Information Commissioner's Office

MONTHLY ROUNDUP

Volume VI, Issue III MARCH 2023

"Be courageous enough to ask for the information that you desire to know." Jamel Hardtman, media personality and host of The Daily Hour, during the PATI & The People's Budget YouTube live broadcast

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 and the Information Commissioner's March Quarterly Briefing, which provided practical tips for conducting a search. This issue also discusses the Court of Appeal decision in Information Commissioner v. Attorney General, the 2022 Annual Report and recent public awareness initiatives.

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- Information Commissioner's recent decisions and resolution
- Monthly statistics for ICO cases
- Information Commissioner's March Quarterly Briefing
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Information Commissioner's 2022 Annual Report is now available! Download your copy HERE

The Information Commissioner's 2022 Annual Report was tabled on 13 March 2023. It provides an overview of the use of the PATI Act and work of the ICO.

ANNUAL REPORT 2022 HIGHLIGHTS

5,800+ **views of *Ask it, Know it, Use it!*** Right to Know Day 2022 video

54 **new applications** for an independent review by the Information Commissioner in 2022

38% **increase in applications for an independent review** by the Information Commissioner in 2022 compared to last year

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63% **increase in applications** closed by the ICO in 2022 compared to last year

34 **Decisions issued** by the Information Commissioner

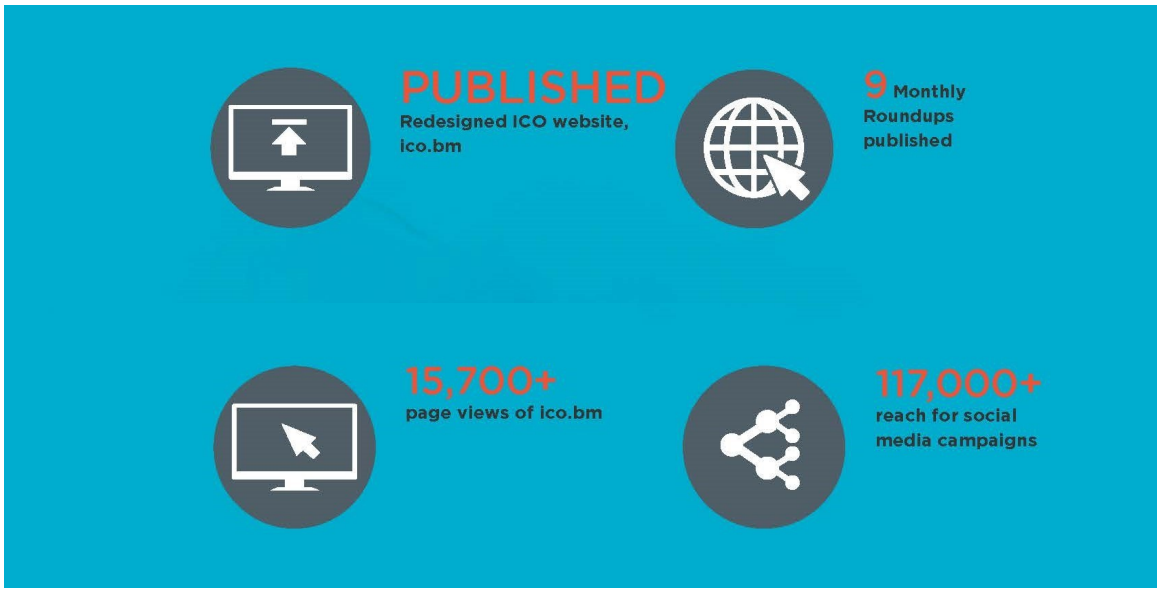
100th **Information Commissioner's Decision issued**

17% **more PATI requests made** in 2022 compared to last year

44% **of public authorities' initial responses** to PATI requests in 2022 granted access in whole or in part to public records

Information Commissioner's 2022 Annual Report is now available! Download your copy HERE

Additional highlights from the Annual Report include:



The Information Commissioner noted in her Welcome that "we know from the enquiries and comments received by the ICO that Bermudians and residents recognize the value of their PATI rights to remain informed and strengthen their ability to hold public authorities and elected officials accountable." She further stated that "PATI requests are seeking more transparency on questions of work permit exceptions; various public-private partnership arrangements; COVID policies, spending and programmes; the development and regulations of the gaming industry; the Government's Molecular Diagnostic Lab, Tudor Farm, and more".

The Information Commissioner also emphasised the need to strengthen "the quality of public authorities' day-to-day practices in applying the PATI Act, and generally in managing records" to lessen the administrative burden on public authorities in upholding PATI Act.

You can learn more about the ICO"s education initiatives, the Information Commissioner's 2022 decisions and compliance oversight, and the use of the PATI Act by Bermudians and resident by reading the Information Commissioner's 2022 Annual Report, available at **ico.bm**.

Information Commissioner's Office

DECISIONS ISSUED

During March 2023, the Information Commissioner issued two decisions, closed two reviews by way of resolution and found an application invalid. Highlights are below:

Can a public authority change its position and decide to release records during an Information Commissioner's review? Yes! Learn more in Decision 03/2023.

Even if a public authority chose to deny access to public records in its decisions, it can still change its stance and disclose the records at a later stage of the PATI process. Public authorities always have the choice to re-evaluate their initial refusals of a PATI request. If they no longer need to rely on the administrative denials or exemptions invoked in the initial and internal review decisions, public authorities can change their stance and choose to disclose part of the record or the whole record during the Information Commissioner's reviews. The Bermuda Police Service (BPS) did exactly this in two cases, both of which were closed by the Information Commissioner in March.

In one review, the BPS initially denied a PATI request for records on statistical information of complaints and internal disciplinary proceedings broken down by the officers' place of origin. The BPS relied on the administrative denials in section 16(1)(a) and (c) in denying the request, because it claimed that the records did not exist and that putting together the requested information in a form requested by the Applicant would cause a substantial and unreasonable interference with or disruption to its other work. At the beginning of the independent review conducted by the Information Commissioner, the BPS also claimed that the request was frivolous or vexatious. Later during the Information Commissioner's review, however, the BPS conceded that its reliance on the administrative denial grounds was not justified. The BPS put together the record containing information sought and disclosed it to the Applicant. Because the Applicant was satisfied by the disclosure, they withdrew their application with the Information Commissioner.

In a separate review which resulted in **Decision 03/2023**, the BPS again demonstrated how a public authority can reconsider their refusal to grant access to records, and how the outcome can prove beneficial for both the Applicant and the public authority.

In **Decision 03/2023**, the Acting Information Commissioner considered a request submitted to the BPS seeking emails on a criminal complaint made by the Applicant. The BPS initially denied the request on the grounds of it being frivolous and vexatious under section 16(1)(e) of the PATI Act. During the Information Commissioner's independent review, the BPS conceded that its reliance on section 16(1)(e) was not justified and confirmed that it no longer relied on the administrative ground for denial of the records. The BPS then provided the Applicant with the responsive emails requested in full. As a result, the Acting Information Commissioner did not require the BPS to take any further action with respect to this Decision.

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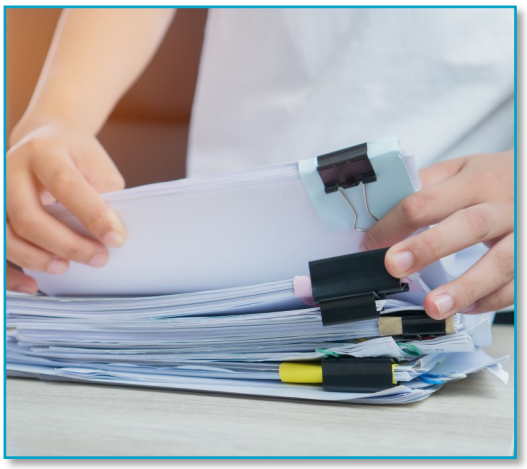
DECISIONS ISSUED...cont.

What happens when records form part of a public authority's evidence in a pending legal proceeding? Read Decision 04/2023 to find out.



In **Decision 04/2023**, Department of Health, the Acting Information Commissioner considered a request to the Department for specific health and safety reports and details on any complaints received about the Histology Laboratory at the King Edward VII Memorial Hospital. The Department's initial and internal review decision denied access to the records in full, under section 4(1)(a) of the PATI Act. During the Information Commissioner's review, the Department abandoned its reliance on the provision to deny public access to details of any health and safety complaints.

The Acting Information Commissioner affirmed the Department's decision to deny access to two specific health and safety records because it was more probable than not that they formed part of the evidence for a pending legal proceeding before the Supreme Court. However, the Acting Information Commissioner concluded that the Department was not justified in continuing to rely on section 4(1)(a) to refuse part of the request asking for the follow up reports. As a result, the Acting Information Commissioner has ordered the Department to re-process parts of the PATI request and issue a new initial decision to the Applicant on or before Thursday, 11 May 2023.

ICO STATISTICS AS OF 31 MARCH 2023

(from 1 April 2015)

Total applications for independent review by the Information Commissioner ……..249	Closed: Decided ……..……136
Pending investigations ..……48	Closed: Resolved ……..……29
Applications pending validation ……0	Closed: Abandoned ……..……...7
	Closed: Invalid ……..…… 29

INFORMATION COMMISSIONER'S MARCH QUARTERLY BRIEFING

Introduction to practical tips for conducting a search

Acting Deputy Information Commissioner Answer Styannes and Investigation Officer LaKai Dill.

The March Information Commissioner's Quarterly Briefing focused on practical tips for conducting an effective and efficient search to locate records responsive to a PATI request. Acting Deputy Information Commissioner Answer Styannes and Investigation Officer LaKai Dill conducted this highly interactive presentation. Briefing attendees were guided through the requirements under the PATI Act for searches and provided with useful resources and examples for how to approach searches.

Much of the briefing focused on conducting email searches to locate records. The presenters demonstrated the importance of using relevant keywords. They shared practical tips on how to identify those keywords and effectively use them in combination with parameters and operators. During the presentation, attendees had the opportunity to practice the tips by searching a test email account using specific keywords, parameters and operators.

An efficient and effective email search could significantly reduce the number of emails that need to be processed (e.g., reviewing the email contents to decide whether to disclose the information). Understanding how to search emails efficiently could potentially save public authorities a lot of time and resources for handling a PATI request for email records.

The presenters also demonstrated how they would think through and document the steps taken to locate records responsive to a fictional PATI request. While the PATI Act does not require a specific format for a public authority's search log, it is crucial for public authorities to make sure that the information contained in the search log is complete and accurate.

The presenters also shared some useful steps for public authorities to consider implementing, even when they do not have any pending PATI requests, to set themselves up for a successful future search. For example, using a naming convention for records, and empowering their Information Officers to exercise their statutory duties.

What did public officers who attended this session have to say about this session?

"Awesome presentation, enjoyed the interactive opportunities."
"Fantastic – awesome co-presenting! Great energy and focus to bring our PATI duties to practical application."
"Very well thought out."
"Great briefing! Real hands on tangible learning!"

COURT OF APPEAL AFFIRMS INFORMATION COMMISSIONER'S AUTHORITY TO SUMMON RECORDS

"In clear and firm language, the Court of Appeal recognized and confirmed in their decision that the Information Commissioner's independent review is crucial to safeguarding the public's right under the PATI Act."
Information Commissioner Gitanjali Gutierrez

On 24 March 2023, the Court of Appeal handed down an important judgment for PATI rights in Bermuda. In **Information Commissioner v Attorney General [2023] CA (Bda) 6 Civ**, the Court affirmed that the Information Commissioner has the power to examine records which a public authority claimed to fall outside the scope of the Public Access to Information (PATI) Act 2010.

ICO team with members of their legal council Monica Carss-Frisk KC, Blackstone Chambers and Warren Bank, Counsel, Cox Hallett Wilkinson Limited.

Why is this Decision an important one for PATI rights in Bermuda?

This Decision confirms that the Information Commissioner has the authority to examine the records and any other information required to conduct a "meaningful" independent review of a public authority's denial of a PATI request. If a Bermudian or resident requests access to public records under the PATI Act, a public authority may decide that the requested records do not fall under the PATI Act because of section 4 of the PATI Act. Under this provision, the PATI Act does not apply to the records of certain public authorities (such as the Attorney General's Chambers) when those records were created or received while fulfilling their functions. For these public authorities, though, the PATI Act still applies to their general administration records, such as spending and human resources records.

The question before the Court of Appeal was whether the Information Commissioner had the authority to examine the records during her evaluation of the Attorney General's claim that the PATI Act did not apply. The Attorney General argued that the Information Commissioner could not see the record during her independent review, and instead had to decide based on the description of the record in the PATI request, and the statement by the Attorney General's Chambers that the record fell outside the PATI Act.

The Court of Appeals rejected the Attorney General's position. Sir Christopher Clarke, the President of the Court of Appeal, found that "[a]ny review without sight of the documents would be, in many cases, illusory or ineffective". The Court has affirmed "it is a function of the Commissioner to decide whether or not the requester is entitled to have access to [the record] under the Act or whether it is excluded from the operation thereof."

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COURT OF APPEAL AFFIRMS INFORMATION COMMISSIONER'S POWER TO REVIEW RECORDS...cont.

The Court recognised that the Information Commissioner may examine the records or any other information required to conduct her independent review.

Sir Christopher Clarke has emphasised that the purposes of the PATI Act (such as to increase transparency, eliminate unnecessary secrecy and increase public authorities' accountability) would be defeated if public authorities could prevent the production of records or any review of their decision, simply by claiming that the PATI Act did not apply to the relevant records and without the Information Commissioner being able to examine the records. The President took into account the existing, "sophisticated review system" under the PATI Act, which includes the requirements for the Information Commissioner to exercise her functions independently and for her reviews to be conducted in private, as well as her wide-reaching powers to examine records.

"In clear and firm language, the Court of Appeal recognised and confirmed in their decision that the Information Commissioner's independent review is crucial to safeguarding the public's right under the PATI Act", stated Information Commissioner Gitanjali Gutierrez. "The Information Commissioner has the authority to examine public records to ensure her review is meaningful, complete and effective. Anything less would render her review—and the public's PATI rights – illusory. As Information Commissioner, I remain dedicated to fulfilling the mandate of the PATI Act. Along with the exceptional officers in the Information Commissioner's Office, we will continue to strive to protect the purposes of the PATI Act and uphold the PATI rights of every Bermudian and resident. We welcome this decision by the Court of Appeal."

Information Commissioner's Quarterly Briefings 2023-2024

Thursday, 8 June 2023
Thursday, 14 September 2023
Thursday, 7 December 2023
Thursday, 22 February 2024

ICO Briefings are for public authorities only.
Registration details will be sent directly to public authorities.

"You have a very powerful right under the PATI Act to be informed and part of the conversation. You have incredible ability to hold [to account] governments that you hold dear or governments that you are opposed to—it's regardless of the government of the day. You're empowered under the PATI Act to hold government to account. But you have to exercise that right." Information Commissioner Gitanjali Gutierrez during her interview on the **Motion to Adjourn** radio programme on Thursday, 9 March 2023.

Information Commissioner's Office

PATI & THE PEOPLE'S BUDGET

YouTube live broadcast on Thursday, 2 March 2023

"If you can write it on Twitter, Facebook, whatever social media platform you prefer, you can send a PATI request." Jamel Hardtman.

On Thursday 2 March, Information Commissioner Gitanjali Gutierrez and media personality Jamel Hardtman hosted ***PATI & The People's Budget***, an interactive YouTube live discussion on the Government's 2023/2024 budget. Commissioner Gutierrez stated that she hoped this broadcast would share that "learning information through the PATI Act can help the public prepare to engage with government departments on issues affecting them such as education, health care, taxes, transportation, small business development, funding for financial assistance, and more." A wide variety topics were candidly discussed between the hosts and the listening public, including:

- **The government's proposed fee for simply making a PATI request:** The Commissioner is concerned that this will create a practical barrier that may take PATI rights away from many Bermudians and residents, preventing them from getting information that they need.

- **The importance of public consultation when amending a public right**, such as the right to access public information: The Commissioner reiterated that if the public is concerned about the potential fees, now is the time to engage with the government about your concerns.

- **The importance of understanding the government's budget**: The hosts explained that the budget informed the public of how the government intends to spend the people's money. The Commissioner reminded the listening audience that through the PATI Act, they can stay actively involved and engaged with the government.

- **Projects that were on people's minds:** People made comments or asked questions about Morgan's Point, medical tourism (e.g., its employment, infrastructure, and the committee of stakeholders involved with this initiative), government consultants, procurement contracts, the Bermuda Gaming Commission, government grants, and more. The Commissioner and Mr. Hardtman talk about what people want to know? How are people's tax dollars being used toward public projects?

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PATI & THE PEOPLE'S BUDGET...cont.

YouTube live broadcast on Thursday, 2 March 2023

- **The state of government records across public authorities**: If public recordkeeping is not organized in a way to facilitate access to information, it can make it burdensome on the public authority to respond to the PATI request. Even if a public authority's records are not organized efficiently, it still needs to process any PATI requests that it receives in accordance with the PATI Act.

- **The impact of PATI requests**: PATI requests have resulted in some public authorities putting more information into the public domain as a matter of course. For example, people can now find the licensing information for daycare and childcare providers, salary scales for some quangos, and restaurant ratings.

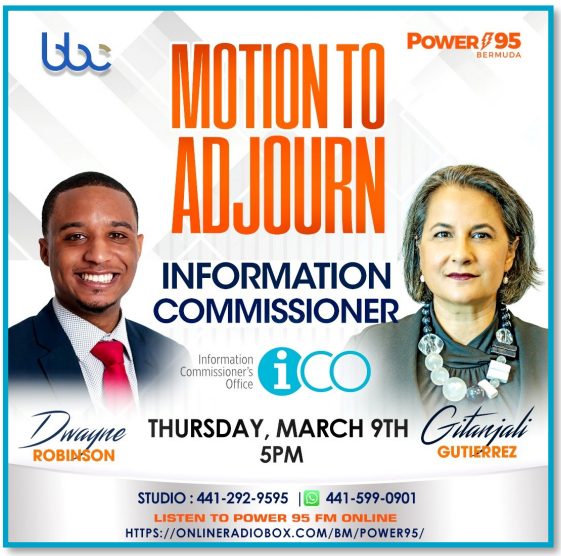
Comments and questions from the listening audience included:

- Concerns about anonymity in the PATI process
- Questions about how to make a PATI request
- " I am extremely concerned with the fee."
- "Can your PATI request be totally ignored by the government?"
- "Does the Government have an 'appropriate limit' in place, whereby they can dismiss requests for information that are deemed to cost them more that the established set amount?"
- "Which public authority would I send a PATI request to ask about the $300,000 PATI request claim from Premier? (I want to send a request)"
- "Commissioner, what was your reaction to the Premier exclaiming one PATI act costed $300,000? Was this inflated/misconstrued?"
- "How important is the 'form' of how the information is provided? e.g. providing budget info in a 3-inch printout versus Excel files - do you have a view?"
- "Because it's public money, Bermudians/taxpayers should be able to have a say on how the money is allocated/spent. Is there a way we can use the PATI Act to influence government's decision on budget allocation?"
- "This information is really good to know."

The full broadcast is available online on the **ICO YouTube page**.

INFORMATION COMMISSIONER GUEST ON MOTION TO ADJOURN RADIO PROGRAMME

"As amendments are being considered to modify that right, it's important that people speak up and stay engaged." Information Commissioner Gitanjali Gutierrez



Commissioner Gutierrez was a guest on the Motion to Adjourn radio programme on Thursday 9 March, hosted by Former Senator Mr. Dwayne Robinson, JP. She provided insight into her background and how exposures in her early legal profession led to her current role here as Bermuda's Information Commissioner. She spoke about the institution of the Information Commissioner's Office, the public's rights under the PATI Act, how members of the public can make PATI requests, and insight into what the PATI process looks like.

The discussion also provided an opportunity for the Commissioner to lift the veil on the day-to-day operations of the ICO and its team members. The Commissioner also highlighted very public outcomes that resulted from people making PATI requests. These included restaurant ratings, licensing of daycare and childcare providers, salary scales within specific public authorities, and the disclosure of the business review of Sandys 360. The Commissioner reiterated how important it is that the public has the same information that the government has when public decisions are being made.

This broadcast was packed with very useful information for anyone who is considering exercising their PATI rights or chooses to make a PATI request. The topic of the potential fee for simply making a PATI request was also discussed. During the broadcast, the Commissioner encouraged the public to consider that some public authorities may be struggling to respond to PATI requests because of the condition of their records. She spoke to the fact that there is no records management Code of Practice in place for public authorities. Training, skillsets and support of PATI officers will also impact how well a public authority handles PATI requests. The Commissioner also shed some light on the inaccurate public comparisons that have been made between Bermuda's PATI legislation and PATI laws in older, more mature jurisdictions, when considering whether the Bermuda government should implement a fee for making a PATI request.

The Commissioner also stated that as the discussions around a PATI fee continues, she is keen to see what the fee will be and how the payment of the fee by the requester will be implemented for this basic right to know.

The full broadcast is available on the **Motion to Adjourn YouTube page**.

Information Commissioner's Office ICO

Q&A CORNER WITH THE ICO

What is a PATI request log and why are they important?

When a public authority receives its first PATI request, the PATI Act requires that a *PATI request log* be established and maintained by that public authority. As subsequent PATI requests are received, the log should be updated. Sections 6(2)-(4) of the PATI Act require all public authorities to make this log available whenever someone asks for it. To be clear, a PATI request does not need to be made in order to receive a copy of a public authority's PATI request log.

There are two things that need to be considered when examining a PATI request log: The content of the log and what type of public disclosures might be attached to the items listed within the log.

The PATI Act is very specific about what the public version of the log must include:

- what each PATI request asked for; and
- whether access to the requested records was granted or refused; and when refused, the reasons for refusal.

This log must not:

- identify who the requesters are;
- include any information that would identify requesters; and
- include any other personal information.

Keeping in mind that if any of the PATI requests listed within a public authority's PATI request log granted access to records, under PATI, those disclosed records have been "disclosed to the world". Meaning anyone, not just the person who made the initial PATI request for the records, can ask for copies of the disclosed records and use them as they wish. One important exception are disclosures of or containing personal information.

For an example of how a public authority can make its PATI request log readily accessible to the public, check out the **ICO's PATI Request Log and the corresponding list of public disclosures**, published on **ico.bm**.