

MONTHLY ROUNDUP

Volume V, Issue II

APRIL 2022

WELCOME

The Information Commissioner's Office (ICO) welcomes you to the next 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.

The ICO's Monthly Roundup offers helpful information about PATI rights and practice for both the public and public authorities. In this issue, we take a closer look at the Information Commissioner's recently issued decisions and a review closed by resolution.

The Information Commissioner's next Quarterly Briefing for public authorities is scheduled in June. If you are involved with PATI work for one of Bermuda's public authorities, speak to your public authority's Information Officer to ensure that you receive the invite to join the Commissioner's Quarterly Briefings.

"The right information brings knowledge. And knowledge is power. Sharing it is empowerment."

Seth Godin, Author

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DECISIONS ISSUED

During April 2022, the Information Commissioner received nine new applications, issued two decisions, and closed one review as resolved. Highlights are below:

Failure-to-decide reviews continue.

In [Decision 10/2022](#), [Bermuda Police Service \(BPS\)](#), the Applicant asked for emails relating to a search warrant. Following the BPS's initial denial of access to the records, the Applicant exercised their PATI right for an internal review. The Information Commissioner decided that the BPS did not meet the six-week deadline for this internal review, since which the BPS has complied with her Order by issuing its internal review decision to the Applicant.



Public authorities have a basic duty to meet the statutory timeframes, including the deadline for issuing an internal review decision once requested. An internal review is the public authority's opportunity to take a 'fresh look' at the PATI request.

Communication is key. At the initial decision stage, if an information officer could benefit from more time to completely and accurately process a PATI request before the six-week statutory deadline, they can communicate with the requester and choose to extend the initial timeframe. Section 15 gives the only acceptable reasons to extend it up to six more weeks. The timeframe to issue an internal review decision, however, is not extendable.

Head of authorities must issue a decision within six weeks based on the information and records they have in hand. If circumstances change after an internal review decision is issued, a public authority may choose to disclose the responsive records later, even if an independent review by the Information Commissioner has commenced.

The Commissioner has published guidance on [Responding to PATI requests for public records](#), and paragraphs 144-152 set a clear understanding of PATI timeframes. When used with the [Minister's PATI Practice Code](#), public authorities can stay on track with giving timely responses to PATI and internal review requests.

What if a PATI request asks for records held in an email account of a former Minister or public authority staff? Read [Decision 11/2022](#) to learn more.

[Decision 11/2022](#) relates to a PATI request filed with the Ministry of National Security Headquarters (Ministry Headquarters) for records about legal settlement payments to certain participants in the 2 December 2016 protest. The Ministry Headquarters denied, among others, the part of the request seeking the basis used for determining each payment amount, claiming no such record existed.

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DECISIONS ISSUED...cont.



when the settlement amounts were being determined.

The Information Commissioner found that, before concluding none existed, the Ministry Headquarters had not taken reasonable steps to locate any record explaining the payment calculations basis. She noted that, among other issues, the Ministry Headquarters did not search the email accounts of the then Minister and Permanent Secretaries in place

The Ministry Headquarters claimed that it did not hold the email records of its former Permanent Secretaries or Ministers at the time of the PATI request. But the Information Commissioner disagreed, emphasising that email records of public officers formerly working in a public authority are reasonably viewed as institutional records managed by that authority, even after the officer has been assigned to another authority.

Absent an adequate explanation, the Commissioner was satisfied that the Ministry Headquarters had control over the relevant email accounts, that such control was shown in its ability to request access to them through the Information and Digital Technologies Department, and that searching those locations was reasonable given the then Minister's and Permanent Secretaries' possible involvement with the legal settlement payments. The Information Commissioner has ordered the Ministry Headquarters to conduct additional searches and issue a new initial decision to the Applicant on or before 9 June 2022.

When responding to PATI requests, public authorities must make efforts to locate records they hold. If a public authority claims that responsive records do not exist or could not be found, the Information Commissioner's review will assess the reasonableness of the public authority's search. The Commissioner's task is not, however, to confirm to a point of certainty whether a record exists. In assessing whether a search was reasonable, the Commissioner mainly considers: the quality of the public authority's analysis of the PATI request; the scope of the search that it decided to make on the basis of that analysis; and the rigour and efficiency with which the search was conducted.

The Commissioner has addressed the topic of reasonable searches during her [Quarterly Briefing](#) in July 2018 and in several other decisions, including [Decisions 04/2017](#), [Department of Health, 02/2018](#), [Department of Human Resources](#) and [10/2021, Department of Child and Family Services](#).

Reasons are always required.

When issuing a decision, a public authority must explain the factual basis for why the chosen provision in the PATI Act is being applied to the requested record or request. It helps to think of this requirement to give reasons together with the public authority's duty to assist by responding completely and accurately to requests. Giving reasons, as required

DECISIONS ISSUED...cont.

by sections 14(2)(a) and 43(2)(b)(i), stands even if setting out why a record does not exist could lead to criticisms that a public authority's actual practice has fallen short of expected standards. This month, the Information Commissioner closed a review by resolution for a case related to Decision 09/2021, about a PATI request for meeting minutes of the Human Rights Commission (HRC).

This review dealt with item 2 of the same request, seeking minutes of all meetings between the HRC's officers during a nearly nine-month period. Since the HRC had concluded that no records responsive to item 2 existed, the ICO used a different approach for this review, aligned with section 46 of the PATI Act, once the parties consented.

During the early resolution process, the ICO raised various questions with the HRC to learn about its scheduling and record-keeping practices for meetings between its staff members. The HRC's reasons for administratively denying item 2 of the request were more fully explained, and its search evidence to support its decision were given to the ICO.

The HRC accepted that its decision notice to the Applicant should have more fully explained why it was confident that no responsive records existed. The Applicant benefitted in learning more about the HRC's past practice. Ultimately, the Information Commissioner was satisfied that the early resolution was successful and accepted the Applicant's withdrawal of their application.

ICO STATISTICS AS OF 30 APRIL 2022

(from 1 April 2015)

Total applications for independent review	Closed: Decided	109
by the Information Commissioner223	Closed: Resolved	22
Pending investigations	Closed: Abandoned	7
Applications pending validation	Closed: Invalid	26

Q&A CORNER WITH THE ICO



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

I Want to Know about deadlines...

- Q:** The six-week deadline for me to ask a public authority for an internal review passed, but I still want one. What can I do?
- A:** Send your request for an internal review to the public authority. In your request, acknowledge that you missed the deadline, explain why, and ask the public authority to exercise its discretion to accept your request out of time, as may be done under section 42(3) of the PATI Act.
- Q:** It's been more than six weeks since the public authority sent me its internal review decision. Can I apply for the Information Commissioner's independent review, even though I know I'm late?
- A:** Yes. Email info@ico.bm asking for the Information Commissioner's review of the public authority's decision. In your application, acknowledge that you missed the six-week deadline and explain why. The Information Commissioner has discretion to accept an application made out of time, under section 45(2) of the PATI Act.



SAVE THE DATE

Information Commissioner's Virtual Quarterly Briefing

Thursday, 16 June 2022, 10:00am - 11:00am

Topic: TBC

ICO Briefings are for public authorities only.

Registration details will be sent directly to public authorities.

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: Ensure the ICO's latest internal policy publication, '[Guidelines for Responding to PATI Requests](#)', is part of your toolbox of handy resources.

Why it makes sense?

The guidelines cover various good practice tips based on the ICO's experience, insights and expertise. It is written by an Information Officer with other Information Officers in mind.

Kudos to those public officers who stay informed.

Tip for Information Officers: When acknowledging a PATI request (and an extension notice as needed), inform the PATI requester exactly how they can submit a request for an internal review.

Why it makes sense?

This is a simple way to prevent internal review requests being misdirected. The [Minister's PATI Practice Code](#) encourages public authorities to do so, in support of the requester's right of review; see suggested language in the sample letters, within 'section E Appendices'.

Kudos to those public officers who share freely even when not expressly told to do so.

Tip for PATI requesters: Not clear on how to count the due dates for your PATI request? Check out the useful summary in our '[Guidelines for Responding to PATI Requests](#)' at paragraphs 144-152.

Why it makes sense?

Things can be a bit confusing if you are not aware of how all the pieces fit together. The ICO publications use plain language to explain what the PATI Act requires. Certain rights can only be triggered when the requester does what the PATI Act indicates must be done. The PATI Act places a responsibility on the requester and the public authority to take certain actions in a timely, defined way.

Kudos to those requesters who seek to be informed.