

MONTHLY ROUNDUP

Volume IV, Issue 6

JULY 2021

WELCOME

The Information Commissioner's Office (ICO) welcomes you to the July 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 three recently issued decisions. Check out the Q&A corner as we answer a common question: What defines a public authority? We also discuss the many issues concerning privacy and transparency in health-related industries and initiatives that the COVID-19 pandemic brought to the forefront.

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"The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."

Barack Obama,
44th President of the
United States



DECISIONS ISSUED

During July, the Information Commissioner received 3 new applications and issued 3 decisions. Highlights are below.

What can the Information Commissioner do when public authorities refuse to disclose whether or not a record exists? Read Decision 05/2021 to find out.

Under section 38 of the PATI Act, public authorities can refuse to disclose whether or not a record exists. To support its decision, public authorities have to show that the record is or would be exempt under the PATI Act. They also have to show that not disclosing the existence or non-existence of the record is in the public interest.



In **Decision 05/2021**, the Information Commissioner reviewed the refusal by the then Ministry of Legal Affairs to confirm whether a report by the Ministry on allegations made against the Director of the Department of Child and Family Services existed or did not exist. In the Decision, the Information Commissioner found that strong public interest factors required the Ministry to inform the public of whether the requested report existed or not. The public interest factors included the contradicting statements made by the Bermuda Government, the nature of the allegations made, as well as the Director's important statutory role relating to the welfare of children. Revealing whether or not the report existed would allow the public to hold the Ministry accountable.

Notably, the Information Commissioner did not confirm in this Decision whether the report actually existed or did not exist. In cases where public authorities have refused to disclose the existence or non-existence of a record, the Information Commissioner's sole task is to decide whether such refusal was justified.

If the Information Commissioner decides that a public authority's refusal to disclose the existence or non-existence of a record was not justified, she will order the public authority to issue a new initial decision. The public authority's new initial decision should inform the PATI requester whether or not the record being sought actually existed. This is what happened in **Decision 05/2021**. If the record existed, the public authority should also decide whether access to the record is granted. A refusal to grant access to the record has to be based on exemptions or administrative grounds available in the PATI Act.

To learn more about the Information Commissioner's role in cases where public authorities refuse to disclose the existence of a record, see **Decisions 08** and **10/2020**, [Bermuda Monetary Authority](#).

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DECISIONS ISSUED...cont.

**Is transparency around public procurement different in a post-PATI world?
Yes! Read Decision 06/2021 to learn more.**



Although the PATI Act largely applies to public authorities, it also has some impact on private entities. The most obvious is in public procurement, where private entities conduct, or plan to conduct, business with public authorities. In **Decision 06/2021**, the Information Commissioner considers a public authority's refusal to disclose records on the relationship between the Bermuda Government and a gambling technology company, MM&I. In this Decision, the

Information Commissioner also considers the objections to disclosure of the requested records from MM&I as a third party.

The Information Commissioner decided that the public authority's refusal and MM&I's objection to disclose the records in their entirety were not justified, because most of the requested records are not exempt under the commercial interests and information received in confidence exemptions in sections 25 and 26 of the PATI Act. Even if it was assumed that some of the records might be exempt under these provisions, the Information Commissioner's Decision states that there is a strong public interest in understanding the relationship between MM&I and the Bermuda Government.

The Information Commissioner also clarified that disclosure of records relating to procurement processes is in the public interest. This is because transparency facilitates disclosure of irregularities in the procurement process or deviations from known procurement practices, if any. Disclosure can also, alternatively, demonstrate adherence to the publicly known procurement process which, in turn, will build public confidence in the process.

Private entities conducting or planning to conduct business with public authorities may want to familiarise themselves with the PATI Act and the Information Commissioner's decisions discussing provisions affording third party rights. While there are provisions in the PATI Act safeguarding the rights of private entities and their legitimate business interests and confidentiality expectations, private entities should expect that conducting public business with public authorities in the post-PATI world means possible public scrutiny. Some level of transparency and accountability around their businesses and their relationships with the public authorities is expected.

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DECISIONS ISSUED...cont.

Do PATI responsibilities belong to individual officers and employees, or do they attach to public authorities as institutions? The correct answer is...public authorities as institutions. Read Decision 04/2021 for details.

The Information Commissioner's **Decision 04/2021** considers the failure of the Bermuda Housing Corporation (the Corporation) to issue an internal review decision within the 6-week timeline set out in the PATI Act. The Corporation accepted that it did not issue an internal review decision within the required PATI timeline.

It explained that the failure to comply with the timeline was due to changes in leadership at the board and executive levels. Despite the personnel changes, the Corporation swiftly issued an internal review decision after the Information Commissioner commenced her independent review. This prevented the need for the Information Commissioner to issue an Order against the Corporation.

The Corporation's swift response to the Information Commissioner's review, despite the changes in its leadership, showcased the Corporation's sound understanding that the responsibilities under the PATI Act are attached to public authorities as institutions, rather than to the individuals within the public authorities. Officers or leadership in a public authority may change, but PATI responsibilities of that public authority remain. Prior to leaving office, officers or leaders of public authorities should ensure that they have fulfilled the institution's PATI responsibilities as much as they can. As a matter of good practice, they might also want to include the public authority's PATI responsibilities in their handover memo. Incoming officers or leadership should proactively check if there are any outstanding PATI responsibilities.

Taking an institutional, rather than personal, approach to PATI responsibilities ensures that PATI requesters and the public can feel confident that their rights are protected, and their requests will not be left unprocessed even when there are personnel changes within the public authorities.

ICO STATISTICS AS OF 31 JULY 2021

(from 1 April 2015)

| | | |
|-------------------------------------------|-------------------------|----|
| Total applications for independent review | Closed: Decided | 82 |
| by the Information Commissioner | Closed: Resolved | 20 |
| 173 | Closed: Abandoned | 7 |
| Pending investigations | Closed: Invalid | 22 |
| 41 | | |
| Applications pending validation | | |
| 1 | | |



Q&A CORNER WITH THE ICO

Highlights of some of the ICO's recent responses to enquiries

I Want to Know about timing...

- Q:** Part of my PATI request has been transferred to a different public authority. That step took a couple weeks to figure out. Which date should I use to know when I should expect to receive an initial response on the transferred part – when I first made my request, or when the receiving public authority got it?
- A:** A public authority receiving a transferred (part of a) request begins the process anew on the date it receives the request. This starts with an acknowledgement letter. The receiving authority is deemed to have received the (part of the) PATI request on the date it received it – not when the requester submitted it to the transferring authority. Since public authorities have a duty to assist requesters and provide public access to public records to the greatest extent possible within the provisions of the PATI Act, the Information Commissioner encourages public authorities to avoid disadvantaging the requester. This is especially if the transfer step took more time than the PATI Act allows, i.e., within 5 working days.

I Want to Know about what defines a public authority...

- Q:** I am not sure if the entity I want to contact for records is a public authority. They offer public services, but I think they operate independently from the Government. How do I find out if the entity is a public authority that I can make a PATI request to?
- A:** The Schedule to the PATI Act defines which entities are public authorities. It names 14 entities specifically, along with 'every department' and 'every parish council'. The two remaining paragraphs of the Schedule give criteria for determining that certain other entities are public authorities, such as those established by statutory provision and carrying out governmental or quasi-governmental functions (paragraph 13) as well as those owned or controlled by the Government or substantially funded by monies authorised by the Legislature (paragraph 14). The ICO posts lists of public authorities with their contact details, names of their Information Officers and Heads of Public Authority, and links to their PATI Information Statements; they are grouped by their associated ministry and available at www.ico.bm. While the ICO makes efforts to ensure that the lists are up-to-date, note that the lists are based on information provided by public authorities.



PRIVACY AND TRANSPARENCY IN HEALTH ISSUES



The July ICIC webinar discussed the many issues concerning privacy and transparency in health-related industries and initiatives that the COVID-19 pandemic brought to the forefront. With a focus on Latin America, these issues ranged from the publication of statistics or geographical information concerning COVID-related deaths, the storage of personal data for contact tracing purposes, and the use of technology and personal data to monitor citizens' current COVID status (think 'Safe Key'-like programs). The panelists agreed that the idea of a conflict between privacy and transparency is a false dilemma. Instead, the two fundamental rights to privacy and transparency complement each other. It is only when governments view both rights as relevant to public health that an appropriate balance can be achieved which protects the public's interests.

The panel reminded us that COVID-19 has created unprecedented circumstances for public decision makers. The policies and actions of governments are not occurring in a normal context. The urgency of the pandemic, though, should not create legal uncertainties around the rights to privacy and access to public information. Panel members discussed real examples of governments providing open data on COVID-19 statistics to promote public health and accountability, while protecting individual privacy, as well as instances when transparency was essential to the public health response in areas such as procurement of vaccines or health services contracts, without threatening privacy rights.

How is this relevant for Bermuda?

The Government's response to the pandemic has involved policies and strategies similar to those adopted around the world. These include leveraging technology to promote public health safety through Safe Key and travel authorisation software programs; announcing statistics for COVID-19 cases and deaths; adapting rapid procurement practices for vaccines and other health services or products; and the quick shift to a digital and remote working environment for public officers.

The robust public access framework in the PATI Act ensures that Bermudians and residents have the right to seek public records related to these issues. The Information Commissioner also ensures that as PATI requests are made, the provisions of the PATI Act are upheld, safeguarding the public's right to know. A PATI request may be used to learn more about the administration of the unemployment benefit program which provided emergency relief to hundreds of Bermudians, but was created and implemented quickly and under strained circumstances during the early months of the pandemic.

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PRIVACY AND TRANSPARENCY IN HEALTH ISSUES...cont.

Or a PATI request might seek records clarifying public procurement for COVID-19 supplies, such as PPE, or for various consultants. Those diligently following the Government's response might seek decision-making documents or statistical records to enable them to evaluate the effectiveness of public health policies. The rights under the PATI Act give Bermudians and residents the tools needed to promote transparency around the health-related issues that are important to them.

There is an important balance between privacy and public transparency. However, Bermuda's privacy and data protection law, the Personal Information Protection Act 2016 (PIPA), is not yet in effect. For Bermuda, this may make it more difficult at this time to ensure that the fundamental rights of privacy and transparency can complement one another in the context of public health-related matters.

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 will be sent directly to them.

International Right to Know Day

Tuesday, 28 September 2021

ICIC Wednesdays – Schedule of Webinars

Theme: Access to Information for a Changing World

Using Technology to Promote Inclusion



25 August - Access to information and freedom of press

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

27 October - State secrecy

24 November - Interplay between data protection and access to information

8 December - Environmental information and P10