

MONTHLY ROUNDUP

Volume VI, Issue 8

SEPTEMBER 2021

WELCOME

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

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

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

In this issue, we take a closer look at the Information Commissioner's recently issued decisions. Check out the Investigator's Insight topic as we discuss eliminating unwanted secrecy through PATI. We also highlight our 2021 Right to Know Week initiatives, which included the Commissioner's first ever virtual International Right to Know Day Declaration.



"Excessive secrecy has significant consequences when policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate."

US Commission on
Protecting and
Reducing
Government Secrecy,
1997



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DECISIONS ISSUED

During September, the Information Commissioner received 5 new applications and issued 3 decisions. Highlights are below.

When meeting minutes contain a mix of information that falls within and outside the scope of the PATI Act, what should a public authority do? Read Decision 09/2021 to learn of the Information Commissioner's view on this.

In **Decision 09/2021**, the Information Commissioner looked at a refusal by the Human Rights Commission (HRC) to provide public access to the meeting minutes of the Human Rights Commissioners. The HRC argued that the entire records were removed from public access under section 4(1)(b)(ii) of the PATI Act, because the HRC created them while carrying out its statutory functions, and, as referred to in section 4(2)(b), they did not relate to its general administration. During the Information Commissioner's review, the ICO queried whether the HRC had carefully considered whether any part of the minutes might relate to its general administration, and thus would still fall within the scope of the PATI Act. After discussing with the ICO, the HRC re-considered its position and accepted that certain parts of the records related to its general administration and came within the scope of the PATI Act by virtue of section 4(2)(b).

Meeting minutes can help public authorities promote openness about how they conduct public business and ensure that the public has access to their decisions, reasons and discussions to the greatest extent possible. These aims can be reached when public authorities prepare their meeting minutes in a manner to facilitate ready access to information. For example, this might include separating sections of the minutes into information that may be subject to public disclosure or that can be proactively disclosed (such as financial discussions) from information that is likely to remain withheld (such as specific human rights complaints).



This Information Commissioner's review revealed how important it has become for public authorities to carefully assess their records management processes in the context of a public access framework. Each PATI request can present an opportunity for putting their internal practices to test. The Information Commissioner's message in her **PATI Implementation Report and Recommendations 2021** reinforces that public authority leaders must prioritise establishing PATI-aligned records management systems (see recommendation no. 5). In **Decision 09/2021**, the HRC is required to re-process the relevant parts of the records where the Information Commissioner found that section 4(2)(b) of the PATI Act properly applies. The HRC now may consider whether any exemption in the PATI Act would justify continuing to withhold those parts of the records. The HRC's new initial decision will be subject to the usual rights of review for the Applicant.

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DECISIONS ISSUED...cont.

Can I access court records using PATI? Unfortunately, no. Read Decisions 08/2021 and 10/2021 to learn why.

While the PATI Act applies to all public authorities in Bermuda, there are certain categories of records to which the PATI Act does not apply. In accordance with section 4(1)(b) of the PATI Act, this includes records relating to the exercise of judicial functions by a court.

The Information Commissioner discussed this question in two of her September decisions: [Decisions 08/2021](#), [Police Complaints Authority \(PCA\)](#) and [10/2021](#), [Department of Child and Family Services \(DCFS\)](#). In [Decision 08/2021](#), the court documents related to the judicial review challenging the PCA's report on the 26 complaints filed following the use of pepper spray by the Bermuda Police Service during the protest on 2 December 2016. In [Decision 10/2021](#), the court document in question was a restraining order issued against DCFS staff members.

The Information Commissioner explained that 'judicial functions' in section 4(1)(b) include the functions of the court to make official decisions about who is right between disagreeing parties. She emphasised that section 4(1)(b) does not mean the PATI Act is inapplicable to all records on legal proceedings that are held by public authorities. For a legal proceedings-related record to fall outside the scope of the PATI Act, it has to have some relation to the courts. It has to be, for example, created by the court in the exercise of its functions. Or, if the record was created by entities other than the court (such as correspondence between parties), it has to be either filed with the court or sent in accordance with a court's instructions, orders or directions.

Because the Information Commissioner found in [Decisions 08/2021](#) and [10/2021](#) that some of the responsive records fall outside the scope of the PATI Act, she concluded that she had no jurisdiction to make a determination on whether their public access should be granted. Although they fall outside the reach of the PATI Act, some court records might be accessible to the public by other means; for instance, by filing a search request at the Supreme Court Registry.

Confused about what constitutes a reasonable search? Decision 10/2021 highlights the keys to meeting the reasonable search requirement.

Before a public authority begins the search for records responsive to a PATI request, it is crucial that public authorities fully understand what records the requester is seeking. Failure to do so will likely lead to searches that do not meet the reasonableness standards set out in the PATI Act and Regulations.

The Information Commissioner's [Decision 10/2021](#) relates to a PATI request filed with the DCFS for various records. The records sought included those on the number of times DCFS was represented by the Attorney-General's Chambers as well as the number of times it opposed and applied for, an appointment of a litigation guardian and lawyer for minors. DCFS refused these particular parts of the PATI request under section 16(1)(a), as it claimed that it did not hold any record showing statistical information sought by the requester.

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DECISIONS ISSUED...cont.

The Information Commissioner found, however, that the request did not particularly ask for a specific record capturing statistical information. Rather, the request should be understood as asking for any records showing the information being sought. This means the PATI request could have been satisfied by either providing the requester with a statistical record (if it were readily available), or by disclosing the underlying records from which the requester could derive their own tallies.

Due to its narrow reading of the scope of the PATI request, DCFS did not take sufficient steps to locate the relevant records. As a result, the Information Commissioner found that DCFS did not conduct a reasonable search and ordered it to do so. **Decision 10/2021** is a reminder for public authorities that it is always a good idea to confirm with a PATI requester whether the public authority's understanding of a request aligns with the requester's expectation. Once a public authority confirms that its understanding of the PATI request is reasonable, the next step is to search all locations that could reasonably hold the responsive records.

In **Decision 10/2021**, another item in the PATI request filed with DCFS was for records relating to the administrative leave taken by the Department's Director. While DCFS appeared to correctly understand the scope of this item of the request, it did not search the Director's government email address despite it being a location that could reasonably hold the responsive records. The Information Commissioner thus ordered DCFS to conduct additional searches, which included searching the Director's government email address using certain parameters.

Another key step in meeting the reasonable search requirements is conducting the search with sufficient efficiency and rigour. This requirement can mean a lot of things but would include, for example, whether the searches include single or multiple attempts, whether full access to locations was given to the individuals conducting the searches, etc.

In **Decision 08/2021**, for example, the Information Commissioner found that the PCA conducted a reasonable search before concluding that the meeting minutes being sought in a PATI request did not exist. The Information Commissioner found that the search was conducted with adequate rigour and efficiency, because the PCA asked its members to locate any documents that were akin to meeting minutes, despite knowing that, as a matter of practice, it did not record official minutes.

ICO STATISTICS AS OF 30 SEPTEMBER 2021

(from 1 April 2015)

Total applications for independent review by the Information Commissioner	179	Closed: Decided	86
Pending investigations	43	Closed: Resolved	20
Applications pending validation	0	Closed: Abandoned	7
		Closed: Invalid	23

ELIMINATING UNNECESSARY SECRECY THROUGH PATI

Secrecy is often required by public authorities to efficiently perform their functions and meet their mandates. It would be challenging for the police to protect the community and prevent crimes, for example, if it were to publicly divulge all information it has on pending criminal investigations. Secrecy is also often needed to protect the rights or interests of others, as explained in our last month's Investigator's Insight. In both circumstances, secrecy is necessary as it is based on legitimate and specific reasons or purposes. The PATI Act acknowledges this; hence, various provisions exempt certain records from public disclosure.



Secrecy is not always necessary, though. It is unnecessary when there is no legitimate reason or purpose for withholding public records or information from the public. Unnecessary secrecy disempowers citizens which, in turn, hinders democracy. It might also affect the quality of public services enjoyed by citizens. This is why the elimination of unnecessary secrecy is one of the purposes of the PATI Act.

There is no definitive list setting out the forms or categories of unnecessary secrecy. But the Information Commissioner and her investigators have encountered examples when reviewing decisions issued by public authorities on PATI requests. In [Decision 12/2018, Ministry of Finance Headquarters](#), for example, the Information Commissioner emphasised that a “long-standing policy”, on its own, is not a legitimate reason for keeping records or information confidential from the public. It is unnecessary and thus unjustified for public authorities to withhold records merely because it has always been the practice.

Secrecy is also unnecessary if non-disclosure of public records is done simply to avoid embarrassment. Not only is ‘embarrassment’ not captured in any exemption in the PATI Act, it also is not a relevant factor to be considered when assessing if disclosure is required by the public interest. Proper public accountability may also be embarrassing, but accountability is essential in a democracy.

Since the PATI Act came into effect in April 2015, Bermuda has witnessed how the PATI Act steadily encourages public authorities to eliminate unnecessary secrecy. The PATI requests filed by members of the public have pushed authorities to reflect on the information and records that they were releasing and withholding. Those requests have nudged public authorities to ask themselves the important questions: what records are we withholding, and why?

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ELIMINATING UNNECESSARY SECRECY THROUGH PATI...cont.

The case considered by the Information Commissioner in [Decision 05/2019](#), [Bermuda Hospitals Board \(BHB\)](#), is a good example. In that Decision, the Information Commissioner considered the BHB's refusal of a PATI request asking for records relating to patient "safety events" occurring at the King Edward VII Memorial Hospital. While initially it had released limited responsive records and information, the BHB publicly released further information responsive to the PATI request during the Information Commissioner's review. After internal discussion, the BHB issued a press release to announce its decision that this information will be available to the public on a regular basis and expressed appreciation for the assessment that the PATI request triggered. Since then, the BHB has been continuously publishing its quarterly quality and safety data on its website.

For more examples of how the PATI Act has pushed public authorities to eliminate unnecessary secrecy, read the various Information Commissioner's decisions. Or check out the ICO's ["What Do You Know Now?" video series](#), released to commemorate the 2021 International Right to Know Day. All are available on www.ico.bm.

SAVE THE DATES

Information Commissioner's *Virtual* Quarterly Briefing

Thursday, 9 December 2021

10:00am - 11:00am

Topic: ICO 2021 Annual Return

ICO Briefings are for public authorities only.

Registration details will be sent directly to public authorities



ICIC Wednesday Webinar

**Theme: Access to Information for a Changing World -
Using Technology to Promote Inclusion**

Wednesday, 27 October 2021,

11:00am

Topic: State Secrecy

This session will be streamed live on the [ICIC's YouTube Channel](#)

Q&A CORNER WITH THE ICO

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

I Want to Know about reasons...

Q: I received a decision on my PATI request. The public authority stated that I could not have access to the records because an exemption applied. When I read the PATI Act, I saw that the letter copied the exact language of the exemption. But I don't understand why the exemption applied, and the letter didn't explain it. Should I expect to be given reasons?

A: Yes, PATI requesters should expect to be given reasons that explain why an exemption or administrative denial applies to the records in question, which the authority has decided to withhold from public access. Check out section 14(2)(a) of the PATI Act, which requires the authority to "[specify] the reasons for the decision, including findings on any material issues relevant to the decision and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision".

I Want to Know about decisions...

Q: I asked for an internal review of the decision I received on my PATI request, because I didn't agree fully with the Information Officer's reasoning. When I received the internal review decision, it read to me as if it had been written by the same Information Officer and just signed by the head. Is that right?

A: Internal reviews must be made by the head of authority (see section 43(1)). As a practical matter, the head can receive assistance from others. The internal review decision may be drafted by others. The final judgment call and decision, though, must be made and signed by the head of authority.



TIPS CORNER FOR PUBLIC AUTHORITIES & PATI REQUESTERS

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

Tip for Information Officers: Build your toolbox of handy resources, and keep them accessible to support your PATI practice.

Why it makes sense?

At her latest Quarterly Briefing, the Information Commissioner offered tips for public authorities on processing PATI requests. Even if you attended live, review the presentation notes to reinforce and refresh the learning. Mark up your copy with your own observations. The latest and all past presentations are available [here](#).

Kudos to those public officers who regularly register, attend and participate.

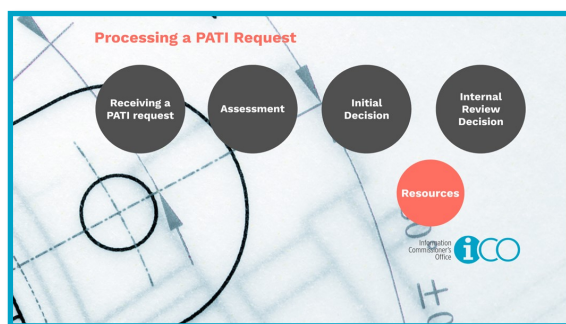
Tip for PATI requesters: If asking for a review or appeal, be clear about why you are asking for it.

Why it makes sense?

Requesting an internal review by the head of authority and appealing to the Information Commissioner are parts of the process provided for in the PATI Act. They empower the public. While the PATI Act protects requesters from having to justify their PATI request, in most cases being clear about the reasons for review will help the reviewer to understand upfront any points of disagreement or specific concerns a requester has about the original response received. This can help to focus their resources on bringing resolution.

Kudos to those requesters who participate cooperatively in the process.

INFORMATION COMMISSIONER'S SEPTEMBER VIRTUAL QUARTERLY BRIEFING



On 16 September, the Information Commissioner held her Quarterly Briefing for public authorities, which focused on the basics of processing a PATI request and learning lessons from the ICO. In outlining the PATI process, Commissioner Gutierrez highlighted tips for successfully handling a response to a PATI request, as well as pitfalls to avoid that the ICO has observed during reviews.

The presentation also included an overview of the various resources available from the ICO, the Cabinet's PIPA/PATI Unit and elsewhere to support the work of Information Officers. The attendees, primarily Information Officers, also shared their own advice and experience with responding to PATI requests. It was a beneficial refresher for all as public authorities head into the busy Fall season. The presentation slides, with presenter's notes, are available on the [ICO website](#).

2021 RIGHT TO KNOW WEEK



This year, the ICO celebrated Right to Know Week by focusing on the theme “What Do You Know Now?” This year’s message highlighted the benefits of PATI rights for Bermudians and residents over the last 6 years and the numerous PATI disclosures that have been made. Some of the PATI disclosures have been very public because they impacted the entire country, while

other PATI requests led to information being placed into the hands of individuals who requested it because their children, family, school or business were affected by the information.

The fact remains that because Bermudians and residents are empowering themselves by using their PATI rights, our community as a whole knows more about the reasons for public decision making. In addition to the information available because Bermudians and residents made PATI requests, the PATI Act also requires public authorities to make certain information readily available to the public, without the need for a PATI request.

Knowing this public information enables Bermudians and residents to hold public officials accountable, to understand how public money is spent and to be included and involved in decisions or programs that affect them. Exercising PATI rights also provides the opportunity for everyone in our community to make better quality of life choices for themselves, their families, their businesses and for Bermuda as a whole.

In support of the theme “What Do You Know Now?”, a 4-part video series was released through the ICO’s social media platforms, each highlighting important information now publicly available through PATI disclosures. The 4 videos talked about:

- Reasons for public decisions,
- Public spending and contracts,
- Public sector salaries and
- Quality of life and public services.

Watch the full video series [HERE](#)



2021 RIGHT TO KNOW WEEK

On International Right to Know Day, which is celebrated annually on 28 September, Commissioner Gutierrez joined The Daily Hour team for a lighthearted and empowering discussion about the ongoing importance of PATI rights in Bermuda. The Commissioner shared with their audience the many benefits of not only exercising the rights under PATI Act but how Bermuda as a whole benefits when PATI disclosures are made. The insightful questions from hosts Jamel Hardtman and Mikaela Ian, and the steady flow of questions from the listening audience allowed for an empowering exchange of information while encouraging listeners to recognize that they have the right to know.

Watch the full interview [HERE](#)



The Daily Hour Host Jamel Hardtman, Co-Host Mikaela Ian and Information Commissioner Gutierrez.

For the first time ever, Commissioner Gutierrez delivered her International Right to Know Day Declaration virtually and released it across the ICO's social media platforms. In line with the ICO's Right to Know Week theme "What Do You Know Now?", the Commissioner reflected on how important it is to level the playing field between those who govern and those who are governed, by strengthening the public's ability to hold public decision makers accountable and encouraging transparent decision making.

Watch the full Declaration [HERE](#)





PATI TRAINING NOW AVAILABLE!

PATI Training is now available through the Government's Department of Employee & Organisational Development (DE&OD). If you are an Information Officer in need of training, consider taking advantage of this opportunity.

DATES:

16-18, November 2021, 1:30pm - 4:30pm

AIM:

To provide Information Officers with a working knowledge of the PATI regime and their statutory obligations which will enable them to better conduct their assigned duties.

LEARNING OUTCOMES:

- Understand the PATI regime
- Understand the role of the Information Officer
- Apply exemptions under PATI legislation
- Conduct the public interest test
- Appropriately respond to PATI Requests

WHO SHOULD ATTEND:

Information Officers and their designates

TO REGISTER:

Government employees must register through the HR Portal, <http://hr.gov.bm>.

Information Officers outside of Government may contact the DE&OD at hrcourses@gov.bm or 279-2820 to register.