

OMBUDSMAN FOR BERMUDA

Annual Report 2014

*For The
Good Of
The Public*



*And Those
Who Serve
The Public*

Cover and back:

Photographs taken of Victoria Park in the City of Hamilton, depicting the network of ropes supporting the Park's trees as part of the restoration efforts carried out in the aftermath of tropical storm Fay and hurricane Gonzalo in October 2014.



OMBUDSMAN FOR BERMUDA

20th June 2015

The Speaker, The House of Assembly
The Hon. K. H. Randolph Horton, JP, MP
Sessions House
21 Parliament Street
Hamilton HM 12

Dear Honourable Speaker:

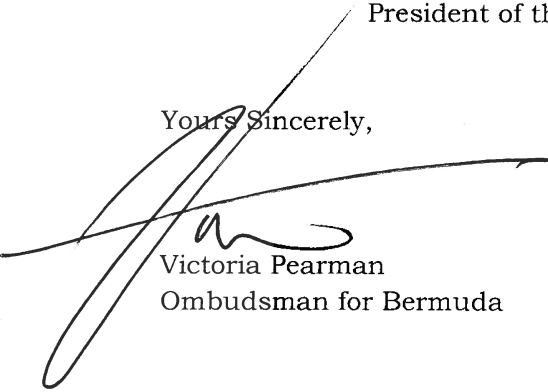
I have the honour of presenting my Annual Report which covers 1st January to 31st December 2014.

This Report is submitted in accordance with Section 24(1) and (3) of the Ombudsman Act 2004 which provides:

Annual and Special Reports

- 24 (1) The Ombudsman shall, as soon as practicable and in any case within six months after the end of each year, prepare a report on the performance of his function under the Act during that year.
- 24 (3) The Ombudsman shall address and deliver his annual report and any special report made under this section to the Speaker of the House of Assembly, and send a copy of the report to the Governor and the President of the Senate.

Yours Sincerely,



Victoria Pearman
Ombudsman for Bermuda

Contents

Introduction

Ombudsman's Message	5
Ombudsman's Office Staff.....	8
Mission Statement and Core Values.....	9
Ombudsman for All the People	10

Strategic Aim I: Greater Public Access

Ombudsman Traffic	11
Empowering the Public to Resolve their Complaints	12
How to Contact Us to Make a Complaint	12

Strategic Aim II: Greater Public Awareness

Ombudsman Process	13
Complaints Received in 2014 by Ministry and Authority	15
Selected Complaint Summaries and 'Did You Knows'	17

Strategic Aim III: Championing Best Practice

Principles of Good Administration	26
Reviewing Internal Processes	26
2014 in Numbers	28
Staff Training	28
Presentations to the Government	29
Accreditations and Affiliations	29

Power to Report to Parliament

When an Authority Fails to Follow a Recommendation	30
Ministry of Home Affairs and Department of Immigration's Failure to Follow the Ombudsman's Recommendations.....	30
Commentary on Whistle-Blowing Protection.....	34

Special Reports

Update on Corporation of Hamilton	35
Update on A Grave Error	37

Supplementary Resources

Ombudsman Act 2004 – In a Nutshell.....	40
PATI Information Statement	41

Figures

Figure 1: How People Contacted Us in 2014.....	11
Figure 2: Complaints Received in 2014 by Ministry.....	15
Figure 3: Complaints Received in 2013 and 2014 by Authority	16
Figure 4: Outstanding Complaints Carried into 2015	26
Figure 5: Complaints Received in 2014 by Disposition.....	27

Introduction

Ombudsman's Message

I am pleased to present the Ombudsman's Annual Report for the calendar year 2014. Could it really be a year since we reported on the work of this Office for the year 2013?

I undertook to review our procedures and improve efficiency in complaint handling. This continues to be a work in progress. This is also a key area for many of my colleagues overseas, notwithstanding differences in organisational size, number of complaints managed and resources. Some complaints initially appear to be straightforward but actually are quite complex. This Office also has the task of balancing and weighing matters that are urgent with those that are important. We have made good progress in addressing outstanding complaints while handling the new ones. There have been improvements but we are not yet satisfied. We expect to do even better.

These improvements will be enhanced by the anticipated replacement of our outdated complaint management software systems. We have researched various solutions for the Office. We will be inviting software contractors to make presentations to us, to find a complaint management software system that is right for this Office.

We promised to build on the good work done to improve awareness and accessibility to this Office. This work continues. The public has a general sense of the work we do. They know we receive complaints and we conduct investigations. In numerous matters where the public have expressed their discontent of how things were being handled, it has been common to hear reference to this Office and statements that the matter should be investigated by the Ombudsman or that a complaint about this should be made to the Ombudsman. This is a general acknowledgement of the Office as a defender of public rights.

Our Office will provide information and education on the types of matters that are within our jurisdiction so that people are better informed about our jurisdiction, and what we cannot investigate.

We hear calls for the Ombudsman to investigate matters which relate to administrative action taken by the Cabinet or by a Minister. This is expressly restricted from our jurisdiction by the Ombudsman Act 2004 ("the Ombudsman Act"). Some matters that are outside our jurisdiction are those dealing with the conduct of criminal or civil proceedings before a court of law or tribunal, and any employment matters within the public service.

We intend to communicate with members of the public in a way that is appropriate. We will encourage feedback and better utilisation of our website, social media and newsletters. We are aware of the diversity of the community we serve and that electronic means of communication is not always sufficient. Members of the public should know what we are doing so they can let us know how we are doing, how we can improve, and how we can better assist them.

Throughout the year, we have made presentations to authorities, groups of young people and other entities.

I would like to see the establishment of a departmental complaint handling system and offer the expertise of the Office of the Ombudsman to facilitate training and assistance in this respect. This Office is required statutorily to defer looking into complaints until a complainant first makes the complaint to the authority unless



it is unreasonable in all the circumstances for the complainant to do so. It is a regular occurrence that complainants who come to this Office are directed back to the department complained of, as this Office is unable to proceed otherwise.

We have set an ambitious goal to meet with the Permanent Secretaries and the various departments. Our aim is to help them to better understand our role and develop working relationships with those responsible for serving the public.

While handling complaints we have conferenced with numerous senior civil servants. They are experts in their areas and very knowledgeable about legislation and technical details concerning their departments. They unselfishly share their knowledge with us. A fifteen-minute phone conference can provide what would take days of research to learn. The issues that require inquiries by us are cases where there has been little or no consideration of how people are effected by application of rules and policies. At times it may occur to the individual that their dealings are with a real person and not just a number and a name on a file.

A first step towards good administration is for the person working in the department to treat the person on the other side of the counter as he or she would expect to be treated. This goes both ways. The customer on the other end of the counter can also put him or herself in the place of the person who is doing his or her job.

The proposal of a uniform complaint handling process across the Government comes from the Cayman Islands, another small island jurisdiction. I am excited by the prospect of this. It has the advantage of the department having the opportunity to address complaints and deal with them more expeditiously. It also encourages ownership of issues. An internal complaint system would enable a department to identify systemic issues and address them. Plus it would provide increased efficiency and enable the department to be more customer focused.

In accordance with the requirements of the Public Access to Information Act 2010 ("PATI"), authorities now have designated information officers who receive PATI requests from the members of the public. These officers or others should be able to assist, without additional reorganisation in most cases, in receiving complaints from the public in the first instance.

Recently a presenter at an international conference for ombudsmen, defenders of public rights and complaints commissioners encouraged colleagues to shift our meeting to focus on 'challenges' rather than concentrating on 'problems'. The focus on challenges is a more positive and empowering approach. It presumes that those affected can do something about it. It contemplates action and self-help, rather than acquiesce and surrender. It is a mind-set that things can be better when we work to make them so. This is important for all who advocate fairness, justice and good administration.

Towards the end of 2014 with its challenges came the announcement that Bermuda would host the America's Cup races. This news was greeted with excitement. It lifted the national spirit. The initial excitement gave way to questions of cost and benefit to the country, of fairness, of shared opportunities and other important considerations. However, in the very beginning, there was pride that Bermuda was chosen, an acknowledgement of its rightful place as a very special destination.

Aside from the money, being selected to host the America's Cup had value.

In 2014, we faced a major challenge – or I should say two. In October, Bermuda was hit by not one hurricane but two in the space of a week. Fay came for breakfast, unannounced. While we were grappling with that shock and the resulting destruction from a forecasted tropical storm, we were warned that another, stronger hurricane, Gonzalo, was on its way.

Weather predictions broadcast across media throughout the world gave Bermuda little chance of escaping such a situation without major damage. Trying to assure myself, I told my 13-year-old son that Bermudians were adept at handling hurricanes, we had been dealing with them for 500 years, we weren't going anywhere, we were made of strong stuff, and we would handle this challenge. Yes, there was damage, but not the kind predicted by the news broadcasts. When faced with the task of putting our lives and Bermuda back together after the hurricanes, once again we remembered that we are neighbours, our brothers' (and sisters') keepers, as we worked together to ensure the Island was back in operation.

The Ombudsman's Office is located on Dundonald Street in the neighbourhood of Victoria Park (not named for me). The Park was the victim of massive destruction. Deep holes existed where roots used to be. Mature trees, unanchored and upended, were lying prone on the ground. Yet, with the hard work of a team refusing to give up, soon trees were standing up again, held up by a network of supporting ropes. When you are in the neighbourhood, look and see.

My thanks to all of those who present their complaints to this Office. Be assured we do not take lightly the confidence and trust you place in this Office. We know that the issues can be difficult and emotional. We do not take your matters lightly, even when we may not be able to resolve them to your satisfaction or find in your favour.

Thanks also to those who work in the public service, share their expertise, and are supportive of our constitutional responsibilities.

I must say a special thanks to the Office of the Ombudsman's team. They are visionary, principled, brilliant and dedicated to the work that we do. I am constantly learning from them and pledge to lead by example. A special thank you to Jason Outerbridge, law school graduate and post graduate researcher, for his invaluable assistance in the production of this Annual Report.

Thanks to everyone who has assisted me and contributed to the accomplishments of this Office during my first year.

A handwritten signature in black ink, consisting of a large, stylized 'V' followed by a horizontal line that extends to the right and then curves back down to the left.

Victoria Pearman
Ombudsman for Bermuda

Ombudsman's Office Staff



Victoria Pearman
Ombudsman for Bermuda
Joined March 2014



Catherine Hay
*Deputy Ombudsman /
Investigations Officer*
Joined October 2011



Lamumba Tucker
*Manager – Finance
& Administration*
Joined September 2012



LaKai Dill
Investigations Officer
Joined December 2014



Lynda Augustus
Executive Assistant
Joined March 2014



Aquilah Fleming
Complaint Intake Officer
Joined March 2014

SPECIAL THANKS TO **Quinell Kumalae**

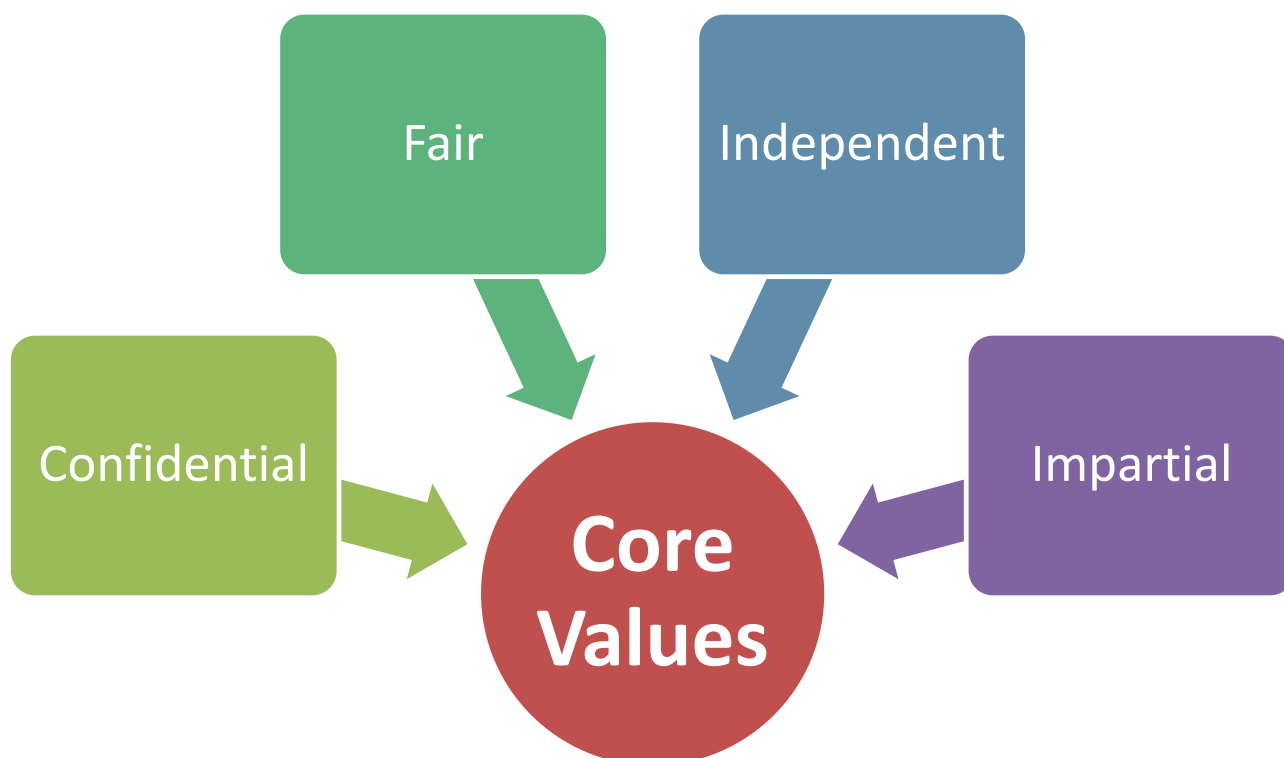
former Senior Investigations Officer

who left the Office in May 2014, after eight years of diligent, devoted and exceptional service to the Bermuda public,
and helped to build and structure the Office from its beginnings.

Mission Statement and Core Values

To investigate **administrative actions** of an authority for the purpose of deciding whether there is evidence of **maladministration** on the part of the authority; and

Pursuant to an investigation, to make **recommendations** to an **authority** concerning administrative actions that formed the subject of the investigation and, generally, about ways of **improving its administrative practices and procedures**.



“ We view your Office as a cornerstone in the great structure that is good governance. By investigating complaints to determine whether the Government is doing things in a fair and proper way, and by learning from what went wrong and translating recommendations into action, you are not only improving governance, but you are improving people’s everyday experience with the Government. ”

– Hon. Premier Alex Scott, January 2006
(at the opening of the Office)

Ombudsman for All the People

In her Annual Report 2013, the Ombudsman set out her strategic aims for the Office moving forward into the year 2014. These were:

- *Greater public access;*
- *Greater public awareness; and*
- *Championing best practice.*

In pursuit of greater accountability to the public, the Legislature, the Government and the Civil Service – who all have a vested interest in the success of Bermuda’s national Office of the Ombudsman – our team has worked diligently to achieve these aims. Our progress during the Office’s ninth year in service is described in this Annual Report 2014.

The Ombudsman’s strategic aims lay out a structure for how we present this Annual Report:

- The second section on **“Greater Public Access”** describes how the public can reach us, suggestions on what complainants can do to resolve issues themselves, and what potential complainants should be aware of in advance of meeting with us.
- The third section on **“Greater Public Awareness”** provides select summaries of complaints closed in the year 2014, along with useful information gleaned about how certain authorities operate and what policies, procedures, practices or laws guide their decisions.
- The fourth section on **“Championing Best Practice”** describes what principles guide us, the focus of our complaint handling in the year 2014, and what we did to build our own strengths and address our shortcomings.
- The fifth section on **“Power to Report to Parliament”** includes a special report on a complex complaint investigation into the Department of Immigration’s handling of a sensitive issue, as well as the Ombudsman’s commentary on the Government’s ongoing efforts to address whistle-blower protection.
- The sixth section on **“Special Reports”** provides the Ombudsman’s updates on two of our most recent special reports regarding the Ombudsman’s own motion systemic investigations into the governance of the Corporation of Hamilton and into the Department of Planning on the demolition of the tombs in the Marsden Methodist Memorial Cemetary.
- The seventh section features additional resources, including an overview of the law that guides our work – the Ombudsman Act – and what the Public Access to Information Act 2010 means.

This Annual Report is geared towards presenting our overall performance in the year 2014 in an easy-to-follow format. You will find our statistics depicted using various graphics throughout the Report, in a performance-focused way to give a snapshot of how our complaints process works. You will also find easy access to our data on the total number of complaints received in respect of each Ministry and then of each Authority, plus data on how we handled the complaints received with our definitions of what each disposition category means. We hope you find this Report to be an engaging and informative insight into how we continue our progress toward improved performance and greater accountability to Bermuda.



Strategic Aim 1: Greater Public Access

Ombudsman Traffic

We maintain and regularly update our **website** at www.ombudsman.bm. In 2014 we hosted 2,142 users where 74% were returning visitors and the peak month was June. In comparison, a total of 1,896 visitors searched for our site in 2013 from search engines in 10 different languages, where 68% were returning visitors. Again, visits peaked in June – perhaps a result of the publication of our Annual Reports. From 2013 to 2014 there was a 13% increase of online traffic to our website.

We hope to attract even more online users worldwide, especially to our social media presence at www.facebook.com/bermudaombudsman, where we will aim to post weekly facts of interest and short commentaries about important issues viewed from where the Ombudsman sits.

We continue to seek out the best ways to inform the public about our work. Our special reports and systemic investigations gain widespread **media coverage**; rightly so, as these investigations are initiated by the Ombudsman and carried out in the public interest. Such exposure proves invaluable in spreading awareness of the Office of the Ombudsman and an appreciation of how our work benefits all people in Bermuda – locals, foreign residents, work permit holders and visitors.

Although this free promotion is beneficial, there are times when intense media attention can impede our investigations or times when we are asked for comment on active investigations. We are bound by law to uphold the confidentiality of our complaints. Thus, we do not comment publicly on complaints or even confirm or deny that a complainant has complained to us.

The majority of complainants in 2014, a total of 79%, **contacted us** either by telephone or in person by visiting our Office. We do not expect this figure to change much over time. Typically when someone complains to us, they are frustrated about their issue or sometimes about the way in which they have been treated. We find that most complainants feel more at ease communicating directly with our Complaint Intake Officer, Ms. Fleming. This direct interaction allows us to quickly gather pertinent information needed to assess the complaint, plus it may speed up the initial assessment and may allay concerns complainants have.



Figure 1: How People Contacted Us in 2014



Empowering the Public to Resolve their Complaints

When things go wrong, the stress and frustration can feel overwhelming. There are practical steps that complainants can take to assist them in making a complaint. We encourage complainants to be proactive and to feel empowered, whether complaining directly to an authority or when coming to our Office.

Before making a formal complaint, consider:

Have you done all you can to resolve the issue yourself?

Be assertive rather than aggressive when challenging an authority about a problem.

Take ownership and acknowledge any mistakes you have made.

Often misunderstandings can be solved informally by talking to the right person.

Ask to speak to a manager or supervisor at the earliest opportunity.

If you feel overwhelmed, ask a trusted friend or family member for help.

Always be prepared when filing a complaint:

Keep a log of all communication with the authority (names, dates, what was said, agreed upon next steps).

Compile and organise all relevant documents, emails and correspondence (including envelopes with post office date stamps).

Take detailed notes as things progress or write a chronological summary of the facts.

Ask the authority to explain to you its complaint procedure.

Follow any advice, directions or instructions given by the authority.

Keep a copy of your complaint.

How to Contact Us to Make a Complaint

If you are dissatisfied or aggrieved with how your complaint to a Government department or authority was addressed, or feel you were mistreated, you can bring your complaint to the Ombudsman. Anyone can make a complaint to the Ombudsman. Nor do you have to be a Bermudian or a resident. You can file your complaint with us by letter, in person, by telephone or fax, by email or online.

Address:

Dundonald Place, Suite 102
14 Dundonald Street West
Hamilton HM 09, Bermuda

Office hours:

Monday to Thursday 9:00 a.m. – 5:30 p.m.
Friday 9:00 a.m. – 5:00 p.m.

Tel: (441) 296-6541

Fax: (441) 296-7734

Emails: complaint@ombudsman.bm
info@ombudsman.bm

Online: www.ombudsman.bm
www.facebook.com/bermudaombudsman



Strategic Aim II: Greater Public Awareness

Ombudsman Process

Receiving a Complaint

After a complainant contacts us, first we assess whether we can investigate both the subject matter and the authority against which the complaint is being made. We call this determining whether or not we have jurisdiction. Complaints made to us that are outside of our jurisdiction are declined. Where there is a more appropriate body that could help, we refer complainants. Once we conclude that we have jurisdiction, we ask complainants whether they have raised their concerns with the authority. If they have not, usually we refer the complainant back to the authority to utilise their complaint handling process, since we are an office of last resort. There are times when it may not be reasonable to expect the complainant to raise his

60% of complaints in 2014 progressed beyond initial assessment or referral

or her concerns directly with the authority. In those instances, the Ombudsman may exercise her discretion to decide whether our Office should proceed.

After the initial assessment of the complaint, our Complaint Intake Officer presents it to the Ombudsman and our Investigation Officers, who are assigned to conduct a detailed assessment of the complaint and determine the next steps. On average three in every five complaints made to us in 2014 progressed past the initial assessment or referral stage.

Impact of Our Referrals

Some referrals occur because complainants haven't complained to the appropriate authority in the first instance. As an office of last resort, we are obliged to direct the complainant to the appropriate authority, so that the authority has the opportunity to put things right first. Other times, we determine that we are not the most appropriate body to address the complainant's concerns. We do not simply turn people away though. We aim to put them in contact with the best person to settle their complaint.

Often, a referral from the Office of the Ombudsman can provide momentum towards a resolution and may make all the difference in solving a dispute that has become heated or protracted.

30% of complaints in 2014 were referred

Still, referrals may take considerable effort on our part. We take time to fully understand the nature of the grievance and sometimes make inquiries of the relevant authority. We routinely take value-added actions, such as tailoring advice about how best the complainant might continue. Whenever suitable, we provide a reasoned written referral to the authority, outlining what we ascertained from our initial inquiries. Usually we provide background information to the complaint and point out alternative resources.

Even after we have referred a complaint, the complainant can return to the Ombudsman if dissatisfied with the outcome from the authority, and then we may consider the matter. Complainants who come back to us, although they may not be satisfied with how the authority handled the matter, usually recognise that our referral put them in a better position than if they had acted alone.

Defining Authorities

Section 3 of the Ombudsman Act establishes which bodies we can investigate. We refer to the bodies that fall under our jurisdiction as "authorities".

Under section 3 of the Ombudsman Act we can review administrative actions of all Government departments, public authorities and Government boards. Additionally, we can investigate any corporation or body

established by an act of the Legislature or by a Minister, or whose revenues derive directly from money provided by the Legislature or a fee or charge of any other description authorised by the Legislature.

There have been times when authorities have countered our jurisdiction. For instance, our jurisdiction over the Department of Tourism was always clear. However, prior to the inception of the Bermuda Tourism Authority it had been argued incorrectly by some that our jurisdictional lines might have been blurred.

We maintain that the Bermuda Tourism Authority fits squarely within our jurisdiction, as it was established by the Bermuda Tourism Authority Act 2013 and is granted substantial public funds from the Legislature. It also has the power to collect fees by way of occupancy tax (now referred to as the "Tourism Authority Fee").

As this example illustrates, questions of our jurisdiction are not always straightforward. For example, the Corporations of Hamilton and St. George's, the Parish Councils and the Information Commissioner are all authorities within our jurisdiction. Also, some charities and non-profit organisations, which consider themselves to be independent and non-Governmental, are still considered authorities subject to the Ombudsman's jurisdiction, because they receive substantial grants from the Government. Examples include the Bermuda Housing Trust, the Summerhaven Trust, and the African Diaspora Heritage Trail Bermuda Foundation.

Some authorities are excluded from our jurisdiction due to the nature of their mandate and function. For instance, we have limited scope to investigate the Bermuda Police Service or the Bermuda Regiment because the subject of their administrative actions, namely protecting the security of Bermuda and investigating crime, are excluded under the Schedule to the Ombudsman Act.

10% of complaints in 2014 were declined because we lacked jurisdiction

If questions of jurisdiction arise, the Ombudsman or the complainant may apply to the Court for an order to declare jurisdiction. The authority cannot. It is

important to note that this Court order would declare, not establish, jurisdiction. Our jurisdiction has been established by Parliament by way of section 3 of the Ombudsman Act.

Defining Administrative Actions

We can investigate administrative actions, including the failure to act, taken by authorities in order to determine whether or not maladministration took place. Maladministration is defined by the Ombudsman Act as inefficient, bad or improper administration. This includes a wide range of actions and inactions which vary in complexity. For example, on the less complex side, complainants may make a complaint of unresponsiveness because a Government department has failed to respond to correspondence or return telephone calls. On the more complex end, complainants may make a complaint of bias, negligence or even abuse of power.

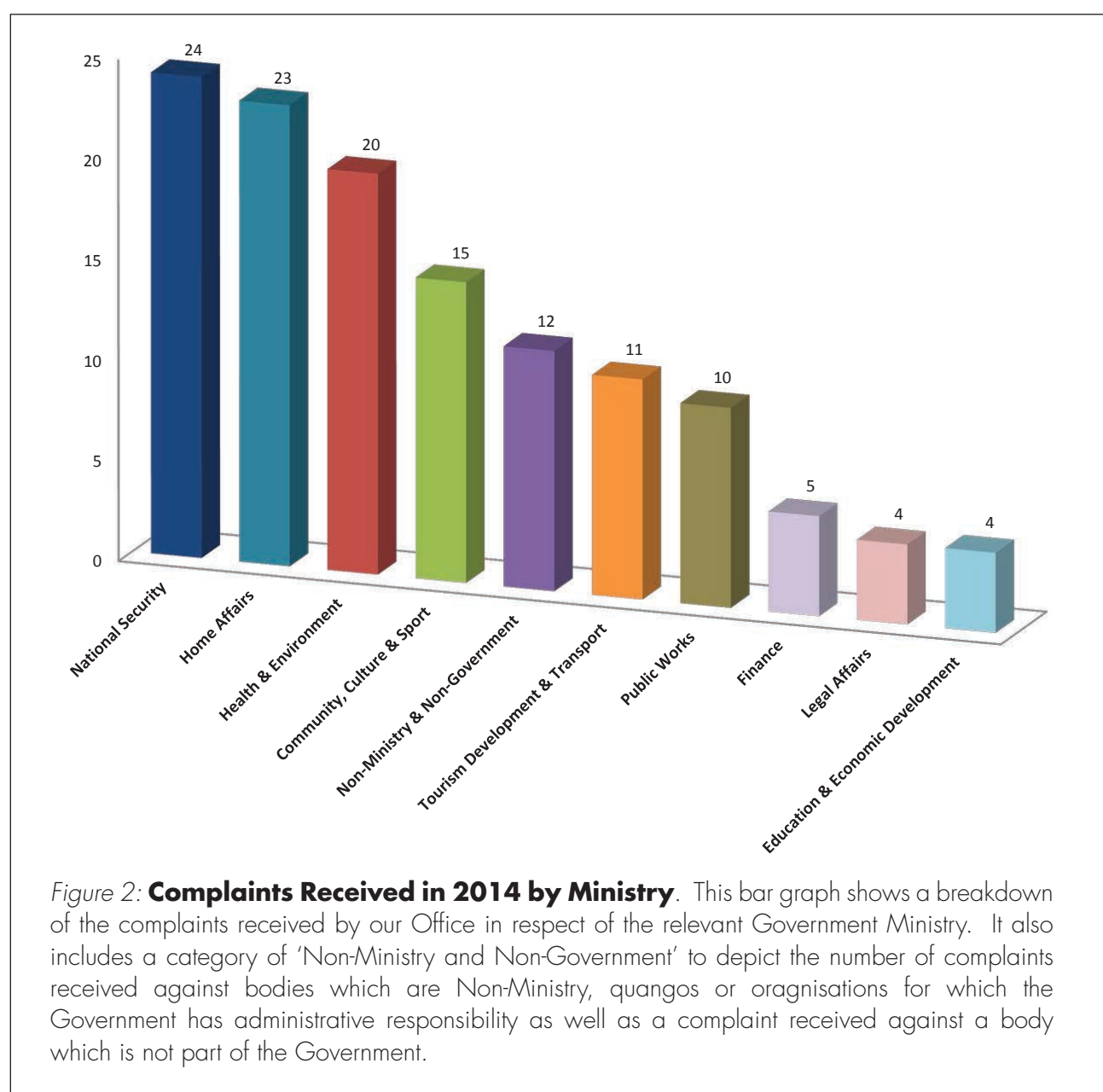
Finding Maladministration

After an investigation, the Ombudsman outlines her findings and reports whether or not she has found maladministration on the administrative actions complained of. If the Ombudsman finds maladministration, she makes recommendations. The authority must respond within twenty days stating whether they will implement the recommendations and if not with their reasons for failing to do so. Authorities usually respond and take steps to implement the Ombudsman's recommendations and rectify the maladministration. If the authority fails to respond, the Ombudsman may outline this, as well as the findings and recommendations, in a Special Report to Parliament.

Complaints Received by Ministry and Authority

In 2014, we received a total of 128 new complaints. Out of this total, 115 were complaints either against or referred to the nine Government Ministries, one was against an organisation that is not a part of the Government, and the remaining 11 were against Government Authorities but the actions complained about were restricted by the Schedule to the Ombudsman Act. Prior to reporting these figures, each Ministry was provided with a breakdown of our complaint statistics as at 31st December 2014.

The Ministry and Department totals below also may include complaints that were not lodged against the body but rather were referred there by our Office. As such, the figures do not represent the number of complaints made against that Ministry or Department. For example, the Bermuda Health Council is shown to have a total of four complaints, however three were made against private employers regarding health insurance matters and thus were referred to the Bermuda Health Council as the more appropriate authority to address them.



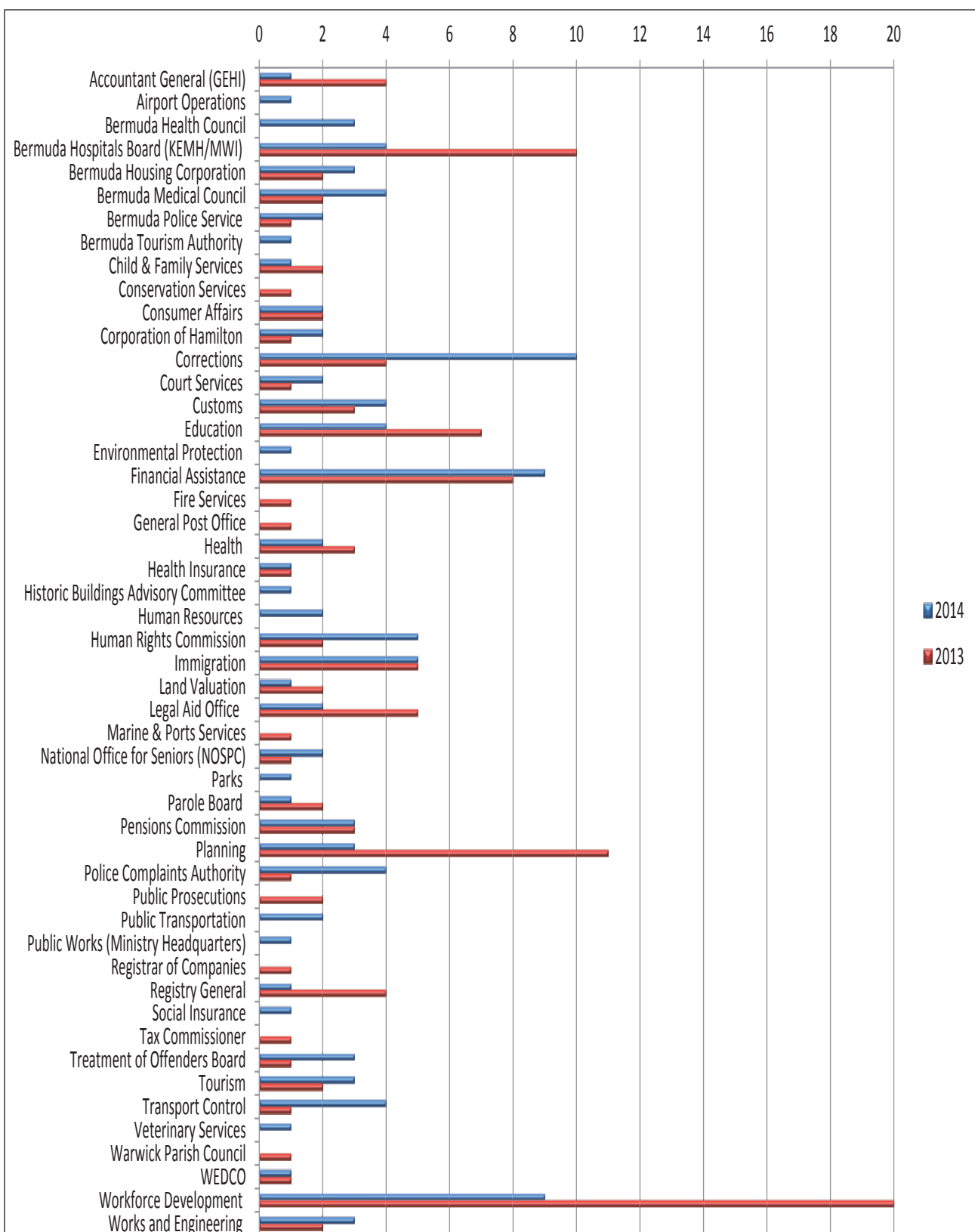


Figure 3: **Complaints Received in 2013 and 2014 by Authority.** This bar graph shows the total number of complaints in respect of each authority, comparing years 2013 and 2014. The figures do not include 12 complaints for 2014 that were made against Non-Ministry or Non-Government bodies.

Selected Complaint Summaries and ‘Did You Know’s’

By sharing stories about some of the complaints our Office closed in 2014, we are able to provide insight into the range of issues we see and the wider impact we have on the public. Try reading these summaries first with the eyes of the complainant and then with the eyes of the Ombudsman.

Department of Financial Assistance

Complaint: Unfair Decision

Mother M’s family was receiving Government financial assistance to support six children. She had a part-time job with no formal employment contract. While out on sick leave (which had been certified by her doctor), her employer decided to dismiss her. Subsequently, the Department of Financial Assistance (“the Department”) duly applied, in Mother M’s case, its power to suspend a recipient’s financial assistance for three months when a recipient has been terminated or he or she resigns from his or her job. The impact of this decision caused Mother M’s family additional financial hardship.

Mother M complained to our Office that the suspension of financial assistance payments was wrong because the family’s claim for financial assistance was obtained via an application by her husband based on his unemployed status. Since her husband remained unemployed, Mother M argued that the Department’s decision was applied incorrectly and unfairly penalised her family.

Before our Office made inquiries into the complaint, the Director conducted an internal file review and decided not to uphold the suspension, thereby reinstating the family’s financial assistance. Mother M was satisfied with this outcome and withdrew her complaint with our Office.

DID YOU KNOW THAT...

Clients receiving Government financial assistance should be aware of what could happen if they are fired from or decide to quit their jobs. By law a client’s assistance must be suspended for three months if the client is dismissed with cause or resigns (see section 4A of the Financial Assistance Regulations 2004).

If a client believes that the dismissal violated the Human Rights Act 1981, a formal complaint must be made to the Human Rights Commission (“HRC”) and the financial assistance worker alerted in order for the suspension to be halted while the discrimination complaint is being investigated.

If a client believes that they were wrongly dismissed under the Employment Act 2000, a formal complaint should be made to the Department of Workforce Development (“WFD”). Once the financial assistance worker receives evidence that a case of wrongful dismissal is

being investigated, financial assistance would be reinstated until conclusion of the investigation. If WFD finds that the client was terminated lawfully, financial assistance would be suspended immediately for the required three months.

At the request of a client, the Director of Financial Assistance can conduct an internal file review. This can be done upon receipt of initial notice of the suspension or after HRC and/or WFD have concluded their investigations. If the client is still unsatisfied with the Director’s decision to uphold suspension, a final appeal can be made to the Financial Assistance Review Board. The appeal must be submitted within 30 days of the client having been notified of the Director’s decision.

While the reality of suspended assistance is harsh to clients, its purpose is to require clients to take personal responsibility for their employment as it relates to their continued access to financial assistance.

Accountant General’s Office (GEHI Section)

Complaint: Failure to Give Reasons

Mother C became pregnant before being hired as a Government employee. Once employed, she was informed by the Government Employment Health Insurance section (“GEHI”) of the Accountant General’s

Office that her pregnancy-related medical expenses would be covered. Later she received an invoice from the King Edward VII Memorial Hospital ("KEMH") which stated that she was responsible for all of her pregnancy-related medical expenses. Subsequently Mother C made a complaint with our Office against GEHI for failure to adhere to the agreed terms and failure to adequately explain why her expenses had not been covered. After making preliminary inquiries with GEHI and KEMH we found that GEHI have a policy that all claims must be submitted within 365 days of the date of the bill. KEMH had not submitted the invoice within that time period. As such the claim period had expired and the Complainant was billed. Both GEHI and KEMH acknowledged the oversight and GEHI agreed to reimburse the Complainant.

DID YOU KNOW THAT...

In the past our Office has received complaints against the GEHI section within the Accountant General's Office. Typically the more appropriate authority to receive complaints against health insurance providers would be the Bermuda Health Council ("the Health Council"), whose mandate is to "regulate, coordinate and enhance the delivery of health services". While they can't answer questions related to personal health or illness, they do help the public by addressing complaints and queries about the health system. Their functions include:

- Enforcing employers' compliance with health insurance;
- Regulating health insurers;
- Overseeing the regulation of health professionals by their statutory bodies;
- Reviewing the Standard Premium Rate annually;
- Setting services and fees regulated by the Health Council;
- Monitoring health system performance and informing the public; and

- Advising the Minister of Health, Seniors & Environment.

Should you have concerns about the above topics, you can make a query or complaint to the Health Council:

- By phone at 292-6420;
- By email to healthcouncil@bhec.bm;
- In person at Sterling House (3rd Floor), 16 Wesley Street, Hamilton HM 11;
- In writing to PO Box HM 3381, Hamilton HM PX; and
- Online at www.bhec.bm/queries.

Where appropriate, the Health Council corrects errors, enforces compliance with legal requirements, and promotes system-wide improvements. Complainants are directly involved in any actions taken on their behalf. For matters that fall within the remit of another statutory body, the Health Council, with the complainant's permission, formally forwards the complaint details to the relevant authority and tracks the status of the complaint until it is resolved.

Department of Workforce Development

Complaints: Inadequate Investigations

We received three separate complaints claiming inadequate investigation against the Department of Workforce Development ("the Department"). The Complainants alleged that they were unfairly dismissed for serious misconduct by their former employers. In each of the three complaints the former employee, the former employer and the Department disagreed on the definition of serious misconduct. Since we received three very similar complaints against the same authority within a short time period, we decided to approach the complaints systemically.

In assessing the complaints, we reviewed the policies, procedures and law that govern the Department. The case of *Fleming v Director of Labour and Training* [2013] SC (Bda) 80 Civ. makes it clear that the Employment Tribunal is the authority to which the Department refers cases when there are reasonable grounds to believe that: an employer has acted contrary to the Employment Act 2000 ("the Employment Act"); there is a chance of success; and there are questions of law/interpretation of the Employment Act.

The statutory provisions also outline that cases can only be referred to the Employment Tribunal by an

inspector within the Department. We had constructive discussions on these matters with the Department. We referred the Complainants back to the Department and recommended that consideration be given to referring the complaints to the Employment Tribunal.

DID YOU KNOW THAT...

Our Office is prohibited from directly investigating employment issues. There are two reasons for this. Firstly, we are specifically prohibited from investigating employment matters within Government. Pursuant to paragraph 3 of the Schedule of the Ombudsman Act, the Ombudsman cannot investigate personnel matters in relation to any office or employment in the public service.

Secondly, this Office has jurisdiction only over: Government departments; public authorities and Government boards; and any other corporation or body which is established by statute or Minister or who receives money from the Government legislature or charges fees authorised by the legislature.

We are prohibited from investigating private employers. As shown in the previous complaint summary, we have jurisdiction over the Department of Workforce Development ("the Department"). However, the subject of any investigation of the Department by our Office will not be the substantive employment matter but the administrative actions taken by the Department.

The Ombudsman's jurisdiction generally is outlined in sections 2 through 7 of the Ombudsman Act. If a member of the public has an employment grievance that they wish to be addressed, it may be directed to the Department.

Bermuda Housing Corporation

Complaint: Unfair Action

Resident R had lived in a Bermuda Housing Corporation ("BHC") building before she was asked to vacate the room she rented. Approximately three years after leaving the BHC building, Resident R lodged a complaint with our Office that the BHC had unfairly disposed of the property she had left in the room without contacting her. Resident R produced a list of the items she claimed had been disposed of and which she valued at just under \$100,000. We were not provided with any evidence supporting the value.

Landlords are not entitled to simply dispose of their tenants' property at the conclusion of a tenancy. The position of a licensee was not as clear. The Complainant was referred to seek legal advice on whether she had a civil claim. Once this aspect was legally canvassed and the Complainant decided against bringing civil proceedings, our Office made preliminary inquiries into Resident R's complaint that BHC's procedures governing the disposal of property that residents' leave behind are unfair.

As a result of our inquiries we established that Resident R had been living in the Building under a License Agreement for Shared Occupation ("Agreement"). The Agreement stipulated that *"upon determination of the License the Licensee shall immediately cease to be entitled to use the Rooms and the House and shall vacate the Rooms leaving them clean and tidy and shall return the keys to the Owner immediately."*

Our inquiries established that BHC had notified Resident R in writing that on the date she was due to vacate ("Vacate Day") *"the locks to your room will be changed if you have not turned in the key and any items will be disposed of."*

BHC had, however, made provision to ensure that Resident R would have assistance in removing her property, offering the services of the Hustle Truck free of charge. Further, BHC recorded that although Resident R was told that her locks would be changed at 5pm on Vacate Day, she could have access to the room after 5pm that day to remove any remaining items.

BHC told our Office that, two months after the Vacate Day, BHC recorded that Resident R had not removed

her property from the premises. With no contact information on file, BHC tried but were unable to contact Resident R at the residence where she was believed to have moved. Faced with food items left in the room causing a health concern, BHC arranged the Hustle Truck to empty the Resident R's room.

BHC recorded that Resident R did not contact BHC about her property until 10 months after Vacate Day, and did not meet with BHC to discuss her lost property until over a year after the Vacate Day. Resident R told BHC that she thought BHC would be able to contact her through another Government department.

Given Resident R's complaint, our Office assessed the fairness of BHC's procedures for the disposal of former residents' property after the residents' licenses have been terminated and in particular Resident R's claim that she was not contacted before BHC disposed of her property. We found that the BHC's procedures were not unfair and the BHC did not unfairly apply them in Resident R's case.

Further, we found that:

- the License that Resident R entered into with the BHC made it clear that upon the determination of the License she would *immediately cease to be entitled to use the Rooms and the House and vacate the Rooms leaving them clean and tidy*. This established the BHC's right to remove her items, as Resident R was not entitled to use the room at end of the License. Resident R was made aware on more than one occasion that she would have to remove her items from the room.
- Resident R was informed on more than one occasion that she would be able to use the Hustle Truck Programme to empty the room without charge. This assistance offered by the BHC more than adequately addressed the needs of residents to move their items. Further, BHC's assurance that Resident R could arrange to remove her items after the locks were changed did not entitle Resident R to expect that she could leave her items for an extended period of time in the room.
- BHC made a good faith effort to contact Resident R before clearing her room, by attempting to reach her where BHC believed she moved next. We could not fault the BHC for failing to contact Resident R through another Government department given the confidentiality obligations that this particular department is obligated to uphold.

DID YOU KNOW THAT...

The Office of the Tax Commissioner ("OTC") and the Department of Land Valuation ("Land Valuation") both have responsibilities for administering different aspects of land tax in Bermuda. Each authority should be contacted for different reasons. For instance:

Taxpayers should contact the OTC for information such as:

- all land tax billing enquiries.
- current land tax rates.

- requests for changes of taxpayer names; and
- requests for changes in mailing addresses.

However, taxpayers should contact Land Valuation for matters such as:

- Annual Rental Value ("ARV") enquiries; and
- alternations to properties, e.g. construction; demolition, splits and merger of units; and
- requests for changes to unit names, e.g. house or commercial building names.

Have you ever considered disputing the ARV of your property as stated on your land tax demand note? If so, you can apply to Land Valuation for a file review by submitting your request with supporting evidence. If the authority decides to amend your property's ARV, the adjusted land tax can be backdated. Sections

**Looking for Bermuda's property assessment information?
Check out Land Valuation's website at www.landvaluation.bm
for a comprehensive assessment search tool, updated daily.**

**For more information about how the Authorities operate,
find them on the revamped Government portal
at www.gov.bm.**

24(4) and (6) of the Land Valuation and Tax Act 1967 ("Act") empower Land Valuation and the Land Valuation Appeal Tribunal to backdate the reassessed value only to the first day of the calendar year in which the amendment is proposed. However, if you believe that the reassessed ARV should be backdated even earlier than the first day of the year in question, an additional application can be made to the Tax Commissioner who is the only authority empowered, pursuant to section 48(1) of the Act, to amend a land tax demand note beyond these periods and to issue an amended note in substitution. The application to the Tax Commissioner should include supporting evidence.

There is also a formal ARV objection process through Land Valuation which is quite different from an informal request such as the one above. Formal objections can result from three 'triggers' only, these being:

- the Draft Valuation List;
- a proposal by the Director of Land Valuation to amend the Draft Valuation List; or
- a proposal by the Director of Land Valuation to amend the Valuation List.

DID YOU KNOW THAT...

All Government authorities should be committed to a fair bidding and tendering process. The aim of Government's tendering, bidding and selection process is to secure value for money by contracting with an agent who has the resources and expertise to complete the job within the allocated timeframe. With the coming into force of the Public Access to Information legislation, the public has a right to make an information request to review the procurement of services policy documents that guide an authority's processes. Interested bidders for Government contracts are encouraged to educate themselves to ensure they understand what Government requires and the criteria used to assess the proposals.

Bidders also should be aware that offering the lowest price for a project does not guarantee a successful bid. If you are unsuccessful in securing a Government contract, you can always ask for clarification on the evaluation of your proposal. You should write directly to the head of the public authority, requesting details about how your bid was measured in relation to the selection criteria

for the specific project. The authority should respond to you within a reasonable time, with reasons for their decision. Should you find the public authority's response to be unsatisfactory, you can make a complaint to the Office of the Ombudsman.

It is a standard requirement that contractors be in compliance with Government taxation and fees. Interested bidders with outstanding Government debt may be deemed ineligible to be awarded a Government contract. This requirement was implemented to ensure contractors have the financial capacity to meet the demands of the project; this includes being able to pay their own staff for work completed and securing the necessary materials and equipment. While these considerations seem reasonable in support of Government's project management requirements, the Ombudsman is of the view this may be unfair to small business owners in certain cases. The Ombudsman intends to discuss this policy with the Ministry of Public Works on how best to ensure fair outcomes.

Magistrates' Court

Complaint: Mistake of Fact and Arbitrary Procedures

The Complainant was on remand when he pleaded guilty to a criminal offence and was sentenced accordingly. He claimed the Magistrate ordered that the time he had spent on remand prior to sentencing was to be taken into account and credit given as part of his sentencing. However the record stated that only some of his time was to be taken into account. For the Complainant this meant he should be eligible for release much earlier than the record dictated. He subsequently made a complaint with this Office. The Ombudsman was unable to investigate as this Office does not have jurisdiction over court matters. The Ombudsman informed the Complainant that this was a matter for the Court. She then contacted the

lawyer who had dealt with the complainant, with the complainant's permission, to express the Complainant's concerns and to ask whether the lawyer would contact the Complainant to discuss whether this could be rectified in the court. The complaint was then declined and closed.

At a later date the Complainant informed our Office that his lawyer appeared before the Court where the Magistrate confirmed that the record was correct in that he intended to give the Complainant credit for only some of the time he had spent on remand. If the Complainant remained aggrieved by the decision, it was open to him to appeal to the Supreme Court.

DID YOU KNOW THAT...

Do you have a complaint of misconduct or negligence against a police officer? Thanks to its recently operational website, you can now submit a complaint online to the Police Complaints Authority ("PCA") at www.pca.bm. You can still choose to make a complaint in person at any police station or at the office of the Professional Conduct Unit of the Bermuda Police Service located at 81 Court Street in the old fire house building.

In accordance with sections 10(1) and (2) of the Police Complaints Authority Act 1998, once a complaint is made the complainant is contacted and advised of the steps intended to be taken. Possible steps include a decision to take no action, informally resolve, investigate or defer the

complaint. The PCA can also recommend that the complaint be settled through mediation and that the officer who is the subject of the complaint receive counseling. At the conclusion of its investigation a letter is sent to the complainant outlining the decisions taken.

The PCA is comprised of six members that meet monthly and then quarterly with the Professional Conduct Unit, which jointly receives and investigates complaints, and the Deputy Police Commissioner, to whom the Unit reports directly. For information on the PCA's work, including its complaint statistics from January 2012 to August 2014 as well as a discussion of some of its challenges, you can download its 2014 annual report from www.pca.bm.

Transport Control Department

Complaint: Wrong Decision and Unreasonable Delay

Business Owner A co-owned a business with her husband for several years before he died. The business was not an incorporated company but had operated under a trading name, which included the initials of her husband's name. Prior to her husband's death, Business Owner A had applied to the Transport Control Department ("TCD") for a permit to operate a heavy truck ("Permit"). On the permit application form where it required the "full name of the applicant" Business Owner A filled out the business's name and neither her own name nor her husband's, and her husband signed the form. TCD did not contact Business Owner A or her husband to clarify in whose name the Permit should be granted. The Permit was granted, and the couple paid the \$3,500 permit fee. The Business Owners then applied for and were granted additional permits for other vehicles.

In the months following her husband's death, Business Owner A relicensed and insured one of her permit vehicles. It was only when she sought to relicense another permit vehicle that Business Owner A was told by TCD that the permits had expired at the time of her husband's death as they had not been held in the business name, but in her husband's name. TCD also informed Business Owner A that the permit could not be transferred into her name.

TCD confirmed that a permit can only be held by an incorporated company or an individual, and not an unincorporated business. TCD's policy holds that upon the death of a permit holder, a new permit must be granted for a vehicle and the \$3,500 fee paid again. Business Owner A said her Business depended on the vehicles being on the road, and she faced having to cease operation until she could resolve this permit complaint.

Business Owner A lodged a complaint with our Office after she discovered that the Permit had been placed in her late husband's name and claimed that TCD erroneously assigned a permit to her late husband. She further complained that following her husband's passing and her discovery that the Permit was in his name alone and not in the name of their business (for which they had originally applied for the Permit) TCD refused to correct the error and place the Permit in Business Owner A's name. She also complained that TCD unreasonably delayed addressing her complaint.

Despite several attempts to resolve these complaints with TCD, the Ministry of Tourism Development and Transport and the Ministry of Finance it took at least two months for TCD to tell Business Owner A that she would have to pay for a new permit.

Business Owner A was granted a six months deferral period to pay the permit fee but was required to sign an acknowledgement of her obligation to pay the permit fees. She maintained that the TCD should have reissued the Permit in her name, thus correcting the error that led to the Permit being issued in her husband's name and the requirement to pay fees for a new permit.

TCD decided that the vehicle which TCD had mistakenly relicensed and Business Owner A had insured on the Permit issued to her husband would be allowed to remain on the road on his Permit until they expired.

TCD also advised Business Owner A that the Motor Car Act 1951 ("Motor Car Act") provides that she may appeal to the Minister regarding TCD's decisions. The Ombudsman Act s.6(1) restricts our Office from investigating a complaint "where there is under any enactment a right of appeal or objection to a tribunal or a right to apply to a court for a remedy in respect of an administrative action taken by an authority". This is subject to s.6(2) which provides discretion to the Ombudsman to investigate where she is satisfied that the requirement would be unreasonable.

In keeping with the spirit of s.6(1) of the Ombudsman Act we referred Business Owner A to the Minister of Tourism Development and Transport to appeal the decision of TCD.

However, there was a lack of clarity as to the appeal procedures under TCD's governing legislation. TCD advised Business Owner A that she may appeal its decision pursuant to s.116 of the Motor Car Act. This section provides for remitting to the Court a decision of the Minister or the Public Service Vehicles Licensing Board ("Board"). We also noted that s.8 of the Motor Car Act provides for the Minister or the Board to authorise any officer of TCD to perform any duty or power exercisable or to be performed by the Minister or the Board. Further, s.8 provides that a person may appeal to the Minister or to the Board "if a person is aggrieved by anything done or omitted to be done by any officer so authorised". While the Minister is empowered, under s.103, to make regulations regarding the appeal procedures in connection with s.8 appeals, no regulations were found.

We asked the Ministry to clarify the procedures that Business Owner A should follow regarding her appeal against TCD's decisions. The Ministry has not provided our Office with this information.

DID YOU KNOW THAT...

It is a fact of life in Bermuda that we have limited land mass, and what we do have is costly. Many of us have witnessed the emotional and financial toll that disputes over land rights take on individuals and families. Not infrequently individuals come to our Office seeking assistance. In some instances our Office can help, such as when there are complaints relating to the administration of planning applications. However, often we receive complaints that are out of our jurisdiction, such as disputes over rights of way, easements

and boundaries. In these instances we do not have jurisdiction to investigate, given that these disputes are, for the most part, unrelated to a public authority's administration and are questions for the Courts to determine. We will refer such complaints to the Court to address.

Court actions are, however, often costly and protracted – especially when relatively minor land title matters are at stake. Sometimes boundary issues involve a question of inches rather than

feet. These factors frequently render a court determination inaccessible to many land owners. As a result, we see these disputes being played out in Government departments that do not have the resources or authority to address the underlying disputes. For example, the enforcement team of the Department of Planning is often charged with investigating complaints of works blocking rights of way, when the existence of a right of way or its dimensions may be the real source of the conflict.

It is for these reasons that the Ombudsman calls on the Government to take the necessary steps remaining to commence the operation of the Land Title Registry, which includes publishing the rules and regulations pursuant to the Land Title Registration Act 2011. Our Office has reached out to the Attorney General to discuss this important matter. To date the Ombudsman's invitation has not been taken up.

Bermuda actually set up a Land Title Registry Office ("LTRO") in 2006. This included the secondment of experts from the England and Wales' Land Title Registry, and in 2007 producing a public report and conducting public consultation. For reasons not entirely clear the Government has not launched Bermuda's land title registration regime. It was surprising to learn that Bermuda was so far behind much of the developed world in its exclusive reliance on a deed-based property transaction system. The length of time taken for Bermuda to adopt a title-based registration system and bring this office on line frankly is embarrassing and expensive. There also has been lost revenues from fees the LTRO could have generated.

We understand that the Government anticipates that, with amendments to the Land Title Registration Act and the required rules and regulations finalised, the public will be able to start registering land in 2016. This will be an important step in Bermuda's administration of land rights. We anticipate that the Government will ensure this is not delayed any further and will proceed with all necessary steps.

Here is an overview of what Land Title Registration is all about:

- **What is Land Title Registration?** This is an administrative procedure backed by statutory provision, through which a guaranteed record of rights and interests based upon the land parcel is created and maintained by a nominated authority, the LTRO. This means that deeds will no longer need to be held in private custody. It also eliminates the trouble and expense of repeated investigations of title. The Land Title Register will be an up to date, accessible and comprehensive record of all registrable rights in land in Bermuda. Once registration has taken place, there will be no need to search behind the Register to establish a chain of title, since the Register itself will provide conclusive evidence.
- **Can I make applications myself?** The vast majority of applications will need to be made by your attorney because your attorney must legally certify that the information provided to the LTRO is complete and accurate. If there is a mistake regarding your title and you suffer financial loss due to their error, depending on the exact circumstances of your case, you may be able to make a claim against your attorney's professional indemnity insurance policy. As a member of the public, you will be able to make requests for plans and title information about other properties which have been already registered by visiting www.norwood.gov.bm or in person at the LTRO. There will be a small fee for each request made.
- **What happens if I have lost my deeds or they have been severely damaged or destroyed?** The LTRO staff will liaise with your attorney as to what is the best way to proceed. Even when original title documents have been lost, stolen or destroyed, often it is possible to show that a person or family has owned a property or land for a considerable amount of time. Such evidence might include land tax records, copies (rather than originals) of deeds and mortgages which may have been registered at the Registry General, mortgage statements, planning documents, Court records, entries from Church records, old utility invoices and family photos that clearly show the property. In all cases where the original deeds are missing (no matter the reason), the LTRO will grant a provisional title as opposed to an absolute title.

- **Why introduce Land Title Registration?** Currently in Bermuda evidence of ownership and other legal rights in land are contained in deeds and documents of conveyance, agreements, mortgages etc. which are created when parties agree to buy, sell, lend, borrow or enter into some other mutually binding arrangement. Land ownership can transfer through gift or inheritance, and interests in land can be created either by deed or informally. In Bermuda's unregistered system, inevitably these important documents are held in private custody, either by the individual, his or her lawyer, a bank or some other third party, or are deposited with the Registry General for safe keeping. Benefits for introducing this system include:
 - *For individuals:* secures tenure of records, reduces likelihood of ownership disputes, simplifies land transactions, improves access to credit and increases market value;
 - *For Government:* creates a land information system to assist with land use planning and development, improves the land market, stimulates investment and assists with the process of equitable land taxation; and
 - *For society:* promotes the peaceful, orderly and wise utilisation of national resources.

These benefits are even more tangible in the modern, technologically-driven information society in which the Bermuda system has been developed. Full advantage now can be taken of automated workflows, electronic data storage, retrieval and dissemination, document imaging and geographic information systems in order to provide a system for 21st century living.

**Interested to read more about
the outcome of the Ombudsman's investigations?**

**Download all Annual Reports from
www.ombudsman.bm/annual_reports.html
(under 'publications')**

Strategic Aim III: Championing Best Practice

Principles of Good Administration

Ombudsmen worldwide benefit from shared tools and guidance on how to assess the actions of public bodies. In our work of investigating the conduct of authorities in Bermuda, we routinely refer to the “Principles of Good Administration” published by the Parliamentary and Health Service Ombudsman in the UK. These guiding principles provide clear and succinct language on how to define good administrative practices. We also routinely describe them in our presentations for Government departments as well as in our correspondence with authorities regarding their complaint handling.

Good administration means...

- ❖ Getting it right
- ❖ Being customer focused
- ❖ Being open and accountable
- ❖ Acting fairly and proportionately
- ❖ Putting things right
- ❖ Seeking continuous improvement

Reviewing Internal Processes

In the spirit of good administration, the Office of the Ombudsman is committed to seeking continuous improvement. The Ombudsman made it clear in the Annual Report 2013 that one of her strategic aims was to improve our turn-around times and attend to outstanding complaints which had been impacted by ongoing systemic investigations. This was an ambitious undertaking to achieve in one year considering there was a new Ombudsman, a handover of investigators, two systemic investigations being brought to conclusion, and the pressing need for a comprehensive review of internal processes. However, we can report that we have made progress on these issues. Firstly, upon reviewing the efficacy and efficiency of our complaint handling procedures we found that there were weaknesses that required attention. Our findings were that we were proficient during the early stages of complaints, but once they progressed to preliminary inquiries or a full investigation, a bottleneck occurred. This was partly because of the inherent difficulties in getting timely responses from parties involved. Also the complexities of some cases demand detailed research and analysis into policy and practice of the authority being scrutinised by our investigators. Added to this was the fact that this Office had begun to transition to a web-based knowledge management software programme. As a result, we had to rely on manual tracking of complaints by the investigation team.

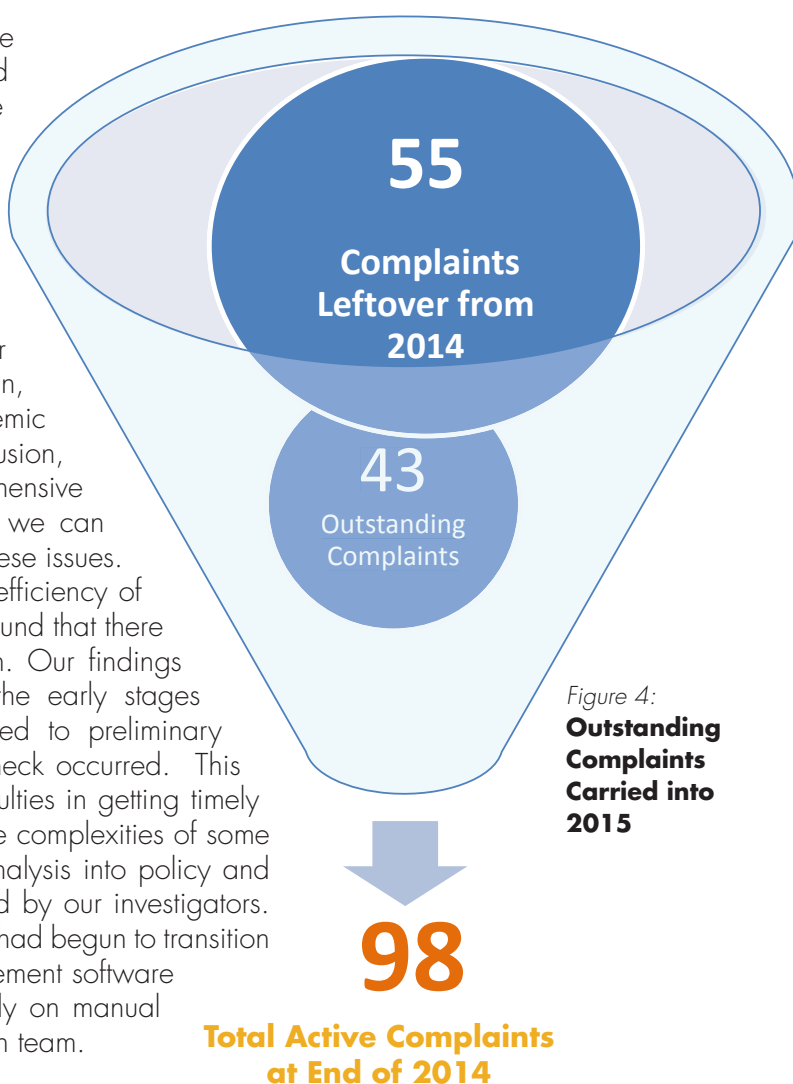


Figure 4:
**Outstanding
Complaints
Carried into
2015**

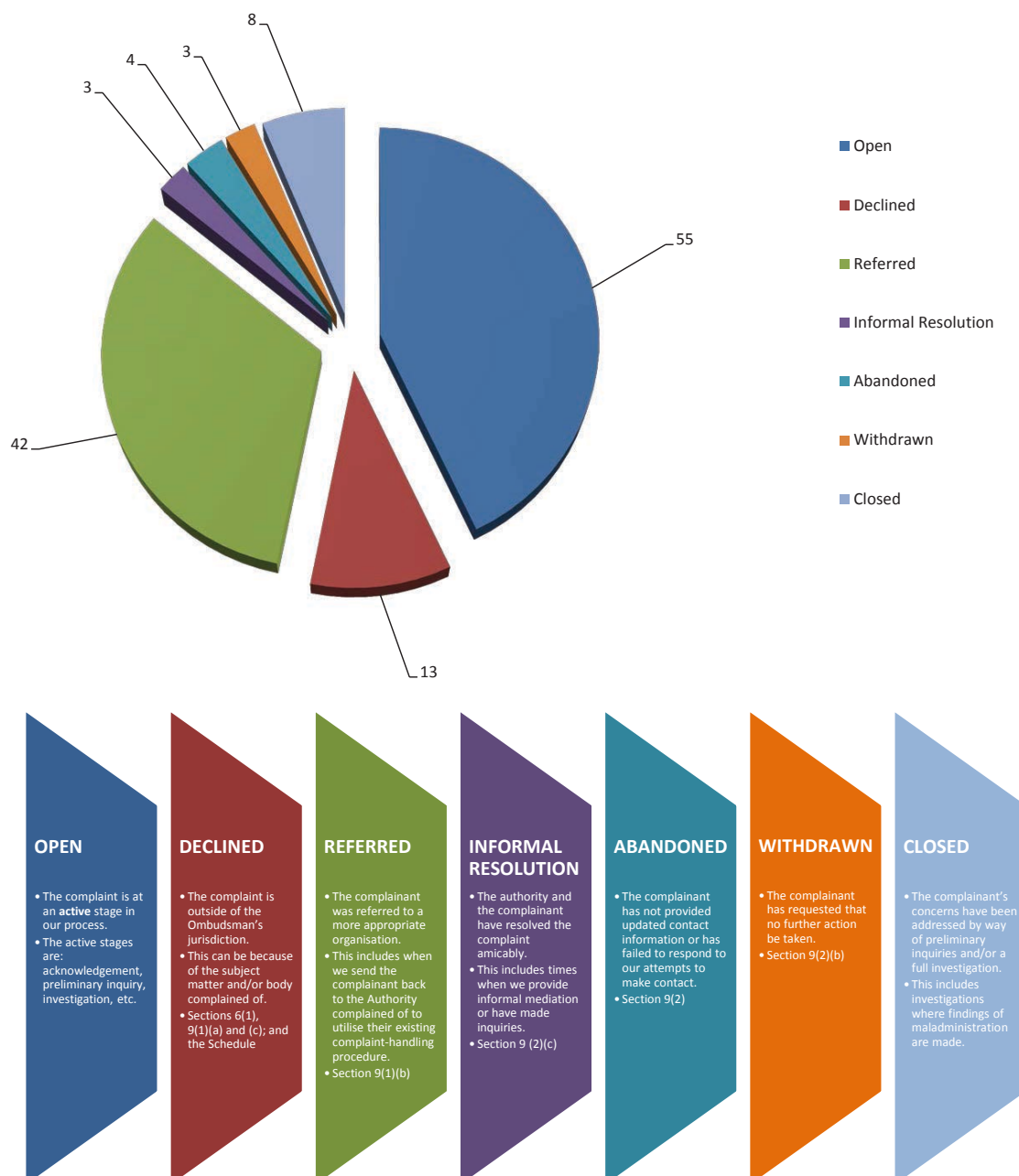
FIGURE 4 IN WORDS: HOW WE CAME UP WITH OUR NUMBERS...

***We carried over 95 complaints into 2014 from previous years.
An internal audit in 2014 revealed that 19 complaints were
misclassified and had been closed already.***

***The revised outstanding complaints at the start of 2014 was 76,
of which 33 were resolved in 2014,
leaving 43 outstanding complaints from years prior to 2014.***

***Of the 128 new complaints for 2014, 55 remain open,
which means we resolved 57% of complaints received in 2014.
This means there were a total of 98 open complaints as at 31st December 2014.***

Figure 5: Total Complaints in 2014 by Disposition.



This meant it was difficult to track and regularly report on complaint progression in real-time.

As things stand now, we can only assess turn-around times by looking at our complaints log and reviewing individual files. After conducting an internal audit of the 95 outstanding complaints reported in 2013, we found that 19 complaints had been misclassified and in fact were already closed as at 31st December 2013.

Secondly, we worked diligently to resolve the oldest complaints and were able to close an additional 33 files. Now there are only 43 active complaints received before 2014.

We anticipate this situation will improve once we source and implement a comprehensive complaint management system that not only will record complaints in more detail, provide time-tracking and a customisable workflow, automate reports and collate statistical data but will also reduce the manual administrative labour required to maintain files as updated and complete. To this end, we have initiated a fair selection process to identify a supplier and anticipate a new system being implemented in 2015. In the meantime, we have standardised the way we document our complaint handling to enhance the completeness of our records and ensure our decisions are made based on full knowledge of information and resources within our possession.

2014 in Numbers

We received **128** new complaints in 2014.

115 complaints were actually for us.

There were **13** complaints that fell outside our jurisdiction.

We could not take them because our legislation does not cover the action complained about or the complaint was about an authority that does not come under the Ombudsman Act.

We assisted **42** people through our referrals process.

We helped them make their complaint to right organisation.

7 complaints were abandoned or withdrawn by the complainant.

About **40%** of closed complaints did not require a full investigation.

We were able to broker an informal resolution with the authority concerned.

Staff Training

A defining characteristic of Ombudsmen and their investigators is that they are specialists in dispute resolution, bound to assist with addressing complaints in a fair manner and operating confidentially, impartially and in accordance with best practice. Ombudsman training is to share practices, standards, research and strategies at regional and international conferences and during specially designed professional development programmes.

In September 2014 the Ombudsman took part in her first training in her new profession. This certificate programme, offered by the Forum of Canadian Ombudsman in collaboration with Osgoode Hall Law School, was created with recent appointees in mind and provided a block of five days for the Ombudsman to explore the theory, practice, requirements and expectations for her role.

Upon completing the programme, the Ombudsman reflected that, for her, an important realisation was this:

"The principles of fairness, impartiality and natural justice, which the Ombudsman applies to assess the

actions and decisions of the authorities for maladministration, are the same principles that she must use to ensure fairness in the exercise of her own process and review. These principles reduce arbitrariness in Ombudsman decision making and counter the need for total reliance on the person and the attributes of the individual Ombudsman.”

Presentations to the Government

In 2014 we delivered education sessions on good governance and our complaint handling process to a Government department and a Non-Ministry office.

For the Department of Corrections, we find that the complexities of the complaints we receive against them makes it very beneficial for us to present annually in order to educate new officers about the role of this Office and our investigation process. It also provides the opportunity to promote good administration more generally and to assist the Department in considering their internal complaint handling.

Then in the autumn we met with the Department of Internal Audit, which is a Non-Ministry office that reports to the Cabinet Office. While there were no complaints filed against them in 2014, the training session helped to underscore the importance of good governance principles that are useful in supporting their work, which is probative in nature.

We anticipate using our complaint data from 2014 to offer other education sessions to the Authorities that we consider will benefit the most from meeting the Ombudsman’s team in person to explore the challenges complaint handling and what good administration means in the work they do.

Accreditations and Affiliations



Power to Report to Parliament

When an Authority Fails to Follow a Recommendation

An essential characteristic of a classical Parliamentary Ombudsman is her inability to make binding recommendations.¹ The Ombudsman has extensive powers to inquire and investigate a complaint of an authority's actions under the Ombudsman Act. Upon making a finding of maladministration, the Ombudsman can only recommend actions an authority should take to address the maladministration. As Gottehrer and Hostina remind us²:



“this limitation on Ombudsman powers, seen by some as a weakness, is seen by most Ombudsmen as a strength for two reasons. First, government agencies persuaded to act are more likely to act effectively and efficiently and do a better job than those forced to act. Second, binding orders would establish appeal rights. That would subject the office to litigation and the need to spend financial resources on defending against actions in court.”

While an authority is not bound to follow the Ombudsman's recommendations, in accordance with the provisions of the Ombudsman Act, the Ombudsman can report to Parliament and the public if an authority has failed to take any action pursuant to her recommendations, or if it has taken inadequate or inappropriate action. The Ombudsman for Bermuda has very rarely had to report to Parliament that an authority has failed to follow or inadequately implement her recommendations. Before submitting such a report, the Ombudsman must follow the process set out in section 17(1) of the Ombudsman Act which affords the authority the opportunity to a hearing.

Ministry of Home Affairs and Department of Immigration's Failure to Follow the Ombudsman's Recommendations

It is after much deliberation that the Ombudsman reports the following failure of the Department of Immigration ("the Department") and the Ministry of Home Affairs ("the Ministry") to follow the recommendations she made after investigating a complaint against the Department and making findings of maladministration.

In December 2013 a Bermudian Professional ("the Professional") lodged a complaint with our Office against the Department and the Minister of Home Affairs ("the Minister"). We investigated her complaint of a failure to give reasons for a decision. She alleged that:

- 1) before making an employment application for an advertised post, she notified the Ministry that she would be applying. She was motivated to notify the Ministry by her belief that the employer ("the Employer") had inflated the experience requirement for the post without justification. A day after making her submission, both the Department and the Ministry were provided with a copy of her application and a letter articulating her concerns;
- 2) she was never contacted by the Employer after she submitted her application;

¹ Gottehrer, D. & Hostina, M. (1998, October 26). "Essential Characteristics of a Classical Ombudsman". Annex I (Background Paper) prepared by Office for Democratic Institutions and Human Rights of Organization for Security and Co-operation in Europe: OSCE Human Dimension Implementation Meeting '98. Warsaw, Poland: OSCE. Retrieved from <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Essential.pdf>

² Ibid, p.7

- 3) over three months after submitting her application to the Employer, the Department and the Ministry, the Professional was notified by email that a work permit had been approved for the post. The Department stated that prior to the Minister approving the work permit, the Department had sought clarity on whether there were any Bermudian applicants for the post. The Employer stated no Bermudians had applied;
- 4) the Employer was asked again and reconfirmed that no Bermudians had applied for the post. The Department suggested that the Professional contact the Employer to discuss what may have happened to her application. The Professional responded to the Department, providing evidence that she had submitted her application before the advertised deadline and that the application had been placed in the Employer's designated mailbox;
- 5) the Department conducted its own investigation into the matter and upon conclusion presented the facts of its investigation to the Minister. The Minister decided not to revoke the work permit; and
- 6) the Ministry and the Department did not give the Professional reasons for this decision.

Investigation

We conducted inquiries into the Professional's complaint and made several findings, including that it is the Ministry's and the Department's duty to ensure that its policies are adhered to. This is true whether or not a complainant gives prior warning to them. In this case, the Professional provided information which was received by the Department, but nothing of consequence was done with that information prior to a work permit being issued. In the circumstances, a failure to enquire further of the Professional amounted to maladministration.

Information from our preliminary inquiries supported that the Department conducted its own investigation into the Professional's complaint. This included the Department's officers questioning parties associated with the Employer's application process, but did not include interviewing the Professional. Our inquiries revealed that the Department established that the Employer closed its mailbox one day prior to the deadline for receiving applications. This, if true, appears to be in violation of the advertising guidelines set by the Department; yet no specific mention was made of this by the Department. The Professional was not aware that the Department recommended that the granted Work Permit be revoked nor that the Minister had not agreed with the Department's recommendation. The Minister gave written reasons for his decision which differ from the findings of the Department. These reasons were not provided to the Professional.



The Ombudsman may inquire into and investigate the adequacy of the information provided to the Minister by the officers in the Ministry and the Department. Prior to the granting of the work permit there is nothing which demonstrates consideration of the information given. The Ombudsman is precluded from looking into the Minister's administrative decision, including the sources, bona fides or adequacy of the information received from outside the Department, and any reasons of the Minister by virtue of section 2 of the Schedule to the Ombudsman Act. By section 10(2) of the Immigration and Protection Act 1956, the Minister is not required to provide reasons for decisions made under this statute.

The Ombudsman may inquire into and investigate the adequacy of the information provided to the Minister by the officers in the Ministry and the Department. Prior to the granting of the work permit there is nothing which demonstrates consideration of the information given. The Ombudsman is precluded from looking into the Minister's administrative decision, including the sources, bona fides or adequacy of the information received from outside the Department, and any reasons of the Minister by virtue of section 2 of the Schedule to the Ombudsman Act. By section 10(2) of the Immigration and Protection Act 1956, the Minister is not required to provide reasons for decisions made under this statute.

Additionally, section 20(2) of the Ombudsman Act requires the Ombudsman not to disclose any information or document received during the course of an inquiry, except in limited circumstances of a breach of duty or misconduct, or in reports to the Legislature or during Court proceedings for offences against the Ombudsman.

We were, therefore, of the view that we were not able to disclose to the Professional the reasons given by the Minister. But for these statutory provisions, we would have concluded that it was our duty to share the Minister's reasons with the Professional.

Developments in the law are such that giving reasons is now a requirement of natural justice. We cannot say whether a Court would impose a duty to give reasons in this case in the face of express and unambiguous statutory language. Even if a Minister is not obliged to give reasons, where he has actually given reasons and the withholding of these reasons leads to unfairness for an individual, the unfairness should be addressed by the public body by disclosing what the reasons for the decision are³. Acting fairly and proportionately is an established principle of good administration:

If applying the law regulations or procedures strictly would lead to an unfair result for an individual, the public body should address the unfairness⁴.

The Department's various responses to our findings and recommendations seek to persuade us that we are mistaken. Some responses are dangerously close to an attack on the integrity of this Office which is wholly inappropriate. If we realise a mistake has been made by us, we are duty bound to acknowledge and rectify it. We have not hesitated to do so. Departments would do well to do the same. We have received no response from the Ministry to our findings and recommendations.

Recommendations

In accordance with section 5(1)(b) of the Ombudsman Act, the Ombudsman may make recommendations concerning any administrative action that formed the subject of the investigation. The Ombudsman has made specific recommendations, which focus on addressing the Professional's specific complaint, and general recommendations, which focus on improving the Department's administration generally.

Specific Recommendations

- 1) **We recommended** that the Department write a without prejudice apology to the Professional for failure to properly process, consider and investigate her complaint prior to the work permit being granted in this case. For the avoidance of doubt, a "without prejudice" apology should be more substantive than mere 'regret'. The apology should be copied to the Ombudsman and should articulate:
 - a) an admission the Complainant was wronged;
 - b) a detailed explanation of what went wrong; and
 - c) the steps being taken to prevent a recurrence in the future.
- 2) **We recommended** that the Department ensure that it looks carefully at how the Employer conducts itself after the work permit expires.
- 3) **We recommended** that the Department provide the Professional with the reasons for making the decision not to revoke the permit. (We are aware that the Department could not do so without the Minister's agreement.)

General Recommendations

- 1) **We recommended** that the Department should review its file management system and instruct officers on appropriate diligence with respect to incoming complaints and appropriate regard given to ensure that complaints are captured and tracked.

³ Had the Public Access to Information Act 2010 been operative at the time of this complaint, the information provided to the Professional may have resulted in her requesting the reasons for the Minister's decision.

⁴ The UK Parliamentary and Health Service Ombudsman's Principles of Good Administration. (n.d.). Retrieved June 18, 2015, from <http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-administration/1>

- 2) We recommended** that the Department's "Work Permit and Advertising Guidelines – Advertising and Recruitment Criteria" be amended such that changes to closing dates or changes to application addresses render the advertisement invalid.

Department's Response

Following the issuance of the Ombudsman's findings in this matter, we met with the Department. More correspondence between us followed. The Department did not accept our criticism of it as fair because the Minister, as was his right, declined to follow the Department's recommendation to revoke the work permit following its investigation. We acknowledge that the Department is not responsible for the Minister's decision. However, it is responsible for failing the Professional by not giving sufficient regard to the information she provided, not adequately addressing her complaint in a timely manner and not ensuring compliance with its policies. We received no correspondence from the Ministry.

By letter the Department wrote to us that it would not be:

- 1) providing a without prejudice apology to the Professional; or
- 2) providing the reasons for making the decision not to revoke the work permit; or
- 3) reviewing its file management system and instructing officers on appropriate diligence with respect to incoming complaints and inappropriate regard to ensure that complaints are captured and tracked.

The Department stated that it will address the remaining recommendations, namely that the Department:

- 1) ensures that it looks carefully at how the Employer conducts itself after the work permit expires; and
- 2) amends its "Work Permit and Advertising Guidelines – Advertising and Recruitment Criteria" so that changes to closing dates or changes to application addresses would render the advertisement invalid.

The Department has not been provided us with specific information on how it will consider the Employer's conduct in the future. It advised that the recommendation regarding the "Work Permit Advertising Criteria" had been included already in the Department's draft Work Permit Policy which was implemented in March 2015.

We draw the public's attention to the Ministry's and the Department's failure to implement the Ombudsman's recommendations, purposely crafted to address the unfairness to the Professional in this complaint. The Ombudsman has no power to compel a Department to implement our recommendations. This does not mean the Department, the Ministry and other authorities are free to dismiss recommendations they do not like. Accepted principles and legal authority dictate that Ombudsman recommendations are expected to be implemented. This is an integral part of the constitutional oversight of the Civil Service that an independent Ombudsman was established by the Legislature to carry out.



This explains why, when an authority fails to adequately implement our recommendations, we are empowered to reveal this failure to the Legislature and to the public, and further why we have included it in this Annual Report.

Authorities and public servants deserve guidance on best practice and recommendations on how to get things right.

Commentary on Whistle-Blowing Protection

Members of the public may have the impression that any good governance issue can be looked into by the Ombudsman. This would be incorrect. In fact our legislation sets certain restrictions on the scope of what we can investigate. One such exclusion is any administrative action taken in respect of personnel matters in the public service. Still there are some good governance issues with regard to personnel matters that have far-reaching impact on the capacity of the Civil Service to operate at its best which do warrant our attention. We then encourage the Government to appropriately address these issues. A noteworthy example is protection for whistle-blowers from retaliation or reprisal within the Civil Service.

Recurring complaints to this Office have highlighted the critical role that Government leadership plays in fostering an environment in which civil servants feel less intimidated by the prospect of reporting wrongdoing, illegal activities or even serious inefficiencies within the administration of Government authorities. Public sector employees must be empowered to feel that they can report issues without fear, even when this act might bring a negative impact to their advancement or livelihood. One civil servant has complained to our Office about the perceived impact of her past whistle-blowing. She continues to be unsuccessful in her efforts to gain a more senior role in the public sector that is commensurate with her education and skills. While she remains employed, she has complained of feeling blackballed by senior civil servants who previously had commended her job performance and leadership qualities.

Bermuda has made good strides in introducing legislation to protect whistle-blowers, namely the Good Governance Acts 2011 and 2012. Special protections are offered also under the Human Rights Act 1981, the Employment Act 2000 and the Ombudsman Act when individuals are complaining to their respective bodies. There are gaps, however, in what the legislation protects. A grey area in which there is no apparent redress is hiring practices. In addition to the statutory protection, policies and procedures become necessary to not only address the gaps but also to outline how the statute should be applied to individual cases and guide the assessment processes of those making hiring decisions in the public sector.

The Government should be guided by policies and procedures which assist in determining whether or not the facts of a case support claims of retaliation for whistle-blowing. There must be sets of standards that help to establish whether a complainant fits the criteria of someone to be afforded protection as a whistle-blower under the Good Governance Acts 2011 and 2012. The civil servant mentioned above might provide a suitable test case. Further, a human resources and management policy is needed to adequately address important aspects not covered by the statute. For instance, such policy must offer protection for whistle-blowers from retaliation in respect of hiring practices, promotions and the awarding of contracts. The Government's position is that the benefits such protections may offer must be weighed against the challenges faced by the employers of employees who may not be genuine whistle-blowers and instead make allegations disingenuously. While this concern is valid, it should not limit the Government from canvassing how these gaps in the legislation have been addressed in other jurisdictions and how best to establish the authenticity of the complaining employee.

The Ombudsman's 2012 Annual Report made a general recommendation that the broad language of section 8 of the Human Rights Act 1981 be considered during the next phase of the Government's drafting of the statute. The Government has not yet brought about amendments to the Good Governance Acts 2011 and 2012. As a matter for urgent consideration, Government leadership should address the highlighted gaps with fair and efficient policies and procedures that fortify the current legislative framework. In the absence of such policy protections, we are concerned that potential reporters of wrongdoing will be less forthcoming in bringing to light what they believe they should in the public interest. The Ombudsman will continue to recommend that the Government explore what a suitable policy and procedural framework might look like for the Civil Service. Our Office remains a channel for Government to utilise in its efforts to address these gaps.



Special Reports

Update on Corporation of Hamilton

Background

In December 2013, the Office of the Ombudsman delivered to Parliament '4x6= 262 Special Report: Ombudsman's Own Motion Investigation into Governance at the Corporation of Hamilton' ("2013 Special Report"). The 2013 Special Report focused on the Corporation of Hamilton's ("Corporation") Request for Proposal ("RFP") and Selection process for the development of the Hamilton Waterfront. The proposed development was described as the most significant construction project ever in Bermuda. The process to select a bidder to develop the Waterfront by the Corporation raised a number of governance concerns.

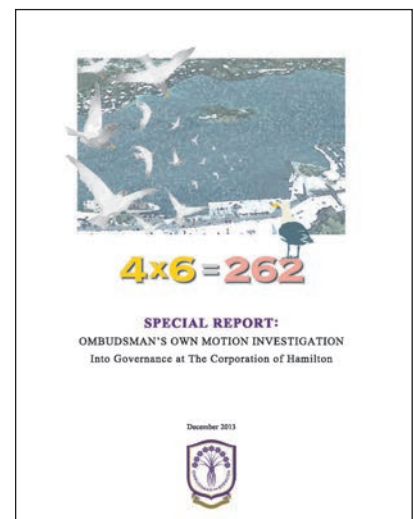
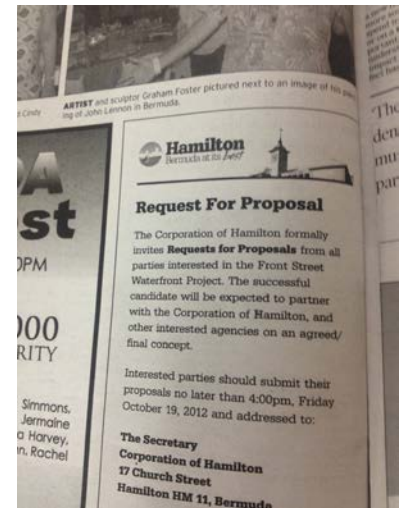
The 2013 Special Report found maladministration on several grounds including:

- the RFP advertisement was inadequate, improperly excluded the advice and role of technical staff and was contrary to well established good RFP practice, including the Corporation's own procurement guidelines;
- the RFP submission process was unclear, unfair, and lacking in transparency;
- the applicant evaluation and selection processes were arbitrary, not properly documented, not transparent, and failed to disclose potential conflicts of interest;
- the Corporation's resolution selecting the successful bidder required that seven conditions be met prior to awarding contracts to the bidder. There was no evidence that these conditions precedent were met;
- three members of the Corporation claimed that they vetted the criteria and determined that at least one of the conditions regarding financing had been satisfied. However, there was no contemporaneous evidence of such vetting and no oral confirmation to the other members of the Corporation or written confirmation in the Minutes that the conditions precedent to awarding the contracts had been met as required by the legal resolution of the Corporation; and
- generally, relevant technical staff and all members of the Corporation were not privy to all pertinent information concerning the awarding of contracts.

Update

The former Ombudsman reported in detail on the Corporation's actions and conduct with a focus on the public interest issues raised by the governance failures in regard to transparency, conflicts of interest and accountability.¹ The 2013 Special Report made key Findings and Recommendations from the investigation of the issues set out above. Recognition by the Corporation and respect for the validity of the Recommendations may have altered or changed conduct in a number of ways; for example in the observance of what would be considered normal and good practice, declarations of interests, and taking action to avoid conflicts of interest, real or apparent.²

In response and during the 2014 year, the Corporation obstructed³ and challenged the 2013 Special



¹ Reference to the Corporation is to the body corporate, the executive of which is the elected Council. We note that there were members of the Council who objected to actions taken and decisions made by the Council as a whole.

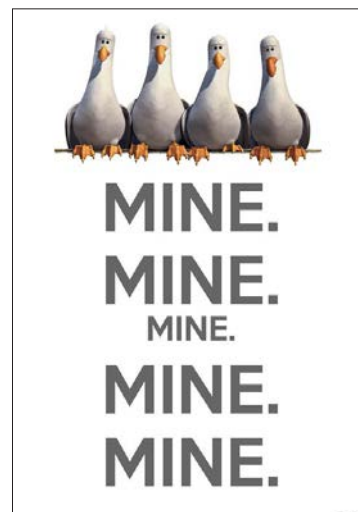
² This account relates to matters in the 2014 year. In May 2015 elections resulted in changes within the Corporation itself.

³ A stewardship notice under the Municipalities Act 1923 was issued to the Corporation on 19th December 2013 and the stewardship ended on 13th March 2014. A second stewardship notice was issued on 26th January 2015 (which remains in place at time of printing).

Report process and refused to take account of the relevant Findings and Recommendations. Over the course of the year, representatives of the Corporation informed the Ombudsman that its members would have no regard to the Findings and Recommendations and planned to ignore them. This is unfortunate. In the 21st century, citizens and even the administrations that purport to be working on their behalf are trying to prove that accountability, transparency and integrity are not mere words. Increasingly, the world is embracing basic standards for good governance. The former Ombudsman's recommendations in the 2013 Special Report were all thoughtfully considered and derived from these best practices. This update in the Annual Report informs the Legislature and the public that the Corporation's response has been wholly inadequate and inappropriate.

The Corporation initiated a series of legal proceedings⁴ at the expense of the public purse which in turn required action in response by this Office at additional cost to the public.

Subsequent to the Ombudsman tabling the 2013 Special Report, further information became public. The daily newspaper of 23rd December 2014 reported that some members of the Corporation learned that the Deputy Mayor, Donal Smith, and one Councillor, Keith Davis, had a business relationship in the Caribbean with Allied's Corporate Communications Partner Victor Webb of Marston Webb International ("Communications Partner"). A member of the Corporation was reported as saying that the Deputy Mayor and the Councillor forced the Corporation, over the objections of some members of the Council, to enter into a public relations contract with Marston Webb International without disclosing that business relationship or recusing themselves. We invited parties to comment on the contents of the update. In response former members of the Council have presented conflicting information to the Ombudsman regarding whether or not Messrs Davis and Smith acknowledged their relationships with the Communication Partner before the Corporation entered into a contract with his company.



The Communications Partner confirmed the relationship in a letter to the Editor of the Royal Gazette on 27th December 2014 that set out his expertise and questioned why the relationship with the Deputy Mayor and the Councillor should be considered controversial. No mention was made by the media or anyone else that the Communications Partner was also part of the development team that had been approved a year earlier in the criticised Waterfront process.

It would appear that the Corporation's failure, which turned out to be a divided house, to respect and take any proper account of the Findings and Recommendations after they had been provided a number of time extensions in which to do so, further demonstrated an unwillingness to act as it should have in the public interest. The Corporation was required to discharge its responsibilities for good governance, accountability and transparency. This included the requirement for Council Members to declare interests and avoid conflicts of interest and generally recognise that they should be accountable for their actions, individually and collectively.

The Corporation is responsible for the failure to deal with the Recommendations, take action and be accountable for matters which were the subject of the 2013 Special Report. The Corporation may be compelled to examine such past conduct which may also have come to the attention of other investigating services or bodies. The Corporation's failure to take action to give effect to the Recommendations was inadequate and inappropriate. Our Office remains prepared to work with the Corporation to see that the Recommendations made in the 2013 Special Report are acknowledged and addressed.

⁴ In the legal proceedings initiated by the Corporation at the end of December 2014, the Ombudsman responded by applying to strike-out any claims or actions against the Office of the Ombudsman. The application was entirely successful. The Chief Justice, Mr. Justice Ian R. C. Kwaile referred in his Ruling to claims against the Ombudsman and making the Ombudsman a party to any such proceedings, as follows: "...it was plain and obvious this complaint was bound to fail because the Ombudsman is not [a] judicial or adjudicatory authority in the requisite sense."

Update on A Grave Error

On 31st January 2014 the Ombudsman tabled her Report “A Grave Error: The Ombudsman for Bermuda’s Own Motion Investigation into the Demolition of Tombs in the Marsden Methodist Memorial Cemetery at Tucker’s Point” (“A Grave Error”). It has been over a year since A Grave Error was published. This update is to inform the Legislature and the public of developments since the publication of the Report.

Background

In October 2013 the tombstones at the Marsden Methodist Memorial Cemetery at Tucker’s Point (“the Cemetery”) were demolished. The Ombudsman was notified soon after the demolition occurred and investigated the actions that led to the demolition. A Grave Error was a follow up to the February 2012 report “Today’s Choices: Tomorrow’s Costs” (“TC:TC”) which gave an account of the investigation into the process and scope of analysis for a 2011 Special Development Order at the Tucker’s Point property. The TC:TC report contained a number of recommendations for the then Ministry of the Environment, Planning and Infrastructure Strategy (“Ministry”) including the recommendation that the Cemetery be listed “as an Historic Building under section 30 of the Development and Planning Act 1974 (“DPA”). (Although already referenced under section 31 as a Historic Protection Area, a section 30 listing would add status and an extra layer of protection.)”

The Ombudsman’s concern that led to the original recommendation in TC:TC was that the designation of the Cemetery as a section 31 Historic Area is indicated only by a tiny coloured spot on the Zoning Maps which forms part of the 2008 Bermuda Plan. There was no public narrative in the Zoning Maps, Bermuda Plan, the Department of Planning’s website or elsewhere that lists the Historic Protection Areas or explains why they were so designated.

There is a document internal to the Department of Planning, namely a 2006 Historical Environment Issues Paper, which maps the location of each Historic Area. The graveyard page contains this single description: “Original Cemetery for the Tucker’s Town residents that were forcibly relocated to make way for the Bermuda Development Company’s real estate development in 1920”. The 2006 Historical Environment Issues Paper is not publicly available, although there is no obvious reason why this could not be made accessible on the Department of Planning’s website. There was concern that a simple printing or ink error in the future could be all that it would take for the small spot on the Zoning Map to disappear. This is not accepted as a real risk by the Department of Planning due to a digital layer on zoning maps.

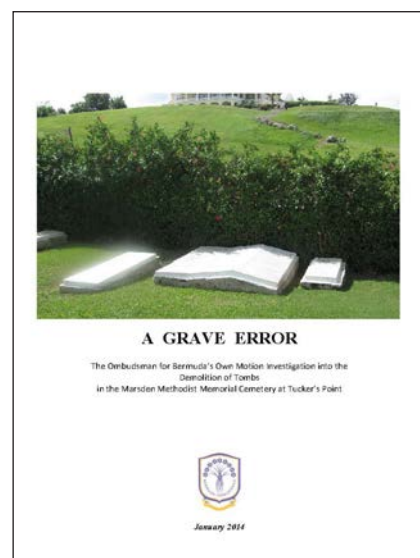
Historic Buildings listed under section 30 of the DPA are online and publicly available. Hence, the recommendation that this would add an “extra layer of protection”.

The Ministry did not implement this recommendation and in mid-October 2012 the graveyard was demolished.

Update

The Ombudsman has continued to follow up with the Department of Planning and Ministry regarding implementation of the recommendations.

It is very difficult to see why the Ministry and the Department of Planning were unable to properly respond in this instance, where action would have helped to prevent destruction of the places of rest of this community of Bermudians of African descent. Throughout the process there seemed to be a failure to come to grips with the critical issues, to properly engage with the problem consistent with the professional duty and responsibility to provide real protection to such historic grave sites.





The Ministry and the Department of Planning were required to take account of the fact that there was a Special Development Order ("SDO") in place. Further, it was the responsibility and duty of qualified technical officers of the Ministry and the Department of Planning to actively seek to provide solutions for the protection of this valuable historical site. This was particularly the case with an SDO in place, a process in which officers were involved and that was prominent and of interest to the public.

The Ombudsman's jurisdictional focus is directed to the conduct and actions of Ministries and Departments of Government and as such our Office does not have jurisdiction over entirely private entities. Fairness, which is a guiding principle for this Office, requires acknowledgement that other hands contributed to the desecration caused in this instance. The negative impact on the Cemetery was not exclusively due to the inaction or ineffectiveness of the Government in this case, although the Ministry and the Department of Planning had a part in this for which they must account.

In October 2014 the Minister of Home Affairs listed the Cemetery, east of 40 Stables Lane, St. George's, as a Grade HM (Historic Monument) under section 30 of the DPA. The Historic Monument is a type of listed building under section 30 and listed buildings are considered to be of special architectural or historic interest; thus any proposed development is subject to a strict development regime.

This Office recognises that the Ministry, after the public consultation period required under section 30 of the DPA, has taken steps to preserve the Cemetery. Listing the Cemetery under section 30 of the DPA fulfilled the Ombudsman's recommendation in TC:TC. Regrettably, it came two years after the Cemetery's tombstones were demolished.

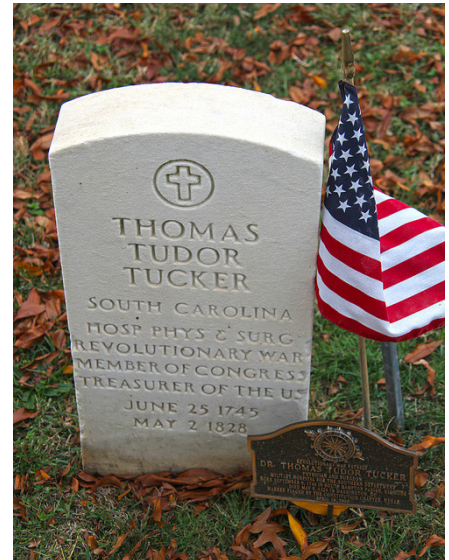
At the conclusion of A Grave Error the Ombudsman set out detailed recommendations to be carried out by both Government authorities and the other stakeholders. These recommendations ranged from the Development Application Board approving a temporary net or other barrier for the Tucker's Point practice tee to permanent reconstruction of the tombs at the gravesite. Following the publication of A Grave Error, this Office consulted with the Department of Planning and the Ministry of Home Affairs, who are charged with preserving the grave site, seeking updates on the implementation of the recommendations from A Grave Error. Unfortunately, save for the listing above, there has been very limited action taken or proposed to be taken of which we were aware. It has always been recognised that multiple parties would be involved in negotiating the implementation of these recommendations. The Government must take its important official role with this but so far it declined to do so. In response to this update they have brought to our attention conversations they have had with some of the stakeholders. They also say it would be inappropriate for the Government to take a lead role as recommended. It is unfortunate that the focus apparently remains on technical objectives.

The idea of memorialising a grave site was endorsed by the Government of Bermuda last year. On 31st May 2014, the Bermuda Government participated in a ceremony to mark the grave, on US soil, of 18th century Bermudian-born Thomas Tudor Tucker. In the 1775 "Gunpowder Plot" he negotiated with Benjamin Franklin to steal and deliver to the rebel forces 100 barrels of British Government gunpowder that was stored in Bermuda. He and his father were protecting Bermuda's mercantile interests by trying to get Bermuda from under the embargo placed by the Continental Congress on British Colonies loyal to the King.

If the Government thinks it is important to mark a grave on US soil, why is it not important to participate in and contribute to restoration and commemorating the graves of a unique, culturally rich and significant community of African descent, right here on our own soil?

The Ombudsman was established by the Legislature to oversee actions of the Civil Service and to make recommendations that are expected to be implemented unless it is appropriate and adequate not to do so. Bermuda cannot proclaim to the world that we are a well governed jurisdiction with checks and balances and ignore the checks and balances when they are uncomfortable. Either we respect this Constitutional oversight or we do not.

The Government, including the Ministry of Home Affairs, the Department of Planning, the Development Applications Board, and any other relevant entities along with all stake holders including private bodies and the public of Bermuda are urged to give consideration to the recommendations set out in A Grave Error and to see that these recommendations are implemented. It would be disappointing if the year 2020, marking the 100th Anniversary of this landmark that symbolises so much that is Bermuda's history, was to pass without recognition and tribute to the memory of those brave Bermudians. We strongly encourage the Government to do the right thing, be accountable and implement the Recommendations set out in A Grave Error.



**Learn more about all of the Ombudsman's
own motion systemic investigations!**

**Download any Special Report from
www.ombudsman.bm/systemic_reports.html
(under 'publications')**

Ombudsman Act 2004 – In a Nutshell

Chapter VI A, section 93A of the Bermuda Constitution 1968 provides:

- For appointment of the Ombudsman by the Governor, after consultation with the Premier who shall first have consulted the Opposition Leader.
- For removal by the Governor for inability to discharge the functions of office, misbehaviour, or engaging in any other unauthorized occupation.
- That in the exercise of her functions, the Ombudsman shall not be subject to the direction or control of any other person or authority.

Prefer your own version of our governing legislation?

Download the .pdf from:

www.ombudsman.bm
(under 'links')

Or search the database at:
www.bermudalaws.bm

The Ombudsman Act provides that:

- the Ombudsman may investigate administrative decisions, acts, recommendations; failure to do an act or make a decision or recommendation; and failure to provide reasons for a decision or action. (Section 2)
- the Ombudsman determines if there is evidence of “Maladministration” which includes actions which are inefficient, bad, improper, unreasonable delay, abuse of power (including discretionary), contrary to or mistake of law, mistake of facts, irrelevant grounds, unfair, oppressive, improperly discriminatory, arbitrary procedures, negligent. (Section 2)
- the Ombudsman reviews administrative actions of all Government departments and boards, public Authorities, other bodies established by Legislature or a Minister or whose revenues or fees derive from money provided or authorized by Legislature. (Section 3)
- the Ombudsman investigates administrative action of an authority:
 - pursuant to a specific complaint or on her own motion – notwithstanding that no complaint has been made – where there are reasonable grounds to carry out an investigation in the public interest; *and*
 - makes recommendations about the specific complaint and generally about ways of improving administrative practices and procedures. (Section 5)
- the Ombudsman may not investigate:
 - until existing procedures or appeals have been exhausted unless she determines that it was not reasonable for the Complainant to have resorted to such procedures; or
 - those matters listed in the Schedule to the Act, including: administrative actions that may not be inquired into by any Court; actions taken by Cabinet, Ministers or Junior Ministers; pardon power of the Governor; action taken for investigation of crime or protecting security of Bermuda; conduct of proceedings before a court of law or tribunal; personnel and employment matters. (Section 6)
- complaints may be made orally, electronically or in writing by a person aggrieved (or other suitable person) about actions within the last 12 months. (Section 7)
 - Persons detained or confined are entitled to be given a sealed envelope to write to the Ombudsman. (Section 7)
- the Ombudsman may make preliminary inquiries before launching a formal investigation or mediation. (Sections 8 & 10)

- the Ombudsman may decide not to investigate if the Complainant knew of administrative action more than one year prior to complaint; existing law or administrative procedure provide adequate remedy and there is no reasonable justification for the Complainant not to have availed himself of the remedy; the complaint is frivolous, vexatious or not made in good faith or has been settled. (Section 9)
- after notifying the authority of the intent to investigate, the Ombudsman may obtain information from such persons and in such manner as she considers appropriate, including inspecting premises, summoning persons and examining them under oath. (Sections 11–13)
- all information given to the Ombudsman is privileged. It is not a breach of any relevant obligation of secrecy to provide information to the Ombudsman. No person may be penalized or discriminated against in their employment for complaining or giving information to the Ombudsman. (Section 14)
- the Ombudsman makes such recommendations as she sees fit including that an omission be rectified, decision be cancelled or altered, reasons be given, practice or course of conduct be altered and an enactment be reviewed. (Section 15)
- within 20 days of receiving the Ombudsman’s recommendation, Authorities must notify her of action taken or proposed to give effect to the recommendation or reasons for failure to implement. She may submit a Special Report to Parliament if she deems the response inadequate or inappropriate. (Section 16)
- the Ombudsman submits an Annual Report and any Special Reports to the Speaker of the House of Parliament with a copy to the Governor and a copy to the President of the Senate. The Ombudsman may not make any adverse statements in reports without giving the authority an opportunity to be heard. (Sections 17 & 24)
- the Ombudsman and staff must maintain secrecy and are privileged from Court proceedings. (Sections 20 & 21)
- any obstruction of the Ombudsman in the performance of her functions constitutes the offence of Contempt of Court. Intentional misleading or false statements are summary offences. (Sections 25 & 26)

**“ There have been errors in the administration
of the most enlightened men. ”**

– Lord Ellenborough
(*R v Lambert and Perry* (1810) 2 Camp 405)

PATI Information Statement

Although the Annual Report covers the Ombudsman activities during the year of 2014, the coming into effect of the Public Access to Information Act 2010 (“PATI”) in April 2015 ushered in a new era of transparency commenced for the Bermuda Government. From the perspective of this Office, as an advocate of good administration in Bermuda’s public authorities, providing the public with access to records held by the Government promotes accountability and will improve administrative practices in the Government if the public avails themselves of the right to request records.

Prior to the April 2015 commencement of the PATI regime, there were several complaints lodged with this Office where the issue was a public authority’s refusal to provide a record. This Office would assess such complaints through the lens of good administration, using the following principles as guidance:

- *public administration should be transparent, and information should be handled as openly as the law allows. Public bodies should give people information and, if appropriate, advice that is clear, accurate, complete, relevant and timely.*
- *public bodies should be open and truthful when accounting for their decisions and actions. They should state their criteria for decision making and give reasons for their decisions.¹*

In Bermuda's new era of open access to information, the individual public authorities have been educated in the importance of accurate record keeping and the public's right to access these records. The presumption tips in favour of providing a record unless there is an exemption to this general right.

We take the opportunity to provide the public in this Annual Report the Office of the Ombudsman's Information Statement (updated as of 18th June 2015):



Office of the Ombudsman for Bermuda

PATI Information Statement

Introduction:

The purpose of the Public Access to Information Act 2010 ("PATI Act") is to:

- (a) give the public the right to obtain access to information held by public authorities to the greatest extent possible, subject to exceptions that are in the public interest or for the protection of the rights of others;
- (b) increase transparency, and eliminate unnecessary secrecy, with regard to information held by public authorities;
- (c) increase the accountability of public authorities;
- (d) inform the public about the activities of public authorities, including the manner in which they make decisions; and
- (e) have more information placed in the public domain as a matter of routine.

Under section 5 of the PATI Act, every public authority¹ in Bermuda must produce an information statement describing its organisation, functions, policies and procedures and the name of a contact person to whom requests under the PATI Act are to be directed. The Ombudsman's information statement aims to make it easy to access key information about the Ombudsman's activities.

Here is a summary of what is in the information statement:

- Who we are and what we do
- What we spend and how we spend it
- What our priorities are and how we are doing
- How we make our decisions
- Our policies and procedures
- Lists and registers

¹ The UK Parliamentary and Health Service Ombudsman's Principles of Good Administration. (n.d.). Retrieved June 18, 2015, from <http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-administration/1>

The information provided includes: organisational structure of our Office; governing legislation; functions and powers; services and programmes; information held, grouped into decision making, administrative or other records; further information, including financial; contact details for the information officer; and locations of the information statement.

Section A: Structure, Organisation and Legislation – s.5(1)(a)

Structure & Organisation

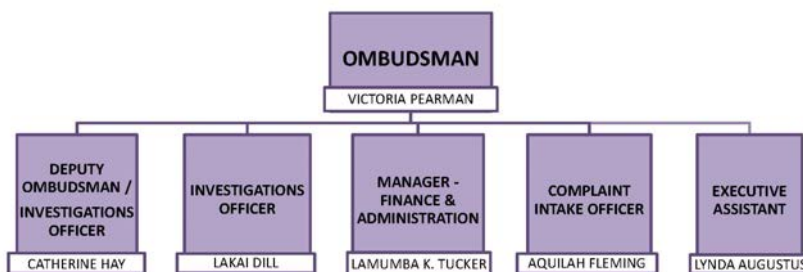
The institution of the Ombudsman was established by the 2001 Amendment to the Bermuda Constitution Order and is governed by the Ombudsman Act 2004. Section 93B(2) of the Constitution protects the fundamental characteristic of an Ombudsman, which is independence, by stipulating that “in the exercise of her functions and jurisdiction, the Ombudsman shall not be subject to the direction or control of any person or authority”. Accordingly the Office of the Ombudsman has constitutional responsibilities which it is legally bound to carry out.

Legislation

- The Ombudsman Act 2004 (“Ombudsman Act”)
- The Bermuda Constitution Order 1968 – sections 93A and 93B

OFFICE OF THE OMBUDSMAN FOR BERMUDA ORGANISATIONAL CHART

AT JULY 1, 2015
TOTAL FULL-TIME EMPLOYEE POSTS = 6



Section B.1: Functions, Powers and Duties of the Authority – s.5(1)(b)

The functions of the Ombudsman are:

- to investigate any administrative action of a public authority for the purpose of deciding whether there is evidence of maladministration on the part of the authority;
- pursuant to an investigation, to make recommendations to the authority concerning any administrative action that formed the subject of the investigation and generally about ways of improving its administrative practices and procedures; and
- to perform such other functions as may be conferred on her under the Ombudsman Act or any other Act (s.5(1) Ombudsman Act).

The Ombudsman may investigate any administrative action taken by or on behalf of a public authority:

- where a complaint is made to her by a person who claims to have been treated unjustly as a result of maladministration arising from or in connection with the administrative action taken by the authority; or
- on her own motion, notwithstanding that no complaint has been made to her, where she is satisfied that there are reasonable grounds to carry out an investigation in the public interest (s.5(2) Ombudsman Act).

Subject to the provisions of the Ombudsman Act, the Ombudsman may regulate investigations and proceedings in such manner as she sees fit.

The Ombudsman is required to annually file with the Speaker of the House of Assembly a report on the performance of her functions under the Ombudsman Act.

Section B.2: Obligations under the PATI Act – s.5(1)(b)

To provide an **information statement** for the public and promulgate it (s.5):

- To provide **other information** to the public so that the public needs only to have minimum resort to the use of the PATI Act to obtain information (s.6). This includes:
 - General information, e.g. activities of the Authority
 - Log of all information requests and their outcome
 - Quarterly expenditure, upon request (s.6(5))
 - Contracts valued at \$50,000 or more
- To **respond to information requests** in a timely manner (ss.12–16)
- To **track information requests** and provide this data to the Information Commissioner
- To respond to requests from the Information Commissioner (s.9)
- To **amend personal information** held by the Authority that is wrong or misleading following a written request by the person to whom the information relates (s.19)
- To conduct an **internal review** if formally requested (part 5)
- To respond to the Information Commissioner in her statutory review pursuant to part 6 s.47(4), if required, subject to s.21 of the Ombudsman Act
- To provide an **annual written report** to the Information Commissioner of the status of information requests (s.58(3))
- **To do anything else as required** under the PATI Act and Regulations (ss.59–60), including:
 - **Fees** for information requests
 - Management and maintenance of **records**
 - **Procedures** for administering the PATI Act
- To **train staff and make arrangements** so as to facilitate compliance with the PATI Act (s.61)
- To **designate one of its officers** to be the person to whom requests are directed (s.62)

Section C: Services and Programmes – s.5(1)(c)

Services

The key services provided by the Office of the Ombudsman are:

- to provide effective and efficient complaint handling for members of the public who make complaints about any administrative action of an authority. This may include referring a complainant to an appropriate authority for further consideration or declining a complaint in a timely fashion and with reasons for declining the complaint;
- to conduct effective and efficient preliminary inquiries and, when needed, investigations of complaints to determine whether there is evidence of maladministration on the part of the authority; and
- when she determines there is evidence of maladministration, to provide actionable recommendations for specific complaints and general recommendations for ongoing improvement in the delivery of government services.

Costs of Services

There is no charge for making a complaint with the Office of the Ombudsman or for any investigation which may be conducted pursuant to a complaint.

Section D: Records and Documents Held – s.5(1)(d)

Records obtained or created by the Office of the Ombudsman in the course of carrying out its functions are not accessible to the public under s.4(1)(b) of the PATI Act with the exception of records related to the general administration of the Office.

The Office of the Ombudsman's Manager – Finance & Administration is responsible for maintaining personnel records of the Office's staff members. These records fall within part 4 of the PATI Act "Exempt Records", under s.23 and s.24 and, as such, are exempt from disclosure to the public on the grounds that they are personal information. (S.23(2) provides exceptions to this and s.24(2) details what "personal information" does not include.)

The Office of the Ombudsman publishes her annual reports and any special reports made to Parliament (pursuant to s.24 of the Ombudsman Act). All of these public reports, along with informational pamphlets can be found at the Office of the Ombudsman and her website www.ombudsman.bm.

The Office of the Ombudsman's accounting records are produced and maintained within the Office by the Manager – Finance & Administration, who keeps the following accounting records, which are accessible to the public:

- Salaries;
- Contractor services;
- Vacation leave;
- Books, periodicals and subscriptions;
- Professional training;
- Membership fees;
- Office supplies;
- Repair and maintenance of office and office equipment;
- Travel;
- Rental – building;
- Audit files; and
- Fixed assets.

In addition the Office of the Ombudsman has service contracts that are accessible to the public.

Our financial year runs in alignment with that of the Bermuda Government (April 1st – March 31st). Each year our projected budget allocation is reported in the Approved Estimates of Revenue and Expenditure. All Government departments' budgetary information (i.e. Approved Estimates and Revenue for the Year) are tabled in the House of Assembly and published on the Bermuda Government (Ministry of Finance) website portal at www.gov.bm. Independent audits of our accounts are reported in the Financial Statements of the Related Organisations and Funds (the Public Accounts) of the Government of Bermuda. These documents can also be found on the Government portal.

The public can make specific requests to the Office of the Ombudsman for accounting records, which will be handled on a case-by-case basis.

Section E: Administration (all public access) Manuals – s.5(1)(e)

The Office of the Ombudsman does not produce an employee manual or other administrative manuals, but is guided by the "Government of Bermuda Conditions of Employment and Code of Conduct". All staff other than the Ombudsman fall under the "Bermuda Public Services Union Collective Bargaining Agreement". Also, the Office of the Ombudsman is guided by the "Government of Bermuda's Financial Instructions".

Section F: DecisionMaking Documents – s.5(1)(f)

The Ombudsman Act sets out the Ombudsman's functions, jurisdiction, complaint handling, investigatory powers and obligations. Additionally, case law of the Supreme Court of Bermuda has provided guidance on the Ombudsman's operations under the Ombudsman Act.

Section G: Information Officer – s.5(1)(g)

Ms. Catherine Hay, Deputy Ombudsman / Investigations Officer
Office of the Ombudsman for Bermuda
Suite 102, 14 Dundonald Street West, Hamilton HM 09

Tel: 441-296-6541 | Fax: 441-296-7734 | Email: info@ombudsman.bm

Section H: Any Other Information – s.5(1)(h)

Pursuant to s.4(1)(b)(iv), the PATI Act does not apply to records obtained or created by the Office of the Ombudsman in the course of carrying out her complaint handling and investigative functions. Accordingly any records related to complaints or investigations undertaken by this Office, whether pursuant to complaints made by individuals or upon the Ombudsman's own motion, are exempt from requests for information.

Section I: Any Other Information to Be Provided – s.5(1)(i)

N/A

Section J: Information Statement: Copies and Updates – s.5(2)–(5)

Pursuant to s.5(2)–(5) of the PATI Act, every public authority shall update its information statement at least once a year and make it available for inspection by the public at reasonable times.

Date information statement was updated: 1st April 2015

Locations of information statement:

- The Office of the Ombudsman, located at Suite 102, 14 Dundonald Street, Hamilton HM 09
- The Bermuda National Library
- The Bermuda Archives
- The Information Commissioner's Office
- Website: www.ombudsman.bm | Facebook: www.facebook.com/bermudaombudsman
- Notice in the Gazette published on 1st April 2015

