Information Commissioner's Office

MONTHLY ROUNDUP

Volume VI, Issue I DECEMBER 2022/JANUARY 2023

WELCOME

The Information Commissioner's Office (ICO) welcomes you to the latest 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 look at the Information Commissioner's recently issued decisions, new roles and new faces at the ICO in 2022, the Information Commissioner's most recent Quarterly Briefing, and updated guidances published by the ICO. The December 2022 decisions include four reviews of the Bermuda Gaming Commission's handling of PATI requests, as well as a decision by the Cabinet Office involving records related to Savvy Entertainment and the Office of the Governor involving correspondence with the former Commissioner of Police.

"The Information Commissioner agrees with the Applicant that, at least with respect to the records at issue, the public has a right to be informed about the background on enhancing the regulatory framework for supervising existing betting shops. This would allow the public to remain vigilant on whether the regulatory approach taken was effective and being well-implemented."

Decision 31/2022, Bermuda Gaming Commission, paragraph 67

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

DECISIONS ISSUED

During December 2022 and January 2023, the Information Commissioner issued seven decisions. Highlights are below:

If a public authority denies access to public records, it must show that the denial was justified under the PATI Act. What might happen during an independent review by the Commissioner if the public authority presents insufficient submissions to support their denial of public access? Read Decisions 28/2022 and 29/2022 to learn what the outcome might be.

In **Decision 28/2022**, the Information Commissioner considered the Cabinet Office's refusal of a PATI request for records about Savvy Entertainment Ltd., who had received a loan of $800,000 from the Government. In response to the PATI request, the Cabinet Office issued an internal review decision denying access to six responsive records. The Cabinet Office based its decision on the law enforcement exemptions in the PATI Act (section 34).

During the Information Commissioner's review, the Cabinet Office was given a reasonable opportunity under the PATI Act to make submissions on the issues under review. Because she did not receive submissions from the Cabinet Office, the Information Commissioner found that the Cabinet Office had not justified its reliance on the law enforcement exemptions and had failed to conduct a reasonable search to locate responsive records. She issued an Order requiring the Cabinet Office to disclose the responsive records (with exempt personal information removed), to conduct a reasonable search, and to issue a new initial decision based on the additional search.

In **Decision 29/2022**, the Applicant submitted that the Ministry of Finance Headquarters did not issue an internal review decision within the 6-week statutory timeline. Because the Ministry Headquarters made no submission showing otherwise, the Information Commissioner ordered the Ministry Headquarters to issue its outstanding internal review decision.

Will the Information Commissioner uphold a public authority's decision on a PATI request when it makes sufficient submissions to the Information Commissioner to justify how it responded to a PATI request? Yes. Read Decision 34/2022 to learn more.

As illustrated in **Decision 34/2022**, the Information Commissioner was satisfied that the Office of the Governor (Government House) had provided sufficient submissions to support its decision to deny public access to the records. The PATI request was for correspondence between the former Commissioner of Police and the Governor, Deputy Governor or other Government House staff, within a certain time period.

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DECISIONS ISSUED...cont.

Decision 34/2022 did not fully detail Government House's submissions, though, because the Information Commissioner must be mindful of not revealing withheld information. Based on the submissions provided to and inspected by her during her independent review, the Information Commissioner was persuaded that the responsive records fell under the personal information exemption and that their disclosure was not in the public interest.

Public authorities should resist the temptation to deny access to requested records without carefully reviewing them first. Read Decisions 30/2022 and 33/2022 to find out why.

When a PATI requester asks for numerous records or for a specific category of records, public authorities might find it tempting to rely on a blanket provision in the PATI Act to deny their access. While it might seem time consuming to search for and identify records responsive to a PATI request, doing so in the first two weeks usually leads to a more efficient PATI process. Taking the time early on to understand the responsive records could help public authorities decide which ones can be disclosed to the public. This narrows the number of the records that need more scrutiny. It also allows more time to identify the most appropriate provision in the PATI Act to justify the refusal of access to the records, if needed.

A short-sighted reaction at the initial response stage does not take into account the whole PATI process, which may include an internal review by the head of authority and later an independent review by the Information Commissioner. If the matter reaches an independent review, the Commissioner will expect to see evidence from the public authority that supports its refusal to disclose public records.

In Decision 30/2022, the Information Commissioner considered the Bermuda Gaming Commission's refusal to disclose its records of communication with the National Anti-Money Laundering Committee. The Information Commissioner carefully reviewed 130 responsive records, alongside the Gaming Commission's claim that their premature disclosure could have had a serious adverse effect on Bermuda's financial interests and the Government's ability to manage the national economy. In fact, the Commissioner found that, because some of the records had been obtained by the Department of Public Prosecutions and the Attorney General's Chambers while carrying out their functions, the PATI Act did not grant the public a right to access them. Of the remaining responsive records, the Information Commissioner also found that only a handful, if disclosed, could have had a serious impact on Bermuda's financial interests and the Government's ability to manage the national economy, as claimed by the Gaming Commission. The Information Commissioner varied the Gaming Commission's decision and ordered the disclosure of some records or parts of records.

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DECISIONS ISSUED...cont.

In **Decision 33/2022**, the Information Commissioner reviewed the Bermuda Gaming Commission's refusal to disclose the minutes of its Board of Commissioners' meetings. The Gaming Commission's initial refusal relied on section 29(1) of the PATI Act, about information whose disclosure could undermine a public authority's deliberative process.

The Information Commissioner found that the Gaming Commission was not justified in relying on section 29(1) to deny public access to all the meeting minutes. **Decision 33/2022** reminds public authorities that a 'discussion' is not the same as a 'deliberative process' and, consequently, records of discussions (such as meeting minutes) are not automatically exempt under section 29(1). A deliberative process involves the consideration of competing arguments, information and facts for making a decision; it reflects a public authority's thought process.

Public authorities must still go through each set of meeting minutes, to identify if any parts can be disclosed to the public, while withholding only the parts of those records that are exempt under the PATI Act.

Decision 33/2022 also shows that, while some information discussed during a public authority's meeting might not be appropriate for disclosure, in most circumstances, it is unlikely that the minutes of an authority's meetings can be withheld from the public in their entirety.

Given it is commonplace for members of the public to make PATI requests for meeting minutes, public authorities are encouraged to proactively publish them. Public authorities that currently post their meeting minutes online include the Regulatory Authority of Bermuda, the Corporation of Hamilton and the Information Commissioner's Office.

What happens if, during an Information Commissioner's review, a public authority decides to change its position and release more records? Read Decisions 31/2022 and 32/2022 to learn why this might happen.

During an Information Commissioner's review, it is always open for a public authority to reconsider whether it will continue to deny access to public records. The Information Commissioner encourages this change in position when it reduces unnecessary secrecy about information held by a public authority, a key purpose of the PATI Act. If a public authority releases the requested records before the Information Commissioner moves to her decision, she may conclude that the application for review has been satisfactorily resolved.

A change in position could arise when it becomes clear to both the public authority and the ICO that an exemption does not apply to a responsive record. Maybe the authority cited a provision in the Act in error or misunderstood how to apply the exemption's test to the actual content of the record. Or, the responsive record could have information that all public

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DECISIONS ISSUED...cont.

authorities are expected to have readily accessible to the public, without needing to file a PATI request. This might include, any public authority's unaudited quarterly expenditures (section 6 (5)) or its PATI request log (section 6(4)).

While the Information Commissioner is conducting her independent review, a public authority may take the chance to stop relying on its prior reasons to deny access to records when making its representations to the Information Commissioner. Examples of this are in **Decisions 31/2022** and **32/2022**, Bermuda Gaming Commission. At that stage in the ICO review process, a public authority may be invited to take into account an investigator's preliminary view that some aspect of the authority's position would probably not withstand the Information Commissioner's scrutiny. In the reviews for **Decisions 31/2022** and **32/2022**, the Gaming Commission's change in position left fewer records for the Information Commissioner to assess in her decisions.

Decision 31/2022 considered the Gaming Commission's refusal to disclose its records about local betting shops. The request had been made before the betting sector officially came under the Gaming Commission's supervision. The Information Commissioner concluded that the authority's refusal was not justified and, except for exempt personal information, ordered the remaining records to be released.

Decision 32/2022 considered the Gaming Commission's refusal to disclose records about its finances, third party agreements and a specified consultant. The Information Commissioner upheld the Gaming Commission's position to have denied public access to certain banking details as well as some parts of records protected by the legal professional privilege exemption. Besides certain exempt personal information, the remaining records were ordered for public release in response to the Applicant's PATI request.

ICO STATISTICS AS OF 31 JANUARY 2023

(from 1 April 2015)

Total applications for independent review by the Information Commissioner ……...246	Closed: Decided ……..……132
Pending investigations ..……..53	Closed: Resolved ……..……..26
Applications pending validation ……..0	Closed: Abandoned ……..……...7
	Closed: Invalid ……..…… 28

New role and new faces at the ICO

2022 has brought exciting changes and additions to the ICO team. The Information Commissioner began an initiative to provide senior ICO officers with the professional development opportunity to serve in a long-term Acting role as Deputy Information Commissioner. **Ms. Answer Styannes** began her role as the Acting Deputy Information Commissioner in October 2022. Ms. Styannes has been an Investigation Officer with the ICO since 2016 and serves as the ICO's Information Officer.

"It is exciting to offer this professional development experience for the ICO's senior officers, who bring rich insights and experiences to the role. In small public offices, it can be difficult to create such opportunities, and this initiative allows the ICO to focus on the retention and development of valued public officers," shared Information Commissioner Gutierrez.

In 2022, the ICO also welcomed two new Investigation Officers: **Ms. Kentisha Tweed** and **Mr. Ian Cameron**.

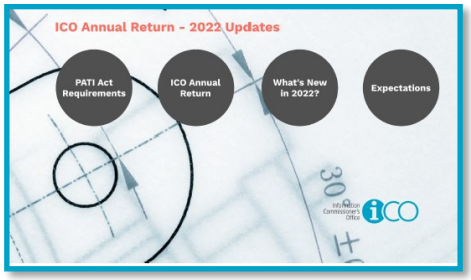
Ms. Tweed joined the ICO in May 2022. Ms. Tweed graduated with a Bachelor of Laws degree from the University of Kent (Canterbury, UK). She completed the Bar Professional Training Course at City University of London. She was called to the Bar of England and Wales in 2014 and the Bermuda Bar in 2016. Ms. Tweed comes to the ICO with an extensive and diverse legal background. She has experience in both general civil and criminal litigation. Ms. Tweed has appeared before, and has experience in, the Magistrates and Supreme Courts and the Court of Appeal. Prior to joining the ICO, she was a Prosecutor within the Department of Public Prosecutions, assigned to various criminal matters. Ms. Tweed was responsible for advocating in Court, together with providing investigative, legal and analytical research.

Mr. Cameron joined the ICO in October 2022 to assist with the growing investigations caseload. Mr. Cameron comes to the ICO with a diverse and extensive background that includes over 15 years' experience in health, criminal justice, public investigations and social services. He has expertise in regulation, compliance, legislative drafting and public policy development, and has led several national projects over the course of his career. Mr. Cameron has also served as an investigator at the Office of the Ombudsman and has certifications in public policy development, alternative dispute resolution, and behavioral therapies. Mr. Cameron has a strong passion and commitment to promoting transparency and accessibility within the public sector.

"The ICO is thrilled to welcome Ms. Tweed and Mr. Cameron, and their breadth of experience and knowledge," stated Commissioner Gutierrez. "With their contributions, the ICO closed more cases in 2022 than in any prior year, while still providing guidance to public authorities, and public education and outreach to the community. A high-performing, cohesive team is invaluable for supporting the Information Commissioner's mandate under the PATI Act."

DECEMBER INFORMATION COMMISSIONER'S QUARTERLY BRIEFING

The **December Information Commissioner's Quarterly Briefing** focused on the 2022 ICO Annual Return, including its purposes, what was new in 2022, and the Information Commissioner's expectations for public authorities' submissions. Commissioner Gutierrez discussed the updated ICO guidance for gazetting contracts with a value of $50,000 or more, which offers more clarity on how to calculate the value of a contract. Attendee feedback shared that the briefing was "incredibly useful and helpful as we prepare our returns" and "is needed to remind participants of the importance of disclosure to the public and our role in ensuring transparency and accountability". The presentation, along with presenter's notes, is available at **ico.bm**.



Book the ICO

for a PATI presentation with your organization or an information table at your upcoming community event.

Information Commissioner's Office

Are you involved with a local charity, school, programme or organization?

Are you interested in further empowering your community?

Do you know of any local organizations that would benefit from understanding their rights under the PATI Act?

Contact Sheena Bassett, Project Officer at the ICO
sbassett@ico.bm
543-3700

ico.bm