

MONTHLY ROUNDUP

Volume III, Issue 5

AUGUST 2020

WELCOME

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

Every Bermudian and resident has the right to make a PATI request for public records.

Every Bermudian and resident is a potential PATI requester. Their curiosity may be piqued by what they saw, or perhaps by what they did not see, in and around a government-funded project. They may be motivated enough to take action because of what they heard, or maybe by what was not said, about a public initiative. Perhaps they want to understand what policies and procedures are in place to protect their child's or even their elderly parent's health, safety and future. Whatever the reason is for making a PATI request, under the PATI Act, Bermudians and residents have the right to ask.

As the ICO continues to champion transparency under the PATI Act, the ICO looks forward to commemorating International Right to Know Day. On Monday, 28 September, the ICO joins freedom of information officers and advocates around the world in recognizing that public information in the hands of citizens shifts the power of accountability into the hands of the people. The PATI Act is an important democratic tool for demanding and expecting transparency from public decision makers. The Information Commissioner is mandated to safeguard these rights.

"Access to information is a human right, but it is often treated as a privilege. This has to change – and it will take all of us to make it happen."

– Erin McKiernan,
physiologist,
neuroscientist, and
open access advocate.

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"When each corner of Bermuda's community advocates for transparency about legal, financial, policy and other decisions made for the community's benefit, accountability is established."
- Excerpt from the July 2020 ICO Monthly Roundup



Information
Commissioner's
Office

DECISIONS ISSUED

In August 2020, the Information Commissioner received 2 new applications, issued 6 decisions and resolved 2 cases. Highlights from the decisions are below.

Can a public authority disclose information to the requester during an Information Commissioner's review? Yes; read Decision 09/2020 to find out what was disclosed during that review.

In **Decision 09/2020**, Bermuda Health Council, the Information Commissioner considered the Health Council's refusal of a PATI request for statistical records on diagnostic imaging tests in Bermuda. Relying on a number of exemptions, the Health Council initially refused to disclose any statistical diagnostic imaging test information categorized by patient age and the number of tests per patient. However, during the Information Commissioner's independent review, the Health Council provided this information to the Applicant. The Health Council also voluntarily disclosed additional information which, although it did not fall within the scope of the PATI request, was relevant to the requester. **Decision 09/2020** reminds applicants and public authorities that even during the Information Commissioner's independent review, continued dialogue may result in voluntary disclosure of additional records.

If you do not ask, you might never know! Read Decisions 11/2020, 12/2020 and 13/2020 to find out what PATI requesters could learn when a record does not exist or cannot be found.

In its response to a PATI request, a public authority should make it clear to the PATI requester whether or not it holds the record being sought. If the record does not exist or cannot be found, the public authority should refuse the PATI request under an administrative denial in section 16(1)(a) of the PATI Act. While this might be disappointing to a PATI requester, it can still be valuable to calm the PATI requester's speculations or, in some cases, to encourage a public authority to consider keeping additional records.

This was highlighted in **Decisions 11/2020, 12/2020 and 13/2020**, Department of Education, which primarily involved the reasonableness of the searches for records responsive to a series of PATI requests by a former public school teacher. A public authority's explanation about its processes can help the public to understand that sometimes legitimate reasons explain a gap between the public's expectation about the records held by a public authority, and what that public authority actually holds. The Applicant in **Decision 11/2020**, expected that the Department held records of an incident occurring at a public school. The Department did not hold them, and explained to the Applicant and the Information Commissioner how such incidents were handled at the school-level and what would, and would not, initiate reporting to the Department-level at that time.

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DECISIONS ISSUED, *cont.*

In [Decision 12/2020](#), the Information Commissioner considered the Department's refusal of a PATI request for policy, protocol or procedures on the handling and reporting of school incidents.

The Information Commissioner confirmed through her independent review that such policy, protocol or procedure documents did not exist. However, the Department explained its general, unwritten practices in place during the time period involved, and also shared its 2003 Code of Practice. Finally, in [Decision 13/2020](#), the Applicant asked for a number of records, including emails sent and received by the Applicant from the email account they had used while employed as a teacher in the public school system. The Information Commissioner independently verified that the Applicant's former email account can no longer be accessed by the Department (and as such, the email records could not be found). The Applicant learned how the Department retains and disposes of email accounts, in the absence of a written retention and destruction policy. [Decision 13/2020](#) highlights how the Information Commissioner's review may include asking the public authority to explain its record retention policy or practices both to her and the requester.

Does a public authority have to confirm that a record exists or does not exist? Not always. Read [Decisions 08/2020](#) and [10/2020](#) to learn more.

Section 38 of the PATI Act sets out when a public authority must confirm or deny the existence of a record. To be clear, it does not consider the disclosure of the record's content. Under section 38(1), a public authority can refuse to confirm or deny the existence of a record only if two criteria are met. First, if the record exists or were to exist, its content is or would be exempt from public disclosure under any other exemption in the PATI Act. Second, the balance of the public interest must support refusing to disclose whether or not a record exists.

In [Decision 08/2020](#), Bermuda Monetary Authority (BMA), the Information Commissioner rejected the application of section 38 to the records requested by the Applicant and has required the BMA to disclose the existence or non-existence of records on its staff recruitment plan analysed by Bermudian and non-Bermudian status. The Information Commissioner found that the balance of the public interest required the BMA to confirm the existence or non-existence of a record. In [Decision 10/2020](#), BMA, the Information Commissioner agreed with the BMA's reliance on section 38(1) to refuse to confirm or deny whether it had any contract or memorandum for services from a specific vendor, Shyft Network. Read the two Decisions together to learn more about this provision in the PATI Act.



PUBLIC ACCESS TO INFORMATION & EDUCATION

In the ICO's new 'Learning More' series, we focus each month on how PATI rights are effective tools that enable Bermudians and residents to learn more about important topics of the day.



The start of public school in September is just around the corner. Students, parents and teachers are full of excitement, concern, questions, optimism, relief and a range of other thoughts and feelings. The end of the last school year showed how quickly circumstances can change for public schools and families. Even before COVID-19, stakeholders have been assessing, reforming and debating Bermuda's approach to education for a number of years.

What does the PATI Act have to do with education?

The successful start of the 2020-2021 public school year involves collaboration between many public authorities. This includes the Ministry and Department of Education; the Ministry and Department of Health; the Department of Public Transportation; the Department of Works and Engineering; and the Department of Communications, to name just a few. The decisions made by these public authorities have real impacts on the learning environment. As issues arise around curriculum, public school policies, funding resources and health or safety, parents may engage with the decision makers through Parent-Teacher Associations, the Parental Involvement Committee and other groups. Teachers and staff, and their unions, may also address workplace concerns with decision makers. Third sector children's advocates are also important stakeholders.

The educational system is an environment that often has high stakeholder engagement. Students, parents and teachers can be better prepared to talk with decision makers by making PATI requests to get the information they need. The PATI Act is also a powerful accountability tool. Students and parents can assess whether departments achieved the outcomes that they promised, or find out how resources were allocated or the reasons for particular policy decisions on curriculum or safety.

Parents, especially, may find it important to have access to any policies, procedures and guidelines that impact their child's school. Having the right to make a PATI request for records that matter to their child and family is a right that the Information Commissioner and her office safeguard daily.

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PUBLIC ACCESS TO INFORMATION & EDUCATION, *cont.*

Parents, and students, can take a deeper dive into information that they consider relevant to help them stay informed, included and involved in all aspects of young people's education and the physical/digital environment in which they receive it. Timely, accurate and comprehensive information in the hands of individuals who can use it effectively, increases trust between everyone impacted by rapid change and the development of Bermuda's educational system.

Some examples of public access to information requests about education issues include:

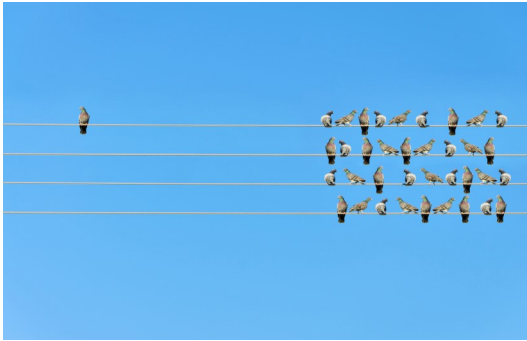
- In Scotland, an access request revealed that about one in three primary schools had not been inspected by the education authority, Education Scotland, for at least a decade. Learn more [HERE](#).
- In New South Wales, Australia, a Department of Education report disclosed through a public access request revealed that the Department was aware that it was failing to serve students with disabilities and had an inadequate plan to address those needs. Learn more [HERE](#).
- In Canada, an investigative journalist used access requests in 2019 to obtain information about the number of reported violent incidents in school districts to then assess the reporting structure, levels of violence and their impacts. Learn more [HERE](#).
- In the UK, a trade union made an access request to the Cabinet Office. It learned that the government initially moved ahead with a plan for a 1 June 2020 phased re-opening of schools (which was later abandoned) despite receiving research data that 42% of Black, Asian and ethnic minority parents had said they would not return their children to school and 40% of lower income parents were also less likely to do so. Learn more [HERE](#).
- In Michigan, US, a trade association representing 1,300 school bus drivers won a public access to information case seeking school bus discipline-referral forms. Bus drivers would complete the forms to document student misconduct on the bus, for school administrators to then determine any discipline as needed. The bus drivers sought the forms to document their responsibilities and working conditions during collective bargaining negotiations. The bus drivers won access to the discipline-referral forms with students' personal information redacted. Learn more [HERE](#).

Remember, Bermudians and residents have the right to ask under the PATI Act. Knowing more and taking action to get access to the information needed starts with you, Bermudians and residents.



TAKING A CLOSER LOOK AT THE INDEPENDENCE OF THE ICO

What does it mean for the ICO to be an independent office, and what does 'independence' look like in practice?



The ICO is a unique public office that supports the Information Commissioner's mandate to protect every Bermudian and resident's right to ask Bermuda's public authorities for public records. The Information Commissioner fulfills her mandate by exercising independent decision making. This means that the Information Commissioner performs her work independently from the direction or control of any other authority, including Ministers, political parties or other individuals.

As the office supporting the Information Commissioner, the ICO is not a Government department and does not fall under any ministry. What makes the ICO unique is the fact that it is its own entity.

A large part of the ICO's work is carrying out independent reviews of decisions on PATI requests when PATI requesters exercise their right to ask the ICO for one. To clarify, two types of reviews might happen as a result of a member of the public making a PATI request to a public authority: an internal review, which is done by the head of the public authority; and an independent review, which is done by the Information Commissioner. The Information Commissioner's reviews are independent because they are conducted external to the public authority that handled the PATI request.

Not only do the Information Commissioner and her office actually have to be independent, they must be seen as independent. The investigators assisting the Information Commissioner with reviews are expected to refrain from making public comments that might lead to the independence of the ICO being questioned. The independent nature of the Information Commissioner's reviews strengthens the public and public authorities' confidence in the ICO's review process.

As with access to information laws in other jurisdictions, the PATI Act is designed to give the public the right to access information held by public authorities to the greatest extent possible. However, the Information Commissioner and her office do not take on the role of an advocate for any individual PATI requester during a review.

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TAKING A CLOSER LOOK AT THE INDEPENDENCE OF THE ICO, *cont.*

When the Information Commissioner is conducting her independent reviews, her loyalty and the loyalty of the ICO, is to the PATI Act in promoting public access to information within the boundaries set out in the law and upholding PATI requesters' rights.

When applying the PATI Act to decisions on PATI requests, the Information Commissioner and her office do not practice favouritism toward public authorities or PATI requesters.

Even as an independent public office, the ICO is subject to external accountability by other independent good governance entities. The Information Commissioner's decisions can be challenged before another independent institution, the Courts, by a judicial review. The ICO's accounts are also subject to an independent audit by the Auditor General. Finally, the Information Commissioner is also accountable to the public through the tabling of an Annual Report in Parliament.

ICO STATISTICS AS OF 31 AUGUST 2020

(from 1 April 2015)

Total applications for independent review by the Information Commissioner	141	Closed: Decided	72
Pending investigations	24	Closed: Resolved	17
Applications pending validation	2	Closed: Abandoned	7
		Closed: Invalid	19



THE ICO BUDGET & SPENDING: AUSTERITY MEASURES

The ICO continues to update the public with our office's response to COVID-19 and its impact, focusing this month on the financial impact. Similar to most public authorities, the ICO has adopted austerity measures to ensure that our public spending is minimized during the financial crisis. The Information Commissioner, in collaboration with the officers in the ICO, has adopted an approach that allows the Information Commissioner to fulfill her mandate under the PATI Act while using our financial resources efficiently.

The original 2020-2021 budget for the ICO was \$1,061,493. The ICO has voluntarily frozen 13.6% of its budget, or \$144,886, for this year. The entire office has also taken a pay reduction, for an additional 10% cost savings starting in August 2020. These measures mirror those taken by Government of Bermuda departments.

The ICO's financial processes ensure value for money, but this year in particular, we continue to scrutinize our public spending. Learn more about the ICO's spending at www.ico.bm/spending. Want to know more? Just ask us at info@ico.bm or call 543-3700.

SAVE THE DATES

Information Commissioner's *Virtual* Quarterly Briefing

Thursday, 17 September

10:00am - 11:00am

Topic: Section 16(1)(e) administrative denials for frivolous or vexatious requests.

ICO Briefings are for public authorities only.

Registration details have been sent directly to them.

International Right to Know Day

Monday, 28 September

Information Commissioner's Right to Know Day Declaration

City Hall at 10:00am

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