

MONTHLY ROUNDUP

Volume VI, Issue VI

JUNE 2023

WELCOME

The Information Commissioner's Office (ICO) welcomes you to the latest 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 practices for both the public and public authorities.

In this issue, we take a look at the Information Commissioner's recently issued decisions, which provide insight into how systemic PATI issues within a public authority impact the PATI rights of Bermudians and residents.

Also, Information Commissioner Gitanjali Gutierrez and Investigation Officer LaKai Dill attended the 14th International Conference of Information Commissioners (ICIC) on 19-21 June, in Manila, Philippines. Commissioner Gutierrez and Ms. Dill both spoke on panels during the conference. See pages 5-6 for more.

"In the current state of the world, though, I have some concern that we need to focus, or continue to focus, our attention on the standards for implementation of existing ATI policy and legal frameworks to ensure that the aspirations they espouse do not stray too far from the reality of citizens' experiences with exercising their rights."

Information
Commissioner Gitanjali
Gutierrez
Excerpt from the panel
entitled *Policy
Framework for ATI
(Access to Information)
in the Global Arena:
Paradigm Shift and
Reforms*, during the
14th Annual
International
Conference of
Information
Commissioners

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DECISIONS ISSUED

During June 2023, the Information Commissioner issued seven decisions and resolved one case. Highlights are below:

When can a public authority refuse to disclose whether a record exists? Check [Decision 15/2023](#) for the answer!

In [Decision 15/2023](#), Bermuda Police Service (BPS), the Information Commissioner has further clarified the requirements for public authorities to rely on section 38 of the PATI Act. The provision allows public authorities to refuse to disclose the existence or non-existence of a requested record. To appropriately do so, public authorities first



have to show that the requested record, if it exists or were to exist, is or would be exempt from public disclosure. This means public authorities must pick another exemption (or more) that is or would be applicable to the record, and then show that the other exemption applies or would apply to it. This exercise should consider the public interest in disclosing the record, if the other exemption is also subject to the public interest test.

Next, to appropriately rely on section 38 of the PATI Act, public authorities must show that the public interest in not informing the public of whether a record exists or does not outweighs the public interest in disclosing its existence or non-existence.

In [Decision 15/2023](#), the Information Commissioner concluded that the BPS's reliance on section 38 was not justified. The BPS relied on this provision in its decision to refuse to disclose the existence or non-existence of any police report of any incident in March 2021 at Clifton, the Premier's official residence, and any communications between the Commissioner of Police and the Cabinet Office concerning any incident in March 2021 at Clifton. The BPS claimed that if any responsive record existed (or were to have existed), it was (or would have been) exempt in its entirety under section 23 of the PATI Act as personal information.

[Decision 15/2023](#) did not confirm one way or another whether any requested records actually existed. But because the BPS did not establish that any responsive record was (or would have been) exempt in full under the personal information exemption, the Information Commissioner concluded that the BPS's refusal to disclose the existence or non-existence of the record was not justified.

The Information Commissioner found that the BPS had failed to show that any responsive report (if it existed or were to have existed) actually related, or would have related, in whole to an identifiable individual. Instead of relying on section 38, the BPS instead should have acknowledged whether a report existed; and if it did, the report could have been redacted to remove any exempt personal information, if needed, as routinely occurs with PATI requests.

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DECISIONS ISSUED...cont.

The Information Commissioner agreed with the BPS that any records of communications involving the then-Commissioner of Police (if they existed or were to have existed) would have contained his personal information, but found that disclosure of some of his personal information would have been in the public interest.

The Information Commissioner found that, in any event, the public interest required disclosure of the existence or non-existence of the requested records. As a result, she has ordered the BPS to provide a new initial decision informing the Applicant of the existence or non-existence of the requested records on or before 11 August 2023.



Does a new Information Officer or Head of Authority have to stick to their predecessors' decisions? Not necessarily!

If you are a new Information Officer or a Head of Authority inheriting ongoing PATI-related matters from your predecessors, you might want to examine the positions your public authority has taken. Doing so might lead to resolving matters in a more efficient manner, as shown in [Decision 14/2023](#), [Bermuda Police Service \(BPS\)](#).

In [Decision 14/2023](#), the Information Commissioner found that no issue remained for her to review, in light of an updated decision by the BPS to abandon its reliance on the administrative grounds to have refused the PATI request.

In response to a PATI request made in 2020 for emails relating to the Applicant's probation, the BPS claimed that the records did not exist and relied on section 16(1)(a) of the PATI Act. It also later relied on section 16(1)(e), because it was of the view that the Applicant's request was vexatious.

During the Information Commissioner's review and following changes in personnel, however, the BPS re-evaluated its reliance on the administrative denial grounds. It located the records responsive to the PATI request and conceded that its earlier claims that the records did not exist and that the request was vexatious were not justified. Because the BPS issued an initial decision on the records it had recently identified, the Information Commissioner did not require BPS to take further action in her Decision.

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DECISIONS ISSUED...cont.

Making PATI requests and having them processed are enforceable rights!

The PATI Act gives public authorities six weeks to issue an initial decision in response to a PATI request. The timeline can be extended for another six weeks in certain circumstances, under section 15.

But if a public authority does not issue an initial decision within the initial six weeks and does not extend the timeline (or tries to extend but does not follow exactly what section 15 says), then a PATI requester has the right to request an internal review by the Head of Authority.

The internal review request triggers the right of the requester to receive an internal review decision by the Head of Authority, who has six weeks to issue one.



Because the requester's right to an internal review decision is an enforceable one, the story does not end if the Head of Authority fails to issue the decision within the statutory timeline. In that scenario, the requester can ask the Information Commissioner for an independent review of the public authority's failure to issue an internal review decision. If the Information Commissioner is satisfied that the public authority did not meet its obligation to issue a timely decision, she will issue an order requiring the public authority to do so—as she did in [Decisions 10-12/2023](#), [Department of Corrections](#), and [Decision 13/2023](#), [Economic Development Department](#). If the public authority issued an internal review decision during the Information Commissioner's review, as the Cabinet Office did in [Decision 09/2023](#), further action was not ordered.

[Decision 09/2023](#) considered Cabinet Office's failure to issue a timely internal review decision on a PATI request for records relating to certain companies and the Fastpass system. [Decisions 10-12/2023](#) related to PATI requests for various records relating to inmates as well as overtime payments made to staff. [Decision 13/2023](#) considered the Economic Development Department's failure to issue an internal review decision on a PATI request for fintech records.

ICO STATISTICS AS OF 30 JUNE 2023

(from 1 April 2015)

Total applications for independent review	Closed: Decided	147
by the Information Commissioner	Closed: Resolved	30
264	Closed: Abandoned	7
Pending investigations	Closed: Invalid	30
47		
Applications pending validation		
3		

14TH ICIC CONFERENCE RECAP

The [International Conference of Information Commissioners](#) (ICIC) gathered for its 14th conference on 19-21 June 2023 in Manila, hosted by the Freedom of Information Philippines (a unit within their government's Presidential Communications Office). This year's ICIC theme was *Bridging information across nations*. The event was attended by access-to-information (ATI) specialists from around the world, across Africa, Asia and Oceania among other regions. It was the first time the ICIC has been held in Asia.

The [conference programme](#) included two 'open' days of panels, presentations and meetings (whose recordings are now on the [ICIC's YouTube channel](#)), followed by a third 'closed' day for ICIC members. On the first day, Information Commissioner Gitanjali Gutierrez participated on a panel called *Policy framework for ATI in the global arena*. She emphasised that improving how existing legal and policy frameworks are implemented may be one of the most important challenges. She highlighted the subtle barriers that arise on a local level to dissuade people from using their ATI rights, as well as government actions that weaken oversight. Commissioner Gutierrez concluded on the ICIC's opportunities to strengthen international standards, ensuring the ATI promise is realised for citizens.

Investigation Officer LaKai Dill spoke on a panel about *Open contracting for public sector cost effectiveness*. She highlighted how Bermuda's PATI Act creates two ATI pathways about public procurement, one being government-driven and the other citizen-driven. She offered insights into some factors that could hinder such information being disclosed, including the 'people' element and misunderstanding third-party rights. Ms. Dill concluded on the importance of informal interventions and practice-oriented guidances to help public authorities improve their ATI decision-making.

Beyond the 'main room' sessions, Commissioner Gutierrez and Ms. Dill attended panels that touched on ATI from different angles, such as culture and society, technological advances, development, COVID-19 'lessons learned' as well as challenges to democracy. They also observed an official meeting of the recently inaugurated African Network of Information Commissioners and another for the Australia-New Zealand region (including Indo-Pacific small island developing states).



Conference delegates, including ICIC Executive Committee members, at the opening ceremony, alongside H.E. Ferdinand R. Marcos Jr., President of the Republic of the Philippines (front middle), as the keynote speaker, and Cheloy Garafil, Secretary of the Presidential Communications Office (front 2nd from left), who introduced the President



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14TH ICIC CONFERENCE RECAP...cont.

As an Executive Committee member, in addition to active participation during the third day's closed session, Commissioner Gutierrez offered comments during the second day's opening before all attendees, encouraging delegates to interact amongst new colleagues whose ATI experiences could add new value to their work at home.

It was announced during the 'closed' meeting that the Bermuda ICO was re-elected to the ICIC's seven-member Executive Committee for a second term until 2026. The ICO was elected as one of four members from a slate of eight. Under Commissioner Gutierrez's leadership, the Bermuda ICO has been a part of the ICIC leadership since 2019 and will continue in this role with Bermuda's next Commissioner.

To wrap-up this international gathering, Commissioner Gutierrez and Ms. Dill joined other conference delegates for a cultural excursion and post-conference debrief on the smaller Philippine island of Boracay, sponsored by the Philippines government. The debrief session was attended by an information officer with the Boracay county office alongside their mayor. In her comments, Commissioner Gutierrez proposed for future conferences to feature more about local-level initiatives, especially within small jurisdictions, so that officials may share about how they bring ATI alive in their everyday work.

What is the ICIC? The ICIC is the only global forum of member Information Commissioners who are responsible for the protection and promotion of ATI laws, and currently has over 80 member institutions. The ICIC's mission is to share knowledge and best practices, to build capacity, to help identify what is needed for global progress, and to act as a collective voice in international fora with a view to improving people's right to public information and their ability to hold to account bodies that provide public functions.



Investigation Officer LaKai Dill speaking on *Open contracting for public sector cost effectiveness* panel, alongside panelists Blanca Lilia Ibarra Cadena, President Commissioner of Mexico's National Institute for Transparency, Access to Information & Personal Data Protection (left), and Adnene Lassoued, President of Tunisia's Access to Information Authority (right)

COURT OF APPEAL RULED ON COSTS IN ICO'S FAVOUR

Following its judgment in [Information Commissioner v Attorney General \[2023\] CA \(Bda\) 6 Civ](#) (24 March 2023), the Court of Appeal issued its [ruling on costs](#) on 7 June 2023. The Court of Appeal concluded that, because its decision in the substantive matter was in favour of the Information Commissioner, the Attorney-General is required to bear the costs of the legal proceedings.

INFORMATION COMMISSIONER'S JUNE QUARTERLY BRIEFING

Essentials for Information Officers: Accessing PATI resources and overcoming challenges

In her June Quarterly Briefing, Information Commissioner Gitanjali Gutierrez focused on providing a safe space for Information Officers to discuss the challenges they encounter when facing their PATI responsibilities.

Commissioner Gutierrez acknowledged how the responsibilities that come with the Information Officer role could be challenging at times. For instance, there might be a lack of understanding of the purpose of the PATI Act and its requirements within the public authority as well as a lack of understanding of or respect for the role of the Information Officer. Information Officers might also feel a sense of isolation arising from PATI work. Despite having the responsibility to meet certain PATI requirements, Information Officers are not always in a position to change the resources their public authorities allocate to PATI matters.

Commissioner Gutierrez shared suggestions on how Information Officers can work through these challenges. During the session, Information Officers also shared strategies they found helpful in meeting challenges, based on their experience.

The Briefing was attended by a good mix of Information Officers, including those who were new to the role, experienced ones, and a past recipient of the Information Commissioner's Award.



SAVE THE DATE

Information Commissioner's Quarterly Briefings 2023-2024

Thursday, 14 September 2023

Thursday, 7 December 2023

Thursday, 22 February 2024

ICO Briefings are for public authorities only.
Registration details will be sent directly to public authorities.