

MONTHLY ROUNDUP

Volume V, Issue VII

OCTOBER/NOVEMBER 2022

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 practice for both the public and public authorities.

In this issue, we take a look at the Information Commissioner's recently issued decisions, along with the 2022 ICO Annual Return and what this means for both the public and public authorities.

In our Q&A, we take a closer look at what statutory power the Information Commissioner has and what happens when the Information Commissioner orders a public authority to disclose records.

"We serve the public so therefore the archives and information, is really public property. We are the keepers of the archives. We manage the archives. We utilize the information. But that information should be available to the public."

CITV Bermuda
Video - An interview with the Hon. Alex Scott CBE, JP, Former Premier of Bermuda, with host Heather Whalen

IN THIS ISSUE:

- Information Commissioner's recent decisions
- Monthly statistics for ICO cases
- ICO 2022 Annual Return
- Q&A Corner with the ICO
- Save the Date

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DECISIONS ISSUED

During October to November, the Information Commissioner received five new applications, issued four decisions, resolved one review and closed one invalid application. Highlights are below:

The importance of reasonable search

In [Decision 24/2022](#), [Department of Education](#) (Department), the Applicant submitted a PATI request that was transferred to the Department and sought personal information records and school complaint policies. This Decision involves the same PATI request considered in [Decision 03/2020](#), Ministry of Education Headquarters. The Applicant asked the Information Commissioner to conduct an independent review because they were not satisfied with the Department's internal review decision that the requested records did not exist.

In this [Decision](#), the Information Commissioner has found that the Department's denial of access to the school complaint policies under section 16(1)(a) was justified because the Department took reasonable steps to locate the requested policies before concluding that they did not exist. In contrast, the Information Commissioner has concluded that the Department had not taken all reasonable steps to locate the personal information of the Applicant or their child. As a result, the Information Commissioner has ordered the Department to conduct a reasonable search and issue a new initial decision to the Applicant.



In [Decision 25/2022](#), [Department of Public Lands and Buildings](#) (Public Lands and Buildings) the Applicant sought records relating to Tudor Farm's current tenants, tender records and decision making policies. In this [Decision](#), the Applicant asked the Information Commissioner to conduct an independent review because they challenged the reasonableness of the public authority's search for responsive records. In her [Decision](#), the Information Commissioner partially upheld Public Lands and Buildings internal review decision.

The Commissioner found that Public Lands and Buildings took reasonable steps to locate records relating to the current tenants and tenders, but did not conduct a reasonable search to locate the decision making policies. While the Commissioner was conducting her independent review, however, Public Land and Buildings conducted additional searches for its decision making policies to meet the reasonable search requirements. These expanded searches during the Information Commissioner's review resulted in the identification of additional records responsive to the PATI request, some of which have been disclosed to the Applicant.

In her [Decision](#), the Information Commissioner has ordered the Department to process two additional responsive records.

DECISIONS ISSUED...cont.

There are several previous Decisions from the Information Commissioner that are related to Tudor Farm: Decisions [01/2021](#), [16/2021](#) and [20/2022](#).

Removing possible confusion between what the Applicant is expecting and what the public authority assumes the Applicant is seeking

Section 12(2)(b) of the PATI Act and Regulation 5 of the PATI Regulations 2014 set out the requirement for public authorities to conduct reasonable searches for records when processing PATI requests. Before starting a search, public authorities might find it useful to communicate with the Applicant to ensure that it is clear what the PATI request is seeking. This can avoid any assumptions by the public authority before it starts searching through records. A public authority may save itself time and frustration and avoid having to re-search if it confirms with the Applicant exactly what should be searched for. Details such as a date range, the names or types of specific documents, or the names of individual public officers whose emails should be searched, might all provide useful directions before diving into any search activity.



[Decision 24/2022](#) provides insight into how Information Officers can put this into practice and work to improve how searches are managed. For example, if in response to a PATI request, an Information Officer notifies its team of public officers via email of the requirement to search for records, simply asking for public officers to search does not mean that the requirement to search has been fulfilled. The Information Officer must make the effort to follow-up with all public officers that were notified to conduct searches but have not responded, so that, if necessary, the information officer can provide proof that reasonable searches were actually conducted. The ICO, while investigating a matter may require evidence of search criteria from the public authority. It would be more efficient to build this into the search processes to save time and resources.

In [Decision 26/2022](#), [Department of Immigration](#) (Immigration), considered the Applicant's request for records created by Immigration for the Applicant's British Overseas Territory Citizen application. The Applicant asked the Information Commissioner to conduct an independent review of Immigration's internal review decision because they believed the disclosures that Immigration made to them were incomplete.

This [Decision](#) brings attention to section 60(2) of the PATI Act which requires the Minister to "establish the codes of practice for public authorities regarding the maintenance and management of records of public authorities in a manner that facilitates ready access to the records". This is pertinent because the Applicant expressed concerns about Immigration's record keeping practices.

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DECISIONS ISSUED...cont.

This Decision may help members of the public who have submitted or are considering submitting BOTC applications to understand how Immigration processes these type of applications, what key public officers are involved in the process, and what records may be generated.

Bermuda is a small community, and [Decision 26/2022](#) illustrates how it may be common for public authorities to have previously interacted with a member of the community in a separate capacity before that individual submits a PATI request to them. It is important for public authorities to not blur the boundary between its past interactions with an individual outside of the PATI process and the handling of a PATI request made by the same individual. As a public authority processes a PATI request, they do not need to know why the Applicant is requesting those specific records under the PATI Act, even if they have interacted with the Applicant previously on the topic of the PATI request.

In [Decision 26/2022](#), the Information Commissioner discussed these issues, and has found that Immigration did not conduct a reasonable search for records responsive to the Applicant's request, specifically the search for relevant public officers' emails, Immigration's electronic AS400 database or other non-email resources. As a result, the Information Commissioner ordered Immigration to conduct a reasonable search and issue a new initial decision to the Applicant.

Orders and enforcement

When necessary, the Commissioner may issue an order to accompany her decision. When the Information Commissioner issues a decision with an accompanying order, the decision is filed with the Supreme Court, in accordance with Section 48(3) of the PATI Act. If a public authority fails to comply with the decision, the Information Commissioner has the authority to pursue enforcement of the order in the same manner as an order of the Supreme Court. The Information Commissioner shall take enforcement action when necessary to safeguard the right to access public records.



For Decision [24/2022](#), [25/2022](#) and [26/2022](#), the Information Commissioner has issued Orders.

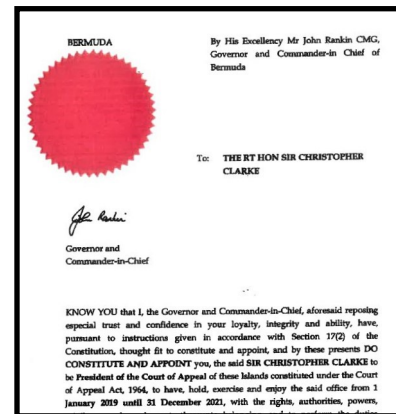
Did you know that PATI requesters can request access to public records in formats other than physical copies?

In [Decision 27/2022](#), [Office of the Governor](#), the Applicant submitted a PATI request to inspect Government House's records of appointment of certain positions made by instruments under the Public Seal (instruments of appointment), in accordance with several provisions in

DECISIONS ISSUED...cont.

the Bermuda Constitution. Instruments of appointment are formal records documenting appointments made by the Governor of individuals to sit in public posts, such as the Premier, other Ministers, the Ombudsman, Chief Justice, Puisne Judges, Court of Appeals Judges and Head of the Public Service Commission. While the public can usually see a list of these appointments online in the Government's Official Gazette, in this case the Applicant wanted to inspect the actual appointment records.

As part of this [Decision](#), the Information Commissioner considered the Applicant's challenge to Government House's decision to provide copies of the requested records, instead of allowing for their inspection. [Decision 27/2022](#) is the first decision by the Information Commissioner that considers section 17(2) and (3) of the PATI Act, which allows public authorities to grant access to records in a manner different from what was requested by the Applicant. Although the Information Commissioner upheld Government House's decision to provide copies of the requested



records rather than the opportunity to inspect them, this [Decision](#) sheds light on the fact that requesters have the option to request access public records in a particular manner.

Even though most PATI requesters ask for copies of public records, section 17(2) of the PATI Act actually allows requesters to ask for access to records in a variety of forms or manners, such as:

- a reasonable opportunity to inspect physical records;
- transcript of information;
- on an electronic device or electronic machine-readable device that contains the requested information;
- a reasonable opportunity to hear or view the record where the records is of sound or visual images; or
- a decoded copy of the information if the information is in shorthand or another code.

In [Decision 27/2022](#), the Information Commissioner also addressed the Applicant's confusion surrounding the fact that the then-Deputy Governor, in her capacity as the Acting Governor, issued the internal review decision. The Information Commissioner confirmed that, because the Deputy Governor was acting as the Governor during the relevant period, she was authorised to issue an internal review decision on behalf of Government House.

The Information Commissioner further emphasised that the designation of the Head of Authority in the Schedule to the PATI Act attaches to the post, and not to the individuals in those posts. The Information Commissioner acknowledged, however, that there were some confusions in this case due to miscommunications.

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DECISIONS ISSUED...cont.

It is common practice for an acting Head of Authority to be appointed for a period of time while the actual Head of Authority is on leave. These appointments are usually published online in the Government's Official Gazette, but the general public may not always be up-to-date with all appointments. The responsibility is not on the shoulders of the requester to identify who the current individual is in the role of the head of authority.

If a requester asks for an internal review, they can exercise their PATI right by simply sending their written request to the relevant public authority. Upon receipt of the internal review request, the Head of Authority (whether acting or actual) should process the request as per the PATI Act. To avoid any confusion, in their interactions with a requester (including in an internal review decision), an acting head of authority should explain that they are communicating in their acting capacity.

ICO STATISTICS AS OF 30 NOVEMBER 2022

(from 1 April 2015)

Total applications for independent review	Closed: Decided	125
by the Information Commissioner246	Closed: Resolved	26
Pending investigations59	Closed: Abandoned	7
Applications pending validation1	Closed: Invalid	28

Information Commissioner v The Attorney-General

The Court of Appeal heard Information Commissioner v The Attorney-General, Civil Appeal No. 7 of 2022, on 9 November 2022. The Information Commissioner is challenging the **judgment** issued on 25 January 2022 by Puisne Judge Shade Subair Williams that found that the Information Commissioner did not have the power to examine records which public authorities claim to fall outside the scope of the PATI Act.

This ruling is the first in Bermuda to consider the extent of the Information Commissioner's powers to receive copies of records when conducting her independent review. The Information Commissioner is currently awaiting the Court of Appeal ruling on this matter.

HOW TO MAKE A PATI REQUEST

BE INFORMED, INCLUDED AND INVOLVED —
MAKE A PATI REQUEST!

STEP 1

WHAT RECORDS DO YOU WANT?

Think about the information you are looking for and how a public authority documents that information. It may be in a report, policy memo, manual, budget, procurement document, letter, meeting minutes, email, bank statement, map or diagram, film or microfilm, videotape or sound recording.

STEP 2

DECIDE WHICH PUBLIC AUTHORITY PROBABLY HAS THE RECORDS THAT YOU WANT.

A list of the 200+ public authorities can be found at ico.bm.

No need to worry if you are unsure. Public authorities have a duty under the PATI Act to assist requesters to find the right office or to transfer a request to the correct office.

STEP 3

SUBMIT YOUR WRITTEN PATI REQUEST TO THE PUBLIC AUTHORITY.

The PATI request should be in writing. It can be given to anyone in that public authority, but directing it to the public authority's Information Officer will make your request easier to track.

STEP 4

WHEN YOU GET YOUR DECISION – WHAT NOW?

If you receive a record under the PATI Act, it can be used and shared as public information for everyone. A disclosure under the PATI Act is a disclosure to the world.

If you disagree with the decision, you have the right to:

- An internal review by the head of the public authority;
- An independent review by the Information Commissioner; and
- Seek leave for judicial review by the Supreme Court.

The 1-2-3 of submitting a PATI request

- **Put it in writing. (email and letters are fine)**
- **Be specific and describe the records enough so the Information Officer knows what you are looking for.**
- **Say how you want to receive the information. (electronic copies are free)**

I WANT TO KNOW 1

WHAT IS A 'RECORD'

A 'record' under the PATI Act includes information recorded in any format. It can be papers, tapes or film or electronic files.

DUTY TO ASSIST

Public authorities have a duty to assist persons in connection with making a PATI request. Need help? Just ask.



MAKE A REQUEST

ICO 2022 ANNUAL RETURN

The ICO commenced the distribution of the 2022 Annual Return package to all public authorities at the end of November. The Annual Return enables the Information Commissioner to monitor public authorities' compliance with PATI Act requirements to make certain information available to the public without having to make a PATI request. This information includes public authorities' up-to-date Information Statement, PATI request log, quarterly expenditure report and the gazetting of contracts with a total value of \$50,000 or more.



Copies of public authorities' information statements are available on ico.bm. Gazette notices for public authorities contracts with a total value of \$50,000 or more are published on gov.bm.

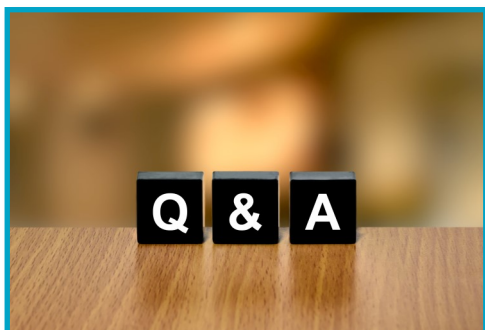
The ICO's redesigned website models transparency by design by making additional ICO records publicly available. The website now includes the ICO's PATI request log and unaudited quarterly expenditure reports. Other records include ICO PATI disclosures, credit card statements and staff meeting minutes.



The ICO's updated website now has a webpage dedicated to the Annual Return. Public authorities will be able to access a copy of the current Annual Return package and the ICO Annual Return guidance [HERE](#).

The Commissioner's Quarterly Briefing on 8 December focused on the 2022 Annual Return package and provided an opportunity for representatives from public authorities to ask the Commissioner and her team specific questions that they had about completing the return. Correspondences related to the Annual Return should be submitted to the ICO at stats@ico.bm. Project Officer Sheena Bassett is available to answer any questions that you may have about the Annual Return process.

Q&A CORNER WITH THE ICO



What power does the Information Commissioner actually have? If the Information Commissioner decides that a public authority should disclose certain records, what actually happens next?

The mandate of the Information Commissioner is to promote public access to public information in Bermuda. One of the way she achieves this is by providing guidance for, and oversight of, public

authorities' compliance with the PATI Act. When the Information Commissioner completes her independent review of how a public authority handled a PATI request, she issues a [decision](#). Often times some of those decisions include an order. What makes the Information Commissioner's decisions "enforceable" is that they are legally binding.

What does this actually mean?

If a public authority does not comply with the Information Commissioner's decision and the accompanying order, it could be found to in contempt of court if the Information Commission seeks enforcement. This means that a decision by the Information Commissioner can be enforced in the same manner as an order of the Supreme Court. Section 48 of the PATI Act speaks to the powers the Information Commissioner has when enforcing her decisions.

Encouragingly, to date, public authorities either have complied or are working towards compliance with all the decisions and orders issued by the Information Commissioner. This means that if the Information Commissioner has ordered disclosure of records, those records have been publically disclosed or are in the process of being disclosed. If the Applicant requested access to their own personal records, then the records were disclosed to the Applicant or are in the process of being disclosed to the Applicant. Public officers who have worked diligently to uphold PATI rights should be commended for the role that they play for an outcome such as this.

If a member of the public is interested in knowing what records have been disclosed under the PATI Act, they can simply ask to see a public authority's PATI request log. A PATI request does not need to be made to access a public authority's PATI request log. If the public authority granted access to the requested records, any member of the public can ask for copies of those records because a disclosure under the PATI Act is a public disclosure to the world, unless the disclosed records were for a requester's personal records.

Book the ICO

for a PATI presentation with your organization or an information table at your upcoming community event.



Are you involved with a local charity, school, programme or organization?

Are you interested in further empowering your community?

Do you know of any local organizations that would benefit from understanding their rights under the PATI Act?



Contact Sheena Bassett, Project Officer at the ICO
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ico.bm



Information Commissioner's Quarterly Briefing

10:00am - 11:00am
Thursday, 9 February 2023
Thursday, 9 March 2023

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



PATI TRAINING NOW AVAILABLE!

The Cabinet Office's PATI/PIPA Unit will be offering the following 2-day trainings, in person, this year. If you are an Information Officer in need of training, consider taking advantage of this opportunity.

DATES:

- 1 & 2 March, 9:00am to 4:30pm
- 15 & 16 November, 9:00am to 4:30pm

AIM:

To provide information officers with the basic knowledge of the PATI Regime which will enable them to 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:

Email privacy@gov.bm.