

MONTHLY ROUNDUP

Volume VI, Issue 7

AUGUST 2021

WELCOME

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



Section 12(1) of the PATI Act gives Bermudians and residents of Bermuda the legal right to request access to records held by public authorities, unless the PATI Act allows a public authority to withhold access to that record. PATI requesters are empowered under the Act to pursue and seek enforcement of these rights. The institution of the Information Commissioner in Bermuda is a key part of the framework safeguarding PATI rights.

We hope that the information in our Roundups reinforces the benefits of the PATI Act for Bermuda, increases the public's understanding of how to use their legal rights under the PATI Act, provides guidance to public authorities about their responsibilities under the PATI Act, and builds confidence in the ICO's role in safeguarding these rights and responsibilities.

In this issue, we take a closer look at the Information Commissioner's recently issued decision. Check out the Investigator's Insight topic as we discuss protecting the rights of third parties. We also discuss freedom of press and the close relationship that it has with access to information globally. Finally, we highlight some of the community outreach initiatives that we have participated in.

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“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
Article 19 of the Universal Declaration of Human Rights (1948)



DECISION ISSUED

During August, the Information Commissioner received 1 new application and issued 1 decision. Highlights are below.

Are there resources to assist you with PATI basics? Definitely, yes!

In **Decision 07/2021**, the Information Commissioner looked at the failure of the Department of Environment and Natural Resources to issue an internal review decision within the 6-week timeline required by the PATI Act. The Department explained that although it attempted to provide an internal review decision, it had misunderstood who its Head of Authority was. The misunderstanding led to the Head of Authority not being aware of the internal review request and, as a result, the Head of the Authority did not conduct an internal review. The fact is that the Department did send a response to the Applicant. Even though this response was helpful, because of the Department's misunderstanding, this response was not the one that the Applicant was entitled to under the PATI Act.

Because the Department promptly issued an internal review decision during the Information Commissioner's review, no further action was needed. The Information Commissioner accepted that the Department's misunderstanding was in good faith. Misunderstandings such as this provide the ICO with the opportunity to remind public authorities of the importance of familiarizing themselves with the PATI Act. The Commissioner also reminds public authorities that the **Cabinet Office's PATI Administrative Code of Practice** offers useful information about the PATI Act and Regulations.

The PATI Act has been in place for about six years, and all stakeholders can benefit from brushing up on PATI basics from time to time. This is particularly important for public authorities who do not handle PATI requests on a regular basis. Various helpful resources are available to assist both members of the public and public authorities alike. In addition to the **Cabinet Office's PATI Administrative Code of Practice**, public authorities may want to consult the Information Commissioner's published decisions and guidances available on the ICO's website as well as attend the Information Commissioner's Quarterly Briefings (psst – the next one is on the basics of processing a PATI request). Public authorities with questions about the handling of specific PATI requests may also want to contact the PATI/PIPA Unit at the Cabinet Office.

Although the burden is on public authorities to show that they are in compliance with the PATI Act, understanding the PATI process and provisions can empower and assist members of the public in navigating themselves throughout the PATI process. **The Code of Practice** is available on the Government's website so members of the public can use it to get to know the PATI Act and its processes a bit more. Information Statements could also be a useful start for members of the public who are thinking of making a PATI request, or who just want to have a better understanding of public authorities' work.

And last but not least, the ICO officers are only a call or an email away should you have any questions about the PATI Act.

PROTECTING THE RIGHTS OF THIRD PARTIES

Decision making on PATI requests must balance the right of access to public records with protecting the rights of others, who are referred to as 'third parties'. These are persons who provided certain information to public authorities or whose personal information is contained within records held by public authorities.



The PATI Act gives third parties the rights to be notified and heard under certain circumstances. Section 39 identifies when third parties' views should be sought during the public authority's processing of the PATI request. This includes when the request is for records, or parts of records, that may be exempt as personal information (section 23), commercial information (section 25), or information received by the public authority in confidence (section 26).

The third party notification requirements in the PATI Act are in place to ensure that public authorities will not publicly disclose records pertaining to a third party's interest without first considering that third party's views. Notifying the third party will also allow the third party to decide if it should challenge the public authority's decision to disclose records relating to their interest.

The third party notification process is beneficial for public authorities as well, in that it allows them to obtain the necessary facts and arguments. They can use this information to correctly balance the need to provide access to public records to the greatest extent possible with the need to protect the rights of others. When it involves a third party's personal information, this includes a right to privacy.

As Investigators, we can see areas where it helps to clarify what the PATI Act requires of public authorities. Firstly, it is important to remember that third party notifications are not required if public authorities do not intend to disclose the records. If public authorities are satisfied that the records are exempt under any of the provisions in the PATI Act, then they do not need to notify the third parties and seek their views. Public authorities may therefore wish to firstly consider whether the records fall within any of the exemptions, particularly those that are not subject to the public interest test (often referred to as 'absolute exemptions').

Secondly, Information Officers and Heads of Authorities must understand the exemptions in sections 23, 25 and 26 to be able to understand how to assess whether a third party notice is needed. For instance, section 25 sets out 4 separate exemptions, and section 26 has 2 separate exemptions. Sections 23(2) and 25(2) also define specific exceptions when the exemption cannot apply.

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PROTECTING THE RIGHTS OF THIRD PARTIES...cont.

Section 26 does not apply if the information was given by another public authority. If the Head of Authority thinks that any of the exemptions in sections 23, 25 and 26 might apply to the records but thinks that the records should be disclosed regardless (because of the public interest test), then a third party notice is required.

Keeping the PATI requester informed is equally important. Section 39 requires that a copy of the public authority's third party notice be given to the requester. But public authorities have to exercise extra caution in doing it so as not to disclose any information which might undermine the third party's interests and rights. If the records contain personal information of a third party unknown to the requester, for example, public authorities should redact any information identifying the third party in the copy of the notice it is providing to the requester.

The public authority also cannot disclose the requester's identity to the third party unless the requester gives written consent. In appropriate cases, even before issuing third party notices, a conversation might be worth raising with the requester. For instance, the requester might be satisfied with redaction of some or all exempt personal information, or might accept statistics instead of records that would need to be heavily redacted. Public authorities must be mindful of their duty to assist the requester and are encouraged whenever possible to take a practical approach in meeting the requester's information needs.

Once a third party notice is formally made by a public authority in accordance with section 39, the third party has the same rights to review as the PATI requester. This means the third party can ask the Head of Authority for an internal review of an initial decision to release records containing their information; or, if the decision to disclose was made at the internal review stage, the third party can apply to the Information Commissioner for an independent review. Where the public authority decides that disclosure is warranted for the third party's commercial information or information received in confidence, the public authority's timeframes for disclosure 'as soon as practicable' under section 14 should allow for the third party to object to disclosure. This allows time for the third party to seek an internal review by the Head of Authority (or later an Information Commissioner's independent review) before the public authority makes any disclosure. If the records which the public authority intends to disclose contain personal information, disclosure should be made only if there is no challenge to the public authority's decision and six weeks after the deadline for the third party to ask for an independent review by the Information Commissioner expires.

Interested in learning more? The Information Commissioner has issued guidances on the exemptions for personal information (section 23), commercial interests (section 25), and the public interest test (section 21). The [Cabinet Office's PATI Administrative Code of Practice](#) details the third party process, including flowcharts and sample letters. The Information Commissioner's recent [Decision 06/2021](#), Cabinet Office gives an overview of the different stages in the PATI request process when a third party might be given an opportunity to comment on the potential disclosure of information within records held by public authorities.

TIPS CORNER FOR PUBLIC AUTHORITIES & PATI REQUESTERS

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

Tip for Information Officers: Make the **Cabinet Office's PATI Administrative Code of Practice** your new best friend.

Why it makes sense?

The Code of Practice includes many useful tips, reminders and explanations for supporting public authorities with exercising their duties under the PATI Act and Regulations. Section 60(1) of the PATI Act requires the Minister responsible to establish codes of practice, and this Code of Practice was published in January 2020. Not only will actively using the Code of Practice support the handling of PATI duties, it should also position public officers to provide specific feedback to the Cabinet Office's PATI/PIPA Unit for any suggested improvements to future editions of this practical guide, as well as to advocate for other resources to be developed.

Kudos to those public officers who actively seek out available resources.

Tip for PATI requesters: Check that the public authority's decisions are issued by the right person.

Why it makes sense?

The PATI Act requires the person making decisions to be the head of the authority in certain circumstances. This role is defined in the Schedule to the PATI Act. All internal review decisions must be issued by the head of the authority. It may surprise you that for government departments, the head of the authority (for the purposes of the PATI Act) is not the department head, but the permanent secretary of the ministry responsible. Another example is a decision based on the administrative grounds in section 16(1)(c) (substantial and unreasonable interference) and section 16(1)(e) (frivolous or vexatious), where such decision must be made 'in the opinion of the head of the authority' even at the initial decision stage.

Kudos to requesters who check the decision notices they receive to see that they include the required details.

ICO STATISTICS AS OF 31 AUGUST 2021

(from 1 April 2015)

Total applications for independent review	Closed: Decided	83
by the Information Commissioner174	Closed: Resolved	20
Pending investigations42	Closed: Abandoned	7
Applications pending validation0	Closed: Invalid	22

ACCESS TO INFORMATION AND FREEDOM OF PRESS



The August ICIC webinar offered a lively discussion on Access to Information and Freedom of Press. These are two core rights within international human rights frameworks as well as the Sustainable Development Goals set out by UNESCO. The panelists shared their insights from their various perspectives as an Information Commissioner, civil society advocate and former journalist. Their discussion started with the acceptance that the right to freedom of expression is defined by three main verbs: the right to seek, impart and receive information. Access to public information is directly supportive of the ability to seek and impart information, and this leads to the public's ability to receive the information. Some of the topics addressed included ways in which journalist use data obtained through access to information requests to verify information offered by governments as well as to obtain raw data for use in their day-to-day work. One panelist described access to information as an important check on government's power, but described how some countries may hinder freedom of information through a sophisticated system of censorship that disrupts the free flow of information (think of countries such as China that may block certain internet sites or apps).

The panelist also highlighted the importance of governments providing proactive access to information to support freedom of the press. For some information, a PATI request should not be required because the information should be forthcoming or already publically available. The panelists agreed that access to information laws should include requirements for proactive disclosure. The discussion acknowledged that the impact of COVID-19 has shown how important the rights to access information and freedom of the press are to people's everyday lives.

How is this discussion relevant for Bermuda?

Bermuda has a strong foundation in the PATI Act for public access to information to support the right to freedom of the press. From the beginning of the PATI Act, the press and advocacy organisations have used their PATI rights to support seeking and imparting information to the public. Bermuda has seen many impactful disclosures made under the PATI Act, when local members of the press made PATI requests to verify or confirm the statements made by elected officials or public authorities. Freedom of the press is not only important to traditional print journalism, but extends to local producers of digital content and independent journalists. The ICO hopes that as the right to freedom of the press strengthens in Bermuda, the corresponding right to access public information will also continue to gain momentum.

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ACCESS TO INFORMATION AND FREEDOM OF PRESS...cont.

The PATI Act also has robust requirements for proactive disclosures, meaning information that is published by public authorities without the need for a PATI request. This includes information about public officers' salary ranges; the details of public contracts for goods or services with a total value of \$50,000 or more; and other information such as quarterly expenditure information. In both her 2019 and 2020 Annual Report, the Information Commissioner highlighted additional information that a broad group of public authorities make available proactively.

Want to learn more?

The recorded webinar is available on the
ICIC YouTube Channel.

The ICIC will host these free open sessions throughout 2021, as online webinars. Each session will bring together experts and professionals from around the world to discuss themes around transparency and access to information.

Check out the *Save the Dates* section for a full list of upcoming webinars in the series.

SAVE THE DATES

Information Commissioner's *Virtual Quarterly Briefing*

Thursday, 16 September 2021

10:00am - 11:00am

Topic: The basics of processing a PATI request - learning lessons from the ICO
ICO Briefings are for public authorities only.

Registration details have been sent directly to public authorities.

International Right to Know Day

Tuesday, 28 September 2021



Information Commissioner's 2021 Right to Know Day Declaration will be pre-recorded and released online on Facebook, YouTube and ico.bm.

Interview on The Daily Hour on BGC Radio at 8:00am, will air live on Facebook, Twitter, Twitch, YouTube, bcgradio.com and its app.

ICIC Wednesdays – Schedule of Webinars

Theme: Access to Information for a Changing World

Using Technology to Promote Inclusion



29 September - Challenges of transparency in the digital governments:
Transparency of public administration in the use of artificial intelligence

COMMUNITY OUTREACH

Raising the awareness of PATI rights is part of the ICO's ongoing mandate. During this year's back-to-school season, the ICO participated in three initiatives to give community groups across Bermuda information on how to use their PATI rights.

The ICO first collaborated with Gina Spence Productions for their annual back-to-school Each One Reach One (EORO) campaign. This year, the EORO campaign distributed gift cards for school uniforms to families in need. The ICO's know-your-PATI-rights brochure was attached to every gift card that was distributed to families. It provided a great opportunity for this information to be put directly into the hands of at least 450 families across Bermuda. When families find themselves navigating their relationships with public authorities, the PATI Act allows them to level the playing field when they want to know more about policies, decisions, services or programs that affect them.



In addition to the EORO campaign, the ICO supported Gina Spence Productions' Champions Programme, which provides support to children left behind due to the loss of a parent resulting from gun or other violence. The ICO provided 40 youth-oriented gift bags to the children currently in this programme.



Finally, the ICO participated in the Future Leaders Community Give-Back event on Sunday, 29 August at Berkeley School Field. The ICO team hosted an information booth and Commissioner Gutierrez delivered a live presentation on PATI rights. The ICO had the opportunity to engage one-on-one with members of the public who wanted to know more about how and when to use their PATI rights. The interactions were robust, animated and insightful, with many leaving the booth with an empowered sense of how to use

their PATI rights when attempting to navigate personal or public matters. Throughout this event, the ICO distributed PATI rights brochures and ICO-branded giveaways, for both school aged children and adults.



If your community group would like to schedule the ICO for an outreach session or virtual education event, please contact Sheena Bassett at sbassett@ico.bm or call 543-3700.