

MONTHLY ROUNDUP

Volume V, Issue I

JANUARY-MARCH 2022

WELCOME

The Information Commissioner's Office (ICO) welcomes you to another issue of our Monthly Roundup, the first for 2022. 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 highlights from her recently published 2021 Annual Report.

Also, 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.

IN THIS ISSUE:

- Highlights from the Information Commissioner's 2021 Annual Report
- Information Commissioner's recent decisions
- Monthly statistics for ICO cases
- A PATI Act milestone: Information Commissioner issues 100th decision
- Information Commissioner's Virtual Quarterly Briefing (March)
- ICIC provides emergency assistance to the Commissioner of the Access to Information Commission in Afghanistan

"PATI rights ensure that Bermudians and residents not only receive the information that public authorities voluntarily choose to provide, but also the information that the public asks for and wants to know."

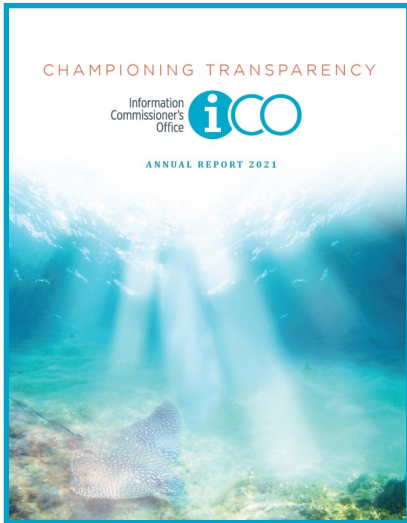
Gitanjali S. Gutierrez,
*Looking Ahead, 2021
Annual Report*



Information Commissioner's Office
Maxwell Roberts Building, 4th Floor
One Church Street
Hamilton HM11
441 543 3700
info@ico.bm
www.ico.bm



**Information Commissioner's
2021 Annual Report is now available!
Download your copy [HERE](#)**



Highlights of the 2021 Annual Report include:

- 135 new PATI requests were made by Bermudians and residents in 2021, which is a 16% increase over the number of PATI requests made in 2020.
 - 48% of public authorities' initial responses in 2021 to a PATI request granted access in whole or in part to the public records.
 - 39 new applications for an independent review by the Information Commissioner were made, which is an 86% increase, compared to the number of applications made in 2020.
 - 22 formal decisions were issued by the Information Commissioner in 2021.
- 4 "What Do You Know Now?" public awareness videos were released.
 - 9 ICO Monthly Roundups were published that discussed the Information Commissioner's decisions, public awareness initiatives and topics of interest about access to public information.
 - 9,000+ engagements occurred with the ICO's social media posts.
 - 333,500+ reaches with its successful social media campaigns were logged.
 - 80% of the public believed that creating and enforcing the PATI Act is a very important public investment.
 - 85 individuals representing over 50 different public authorities attended the Information Commissioner's virtual Quarterly Briefings for public authorities.

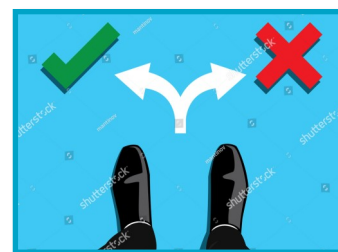
This Report is ripe with evidence that Bermudians and residents are using their PATI rights to gain access to more detailed information about public decisions that affect their families, community, businesses and future. Every PATI request submitted is demonstrating that Bermudians and residents are closely observing public decisions, policies and spending. Each public disclosure under the PATI Act provides the public access to information that further strengthens Bermudians and residents' ability to engage meaningfully with those that govern and make public decisions on their behalf.

DECISIONS ISSUED

During the first quarter of 2022, the Information Commissioner received 22 new applications and issued nine decisions. Highlights are below.

Failure-to-decide reviews are on the rise.

The Information Commissioner issued six failure-to-decide Decisions during this period: **Decision 01/2022** and **Decision 03/2022**, Ministry of Health Headquarters; **04/2022**, Cabinet Office; **05/2022**, Bermuda Police Service; **07/2022**, Ministry of Finance Headquarters; and **08/2022**, Bermuda Medical Council.



In failure-to-decide decisions, the Applicant exercised their right to request an internal review of the initial decision they received from the public authority, but by the six-week statutory deadline, they were still awaiting the head of authority's decision. Public authorities have a basic obligation under the PATI Act to respond to a PATI request within the statutory timeframes in the Act. The internal review is the public authority's opportunity to take a 'fresh look' at its response to the PATI request to ensure it is complete and accurate. Once requested by the requester, this decision must be issued by the public authority within six weeks of their request for one. In each of the cases above except for **Decision 07/2022**, the public authority issued an internal review decision to the Applicant during the Information Commissioner's review.

In Decisions **01/2022** and **03/2022**, the Commissioner acknowledged the explanation of the Ministry of Health Headquarters (Ministry Headquarters) that the impact of the more recent COVID -19 outbreak and other COVID-related work affected its capacity to conduct a timely internal review. In **Decision 01/2022**, the Ministry Headquarters received a request for records on the Government's Molecular Diagnostic Laboratory, COVID-19 testing programme and payments made to resQuest and resPartner Ltd. In **Decision 03/2022**, the Ministry Headquarters received a request for the records used to calculate its 'national health emergency' cost centre figures as stated in the Government's 2021/22 Budget Book.

In both Decisions, the Information Commissioner acknowledged the challenges the Ministry Headquarters faced but emphasised that this does not recuse the Ministry Headquarters from upholding the Applicant's PATI right to an internal review decision. These Decisions remind the public and public authorities that even when circumstances make it challenging to meet the PATI Act's statutory timeframes, meeting deadlines set by the PATI Act is the safest way to preserve a requester's rights to a review and to their timely access to non-exempt records.

In **Decision 04/2022**, the Cabinet Office, the Applicant submitted a PATI request for the Premier's correspondence related to Gencom, its subsidiaries and specific individuals. The Information Commissioner reaffirmed in this decision that although the Cabinet Office had received additional requests on a related topic, this did not change the Applicant's rights under PATI to a timely internal review decision for this request.

Continued on next page

DECISIONS ISSUED...cont.

In **Decision 05/2022**, Bermuda Police Service (BPS), the PATI requester asked for records related to a proceeding involving them. During the Information Commissioner's independent review, the BPS's submissions to her stated that the outcome of these proceedings would affect the outcome of their internal review. The BPS explained that it did not issue an internal review decision because it was hopeful that the proceedings would have concluded before the internal review decision was due. The Information Commissioner reiterated, though, that the deadline set within the PATI Act is firm and public authorities should proceed with issuing an internal review decision if a change of circumstances is unlikely to occur before the deadline.

In **Decision 07/2022**, Ministry of Finance Headquarters, the Applicant submitted a PATI request for copies of the Minister of Finance's correspondence related to Gencom, its subsidiaries and specific individuals. However, the Applicant did not receive an initial decision. During the processing of this PATI request, the Ministry Headquarters did advise the Applicant that an initial decision would be forthcoming, but unfortunately one was not provided to the Applicant by the 6-week statutory deadline.

In **Decision 07/2022**, the Information Commissioner noted that this specific PATI request arose out of a prior request for the same information, for which the Ministry Headquarters did not provide a substantive response. In this prior PATI request process, the Ministry Headquarters had led the PATI requester to believe that an initial decision was forthcoming, but one was never provided. At that point, the Applicant was out-of-time to seek further review. This current PATI request is a renewed effort to seek access to these public records and, unfortunately, the Ministry Headquarters repeated its failure to provide a substantive response.

In addition to finding that the Ministry Headquarters failed to decide the internal review and issuing an Order for it to do so, the Information Commissioner also recommended that the Ministry Headquarters seek training and support to improve its administration of its PATI responsibilities. Public authorities are reminded that several resources are available to ensure that their officers are equipped and confident in their handling of PATI request matters. The Cabinet Office's PATI/PIPA Unit offers training throughout the year. In addition, the Information Commissioner hosts her Quarterly Briefings, which provides an opportunity to take a closer look at different aspects of the PATI Act and share knowledge amongst others involved in PATI work. Finally, and perhaps most importantly, **the PATI Practice Code** offers a step-by-step guide to ensuring PATI obligations are met.

In the final failure-to-decide review for this quarter, **Decision 08/2022**, the Bermuda Medical Council received a request for records related to medical misconduct proceedings and an individual physician. Under the PATI Act, an internal review decision should be made by the head of that public authority and the Schedule to the PATI Act states who the head is for public authorities. In **Decision 08/2022**, however, the head of a Government Department conducted the internal review, not the Council's Chairperson.

Continued on next page

DECISIONS ISSUED...cont.

The Schedule to the PATI Act identifies the Council's Chairperson as the head of the authority. If an applicant is ever unsure of who the current Chairperson is for a board, committee or other public authority, updates to the members of these groups are published on the Government website and in the Government's official gazette notices.

Is a private entity's information automatically subject to public access when given to a public authority? Not necessarily. Read [Decision 02/2022](#) to learn why.

In [Decision 02/2022](#), [Bermuda Business Development Agency \(BDA\)](#), a request was made for records on Game Theory, a company who planned to open a business in Bermuda. BDA disclosed extensive records to the Applicant, but also withheld certain records under sections 23 and 26 of the PATI Act. The records involved third parties' interests. The Information Commissioner considered whether BDA and the third parties were justified in relying on the personal information (section 23) and breach of confidence (section 26) exemptions to argue that the records should be withheld. In [Decision 02/022](#), the Information Commissioner found that BDA was justified in denying public access to certain records. However, she ordered disclosure of certain information not exempt under the PATI Act or whose disclosure was required by the public interest.

This Decision highlights the handling of records related to the interests of third parties outside of the perhaps more familiar procurement context. In this scenario, BDA held information about companies and individuals involving the third parties' work in the private sector. The nature of such interactions with and submissions to public authorities were unrelated to public procurement, but still contained private entities' commercial and employee information. [Decision 02/2022](#) reminds the public that not all relationships between public authorities and private entities involve public procurement or public spending.

Generally, private entities that engage with public authorities should familiarise themselves with the PATI Act and their PATI rights, because records submitted to public authorities may contain information that could be publicly disclosed or subject to a PATI request. It is beneficial for private entities to engage in due diligence to ensure their awareness of how their business-related records could be handled under the PATI Act. One proactive step that private entities can take, for example, is to clearly identify what information may fall within the exemptions for commercial information or personal information when providing information to a public authority. Private entities may want to keep in mind that when they interact with public authorities, this does not mean on its own that the private entity waives all expectations of confidentiality. The PATI Act acknowledges the varied nature of the relationships between public authorities and private entities or individuals.

Are the Government's litigation costs subject to public access? Read [Decision 06/2022](#) to find out.

In [Decision 06/2022](#), [Attorney General's Chambers \(AG's Chambers\)](#), the Applicant made a request for records related to the costs associated with the legal challenge against same-sex

DECISIONS ISSUED...cont.

marriage at the Court of Appeal. AG's Chambers denied this PATI request on the grounds that the PATI Act does not apply to the responsive records in accordance with section 4(1)(b)(vi), because the records were created or obtained by AG's Chambers in the course of carrying out its functions. Because these records relate to AG's Chambers' core functions, the Information Commissioner was satisfied that they do not relate to AG's Chambers' general administration. The Information Commissioner noted that even though these records fall outside the scope of the PATI Act, the Government or AG's Chambers could voluntarily disclose information about the final costs of legal cases, as it has done in the past in other circumstances.

Do public authorities sometimes provide the 'building blocks' for a PATI requester to make their own calculations? Absolutely! See an example in Decision 09/2022.



In **Decision 09/2022**, Department of Public Prosecutions (DPP), a request was made for records containing statistical information on sexual offence cases. The Information Commissioner affirmed the DPP's internal review decision as correctly stating that the DPP was unable to provide the information in the format sought, i.e., statistics. During her review, the Information Commissioner concluded that the internal review decision provided the Applicant with the building blocks to determine the information that they sought. The Information Commissioner was satisfied that there were no issues to consider in this review.

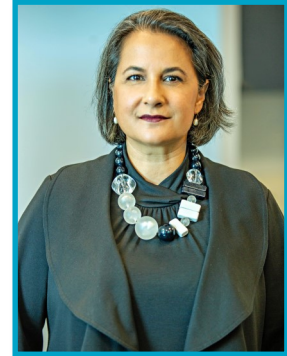
ICO STATISTICS AS OF 31 MARCH 2022

(from 1 April 2015)

Total applications for independent review by the Information Commissioner	214	Closed: Decided	107
Pending investigations	52	Closed: Resolved	21
Applications pending validation	2	Closed: Abandoned	7
		Closed: Invalid	25

A PATI ACT MILESTONE: INFORMATION COMMISSIONER ISSUES 100TH DECISION

On 28 January 2022, the ICO reached a milestone when Information Commissioner Gutierrez issued her 100th formal decision since the PATI Act went into effect. Only about 11% of the PATI requests made by Bermudians and residents result in a decision by the Information Commissioner. This portion reflects, in part, the benefits of the robust process under Bermuda's PATI Act when public authorities consider the PATI request that they receive. This includes public authorities' own internal review process to look at their responses again.



*Information Commissioner
Gitanjali Gutierrez*

When the PATI requester and public authority still disagree about the public's access to records or other issues, the Information Commissioner conducts an independent review and, where appropriate, issues a formal decision to ensure that PATI rights are legally enforceable rights.

The Information Commissioner's decisions have significantly contributed to ensuring that Bermudians and residents have access to public records, and have provided guidance to public authorities on the application of the PATI Act. Each decision explains the Commissioner's reasoning as fully as able, and public authorities have complied each time an Information Commissioner's decision required them to release records, conduct further searches or take other actions, such as fulfill the duty to assist a PATI requester.

In marking the 100th decision and the work it reflects, Commissioner Gutierrez also commended the integrity and dedication of the ICO's officers who strive daily to support the Information Commissioner's mandate under the PATI Act and engage respectfully with the public and public authorities as they do so.



SAVE THE DATE

Information Commissioner's Virtual Quarterly Briefing

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

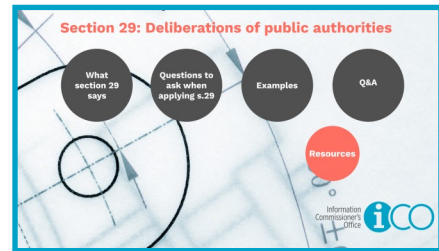
Topic: TBC

ICO Briefings are for public authorities only.

Registration details will be sent directly to public authorities.

INFORMATION COMMISSIONER'S MARCH VIRTUAL QUARTERLY BRIEFING

On 10 March 2022, the Information Commissioner held her fourth Information Commissioner's Quarterly Briefing for the 2021-2022 budget year for nearly thirty participants. Commissioner Gutierrez discussed the exemption for the deliberations of public authorities in section 29 of the PATI Act. Section 29 safeguards the confidentiality of a public authority's decision making process, including the consideration and rejection of various courses of action. This presentation provided a solid understanding of where to start if Information Officers seek to rely on this exemption in future PATI decisions. During the Briefing, participants discussed the difference between 'deliberative process' information that may be withheld compared to the reasons for a final decision that may need to be disclosed. Commissioner Gutierrez also discussed examples of how disclosures would undermine the deliberative process.



The Commissioner's Quarterly Briefing presentation, including speaker's notes, is available at ico.bm.

ICIC PROVIDES EMERGENCY ASSISTANCE TO COMMISSIONER OF THE ACCESS TO INFORMATION COMMISSION IN AFGHANISTAN



In the fall of 2021, the International Conference of Information Commissioners (ICIC) received a request for protection from Zahra Mosawi, Commissioner of the Access to Information Commission in Afghanistan. As an Information Commissioner mandated to promote democracy and openness, Mrs. Mosawi feared for her life and the lives of her family during Afghanistan's humanitarian crisis. The ICIC Executive Committee, of which Commissioner Gutierrez is a member, led the ICIC's response. The ICIC issued a statement in September 2021 emphasising the values of democracy and access to information amidst national emergencies. Through efforts by the ICIC member offices, former Commissioner Mosawi and her family were able to arrive in Mexico and enter the United States of America through a humanitarian parole managed by the Institute for Women in Migration. You can learn more about former Commissioner Mosawi's experience working to establish freedom of expression and information rights for the Afghan people by listening to her keynote address at the IAPP Global Privacy Summit 2022 [here](#).

The brave journey of former Commissioner Mosawi and her family is a reminder to those of us in Bermuda that we should not take our PATI and other rights for granted. With Commissioner Gutierrez at the table at the ICIC's Executive Committee, Bermuda stands with other jurisdictions who are committed to upholding PATI rights globally and demonstrate what a collective body of professionals can accomplish together in times of crisis.