

Information  
Commissioner's  
Office



# ANNUAL REPORT 2015



*“Everything secret  
degenerates, even  
the administration  
of justice; nothing  
is safe that does  
not show how it  
can bear  
discussion and  
publicity.”*

John Dalberg-Acton  
1st Baron Acton  
1861



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# Information Commissioner's welcome

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I am proud to welcome you to the first Annual Report submitted by the Information Commissioner. The Information Commissioner, much like the Auditor General and Ombudsman, is a new institution of good governance that will serve Bermuda today and our children in the future. It affords the public and public authorities a neutral institution for guidance, enforcement and oversight of the new rights guaranteed by the Public Access to Information (PATI) Act 2010. This Office provides education and support for adapting to the changing nature of the relationship between the public and those within public authorities.

Our work during this inaugural year of the Information Commissioner's Office has been inspired by long-term capacity building to lay sturdy foundations, while addressing short-term objectives. You will see a theme emerge through the design and contents of our Annual Report: we are creating a multi-dimensional, transparent infrastructure to support and monitor the new rights and responsibilities of the PATI Act.

Examples of our foundational work range from the staffing of the office to completing the renovations for our traditional Bermuda limestone building. We accepted our first applications for review at the end of June and have been drafting and publishing our Guidances on key provisions and exemptions in the PATI Act, as well as policies, procedures, and Guides to govern our decision making processes.

Our year has been devoted to developing a well-governed, open, impartial, independent and high-performing institution that will serve our community for many years to come. During a time of political and economic challenges, we are excited to share the emergence of a new institution in which we can all take pride—one that sides with no one and belongs to everyone.

The Information Commissioner's authority to enforce the obligations of the PATI Act through decisions on reviews ensures that the PATI Act will be more than a paper tiger. As we move forward in the upcoming year, I will issue decisions reached through a fair process and impartial application of the law. These decisions will further the understanding of both the public and public authorities about the nature of the rights under the Act and the strength of their independent enforceability.

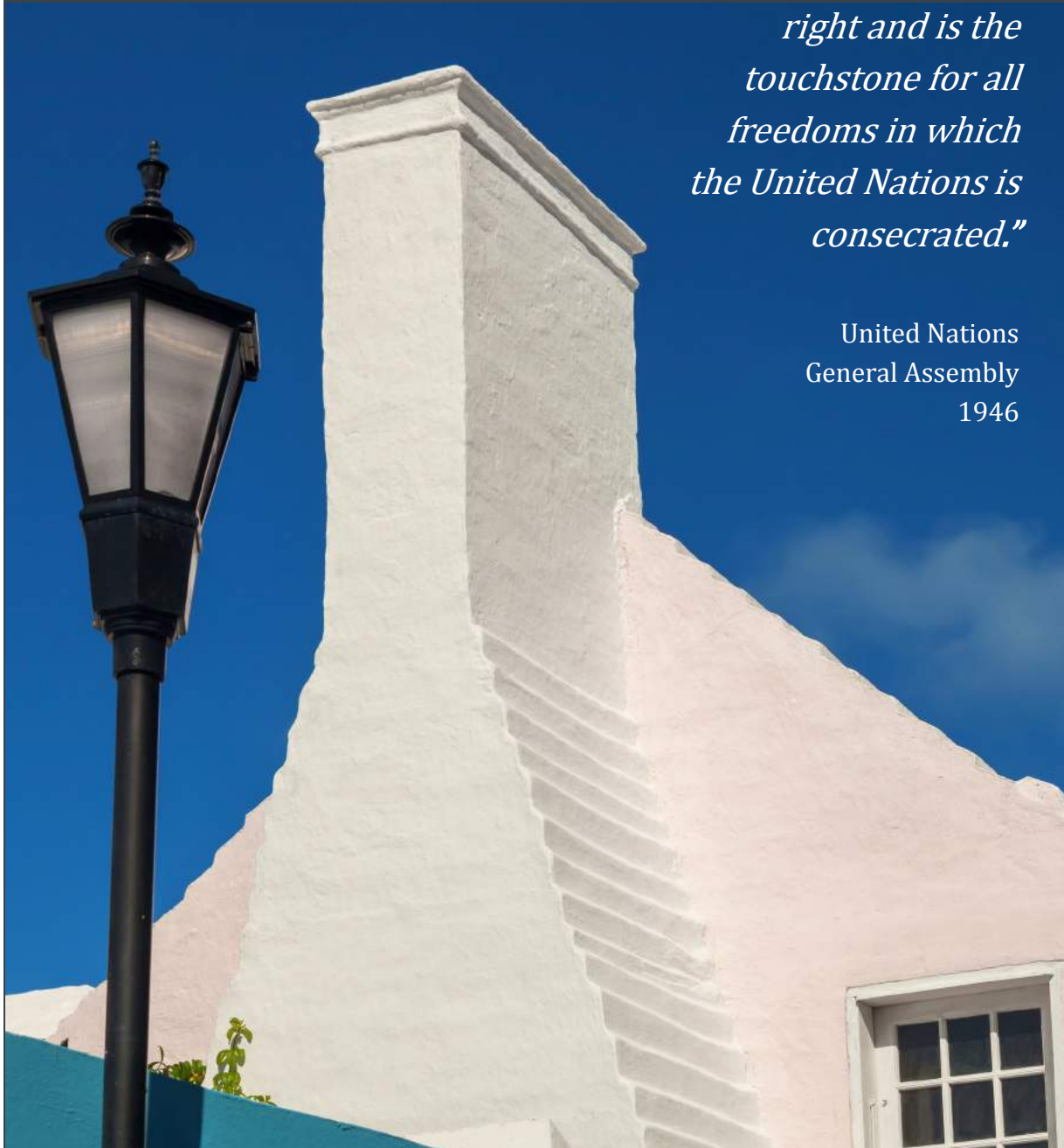
A critical piece of our work in these early years is also to ensure that the public and public authorities have the awareness, guidance and resources to understand properly how to give effect to the rights under the PATI Act. Our mandate is to educate the public about their new right: how to use it responsibly and effectively. We are also tasked with promoting the public and public authorities' understanding of the proper balance between the vast majority of records that the public authorities should willingly provide to the public, and the narrower category of records that may be legitimately withheld under the PATI Act.

Finally, our Annual Report does not actually cover a full year of either our Office or the PATI Act. We knew it was important, though, to give all stakeholders a snapshot of the first ten months of the PATI Act. The production of our Annual Report at this point in our development is a true testament to the skill and dedication of my staff. We look forward to your feedback as we reflect on lessons learned and our future efforts.

**Gitanjali S. Gutierrez**  
**Information Commissioner**

*“Freedom of  
Information is a  
fundamental human  
right and is the  
touchstone for all  
freedoms in which  
the United Nations is  
consecrated.”*

United Nations  
General Assembly  
1946





## Our Mission

*The  
Information  
Commissioner's Office  
seeks to work for all of  
the people of Bermuda to  
ensure full access to  
public records within the  
provisions of the Public  
Access to Information  
Act.*





# The Information Commissioner's Office

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The keystone of the PATI regime is the Information Commissioner's Office. Through our independent oversight and support, the various stakeholders receive guidance to support their good practice and decision making, information about their rights and responsibilities under the Act, and an independent, neutral authority to help resolve confusion or disputes about where to draw the line between disclosure and confidentiality.

Our fundamental approach to our work is rooted in the Information Commissioner's mandate to promote public access to information; provide guidance to public authorities and the public about the obligations under the PATI Act; and engage in oversight of public authorities' compliance with statutory obligations.

We are guided by our commitment to three core values: independence, integrity and fairness.

## Independence

We will work independently to oversee compliance with the PATI Act.

We will take action when the PATI Act and our policies say we should.

We will use the full force of the Information Commissioner's powers to promote and safeguard the right to access information.

We will ensure that when carrying out her functions, the Information Commissioner is not subject to the direction or control of any person.

## Integrity

We will make objective, evidence-based decisions based upon the reasoned application of the PATI Act's provisions and our policies to well-founded facts.

We will fulfil the Information Commissioner's mandate according to the requirements of the PATI Act and our policies, without favour, partiality or self-interest.

## Fairness

We will ensure a thorough and timely investigation.

Our communications will be courteous, professional and direct.

We will apply the same law and policies to every public authority and individual.

# Our team

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**Gitanjali S. Gutierrez**, the Information Commissioner, has the statutory responsibility to promote public access to information by raising public awareness and understanding of the rights conferred by the Act, and by providing guidance to and oversight of public authorities concerning the obligations imposed on them by the Act. She also decides reviews from decisions made by public authorities under the PATI Act. She is the Accounting Officer for the finances of the ICO.



**Jason D. Outerbridge**, the Assistant Information Commissioner, is responsible for working closely with the Information Commissioner to monitor, investigate and report on public authorities' compliance with Act and to promote public awareness of the rights under the PATI Act. He is also responsible for supporting the consideration of applications for review of decisions made by public authorities under the PATI Act.



**Tikitta Suhartono**, our Office Manager, is responsible for all aspects of the running of the Office, including the financial management, office management and administration and human resources management of the Office.

Our **Investigation Officer** is responsible for responding to inquiries as well as providing investigative and research support for the review process, the compliance assessments and other investigations. We anticipate filling this position in 2016.

Our **Policy and Education Officer** is responsible for proactive outreach to raise public awareness about the rights and responsibilities under the Act, and to assist with research and development of our information rights law. We anticipate filling this position in 2016.

**Patricia A. Trott (second from right)**, our former temporary Administrative Assistant, was the first employee of the Office and provided invaluable assistance during its first months of operation.

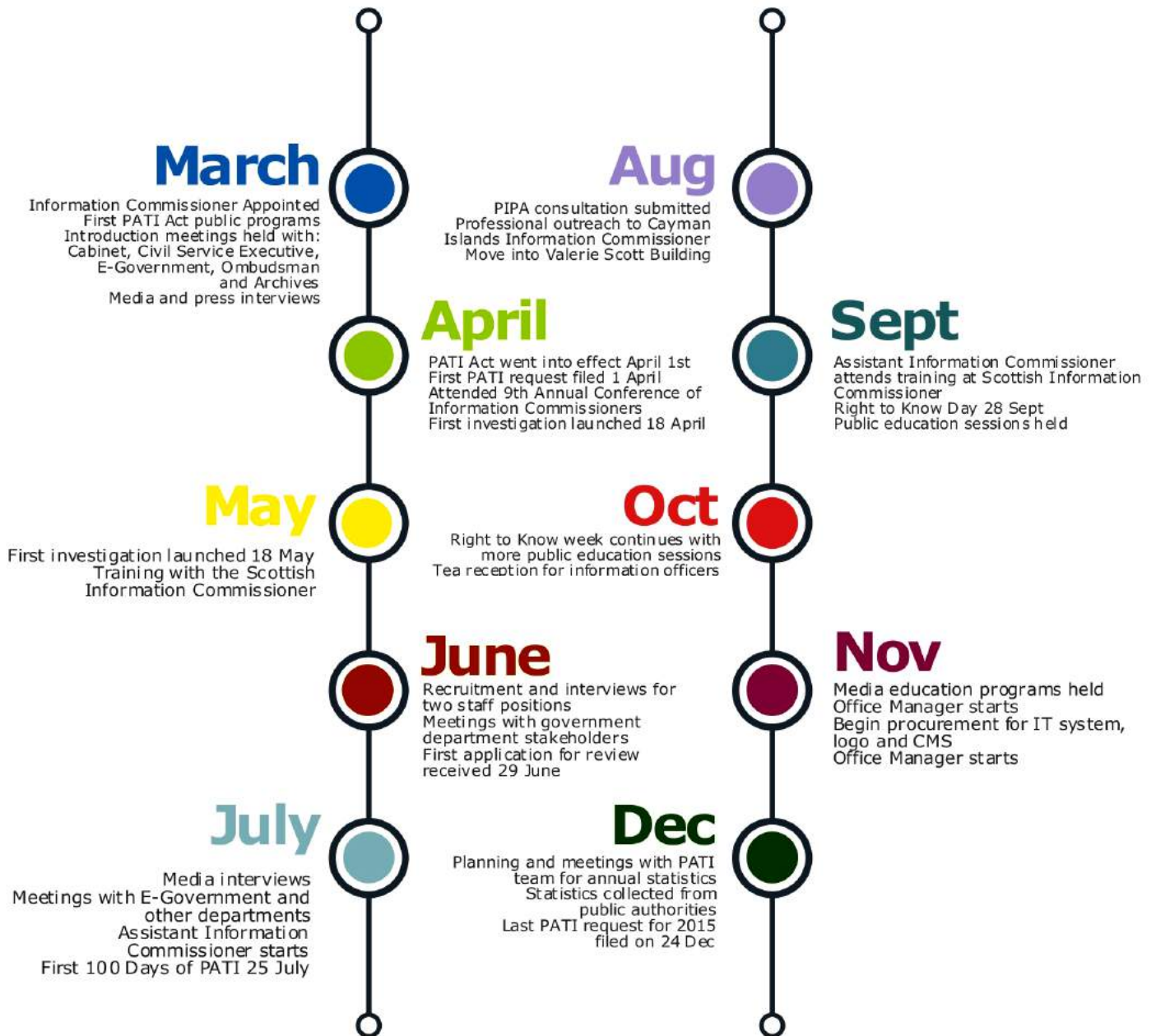
Workforce Development intern, **Alexa Holdipp (first from left)**, spent the summer of 2015 with our Office as part of our commitment to provide mentorship to young adults interested in law and policy.





# Our timeline

We have accomplished a great deal across many areas of our work.  
We have taken a moment to share the highlights of our first months.







WHAT WE DO

Strengthening the rights  
and enforcing the Act

# A new right to access information

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The Public Access to Information (PATI) Act 2010 is one of the most important democratic advances in Bermuda in decades. This is not overstated.

As set forth in section 2 of the PATI Act, its purposes are to:

- 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;
- increase transparency, and eliminate unnecessary secrecy, with regard to information held by public authorities;
- increase the accountability of public authorities;
- inform the public about the activities of public authorities, including the manner in which they make decisions; and
- have more information placed in the public domain as a matter of routine.

The PATI Act fundamentally alters the relationship between the population and those who make decisions on its behalf.

The public is now placed at the centre of decisions because the PATI Act provides a new mechanism for public scrutiny. Not least, when the PATI Act went into force on 1 April 2015, those impacted by public authorities' decisions gained an enforceable right to understand the rationale behind those decisions. The governed now have a right to be more informed and effective in our democracy—regardless of the Government of the day, the particular public authority involved or the individuals asking for information.

The PATI Act also strikes a careful balance between this right and a public authority's need to keep some information confidential to protect the ability of the authority to perform its functions effectively, or to protect the wellbeing of the public. The PATI Act is designed to improve decision making and performance within public authorities, not to erode it. That principle is enshrined in many of the exemptions within the Act, which set out the legal justifications for withholding records from requesters.

Like the right to vote, the right to access information is a critical tool of democracy.





# Strengthening the rights: public education

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The Information Commissioner's Office held its first public programme on 16 March 2015, a few weeks before the PATI Act went into effect. Since that day, the ICO has provided twelve formal education programmes for community and professional groups, as well as the general public, that have reached over two hundred people in 2015.

Our website and Facebook page also went live in April 2015. Our social media efforts throughout the year, including during Right to Know Week, reached 27,864 people.

Throughout the year, the ICO contributed to the effort to maintain sustained media coverage of PATI rights through in-depth interviews, press releases and opinion pieces. The work of the Information Commissioner's Office was covered by diverse news outlets, including Bernews, MJM's Bermuda Law Blog, the Need to Lead on HOT1075, the Royal Gazette, the Sherri J Show, The Workers Voice and ZBM News.

Through each of the media engagements, the ICO sought to increase public awareness about how to file a PATI request, and the ways in which the PATI Act can help individuals stay informed, increase the accountability of public authorities, question public spending and be more effectively engaged with decision makers.

Our social media campaigns reached **27,864 people** in 2015

We responded to over **200 inquiries** in 2015

## Responding to Inquiries

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Along with our written guidances, we regularly respond to inquiries from the public, media and public authorities about a variety of topics. The questions we answer range from general questions about how the PATI Act works, to how to contact public authorities to make a request, to the nature of the tests for specific exemptions. Our office maintains hard copies of all of the Information Statements, which are available for the public to use. We also keep an updated list of the public authorities and their Information Statements on our website, [www.ico.bm](http://www.ico.bm).

We receive queries through our website and email, as well as over the phone. All of our staff have also found ourselves in the grocery store, coffee shop and on the street talking to people about how the PATI Act works. We will continue to respond to inquiries as a routine part of our work.



# Strengthening the rights: public education

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## International Right to Know Day

28 September 2015

The Information Commissioner's Office celebrated our first International Right to Know Day on 28 September as we joined over 100 countries with public access to information laws. International Right to Know Day was established on 28 September 2002 by campaigners from around the world to mark the creation of the Freedom of Information Advocates Network. Since then, on 28 September each year, Information Commissioners, advocates, human rights organizations, the media, public bodies and the public celebrate the right to access information and the principles of openness, accountability and transparency.

This year, International Right to Know Day also fell during the same week that we marked six months of the PATI Act in action. The Information Commissioner's Office hosted a series of public events and media engagements during the week of 28 September – 2 October 2015 to raise awareness of the new rights under the PATI Act. In addition to the traditional education programmes, the Information Commissioner joined the Royal Gazette for a successful "Live Chat" question and answer session with the public.



Information Commissioner, Gitanjali S. Gutierrez, conducts a Know Your Rights public session during the week of International Right to Know Day

# Strengthening the rights: Guidance

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## Our Guidance Series

In addition to “know your rights” public education outreach, we also produce ICO Guidances on exemptions and key provisions of the PATI Act. We published five Guidances by the end of 2015. Our Guidances are geared towards supporting public authorities’ decision making when processing individual PATI requests. We make the Guidances available on our website. We will review them regularly to ensure that they are as clear and user-friendly as possible, particularly for non-lawyers. We would love to hear what you think of them.

In 2015, we published the following ICO Guidances, which are available on our website:

*Information Statements: Criteria for Compliance Assessment*

*Timeframes for providing access to records: section 14 and Part 2*

*The public interest test: section 21*

*Information Commissioner’s Reviews: A guidance for applicants and third parties*

*Information Commissioner’s Reviews: A guidance for public authorities*

*“Official information that enhances people’s capacity to exercise their rights belongs in the public domain. This information must be accessible and understandable.”*

United Nations  
Development  
Programme,  
Access Position paper

# Enforcing the Act: compliance oversight

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## Information Statements

The Information Commissioner's Office has oversight to monitor and enforce compliance with various requirements for proactive disclosures under the PATI Act. In 2015, the most notable of these proactive publications were the Information Statements.

The PATI Act requires every public authority to publish an Information Statement explaining its:

- Organisational structure
- Functions, powers and duties
- Services
- The types of records it holds
- The manuals it uses to carry out its work
- Policies, rules and guidelines used to make decisions or recommendations
- The contact information for the Information Officers, and
- Any other required information

The Information Statements are helpful tools for the public to find out what kinds of records are kept in a public authority and for public authorities to facilitate their work under the PATI Act.

In preparation for the PATI Act to go into effect on 1 April 2015, the Cabinet Policy Unit's PATI Implementation Team and the Cabinet PATI Legal Advisor worked extensively with public authorities to support the preparation of the Information Statements.

In March and April, the Information Commissioner addressed concerns raised by several bodies that they should not be designated as "public authorities" under the

PATI Act. The Information Commissioner was able to successfully work through the issues and reach agreement that the entities were public authorities subject to the PATI Act. When the PATI Act went into effect, the vast majority of Information Statements were published. Throughout the rest of the month, the Information Commissioner worked with public authorities to complete the remaining Information Statements and secure their publication.

By late April, every public authority had prepared an Information Statement.

The Information Commissioner's Office website, [www.ico.bm](http://www.ico.bm), contains a complete listing of public authorities with links to their up-to-date Information Statements.

The Information Commissioner holds statutory authority to provide guidance for public authorities on preparing Information Statements as well as to review the Information Statement's compliance with the statutory requirements. On 1 April 2015, the Information Commissioner published a Guidance, *Information Statements: Criteria for Compliance Assessment*, to inform public authorities of the evaluative criteria that will be used for assessment. In our 2016 Performance Measures, we committed ourselves to ensuring the publication of all 2016 Information Statements and to conducting a full audit review by 28 February 2017 to evaluate the compliance of the Information Statements to the PATI Act's requirements.

# Enforcing the Act: our reviews

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## Our approach

The PATI Act has a strong enforcement framework, and in this respect offers protections to the right of access that mirror international best practices. The ICO provides an independent review (or appeal) of the public authority's decisions or inactions. During the review process, the ICO can test the public's authority's justification for withholding a record, reasons for seeking an extension of time, failure to issue a timely decision, and any other aspect of the public authority's obligations under the Act. The PATI Act affords the Information Commissioner robust investigation powers to facilitate the review process, including the authority to compel the production of evidence and enter any premises to interview individuals or examine records and systems.

It is precisely because of these robust investigation powers and the binding legal nature of the Information Commissioner's decisions that we strive to work accurately, responsibly and fairly. To achieve this, we have spent this year studying the PATI Act's requirements and consulting with Information Commissioner's Offices in other jurisdictions to determine the most effective review process for our Office. We are developing a Review Policy and Procedures Handbook that will govern our work and will be published in early 2016.

We have published overview Guides for requesters who have asked the Information Commissioner for reviews ("applicants") and for public authorities whose decisions are subject to review. These Guides are available on our website. They are designed to give parties a sense of what to expect as the review proceeds.

As the Information Commissioner moves toward resolving

or deciding the pending applications in 2016, our investigation and decision making will be governed by the same values that guide all of our work: independence, integrity, and fairness.

To this end, we are drawing upon the experience and wisdom of other similarly-placed ICOs to implement a process that provides a fair hearing to all, consistent with the PATI Act and the Constitution. The aim is to be able to reach objective, evidence-based decisions founded upon the well-reasoned application of the PATI Act's provisions and other relevant law. We are especially committed to ensuring that parties before us understand the process and the reasons for any decision to the greatest extent possible. Our goal is that while parties may disagree with the ultimate decision in their individual case, they will trust that during a fair process their position was respectfully considered and the objective reasons for the decision are clear.

We began to receive applications for review in 2015. Some came to us too early for the Information Commissioner to have the power to decide them. We worked with the applicants to return to the relevant public authority and obtain a review decision from the head of the authority first. As shown below, we were able to resolve one application. After its resolution, we provided the public authority with a "lessons letter" that outlined suggestions for both the public authority and the ICO to improve our practices.

As of 31 December, we had seven applications for review from 2015 pending.

# Enforcing the Act: our reviews

As our Handbook sets out, when we receive an application for a review, it may ultimately progress through four stages: validation, early resolution, investigation and decision.

## Early Resolution

During early resolution, the ICO will assess whether informal resolution or formal mediation processes are appropriate to settle the issues. The ICO takes a resolution-based approach through the entire process. When appropriate based upon the issues and circumstances of the case, resolution will be considered through the entire process, up to and until the Information Commissioner issues a Decision Notice.



## Investigation

If the application is not resolved at the outset, it will move to a review and investigation. In most cases, the Information Commissioner will require the public authority provide the withheld material or details of its search process. This allows the ICO to test the public authority's assertion that information is properly withheld under an exemption or that records could not be located.



## Validation

The ICO ensures that the Information Commissioner has the legal power to consider the review. The applicant must have asked for an 'internal review' by the head of the authority first. This affords the public authority an opportunity to reconsider its decision before the Information Commissioner takes it under review.



## Decision

Once the ICO staff have conducted a full investigation and made recommendations, the case will be considered by the Information Commissioner and a Decision Notice issued. The decision may affirm, vary or reverse the decision of the public as well as make any other order consistent with the PATI Act that is appropriate. The Information Commissioner may issue a decision ordering a public authority to disclose an incorrectly withheld record. The decision is legally binding and if the public authority refuses to comply, the Information Commissioner can file the decision with the Registrar of the Supreme Court and seek enforcement in the same manner as an order of the court.



Any party aggrieved by the decision may seek judicial review.



# Our statistics

as of 31 December 2015

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In 2015, our Office received 11 applications for internal review by requesters who were dissatisfied with the way their PATI request was handled by the public authority.

We were able to close four applications by the end of 2015. Three of them were invalid because the applicant came to us too soon. We gave the applicants in those cases information about how to ask the

public authority concerned for an internal review. We explained their right to appeal to us after they received a final decision from the authority on their internal review, or if the public authority failed to decide their requester after six weeks.

We settled the fourth application between the parties, with the applicant gaining full access to the requested record.

## Applications for Review

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Open



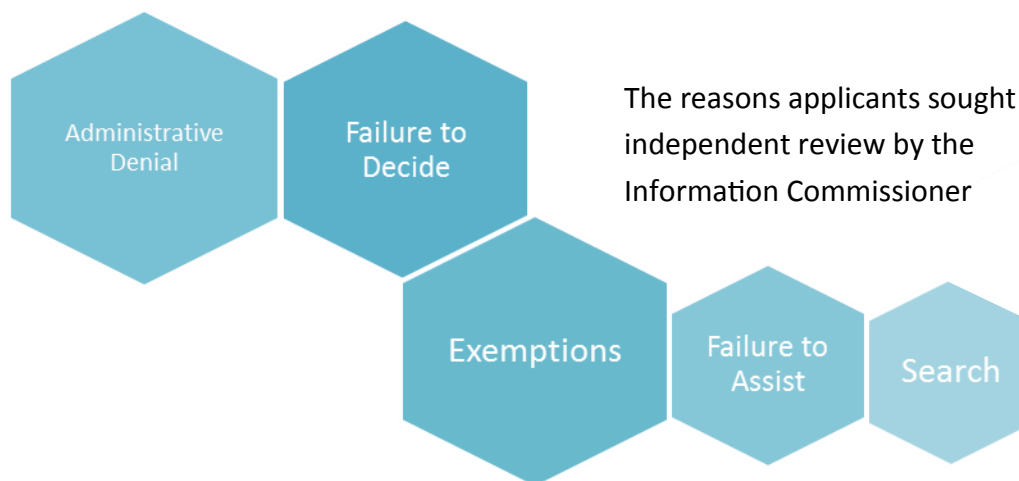
4

Closed



**4** of our open reviews challenge **exemptions** or **administrative denial** of a request

**3** of our open reviews were because the public authority **failed to decide** within the timeframes



# Enforcing the Act: our investigations

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The Information Commissioner conducts compliance investigations under section 57(3) of the PATI Act. They are designed to assess public authorities' practices and procedures used to comply with the PATI Act. This is integral to our overview and monitoring functions.

An investigation is initiated by patterns of non-compliance or serious single instances of non-compliance that threatens the actual or perceived security of the public's rights. Our objective criteria, our approach and the steps of an investigation are explained in our *Investigations Policy*, which is available on our website, [www.ico.bm](http://www.ico.bm).

Our first compliance investigation took place between May and December 2015. The investigation assessed the practices and procedures used to protect a requester's confidentiality, as required by section 12(4), within the Ministry of Public Works Headquarters and the Department of Works and Engineering.

At its conclusion, the Commissioner made a total of eight recommendations to both public authorities. The Investigation Report is appended to the Annual Report.



# Public authorities' statistics

## as of 31 December 2015

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### First PATI Request 2015

Planning Dept.  
1<sup>st</sup> April

Full access granted

The PATI Act requires public authorities to report by the end of the calendar year their annual statistics to the Information Commissioner over six variables listed in section 58 of the PATI Act. The PATI Regulations also require public authorities to keep an electronic register of requests which records essential information relative to the request.

Before the Act came into operation, the Cabinet Policy Unit's PATI Implementation Team developed a PATI Tracking System (PTS) to assist public authorities in managing the PATI process and in meeting the statutory reporting requirements. The PATI Implementation Team's efforts are exemplified by our ability to report important statistics, which will be tracked over time, as Parliament intended.

All Government of Bermuda departments and some authorities external to the Government of Bermuda use the PTS to record and track the progress of the PATI requests they receive. At the year end, the PTS creates a report which captures the required statutory information. This, in turn, is sent to the ICO for verifying, collating and inclusion in our Annual Report.

To support public authorities that do not use the tracking system, the ICO developed a basic spreadsheet to capture the relevant information. As with any new statistical reporting mechanism, limitations must be noted. Human factors such as confusion about the process, recording errors and failure to meet the reporting deadline occurred.

Also, the reporting period falls squarely during the Christmas and New Year's holiday period. Statistical returns were submitted in mid-December with the understanding that any additional 2015 requests would be reported promptly in the New Year.

This created coordination challenges over determining the completeness of the statistics through to 31 December 2015. We anticipate that reporting in 2016 and the years to come will continue to improve as we plan practical ways to overcome the challenges identified. Because this year's figures also only cover the first ten months of the PATI Act, we will include the statistics from 1 April 2015 through to 31 December 2016 again in our 2016 Annual Report.

On a final note, we have intentionally not used this year's raw data to single out public authorities for procedural mistakes in their processing of PATI requests (for example, missing deadlines for sending a requester an acknowledgement). The ICO is very aware of specific areas of practice that are in need of improvement. We have consistently taken the approach during our first year to work collaboratively with public authorities towards setting and improving good practice. Once the standards are understood and set, we will progress to escalating enforcement measures, if and when required. Beyond getting the procedures correct, any decision-making errors about whether to provide access to a record will be corrected by our decisions on reviews.

### Last PATI Request 2015

Dept. of Marine & Ports  
24<sup>th</sup> December

Partial access granted

# Public authorities' statistics

continued

Total reported number of PATI requests made under section 13 and received by public authorities

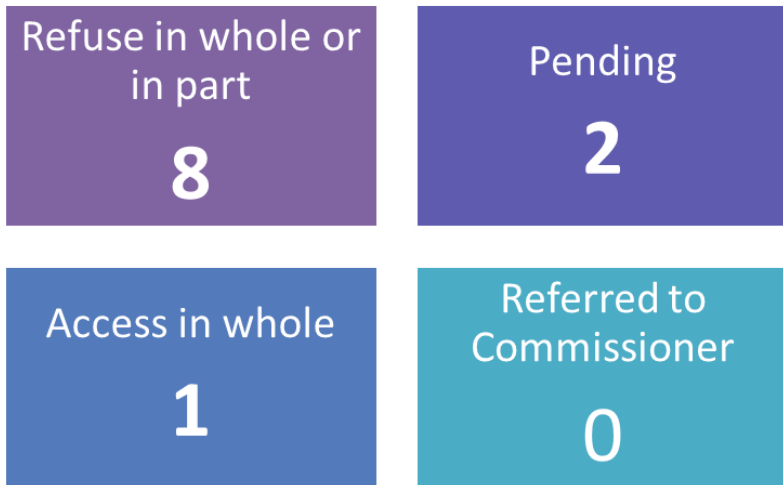
[reported in accordance with section 58(2)(a)]

No requests to amend personal information under section 19 were reported



Total reported number of requests for an internal review and dispositions

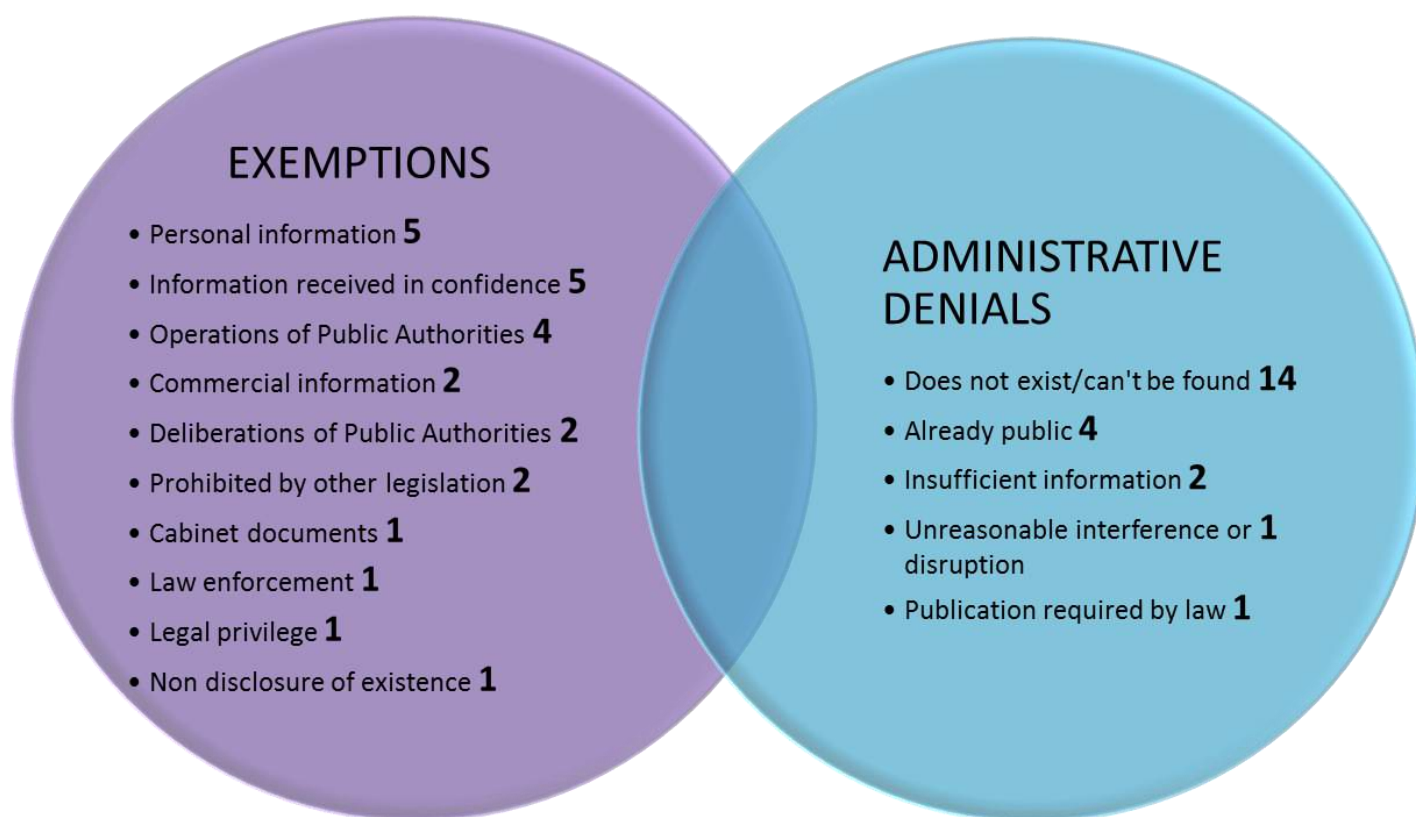
[reported in accordance with section 58(2)(d)]



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Total reported number of times exemptions were invoked by public authorities

[reported in accordance with section 58(2)(c)]



Total reported number of administrative denials were invoked by public authorities

[reported in accordance with section 58(2)(a) and (d)]



# Developing Information Rights Law

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## Anonymous requests and universal access

Every person who is Bermudian or a resident of Bermuda now has a right to request access to public records (section 12). While anyone can ask for a record, only those holding a right under the PATI Act can challenge a denial of access and pursue their rights under the PATI Act. This creates practical problems for those who currently hold the right, falls below international best practices, and precludes those who formerly resided or are visiting from accessing records related to them after they leave the island.

As a practical matter, requesters are being routinely asked by public authorities to prove their identity, submit PATI requests in person and allow the public authority to photocopy their ID. Requiring requesters to file in person to establish their identity can create a barrier to accessing their right. Consider the situation of an elderly requester or a single parent with small children who may not have transportation or easy means to go in person to a public authority's office.

While anonymous requests are not permitted, public authorities are still under an obligation to protect the confidentiality of a requester's identity. This becomes increasingly difficult to guarantee when requesters must come into the public authority's offices to submit a request, versus submitting it via email or letter.

The Act does not currently allow for requesters to seek non

-personal information using a pseudonym or anonymous. In our small community it is a fact of life that "everyone knows everyone else's business". Requesters may be put off from filing requests because they feel apprehensive about the process and want to avoid the risk of being identified and ultimately singled out or subject to retaliation or retribution.

Knowing the identity of the requester can also unconsciously, but inappropriately, influence the decision to withhold a record. The identity of the requester should not be a consideration because a release under the PATI Act is a disclosure to the public at large. Once a public authority knows the identity of a requester, however, a risk arises that actual or perceived bias can influence the PATI decision making process.

It is the position of the Information Commissioner that our small community should move towards a universal access approach. Universal access would allow for a similar mechanism to that in the Cayman Islands, where requesters may use pseudonyms to facilitate administrative communications for requests for non-personal information. This significantly reduces the administrative burden on public authorities, focuses more efforts on good decision making rather than on sorting out the logistics of identity verification, and guarantees a fairer and more accessible process for requesters.

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## Time for processing a PATI request

Time limits for public authorities to decide on requests and to complete an internal review are both set at six weeks under the Act. Requesters also have six weeks after an initial decision to ask for an internal review, and after an internal review, a requester has six weeks to ask for an independent review by the Information Commissioner. International best practice is for a decision on access to be made in 20 days. Our law is more than double the international standard.

The lengthy timeframes advantage public authorities who may instinctively seek to delay access to a record. No advantage is gained by the requester. Delay builds frustration in requesters, who often have a pressing need for the records requested.

It is the position of the Information Commissioner that a reduction in the processing times to bring them within international best practices would strengthen the PATI Act as our law and practice evolves.

## The need for privacy legislation

In July and August 2015, the Government conducted a consultation on the Personal Information Protection Act (PIPA) Draft Model. The Information Commissioner submitted extensive consultation comments identifying the interactions between the Draft Model and the PATI Act, as well as areas for harmonisation. Our movement towards enacting privacy legislation is welcome progress with significant implications in many areas. Here, we highlight only the increased need for its enactment in light of the PATI Act.

When the PATI Act went into effect, numerous individuals in the public and within public authorities recognised the challenges raised by having a right to access public records without corresponding clear privacy protections. The privacy implications of the PATI Act range from how public authorities are copying, storing and destroying requester's identification documents to the factors public authorities take under consideration when deciding whether to disclose personal information.

The Information Commissioner's full analysis of the interactions between the PATI Act and the PIPA Draft Model are available on our website.

If one were to look at the various approaches taken in the European Union, the decision whether or not to disclose personal information is subject to a complementary but different set of factors under privacy legislation than the factors applicable to the decision to disclose other types of public records under a right to access law. The privacy legal frameworks involve well-recognised principles that are not incorporated into public access to information. The Information Commissioner's Office will continue to contribute as a stakeholder in the ongoing efforts to adopt privacy legislation and provide a comprehensive information rights framework in line with international best practices.

# Establishing a new institution

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This year marked not only the PATI Act coming into force, but also the simultaneous appointment and establishment of an entirely new independent public office from scratch. Unlike many new Information Commissioner's Offices in comparable jurisdictions, we did not have a period of time to establish our organisational capacity prior to taking on our statutory responsibilities. Because of the late nature of the Information Commissioner's appointment, the ICO was not involved in the implementation timetable or preparations for the PATI Act going into effect. We have taken a very distinct approach to these challenges, driven by our focus on establishing an enduring institution and investing in local experience and skills.

We have made a conscious decision to develop our capacities and resources locally, with significant collaboration and support from the Information Commissioner's Office in the Cayman Islands and in Scotland. In some jurisdictions, an overseas advisor is hosted by a new ICO for a period ranging from one to six months to assist in the development of internal procedures and structures. We did not take this route. Instead, the Scottish Information Commissioner hosted both the Information Commissioner and Assistant Information Commissioner at separate times and afforded us an opportunity to learn from their experience. (We will be joining the Cayman Islands Information Commissioner for joint training in early 2016). We have brought this learning home and developed our organisational capacity from the ground up. While we did not benefit from the "jump start" that an overseas advisor might have provided, the framework we are building—both in terms of resources and capabilities—is solidly grounded in Bermuda.



*Scottish Information Commissioner Rosemary Agnew and Bermuda Information Commissioner Gitanjali S. Gutierrez during meetings in St. Andrews, Scotland May 2015*

We have also sought to balance the time we spend addressing the unanticipated challenges or matters that arise each week with our more planned and organised efforts to establish our Office. It has been a weekly endeavor to balance the proactive and reactive aspects of our work this year.

Two key positions in the Information Commissioner's Office were not staffed in 2015, which left a burden on our human resource capabilities. The Legislature will be able to consider the Information Commissioner's 2016/17 budget, which includes allocations for the required positions. The delay in staffing has an ongoing negative impact on the ability of the Office to fulfil its statutory functions. We look forward to recruiting and developing local talent to fill these two vacancies in mid-2016.

# A last word

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**W**e invite everyone to join us on this path towards a stronger democracy and more open society. The path will not always be smooth. Public access to information is not designed to make everyone comfortable. In fact, it is unavoidably uncomfortable at times for those in public authorities to open access to public records they hold and to subject their day-to-day activities to scrutiny. Until working in a glass bowl becomes routine, the new transparency is not always a pleasant experience. But our democracy cannot progress without it.

It can be equally uncomfortable to make your first request under the Act and risk being labelled as rude or troublesome, or accused of stepping out of line. This risk may be felt particularly acutely when a highly-publicized national disclosure of a PATI requester's name occurred six weeks after the right went into effect. Right out the gate, requesters had reason to question the security of their right to remain confidential. Those who filed PATI requests in 2015 did so because they were driven to accomplish something and recognised that the PATI Act offered a new tool for achieving it. Their bravery has paved a path for others and transformed the principles of the PATI Act into concrete action.

As uncomfortable as the process may be initially, when we begin to embrace its practices, it is guaranteed to make us better as a country, as public authorities, and as an informed and involved community. We are already seeing public authorities emerge who are proud of their ability to respond to PATI requests, provide information and demonstrate the quality of their internal workings and decision making. We see, too, those individuals who have risen to the challenge offered by the PATI Act and taken steps to measure accountability.

Over one hundred PATI requests were filed in 2015, by individuals seeking to empower themselves in their own daily lives or to obtain information that impacts their community.

Our progress continues, and the Information Commissioner's Office will be unwavering in our commitment to fair and effective oversight of these new rights and obligations.

It is a tremendous honour to serve as our first Information Commissioner. I enter this Office with the knowledge that the past, current and future success of the PATI Act is possible due to the dedication and hard work of many individuals. Our growth today would not have been possible without the leadership of multiple successive Governments, the longstanding work of the Cabinet Policy Unit's PATI Implementation Team, the advice and support of the Cabinet's PATI Legal Advisor, the ongoing campaigning for the Right to Know by organisations such as the Royal Gazette and the Centre for Justice, and the efforts and courage of the staff of public authorities and the members of the public who have been engaged in the day-to-day preparation and initial progress of their work under the PATI Act.

We look forward to strengthening our work, together.


**Gitanjali S. Gutierrez**  
**Information Commissioner**

# APPENDICES



# Appendix 1: 2015 Financial Performance

Office of the Information Commissioner's unaudited expense report for the period from 1 April to 31 December 2015.

							14/01/16	8:26:28
R5509PFR1A								
ALL GOVERNMENT EXPENDITURE								
Expense accounts								
GOVERNMENT OF BERMUDA Department by Object For the Nine Months Ending 31/12/15								
DESCRIPTION	ORIGINAL BUDGET 2015/2016	ADJUSTED BUDGET 2015/2016	CUMULATIVE PROJECTED SPEND TO DATE	ACTUAL TO DATE 2015/2016	ACTUAL TO DATE %	COMMITTED 2015/2016	RESIDUAL	RESIDUAL %
00098 INFORMATION COMMISSIONER'S OFF								
4000 EXPENDITURE	0	0	0	0	0	0	0	0
4001 EMPLOYEES	0	0	0	0	0	0	0	0
4005 SALARIES	371,540	371,040	234,102	199,206	54	0	171,834	46
4250 WAGES	0	0	24,559	37,775	0	0	(37,775)	0
4900 TRAINING	6,000	6,000	3,000	0	0	0	6,000	100
4001 EMPLOYEES	377,540	377,040	261,661	236,981	63	0	140,059	37
5000 OTHER OPERATIONAL EXPENSES	0	0	0	0	0	0	0	0
5050 TRAVEL	29,000	29,000	13,494	1,960	7	0	27,040	93
5100 COMMUNICATIONS	21,000	21,000	15,000	2,930	14	102	17,968	86
5180 ADVERTISING & PROMOTION	25,000	25,000	29,000	2,698	11	129	22,173	89
5250 PROFESSIONAL SERVICES	25,000	27,000	21,025	8,404	31	0	18,596	69
5450 RENTALS	150,000	128,250	20,000	19,334	15	0	108,916	85
5500 REPAIR AND MAINTENANCE	0	12,000	11,523	750	6	0	11,250	94
5700 ENERGY	9,000	9,000	3,717	2,468	27	0	6,532	73
5800 MATERIALS & SUPPLIES	29,500	31,750	29,490	9,017	28	13	22,720	72
6050 EQUIPMENT PURCHASES	0	5,500	70,400	1,414	26	350	3,736	68
5000 OTHER OPERATIONAL EXPENSES	288,500	288,500	213,649	48,975	17	594	238,931	83
4000 EXPENDITURE	666,040	665,540	475,310	285,956	43	594	378,990	57
00098 INFORMATION COMMISSIONER'S OFF	666,040	665,540	475,310	285,956	43	594	378,990	57
<b>ENDORSEMENT:</b>								
<i>Gitanjali Gustierrez</i>							<i>19-1-2016</i>	
HEAD OF OFFICE (PRINT NAME)		HEAD OF OFFICE (SIGNATURE)					DATE	
<b>EXPLANATIONS FOR COMMITTED AMOUNTS</b>								
	OBJECT CODE	AMOUNT	COMMENTS					
	5100	\$102.00	CELLONE; PO 21394897 08/09/15 to be deleted					
	5180	\$129.00	Royal Gazette; Invoice no. 427812, paid on batch no. 3673159					
	5800	\$13.00	Carried over from May 2015 - to be resolved					
	6050	\$350.00	2 Tech; door chime & remote installed; invoice to follow					
		\$594.00						

## Appendix 2:

# 2016 Key Performance Indicators

The following offers the first Key Performance Indicators for the Information Commissioner's Office:

**Budget Year 2016/17**  
**Information Commissioner's Office**

MEASURE/INDICATOR	TARGET OUTCOME 2016/17
<b>BUSINESS UNIT: 108000 ADMINISTRATION</b>	
Publish and file with the Legislature the ICO's s.58 Annual Report by 31 March 2017	Lay before Parliament by 31 March 2017
Complete yearly review of internal guides, procedures, and policy manuals and publish revised editions by 31 December 2016	Complete by 31 December 2016
Information Commissioner to attend 3 overseas training/conferences/meetings per year	To be completed or attended before year end
· Records Management Training/Conference	
· Information rights law conference	
· Management/information rights training	
Operational staff to attend one overseas training/conference/meeting per year	To be completed or attended before year end
· Information rights training	
· Records Management Training	
· Mediation/investigation training	
· Information rights law conference	
ICO to host 3 volunteers, interns, and/or work shadow candidates per year	3
Complete electronic and security audit by 31 September 2016	Complete by 31 September 2016
Conduct monthly internal education sessions on best practices, information rights principles, or other professional development topics	12
<b>BUSINESS UNIT: 108010 APPLICATIONS (APPEALS)</b>	
Requesters make appeals to the Information Commissioner of negative decisions by the heads of authority	60%

MEASURE/INDICATOR	TARGET OUTCOME 2016/17
<b>BUSINESS UNIT: 108010 APPLICATIONS (APPEALS), <i>continued</i></b>	
Requesters make appeals to the Information Commissioner of negative decisions by the heads of authority	60%
Acknowledge receipt of applications for review within 5 days	100%
Complete validation of applications for review within 3 weeks	95%
Compete and close valid applications within 4 months	95%
Publish Information Commissioner's decisions on www.ico.bm website within 10 days of being issued	100%
Number of judicial review cases appealed against decisions by the Information Commissioner	10% of total IC decisions
Reduce the number of invalid applications submitted to the Information Commissioner	50% reduction
Maintain strict confidentiality with respect to the ICO's work on reviews and comply with statutory confidentiality obligations	100%
<b>BUSINESS UNIT: 108020 COMPLIANCE/BEST PRACTICE</b>	
Publish all current 2016 Information Statements in publicly available database on www.ico.bm website by 1 August 2016	100%
Conduct audit review for compliance of Information Statements by 28 February 2017	95%
Complete investigations under s.57 within 4 months	95%
Complete project plan for the ICO's s.57(1) report on two-year review and investigation into general operation of the PATI Act across public authorities by 31 September 2016	Complete by 31 September 2016
Complete yearly review of existing ICO guidelines on the application of the PATI Act exemptions and other PATI Act provisions and publish revised editions by 31 March 2017	Complete by 31 March 2017
Organise and deliver quarterly best practice, leadership, and/or good governance events for public authorities	4
Conduct and complete a voluntary compliance audit of 1 public authority	Complete 1 by 31 August 2016
Respond to enquiries from public authorities on general questions about the PATI Act and its provisions	100
Provide official comment on any draft Bills which impact/impede PATI Act provisions	Ongoing
Propose beneficial legislative amendments to strengthen the PATI Act and Regulations	Ongoing

MEASURE/INDICATOR	TARGET OUTCOME 2016/17
<b>BUSINESS UNIT: 108030 PUBLIC AWARENESS</b>	
Conduct general public education sessions on using the PATI Act (outside of Right to Know Day activities)	4 by 31 March 2017
Conduct targeted education sessions to interest groups	22 by 31 March 2017
Collaborate with local charities/advocacy organisations to co-sponsor public awareness event on information rights	1 by 31 March 2017
Feedback from education sessions rated good or excellent	80%
Conduct public educational events to commemorate Right to Know Day on 28 September through 1 October 2016	3
Conduct media interviews to commemorate Right to Know Day on 28 September through 1 October 2016	2
Sponsor secondary school essay, photo, or video contest for Right to Know Day	1
Engage in media interviews by Information Commissioner to promote awareness of PATI Act	20 by 31 March 2017
Social media ad campaigns outreach	30,000 people by December 2016
Social media ad post engagements	750 people by 31 December 2016
Unique visitors to our website, www.ico.bm	300 by 31 December 2016
Offer late opening hours at least 1 day per week	100%
Translate our public guides and flyers into Portuguese	Ongoing
Increase number of PATI requests year-over-year	↑ 30% by 31 December 2016
Respond to enquiries from the public on questions concerning the PATI Act and their rights	250
Develop and produce public awareness videos on PATI rights	2
Develop and publish educational materials on information rights for primary, middle, and secondary school students (with a set of learning materials for each age grouping)	To be completed before year end

# Appendix 3:

## Information Commissioner's Investigation Report



### INFORMATION COMMISSIONER'S INVESTIGATION REPORT

Ministry of Public Works Headquarters  
Department of Works and Engineering



## Background

This Report contains the Information Commissioner’s findings and recommendations following an investigation conducted pursuant to section 57(3) of the PATI Act between 15 May 2015 and 31 December 2015 into the practices and procedures used by two public authorities—the Ministry of Public Works Headquarters and the Department of Works and Engineering—to comply with their obligations under the PATI Act.

This is the first section 57(3) investigation and practice recommendations by the Information Commissioner. It results from allegations of a breach of a requester’s confidentiality contrary to section 12(4) of the PATI Act that came to light on 15 May 2015—six weeks after the PATI Act came into effect.

Under section 57(3) of the PATI Act, “The [Information] Commissioner may at any time carry out other investigations into the practices and procedures adopted by public authorities generally or any particular public authority for the purposes of compliance with the provisions of this Act”.

An investigation into an authority’s practices and procedures pursuant to section 57(3) results in recommendations by the Information Commissioner with steps for the public authority to take for improvements. This is distinct from the Information Commissioner’s reviews of public authorities’ decisions on requests, which may ultimately conclude with a legally enforceable decision by the Information Commissioner that is subject to judicial review.

A section 57(3) investigation is also distinguishable from a criminal investigation into activities that may violate the criminal provisions of the PATI Act (sections 64 and 65). Enforcement of any criminal provision is properly the purview of the Bermuda Police Service and the Director of Public Prosecutions.

## Basis for initiating the section 57(3) investigation

A requester filed a PATI request on 4 May 2015 via email submitted to the Ministry of Public Works Headquarters. Over the next ten days the request was processed. The Ministry of Public Works Headquarters copied the request to the Department of Works and Engineering, which held the requested records. The requester subsequently went to the office of the Department of Works and Engineering to verify his identity, as required by the Department. During that visit, the requester had an unplanned encounter with the Minister for Public Works in the corridor of the Ministry Headquarters, which is shared by the Department of Works and Engineering. That encounter led to discussions between the requester and the Minister in the Minister’s office. As a result of those discussions, the requester became aware that the Minister had prior knowledge of his identity as a PATI requester without his consent.

Then on 15 May 2015, the Minister for Public Works named a requester during debate within the House of Assembly, for which he later publicly apologised. That same day, after being contacted by an uninvolved member of the public, the Information Commissioner commenced inquiries into the potential breach of confidentiality that allowed a Minister to learn the identity of a PATI requester in the first instance. Under most circumstances, a Minister should not know the name of a requester

because Ministers are not decision makers under the PATI Act or involved in the processing of a request.

The disclosure during debate in the House was the impetus for the Information Commissioner's investigation, but the actual disclosure by the Minister in Parliament is outside the remit of the Information Commissioner and does not form part of this investigation.

As a result of the Information Commissioner's initial inquiries, the Information Commissioner found sufficient factual evidence that, on the balance of probabilities, the public authorities' practices or procedures needed improvement to achieve compliance with their obligations under section 12(4) of the PATI Act to safeguard a requester's confidentiality. Pursuant to the PATI Act and as described in the Information Commissioner's Office ("ICO") investigations policy (*Investigations Policy: Investigations conducted under Section 57(3) of the PATI Act*; available at [www.ico.bm](http://www.ico.bm)), this was sufficient to warrant commencing an immediate investigation under section 57(3) of the PATI Act, into the practices and procedures at the identified public authorities for the purpose of assessing their compliance with the PATI Act. By 18 May 2015, the Information Commissioner had verbally explained to both public authorities that she was initiating an investigation and that her findings would be reported publicly due to the nature of the issues.

## Approach

As set forth in our investigations policy, when working with the public authority during an investigation, our overall aim is to enable it to achieve and maintain good practice for the benefit of both the public and the public authority.

To achieve this, the Information Commissioner and the ICO team work cooperatively and constructively with public authorities. Whenever improvements to practices and procedures are necessary, we strive to create an improvement plan that the public authority and Information Commissioner can agree upon.

From the outset, it is important to state that an assessment of practices and procedures must be made against some standard. Information Commissioner's compliance investigations in comparable jurisdictions evaluate public authorities' actions against established Practice Codes. The Information Commissioner recognises that the Minister is in the process of drafting the Code of Practice concerning the administration of the Act under section 60 of the PATI Act ("section 60 Practice Code").

Under the present environment, as the section 60 Practice Code is being drafted, public authorities and those responsible for the day-to-day administration of the PATI Act cannot avoid their responsibilities under the Act that arise when a request is filed.

Instead, public authorities must rely upon existing resources to determine and adopt their written and unwritten practices and procedures.

For purposes of this investigation, the Information Commissioner assessed both public authorities' practices and procedures against the PATI resources available to all public authorities at the time of the investigation. These are: the PATI Act which outlines legal obligations; the PATI Regulations for

instruction on carrying out the purposes and provisions of the PATI Act; training and materials provided by the Cabinet Office Central Policy Unit's PATI Implementation Team; access to advice from the Cabinet Office PATI Legal Consultant; and the computerised PATI tracking system with its inbuilt cues and reminders.

Future Information Commissioner compliance investigations, conducted after the publication of the section 60 Practice Code, will assess public authorities' practices and procedures against corresponding provisions of the section 60 Practice Code, as is done in other jurisdictions.

## Information Commissioner's Findings

### Findings

The Information Commissioner finds that confidentiality breaches occurred within both public authorities. Each authority expressed a willingness to improve its practices and procedures under the PATI Act.

The Information Commissioner found that the breaches of confidentiality stemmed from the lack of adequate practices or written procedures in four key areas:

1. Sufficient training on their statutory confidentiality obligations for all staff handling a PATI request or interacting with the PATI requester;
2. The receipt and communication of a PATI request in a manner that safeguards the requester's confidentiality;
3. Basic written procedures that can be shared and adopted by any staff member who interacts with a requester or handles a request and that uniformly safeguard the confidentiality of a requester's identity; and
4. Written procedures for senior civil servants to manage their assistance to Ministers in the preparation of responses to parliamentary questions in light of the overlap between parliamentary questions and PATI requests.

The Information Commissioner finds that although this investigation was not probative of the question of bad faith conduct on behalf of individuals, she did not uncover any information that suggested employees of the public authorities acted in bad faith when performing their duties under the PATI Act.

The Commissioner also notes that a "perfect storm" of events drew attention to the practices and procedures of these two public authorities during the handing of their very first PATI request. But the same lack of written procedures and inconsistent practice may be found across public authorities during the transitional years. The Information Commissioner's recommendations give direction towards addressing these issues in a comprehensive manner, which will best serve the public and support public authorities in their PATI practice.

## Reasoning

The obligation to maintain a requester's confidentiality is express and unequivocal in section 12 (4) of the PATI Act. It is clear and unambiguous in practice, and is held by all employees and members of a

public authority, as set out in section 12(4) of the PATI Act. No public authority should have doubt or require clarification of this obligation.

The importance of safeguarding a requester's identity cannot be overstated, particularly within a small community such as ours, where the consequences of a breach can grow exponentially and stigmatisation may remain for a lifetime.

A breach of confidentiality cannot be undone.

Once a requester's identity is revealed, the extent of the harm to both the individual requester's life and the public's perception of the security of their right to confidentiality is difficult to anticipate, as the events related to this investigation have shown. We currently do not have a mechanism that allows a requester to ask for records anonymously. Thus, maintaining a requester's confidentiality protects them from retaliation and other negative consequences when they file PATI requests in certain circumstances.

In the absence of written procedures to guide the public authority's staff in the handling of a PATI request, the public cannot have faith that their confidentiality will be safeguarded. A key tenant of the PATI Act is that the right to access a record is no longer based upon the sole discretion of the public authority or individual staff member. Rather, it is based upon a clear right set out in section 12 of the PATI Act that can only be derogated from under specific circumstances set out in the Act.

Consequently, requesters' right to have their confidence protected cannot be dependent upon who is sitting at the desk when a request is submitted. Every employee should receive and process a PATI request in the same manner based upon set written procedures. Public apprehension about filing a PATI request may be minimised if it can be seen that written procedures to protect confidentiality are adequate; that staff are trained on the procedures and required to follow them; and that breaches are rare. This will ensure that potential requesters are assured of their rights.

Each staff member taking on a new role under the PATI Act should be aware of their confidentiality obligations from the plain words in section 12(4). But relying on individual employees to educate, train and supervise themselves is an ineffective approach to managing the risk liability and responsibilities presented by the new regulatory environment under the PATI Act.

The responsibility for ensuring the necessary training and adequate written procedures for employees of a public authority falls squarely on the most senior leaders in the organisational structure. Here, the responsibility shifts upwards, beginning with the Permanent Secretary in a Ministry responsible for ensuring staff have the training and support they need to successfully implement new statutory requirements, to the Civil Service Executive who manage the civil service overall, to the Cabinet Secretary sitting as the CEO of an organisation that has just been placed under a new regulatory requirement. The Minister responsible for the PATI Act is tasked with producing the section 60 Practice Code. Finally, Cabinet Ministers, in turn, have responsibility to ensure that resources are allocated in a manner that facilitates meeting all the responsibilities assigned by the Legislature under the PATI Act, which will help address many of the improvements identified below.

Shortcomings at any level risk a cascade of errors that ultimately undermines the public's right to access public records. We succeed or fail together.

Our country has taken an historical step to implement a public access to records law. As momentous as the passage and enactment of the law has been, it signals the beginning—not the end—of laying the foundations for the right to access public records. The Information Commissioner could spend months working to improve the practices and procedures for ten or fifteen civil servants. But that approach is reactionary and piecemeal. It leaves the right subject to individual competencies rather than supported by authoritative written procedures with universal application. For a robust right of access, we need to collectively continue putting in place the resources and structure needed to support its successful application.

This, in turn, requires the commitment and efforts of Government leaders and top civil servants to meet the challenges of the needed improvement to practices and procedures as highlighted by this investigation. The Information Commissioner commits to providing collaborative support as the foundations for the PATI Act are laid, and makes a commitment to the public to use the full force of the Office to protect and promote their rights under the PATI Act.

## Information Commissioner's Recommendations

The recommendations outlined in this report have been shared and discussed with the public authorities subject to the investigation in November and December 2015. Each recommendation can have a positive impact on a public authority's ability to safeguard a requester's confidentiality. The recommendations are addressed specifically to the authorities in the investigation, but may equally benefit other public authorities who strive for good practice.

It is recognised that both public authorities have worked on improving their practices. Some of the recommendations have already been adopted in part.

During the investigation, the Department of Works and Engineering demonstrated very good practice in the handling of the request. The source of that good practice originated from an employee's prior work experience, not as a result of established practices or written procedures. Notwithstanding, the good practice was trumpeted by the ICO and discussed with Ministry of Public Works Headquarters.

Both authorities share an office space and identified, early on, improvements to the logistical arrangements of meeting with requesters at their office. Clear improvements were also made by the Ministry of Public Works Headquarters to immediately address some of the insufficiencies in their practices, such as securing PATI training for all appropriate staff.

At the close of the investigation, the Information Commissioner had not received any evidence that improvements in practice were supported by written procedures. These are critical to standardising practices to assure protection of requesters' confidentiality.

The problems associated with the overlap between PATI requests and parliamentary questions remains unaddressed by both public authorities. The confusion between the two processes persists, and needs clarifying for senior civil servants within all public authorities in the Bermuda Government.



## 1. Ensure and document staff training on the duty of confidentiality

*Finding: Staff within the public authority were unaware of duty of confidentiality or did not recognise when a breach of confidentiality occurred.*

- a. Provide training on the duty of confidentiality under section 12 of the PATI Act to all staff who may come into contact with a PATI requester in the office or who may learn about a PATI request, which could be in the form of a training by the CPU PATI Team or Legal Consultant, an in-house training, workshop, or a staff meeting.
- b. Require staff to sign a training log that records the staff training and acknowledgement of their understanding of their duty of confidentiality.
- c. Expressly include the duty of confidentiality under the PATI Act as part of any new employee induction and document new employee's receipt of this information.
- d. Adopt written practices that any individual assuming a statutory responsibility under the PATI Act for an Information Officer, a delegate of the Information Officer, or the head of the authority must, before handling a PATI request, first receive some form of PATI Training that also covers instruction on the duty of confidentiality.
- e. Clearly indicate in written procedures how coverage will be provided during absences of the statutory Information Officer.

## 2. Ensure adequate training and compliant procedures for receipt, acknowledgement, and transfer of requests

*Finding: The public authorities failed to comply with the PATI Act requirements concerning receipt, acknowledgement, and copying of PATI requests to the other authority.*

- a. The PATI training for Information Officers and their delegates will also ensure the required improvements for the Ministry of Public Works Headquarters' practices concerning the receipt, acknowledgement, and transfer of requests. These practices should be the subject of future written procedures evolving from the ICO's Guidances and the Minister's section 60 Practice Code.

## 3. Incorporate PATI duty of confidentiality into existing written governing documents

*Finding: Existing governance documents have not explicitly incorporated PATI confidentiality obligations*

- a. Review existing written policies, procedures, manuals, job descriptions, and similar documents to identify where a PATI confidentiality obligation should be referenced and incorporated.

#### **4. Adopt written practices to guide managing a PATI requester's visit to your office**

*Finding: A risk exists that PATI requesters' confidentiality may be breached when they visit your office*

- a. Adopt written practices concerning how you will discreetly receive PATI requesters when they visit your office, and share the practices with all staff. You may want to consider adopting in writing and implementing the good practices exercised by the Department of Works and Engineering in this regard.
- b. Your written practices should:
  - Reflect a presumption that a PATI requester's identity will be treated confidentially;
  - Require that staff do not discuss the request with the requester within earshot of others;
  - Require that staff do not discuss with, or disclose to, colleagues the reason for a requester's visit to the office; and
  - Suggest that staff meet with requesters in a private office or room, and not in an open area, such as a reception space or lobby.

#### **5. Adopt written procedures to safeguard the requester's identifying information contained in communications with your authority, including the original request**

*Finding: Authority may inadvertently share emails or other records containing requesters' identity*

- a. Adopt written procedures to safeguard the identity of the requester contained in the original request and during any subsequent email, phone, or other communications. You may want to consider adopting in writing and implementing the good practices exercised by the Department of Works and Engineering in this regard. Your written procedures should include:
  - A requirement that, upon receipt, the original request is placed into a separate electronic or hard copy file that is only accessible to the Information Officer and those required to know the name of the requester for purposes of fulfilling a function under the PATI Act (for example, the Information Officer may delegate responsibility to another individual for day-to-day communications with the requester);
  - Keep the original request and hard copies, if any, in a locked drawer
  - Store electronic copies of requests, if any, in a separate, electronic folder with limited access (e.g., a password protected folder);

- Provisions to prohibit an Information Officer, and any delegates, from forwarding to others the original request via email or other means, or forwarding any email or scanned written correspondence from requesters;
- Although forwarding emails and scanned requests is a convenient, easy way to share the background on the request, forwarding the request, which contains the requester's name, to others is a violation of the duty of confidentiality; and
- A requirement that phone calls to the requester be conducted under circumstances which prevent anyone else from overhearing the conversation.

## 6. Adopt written practices to guide managing the relationship between PATI requests and parliamentary questions

*Finding: Assisting Ministers with responses to parliamentary questions risks disclosing the identity of PATI requesters asking for the same or similar information through a PATI request*

- a. Adopt written practices to support senior civil servants in managing the potential interrelation between the handling and processing PATI requests and assisting Ministers with preparing responses to parliamentary questions. Your written practices should remind all civil servants within your authority that parliamentary questions and PATI requests are two independent systems for obtaining public information.
- b. The same civil servants in your public authority may be involved with formulating answers to parliamentary questions and processing PATI requests. Your written practices should provide them context on the interaction between PATI requests and parliamentary questions, along with guidance on how to protect the integrity of both democratic methods of obtaining information and to ensure confidentiality of PATI requesters' identity.
- c. Your written practices should articulate the clear differences between the two methods:
  - A Member of Parliament ("MP") may ask for information through the PATI Act and/or in the form of parliamentary questions. A member of the public may submit a PATI request for records covering the same information that is subject of parliamentary questions.
  - A comparison of the benefits of one method over the other. For example, the timeliness of obtaining the information; the nature of any independent review of the response, and the ability of an independent authority to enforce disclosure of information.
  - Recognise potential situations where the two methods of obtaining information overlap. For example, when the same politically-timely topic is the subject of both a parliamentary question by a Member of Parliament and a PATI request, by the same MP or someone else.
- d. Your written practices should direct how your public authority will protect a requester's confidentiality when there is overlap (of requester/subject matter) in a PATI request and parliamentary question. This should include directions such as:

- Whenever a civil servant is preparing or discussing the response to a parliamentary question with a Minister that is also the topic of a PATI request, the civil servant will safeguard the PATI requester's confidentiality. This is mandatory, because a Minister is not in the line of PATI decision making and, in this situation, is not fulfilling a function under the PATI Act that would require the Minister to know a requester's name.
  - Whenever a civil servant is meeting with a Minister to discuss parliamentary questions, any discussion about a PATI request with the same topic must not lead to the disclosure to the Minister of the requester's name directly or inadvertently (e.g. by reading the PATI request files or notes on the desk).
- e. Your written practices should also include how your public authority will handle advising Ministers of any relevant PATI requests which are under consideration which could impact on the way the parliamentary question should be answered. For example, in some situations if a Minister is aware that the same matter is being addressed in a PATI request, the Minister may choose to provide a fuller response to a parliamentary question, knowing that the information is likely to be made public in the future.
- f. Your written practices should ensure that civil servants understand the following:
- When preparing responses to parliamentary questions, PATI Act 'exemptions' should not be explicitly invoked when refusing to provide information in response to a parliamentary question;
  - That the processing of a parallel PATI request is not a reason to delay a response to a parliamentary question.
- g. Finally, your public authority should demonstrate that clear lines of support exist for civil servants and/or Information Officers to obtain assistance from supervisors or Permanent Secretaries, when applying these practices and whenever they encounter challenges or obstacles.

*Note: In the context of this investigation, the Information Commissioner also formally made this recommendation directly to the Cabinet Secretary in November 2015. The Information Commissioner specifically highlighted the risk that Ministers and Members of Parliament were confusing the PATI request process and the process for parliamentary questions in a manner that would place senior civil servants in a difficult position. While all stakeholders in the parliamentary process are becoming more familiar with the nature of the PATI Act, it would benefit the civil service to have a clear understanding of its roles, responsibilities, and support resources.*

*More generally, the Information Commissioner has provided information produced by the UK Cabinet Office to the Honourable Premier (July 2015), the Honourable Speaker of the House (July and November 2015) and the Honourable President of the Senate (July and November 2015)*

that outlines the general differences and good practices under the UK's Freedom of Information law and the UK's parliamentary questions system. The Information Commissioner highlighted the ongoing need to inform Members of Parliament about the distinction between the two processes. Receipt of the information has been acknowledged.

## **7. Adopt written procedures to guide mitigating the harm in the event of a breach of confidentiality**

*Finding: An inadvertent breach of confidentiality may cause an unnecessary amount of harm because of a failure to mitigate*

- a. In the event of a breach of confidentiality, authorities should have a written procedure to mitigate the harm of the instant breach and/or further leaks. A breach of confidentiality could occur when an unauthorised disclosure of the requester's identity is made to someone else within your public authority or to someone within another public authority. It could also be to someone external to your authority.
- b. This written procedure should include:
  - Instructions on how to report a breach of confidentiality (how and to whom should the report be made).
  - A requirement that when you discover a breach of confidentiality, any unauthorised recipients of the requester's identity should be informed that a breach occurred.
  - A requirement that unauthorised recipients are contacted and given formal notice that they have received confidential information which should not be further disclosed. Your authority's notices, their receipt, and the recipients' responses confirming their understanding should be documented. If confirmation cannot be obtained, sufficient documentation should be recorded of your authority's efforts.
  - A requirement that the requester be notified in writing of the breach of confidentiality and its extent as soon as possible.
  - Provisions for how supervisors should respond to, and the consequences for, breaches of confidentiality made in bad faith.

## **8. Adopt written procedures to properly store, dispose of, destroy, or delete records containing the requester's identifying information**

*Finding: The retention of identifying records beyond the period of time they are required to meet obligations under the PATI Act increases the risk of a breach of confidentiality*

- a. Your authority should have written procedures to properly store any records that contain the requester's identity. This includes not only communications with the requester, as noted above, but also any documents you create during the course of handling the request or fulfilling other functions under the PATI Act that contain the requester's identity.

- b. Your written procedures may distinguish the storage procedures for pending PATI request files and for closed PATI request files. For example, once a PATI request file is closed, you may adopt procedures to destroy all hard copies of case files and retain only an electronic copy in a secure folder for a certain period of time before a scheduled destruction.
- c. Your authority should also determine how long you need to retain records containing the requester's identity after the PATI process for the request has concluded. This should be incorporated into a written procedure for safely and securely destroying any records with the requester's identifying information, received or created during the process of handling a PATI request.

## Monitoring progress

It is essential that the requirements of this report are acknowledged and acted upon at a senior level. The risks and impact associated with confidentiality breaches can be greatly mitigated by ensuring that systems and processes are in place to enable authorities to adequately protect confidentiality in practice and prevent confidentiality breaches. This must be driven by leadership and a commitment from senior civil servants, the Civil Service Executive and the Cabinet Office to put in place a governance framework to ensure that the most effective procedures and practices are established to meet the statutory obligations.

At the conclusion of the investigation in December 2015, the Information Commissioner reached agreement in principle with the two public authorities in this investigation that these recommendations would be beneficial to their practices under the PATI Act. The PS for the Ministry of Public Works had also raised the Information Commissioner's recommendations to the Civil Service Executive in November 2015.

The Information Commissioner did not receive a response clarifying which of the recommendations the Ministry of Public Works Headquarters (which has administrative oversight of the Department of Works and Engineering) could address within its own Ministry resources and which recommendations require involvement and approval by the Civil Service Executive or others. Without defined ownership it is difficult, looking from the outside, to know which entity will have strategic responsibility for implementing the Information Commissioner's recommendations.

To a great extent, the Minister's forthcoming section 60 Practice Code should address practice deficiencies in most areas, including how to secure and maintain confidentiality. The section 60 Practice Code is required to be undertaken with consultation. During the interim, while the section 60 Practice Code is in drafting and consultation, the Information Commission recommends that the Ministry of Public Works Headquarters clarify what interim measures it can adopt for public authorities within the Ministry of Public Works specifically, and what measures must be clearly requested from and provided by the Civil Service Executive or others. Civil servants on the frontline handling PATI responses need and deserve support to fulfil their day-to-day PATI Act obligations. This will also safeguard the public's rights under the PATI Act.



In order to monitor progress with the recommendations in the Report, the Information Commissioner requests that the Ministry of Public Works Headquarters and the Department of Works and Engineering provide her with a report within three months from the date of this report setting out the measures they have taken in implementation of these recommendations with evidence to demonstrate improvement in the areas where they have been found not to conform with their obligations under the PATI Act. This may be tested by way of a compliance audit by the ICO.

A practice and procedures recommendation cannot be directly enforced by the Information Commissioner, unlike a legally binding decision in a review of a public authority's handling of a specific PATI request. However, a failure to take the steps recommended at the conclusion of a section 57(3) investigation may be taken into account when conducting future independent reviews on appeal of the public authority's decisions in individual PATI requests, or when engaging in other oversight of the public authority's compliance with the PATI Act.

The ICO will continue to support the Ministry of Public Works Headquarters and the Department of Works and Engineering in their efforts to develop and improve their practice and procedures. We shall report on their adoption of the practice recommendations and improved compliance with the PATI Act in our 2016 Annual Report.

**Gitanjali S. Gutierrez**  
**Information Commissioner**  
**14 March 2016**



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