended purpose of such a review would be to (a) assess whether the legislative provisions are necessary to protect against disclosure of information beyond what is already captured by the exemptions in the PATI Act and (b) to repeal or amend

those provisions, as required, based on the outcome of such an assessment. These issues could be addressed now by a review of the secrecy provisions in all Bermuda statutes, including those that have come into force since 2015, which should take place at the earliest opportunity.

The results of such a review should be published, with an opportunity for engagement by stakeholders, the Information Commissioner, as well as the public, to inform the decision-making process that will be required to decide the extent to which these incursions into the PATI Act should remain.

While such a comprehensive legislative review would be preferable, it may not be feasible in light of other legislative priorities related to the current challenges facing Bermuda. The CLD recommended, in accordance with best international practice, that the PATI Act simply be amended to make the PATI Act prevail over all other statutes. At a bare minimum, the PATI Act itself should be amended to clarify that section 37 is applicable to statutory prohibitions on the disclosure of specific categories of records, and does not include general employee secrecy provisions. If this approach is adopted, any amendment should also be subject to meaningful public consultation with all stakeholders.

Once again, the *2019 Government Reform Plan* shines a light down the path before us. Part of the Future State Target Operating Model outlined in the Plan is that "Major issues are discussed in public forums and are not limited to prepared speeches in parliament." If this Target Operating Model is to be attained, it must come with a commitment to engage in good faith public consultations on any legislative proposal that could impact access to information. In order for such a commitment to be meaningful, it should also be backdated, so that we can look at the past laws that continue to impact the right of access, and truly assess whether such laws are necessary, or whether they are broader in scope than required today.

Implementation improvements

The Carter Center's Implementation Assessment Tool (IAT) matrix evaluates key indicators for specific activities (leadership, rules systems and resources) and public authorities' functions and responsibilities under access to information laws (receiving and responding to requests, proactive disclosures and records management). Using a stoplight method (red/yellow/green), the IAT provides an assessment of both qualitative and quantitative aspects of a public authority's implementation of an access to information law. This assessment focuses on four key areas:

- Fundamental Functions (For example, whether PATI Information Officers have been assigned, trained and provided with the necessary resources to carry out their roles; and

whether the leadership within public authorities is engaged, supportive, and monitoring the delivery of PATI services for quality.)

- Receive and Respond to Requests (For example, whether each public authority has guidelines in place to receive, manage and respond to PATI requests.)
- Proactive Disclosure (For example, whether the public authority has guidelines and procedures for proactive disclosure and whether officials have been appointed to carry them out.)
- Records Management (For example, whether public authority leadership is engaged, supportive, and monitoring the delivery of the records management program for quality; whether rules and guidelines are in place for records management, including records in paper, digital and other formats; whether officials have been appointed who are responsible for records management; and whether those individuals are appropriately trained and resourced.)

The Carter Center's methodology also includes engaging local researchers and blind peer reviewers for the assessment to support the reliability and completeness of the IAT findings.

The Carter Center conducted its assessment on the PATI Act from 2019-2020. Prior to the IAT, the ICO consulted with the Carter Center on the appropriate timing to conduct the IAT, to ensure that public authorities had a sufficient amount of experience with the PATI Act to allow for a meaningful assessment. The ICO also considered a number of factors to select thirteen (13) diverse public authorities to undergo the assessment. The public authorities chosen represented many different types of public authorities: government departments, ministry headquarters, local government, statutory boards and quangos. The ICO also considered public authorities whose work was critical for the entire community and ones which varied in size. The thirteen public authorities involved in the assessment are:

- Cabinet Office
- Ministry of Finance Headquarters
- Department of Child and Family Services
- Department of Education
- Department of Health
- Department of Human Resources
- Department of Immigration
- Department of Public Lands and Buildings

- Department of Social Insurance
- Bermuda Hospitals Board
- Bermuda Police Service
- Bermuda Tourism Authority
- The Corporation of St. George

On behalf of the ICO, I express my appreciation to these public authorities for their willingness to participate in the IAT.

In November 2019 in Bermuda, the Carter Center provided a preliminary presentation of its findings to approximately 25 Permanent Secretaries, other heads of public authorities, information officers and other public authority staff. This provided the Carter Center with the opportunity to receive their feedback and responses. The Carter Center provided its final report to the ICO in November 2020. Importantly, the Carter Center's IAT is not intended as an overall evaluation of the PATI Act's administration. Rather, it provides insights from a 'deep dive' into the thirteen selected public authorities' implementation of the PATI Act.

The Carter Center's assessment is annexed to this Report and is available at https://www.cartercenter.org/resources/pdfs/peace/ati/bermuda-iat-country-report.pdf. For purposes of this report, I will discuss a few key recommendations that are consistent with my observations over the last six years.

Fundamental functions and processing PATI requests

Despite the variation in some areas of the assessment across public authorities, the IAT found significant deficits in both 'fundamental functions' and processing PATI requests ('receive and respond to requests'). These are areas for improvement. Hopefully, many of these improvements will be facilitated by the adherence to the PATI Practice Code, as well as the PATI Practice Code's promotion by leadership within public authorities.

The Carter Center's assessment, on page 31, describes 'fundamental functions' as 'those implementation elements that traverse more than one function' and 'serve as the framework for the authorities' access to information regime'. These include elements such as leadership with a commitment to support the inclusion of transparency and openness in strategic plans, appropriate resourcing for PATI obligations and public authority specific guidelines and instructions for the administration of PATI requirements. Among its findings in this area, the Carter Center explained, at page 32:

> *Importantly, with one exception, the appointed [Information Officers] have the requisite authority needed to comply with the PATI mandates. But time, staffing and specialized training of the officers is not uniformly sufficient for these public authorities to fulfill their PATI responsibilities. The lack of additionally staff, as needed, or time to devote to PATI was identified as an ongoing issue, particularly for those public authorities that receive a higher volume or more challenging requests.*

Many of the areas for improvements in fundamental functions identified by the Carter Center—ones that concern staffing, resources and strategic planning—require the engagement of executive officers and senior management to address.

The Carter Center also evaluated the thirteen public authorities' process for receiving and responding to PATI requests. The assessment of the PATI Act's implementation in this area is consistent with the critique from the CDL that the process for making a PATI request should be simplified. The Carter Center's IAT, at page 33, emphasizes the importance of this key aspect of the PATI Act's implementation:

> *The process for requesting and responding to documents should be as easy, simple, and flexible as possible. For this goal to be met, implementation efforts should be focused on operationalizing procedures that decrease bureaucratic obstacles, provide clarity to Information Officers, and support requesters.*

The IAT found, at page 34, that:

> *While many public authorities adopted the centrally, issued guidelines for receiving requests fewer demonstrated that the authority had written guidelines for responding to a request. This was equally true for authority-specific standard operating procedures for processing requests and issuing and serving responses, where the majority of the public authorities had not created specific processes that speak to their unique functions, administrative organization, and attributes.*

These deficits in both fundamental functions and processing PATI requests could potentially be ameliorated by using the PATI Practice Code. The PATI Practice Code offers detailed guidance to Information Officers and Heads of Public Authorities to support them in carrying out their duties under the Act. The PATI Practice Code describes its purpose as follows:

1. Provide standards of best practice for administration of the Act;
2. Provide guidance on the obligations and responsibilities of public authorities to enhance their knowledge and expertise for compliance;
3. Articulate the process for responding to requests; and
4. Enable, to the greatest extent possible, consistency of approach by public authorities in responding to requests.

The PATI Practice Code is an excellent resource and it should be of daily assistance to a busy Information Officer. It is essential, however, that senior officials are seen to endorse and clearly support and encourage its use, otherwise its value may be limited. Furthermore, ongoing training sessions to introduce and explain the PATI Practice Code to those who must use it are also essential. If these steps are taken, I anticipate that we will see improvement in several areas assessed by the Carter Center that had been found wanting.

It should be noted, however, that the PATI Practice Code is not an off-the-shelf replacement for a public authority's internal procedures. While the PATI Practice Code provides appropriate detail in many areas of PATI administration, it can only supplement procedures which each public authority must implement. For example, the PATI Practice Code states on page 32 that:

> *The Public Authority should have internal procedures in place on how they will accept the PATI request including: where the request will be accepted; who will accept the request; and a place where the requester can meet with the Information Officer. The internal procedures should not impose requirements or burdens on the requester other than what are required by the PATI Act or Regulations. Requests can be accepted by an officer of the Public Authority and directed to the Information Officer (reg. 6(1)). These procedures must ensure the confidentiality of the requester.*

The PATI Practice Code advises the following, at page 47, regarding the process of redacting (or removing) exempt information from a record in order to provide the remainder to the Applicant:

> *There are a number of redaction methods and each Public Authority must decide which best applies to its records, requirements and resources.*

These processes should already be in place at public authorities. As noted above, while the PATI Practice Code will not replace the need for each public authority to take steps to put its own procedures in place, it should be a significant asset to PATI program delivery.

Records management

One of the areas assessed by the Carter Center was records management (also referred to as information management). Information management is now mission critical for public authorities in Bermuda. Some public authorities have already taken steps to appropriately organize, classify and securely store their records. Many have not, and the Carter Center's assessment shows that this is a persistent problem.

To summarize some of the key findings from the Carter Center's assessment of records management, it found that:

- Nine of thirteen public authorities reviewed had not created or adopted a records management policy for paper-based and digital information, and twelve out of thirteen did not have documented instructions or guidelines for implementation and/or operation of records management.
- While four out of thirteen responses indicated that one or more officials had been appointed to be responsible for records management, the responses from the remaining public authorities indicated uncertainty on this question. Furthermore, even where officials had been appointed to oversee records management, not all had been trained or had adequate resources to carry out their work.
- Seven out of thirteen responses indicated that all officials employed by public authorities have not been made aware of basic records management processes. Only two answered in the affirmative, while the rest were uncertain.
- Only one of thirteen public authorities assessed were able to say that their organization was effectively fulfilling its function regarding records management.

Unfortunately, these findings are not surprising. In six years of PATI oversight, the ICO has seen repeated difficulties experienced by public authorities in locating records responsive to PATI requests. Sometimes this can be attributed to lack of knowledge or experience in conducting searches, but it has often been the case that poor records management is either a significant or contributing factor in the failure to fulfill PATI obligations. At times, public authorities have also viewed records as an individual employee's asset or something an individual employee controls, rather than as an institutional asset, e.g., a corporate record subject to the organisation's records management policies and procedures. The right of access to information cannot be fulfilled unless Information Officers employed by public authorities have both the skills and means to reliably identify where requested records are stored and to retrieve them efficiently. This cannot occur without proper records management and an institutional approach to records management. The result of lacking this foundational element is that finding records is often hit and miss.

This has effects beyond the PATI Act as well. Good governance requires sound decision-making and effective program delivery. If records management is poor, how can decision-makers be sure that they have the information they need, when they need it, to carry out their mandates? How can officials charged with program delivery carry out their mandate if the information they need is not efficiently organized for easy retrieval when required?

Additional legislative requirements also loom on the horizon. With the appointment in January 2020 of Privacy Commissioner Alexander White, PIPA is closer to coming in to force. Public authorities will be unable to discharge their responsibilities under PIPA to ensure that information is retained securely if they cannot demonstrate that adequate records management policies and procedures are in place and being followed. To put it bluntly, how can you secure something if you do not know what you have or where it is?

Some appreciation that these challenges exist and must be addressed is apparent from the *2019 Government Reform Plan* referenced above. In the "Information" category, the 2019 Plan outlines several characteristics in the current state, and lists several goals intended to represent future state operations, relevant portions of which are excerpted in the table below:

Current State (Current Operating Model)	Future State (Target Operating Model)
• Information does not flow freely between people and across Ministries and Departments • Data is entered and stored in multiple places in numerous ways • Reports and data are not consistently available within Government or to the public • Data obtained is not in a consistent format	• Data is stored digitally providing ease of access between Ministries and Departments • Data is entered once, with consistent data standards and definitions, allowing the use of leading data techniques to leverage quality and reliable information • Public officers have access to a digital repository or shared knowledge to assist in their roles and decision making • Citizens and other stakeholders have access to relevant parts of the digital repository, building confidence • Consistent culture regarding the importance of information

	security, with information governance defined, governed and owned centrally

Once again, we see that *2019 Government Reform Plan* assessment and Target Operating Model are consistent with improvements to the effective administration of the PATI Act. The same significant issue for efficient PATI administration is also having wider impacts on the ability of the government to perform its core functions. The *2019 Government Reform Plan* identifies some characteristics of what a future state would look like in terms of how government manages its information. One of the immediate challenges in bridging the gap from the current state to the future state was identified in the Center's assessment: there is a dearth of policy and guidance as to how to implement good records management. Furthermore, there has previously been a lack of direction from senior levels of government to develop records management capacity. The *2019 Government Reform Plan* is clearly predicated on the notion that senior officials within government will be tasked with planning and implementing measures in order to achieve the future state Target Operating Model.

The objectives of the *2019 Government Reform Plan* as they relate to information management present a unique opportunity. As noted above, the PATI Practice Code has recently been issued, which is a very positive development. It is also important to note that that PATI Practice Code is not the only Practice Code required by the PATI Act. Section 60(2) requires the establishment of a similar guide for records management:

> *The Minister shall, in consultation with the Commissioner and the Director of the Department of Archives, establish codes of practice for public authorities regarding the maintenance and management of records of public authorities in a manner that facilitates ready access to the records.*

It is now long past due for this particular requirement of the PATI Act to be fulfilled, for the reasons outlined above. If a Records Management Code of Practice is developed in the very near future, and appropriate training and resources are put in place, not only will there be an opportunity for increased efficiency in government performance overall, as indicated in the *2019 Government Reform Plan*, but we should also expect the administration of the PATI Act to run more smoothly.

A new Records Management Code of Practice, combined with the new PATI Code of Practice, properly promoted within each public authority with the necessary training and support from senior leadership, will bring about a number of positive outcomes. With respect to the PATI Act

specifically, Information Officers will be in a better position to locate requested records more efficiently and with less effort, resulting in timelier responses to PATI requesters. A well-utilized PATI Practice Code, along with a Records Management Code of Practice, should also mean that public authorities will "get it right" more often, hopefully leading to fewer internal reviews and fewer complaints to the ICO. Once again, I believe this will reduce the administrative burden felt by public authorities, having to submit less frequently to ICO investigations. Even when those investigations must proceed, the issues will be more likely to focus on whether the reliance on exemptions or administrative denials are justified, rather than procedural failures or basic misunderstandings of the PATI Act. In the end, if we are to take a stakeholder-centric approach to delivering and safeguarding PATI rights, all of this will benefit the users of the PATI Act: Bermudians and residents.

Additional observations

In addition to the results of the Carter Center's assessment, I make two further observations for improvements to the PATI Act's implementation.

Statutory boards and committees

First, the focus of much of the implementation of the PATI Act has been on the practice and procedures for Government of Bermuda departments and for quangos. From the outset, minimal information and training was provided to the diverse statutory boards, committees and other bodies that come within the scope of the PATI Act. The inefficient administration of the PATI Act's requirements for these public authorities should be addressed.

As one of the more recent national public access to information laws, the PATI Act's application to diverse public authorities reflects current international trends in access to information law, as discussed by Right2INFO.org, a constitutional and legal research organisation focused on access to information and open government. As a result, the PATI Act provides a robust right of access for Bermudians and residents. Paragraphs 13 and 14 of the Schedule to PATI ensure that it will reach:

> *13. Every entity that is established by statutory provision and carries out functions of a governmental or quasi-governmental nature.*
>
> *14. Every entity that is owned or controlled by the Government or that is substantially funded by monies authorized by the Legislature.*

The PATI Act recognises that the work of these public authorities touches upon important aspects of public life. It is essential for the public to have access to these public authorities' proactively published information, such as Information Statements that outline their governing legislation, procedures, the nature of their decision making and classes of records, among other things. It is also important for good governance and public accountability for these public authorities to receive and process PATI requests.

Yet it has been increasingly apparent during the Information Commissioner's reviews and the ICO Annual Returns, that PATI support and resources are required that are specific to the nature of these public authorities. Unlike other public authorities, many of these entities include a number of voluntary bodies that depend upon administrative support from public officers within the related government department. In many instances, the chairmen of statutory boards or committees are surprised to learn that their public authorities have obligations under the PATI Act for which they are accountable. Often, a government department holds the statutory board or committee's electronic or physical records, and does so in the absence of records management policies or procedures clarifying responsibility for storing, disclosing, retaining or destroying records. The PATI Act also makes no provision for a statutory decision maker in the absence of the appointment of the chair of a statutory board or committee. In practice, government department public officers often fulfil the PATI requirements for these public authorities, without a formal arrangement in place that clarifies roles and responsibilities.

For the rights under the PATI Act to be fully realised, government should provide resources specifically to support the public authorities defined in paragraphs 13 and 14 of the Schedule to PATI. This should include informing newly-appointed chairman of their public authority's PATI obligations and an overview of available resources to address PATI requests and complete the ICO Annual Return. The government should provide a simple template agreement that chairman and government departments can complete to formally delegate responsibilities to a shared Information Officer, if that approach is adopted, and to define the basic parameters of records management.

Supporting frontline staffing and resources: the Information Officer

My second observation concerns the staffing and resources at the frontline to meet public authorities' PATI obligations. The PATI Act requires every public authority to appoint an Information Officer, who first processes a PATI request and issues an initial decision. The Information Officer has additional responsibilities under the PATI regulations, and often also plays a role in preparing a public authority's ICO Annual Return. The Carter Center's IAT made a number of findings about the need to provide adequate support for Information Officers. In

general, the IAT found, at page 9, that 'public authorities have formally appointed information officers, with sufficient authority, responsible for PATI functions and duties'. The Carter Center emphasised that these 'officers should continue to be supported through training, time, and staffing'. A competent and efficient Information Officer, supported with adequate training and resources, can greatly reduce the PATI Act's administrative burden on a public authority.

Prior to the publication of the Minister's PATI Practice Code in January 2020, public authorities did not have guidance for the required skills and appropriate selection of an Information Officer. To date, very few public authorities have incorporated the statutory role of Information Officer into job descriptions. As a result, Information Officers ranged from employees who volunteered for the role to those who were instructed to perform it. Information Officers have also ranged from clerks and administrative assistants to policy analysts and deputies. The resources available to support Information Officers has also varied widely and, in many instances, has not been sufficient.

Further, over the past six years, the government unit supporting the administration of the PATI Act has undergone no less than four restructurings, including changes in Ministries. Without consistent support from political leadership, the various versions of the PATI support unit have faced challenges over the years in offering regular trainings, technical assistance and other resources. This has disadvantaged public authorities and Information Officers who lacked support when handling PATI requests or meeting other requirements of the PATI Act. The cumulative effect of these various issues is, at times, avoidable missteps when initially processing a PATI request or fulfilling the publication requirements in Part 2 of the PATI Act. With each escalation to an internal reviews, or to an independent review or enforcement action by the Information Commissioner, a corresponding increase occurs in the costs and resources for administering or enforcing the PATI Act.

With the publication of the PATI Practice Code, the movement towards improved records management and the establishment of the more permanent PIPA/PATI Unit within the Cabinet Office, public authorities have an opportunity to improve the administration of their PATI responsibilities. The PATI Practice Code helpfully outlines the skills and experience required for Information Officers to successfully fulfill their responsibilities. Public authorities will benefit from reviewing these well thought out criteria and ensuring that their Information Officers have the skills and experience appropriate for the role.

The PIPA/PATI Unit continues to offer a centralised team with expertise and resources to support the administration of the PATI Act. I would encourage continued strengthening of this unit. Importantly, resourcing the PIPA/PATI Unit, and the resulting support it can provide to

Information Officers, offers a high return on investment. It is far less costly in terms of human resources and time for public authorities to meet their obligations properly in the first instance.

The ongoing improvement in records management under the government reform initiative is encouraging a cultural shift within public authorities towards viewing records and information as public assets, rather than personal property of employees. This has been particularly important within government departments. When records are viewed as depersonalized, institutional assets, public authorities can capitalized on the provision in the PATI Ac that allows for the sharing of Information Officers. Where operations allow, public authorities can elect to share an Information Officer, who is afforded appropriate training and support to process PATI requests across public authorities and support public authorities in meeting the publication requirements in Part 2 of the PATI Act. An institutional approach to records management will allow a shared Information Officer to conduct or supervise reasonable searches for records, and then make initial decisions concerning whether to disclose or deny public access to those records. The model embedded in the PATI Act is also consistent with the aim of the *2019 Government Reform Plan* to amalgamate shared services, reduce duplication and seek opportunities for efficiencies.

What can we celebrate?

Since the PATI Act came into force in April 2015, hundreds of PATI requests have been filed, and in the majority of cases, requesters have received most or all of the information they have sought. This is something to be celebrated. Over the past six years, a number of dedicated Information Officers and Heads of Public Authorities have emerged as PATI champions. Without their dedication to this fundamental democratic right, the PATI Act would have floundered badly. What is all the more commendable is that these individuals have not always had the necessary tools at their disposal to implement the PATI Act. The ICO has issued guidance on the interpretation of exemptions and other key provisions, and offered briefings on a number of topics. From a procedural standpoint, however, public authorities have gained much learning through trial and error, which has taxed the resources of public authorities and the patience of requesters. The recently published PATI Practice Code is an extremely valuable tool in this regard, and the accomplishment of producing this important guide is also to be celebrated.

We can also celebrate the importance of the PATI Act to Bermudians and residents, as well as their steady use of their PATI rights over the years. The ICO's annual research survey has consistently found high levels of awareness of the PATI Act and its importance as a priority to the public. My 2019 Annual Report revealed that during the first five years of the PATI Act, half of all applications for an independent review by the Information Commissioner came from individuals who were not journalists or other media. Even during 2020, the year of the COVID-19 shelter-in-

place public health orders, Bermudians and residents made 27% more PATI requests than they had in the prior year. The PATI Act continues to be shaped by its use by Bermudians and residents.

Recommendations

The recommendations throughout this report are summarised below. As Information Commissioner, I respectfully look forward engaging with Government to improve and strength the PATI Act for the benefit of public authorities as well as of Bermudians and residents.

1. Public consultation for changes to PATI Act and Regulations affecting public rights

PATI rights impact the relationship between the government and the public. The government should conduct a review of the Information Commissioner's recommendations for improvements to the PATI Act and PATI Regulations, considering and commenting on each recommendation, and release the results publicly as the basis for further consultation with the public, all public authorities and the Information Commissioner. The PATI Act should be amended based on the results of those consultations and public engagement.

2. Simplify the PATI request process and enable anonymous requests

PATI Act and Regulations should immediately be amended to remove the requirement for requesters to provide anything other than an email address or mailing address as contact information.

3. Exclude generic statutory confidentiality provisions as the basis for exempting records from public disclosure

The government should conduct a review of all Bermuda statutes, as promised by the Legislature when the PATI Act was being debated, in order to ensure that PATI rights are impaired by other statutes to the minimum extent. The Information Commissioner should be consulted during that review, and the results should be made public. Restrictions on access to information in other statutes should be removed where existing PATI exemptions provide adequate protection. If such a review is not feasible, public consultation should be held on an amendment to section 37 of the PATI Act to limit its application to prohibitions on the disclosure of specific records and to exclude generic confidentiality clauses for employees.

4. Increased engagement of leadership from heads of public authorities

Leadership from heads of public authorities is required to promote cultural change in public service and improve infrastructural support for improved PATI practices. Heads of authorities

should ensure that principles of openness are included in strategic plans, the PATI Practice Code is endorsed and adhered to, specific policies and procedures are adopted to meet PATI requirements, an Information Officer with appropriate skills is appointed, and sufficient training and resources are provided to the Information Officers and other employees to fulfill PATI duties.

5. Improve public sector records management

The Minister should develop the Records Management Code of Practice at the earliest opportunity to facilitate ready access to public records, as required by section 60(2) of the PATI Act and consistent with the *2019 Government Reform Plan*. Leadership within public authorities should prioritise records management, including ensuring that the public authority adopts appropriate formal guidelines and standard procedures for records management.

6. Provide resources and frameworks specifically to support statutory boards, committees and other bodies

The government should develop specific resources and frameworks for supporting statutory boards and committees in meetings their PATI obligations.

7. Review appointment of, and support provided to, Information Officers to increase efficiency and effectiveness

Public authorities should review the appointment of, and support given to, Information Officers to enable efficient and effective handling of PATI requirements at the outset. This should include adhering to the recommended skills and experience for Information Officers in the PATI Practice Code, along with consideration of sharing Information Officers to consolidate training and support resources. Consideration should be given to updated job descriptions to include the statutory duties under the PATI Act. Finally, the PIPA/PATI Unit should be consistently resourced to provide ongoing training and support to public authorities.

Conclusion

There is a perception among some that the PATI Act is a tool for journalists and politicians, and nothing more. This is an unfair characterization of the PATI Act. Statistics show that in first five years the PATI Act has been in force, fully 50% of the applicants seeking independent reviews by the Information Commissioner are everyday residents or citizens of Bermuda. Notwithstanding that journalists and politicians play an important role in holding the government of the day to account, critics of the PATI Act must bear in mind the extent to which our neighbours and friends throughout Bermuda have relied on the PATI Act as the only available means to obtain information from public authorities, and thereby become better informed citizens. They may be seeking to assist their families, community organizations or friends, or may be seeking redress of their own grievances. As I reiterated in my *Statement on Access to Information During National Crisis*, on 6 April 2020:

> *The right to access public records is more than a keystone for public accountability. It enables our community to reflect on, and understand, how and why decisions and actions were taken. This informs our ability to do even better in future crises. Our continued growth as a country is only possible when the Government and other public authorities are fully transparent, respect good information management and uphold access to public information.*

I look forward to working with the Government and public stakeholders to ensure that the promise of the PATI Act is fulfilled for the benefit of all Bermudians and residents.

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Annex 1 *Bermuda: Analysis of the Public Access to Information Act 2010 (March 2019)*

Annex 2 *Findings for Selected Public Authorities in Bermuda: Access to Information Legislation Implementation Assessment Tool (IAT)* (June 2020)