



Companion Guide to the Consultation Draft of the Public Access to Information Bill



GOVERNMENT OF BERMUDA
The Cabinet Office

October 2009



The Cabinet Office

105 Front Street Hamilton HM 12 Bermuda
Tel: 441-292-5501 Fax: 292-8397

October 15th, 2009

Dear Sir or Madam,

Public Access to Information (PATI) Draft Bill Consultation

In support of the Government's commitment to openness and transparency, I am happy to share with you, the public, proposals for Public Access to Information (PATI) legislation in this companion guide to the draft bill.

The bill is designed to make central Government, and the larger public sector, more open and accountable by giving the public the legally enforceable right to request and access information subject to limited and prescribed exemptions. PATI legislation, also commonly referred to as Freedom of Information, was first established in Sweden in 1766. Since that time over 60 countries have put PATI legislation in place, including: Antigua and Barbuda, Argentina, Australia, Belize, Canada, the Cayman Islands, Denmark, Finland, Germany, India, Ireland, Israel, Jamaica, Japan, Mexico, The Netherlands, New Zealand, Norway, Peru, Portugal, South Africa, Spain, Trinidad and Tobago, the United Kingdom and the United States.

The concept is also supported and recognized by a number of international and intergovernmental organizations such as the United Nations, the Organization for Economic Co-operation and Development, the International Monetary Fund, the Commonwealth Secretariat, the European Union and Caricom, among others.

You are therefore encouraged to review the information in this companion guide and review the draft bill, which is available electronically at www.gov.bm and in hard copy at the Cabinet Office for your viewing.

Sincerely,

A handwritten signature in black ink, appearing to be 'E. Brown'.

Dr. the Hon. Ewart F. Brown, J.P., M.P.
Premier of Bermuda

Invitations for Submissions on Proposals for Public Access to Information

This document serves as a companion guide to the draft bill on Public Access to Information (PATI). The purpose of the consultation on the draft bill and the companion guide is to help inform the people of Bermuda about proposals for PATI. You are being given the opportunity to give your input to important legislation intended to make Government more accountable and responsive.

Both the companion guide and the draft PATI bill are available online at www.gov.bm, or in hard copy at the Cabinet Office at 105 Front Street, Hamilton.

The Government invites submissions on the draft bill that can be emailed to the Cabinet Office at pati@gov.bm or submitted by mail or hand to:

The Cabinet Secretary
Re: PATI
The Cabinet Office
105 Front Street
Hamilton, HM 12

They may also be faxed to 296-0555.

If you have questions regarding the proposals for PATI legislation, you may contact the Cabinet Office via email at pati@gov.bm or at 298-7168.

Unless confidentiality is requested, the contents of the submissions may be made publicly available.

Companion Guide to the Consultation Draft of the Public Access to Information Bill

1.0 Introduction

In the 2003 Speech from the Throne, the Government outlined its intention to consider proposals for Public Access to Information (PATI) legislation. Resultantly, a commitment was made to develop PATI legislation in support of the Government's ongoing pledge to good governance and transparency.

Currently, access is provided to certain Government or wider public sector held information by way of legislation, by way of custom and practice, by way of discretion, in response to Parliamentary Questions in the Legislature, and in response to queries from the public and the media.

There is however, no statutory right that is applied across the public sector that gives the public the right to access information and to apply for redress if requests for information are denied. PATI legislation is required in order to make access legally enforceable and to help ensure that the release of information is not arbitrary or unreasoned.

2.0 International Perspective

PATI legislation, also commonly referred to as Freedom of Information was first established in Sweden in 1766. Since that time over 60 countries have put PATI legislation in place, including: Antigua and Barbuda, Argentina, Australia, Belize, Canada, the Cayman Islands, Denmark, Finland, Germany, India, Ireland, Israel, Jamaica, Japan, Mexico, Netherlands, New Zealand, Norway, Peru, Portugal, South Africa, Spain, Trinidad and Tobago, the United Kingdom and the United States.

The concept is also supported and recognized by a number of international and intergovernmental organizations such as the United Nations, the Organization for Economic Co-operation and Development, the International Monetary Fund, the Commonwealth Secretariat, the European Union and Caricom, among others.

3.0 Benefits of PATI Legislation

PATI allows individual citizens, organizations, companies, the media, and other interested parties to know what Government is doing and how decisions are made. Intended benefits include:

- a) democratic participation and understanding;
- b) improved decision making processes;
- c) improved records management;
- d) improved internal efficiency; and
- e) increased accountability.

4.0 Impact on the Public Sector

PATI legislation will have a wide and varied impact on the public sector. Each public authority covered by the legislation must be able to provide information to the public upon request as long as that information is not exempted or excluded from being released by legislation. Records management systems must be

enhanced to the extent that public authorities are able to find and deliver information in a timely manner, and some public authorities will need to improve how they document their operations.

In addition, public authorities will have to be proactive by releasing certain information before the public asks for it. They will also have to monitor the types and number of requests made for information, the number of requests that are granted and refused, the reasons for refusals, and over time monitor the successes and/or failures of the legislation.

5.0 Summary of Proposals for PATI legislation

5.1 Purpose

The purpose of the legislation is to:

- a) give the public the legally enforceable right to access information held by public authorities;
- b) increase transparency and eliminate unnecessary secrecy;
- c) inform the public about the actions of public authorities; and
- d) put more information into the public domain.

5.2 Public Authorities Covered by Legislation

It is proposed that the legislation apply to central Government and all public authorities, including the Office of the Governor, all quasi non-governmental organizations (quangos), the City of Hamilton and the Town of St. George and Parish Councils, etc. The legislation refers to these bodies as ‘public authorities.’

The investigative records of the Department of Public Prosecutions, the Office of the Auditor General and the Bermuda Ombudsman will be excluded, but their administrative records (i.e. non-investigative records) will be covered by the legislation. Additionally, an Information Commissioner will be established to hear appeals under PATI legislation. The investigative records of the Office of the Information Commissioner will also be excluded from PATI legislation.

The courts or any body exercising a judicial function would be excluded.

5.3 Information Statement

Each public authority subject to the legislation will be required to have an Information Statement, which is a public document that provides information about the public authority in order to promote a better understanding of what the public authority does, to inform members of the public of what information they may have the right to access, and to help them specify what information they are looking for.

Each public authority will have to update its Information Statement at least once a year and make it available online and at its principal office. Information Statements will also be made available at the Bermuda National Library and at the Bermuda Archives.

5.4 Provision of Other Information

The proposed legislation encourages public authorities to be proactive in the disclosure of information. Since PATI legislation will only cover information not publicly available, the more information made

available to the public means that fewer requests will need to be made under PATI legislation.

It is proposed that public authorities keep a log of all requests, and make any information provided to the public under PATI legislation available as a matter of course.

They will also have to make certain details (i.e. the total value of a contract, the name of the contractor, the goods and/or services provided) of all contracts over \$50,000 available.

The job title and salary range of all public officer positions within central Government will also be made publicly available.

5.5 Right of Access

It is proposed that any member of the public be able to make a request for information. The request must be in writing and the public authority must decide the request within 28 days. This is consistent with international practice. Under certain circumstances, a public authority can extend this 28 day period. For example there may be insufficient time to complete consultation with third parties, there may be a large amount of information to search through, or dealing with the request within the 28 day period would substantially or unreasonably interfere with the day to day operations of the public authority.

A requester is not required to give any reasons for making a request, and the identity of a requester is also confidential.

5.6 Duty to Assist

Public authorities have a duty to assist persons making requests. If a request is made to the wrong public authority, the public authority that received the request must transfer it to the appropriate public authority within 10 days.

5.7 Forward Looking

With the exception of an individual's personal information, it is intended that the legislation cover information created after the date that the legislation goes into effect. Requests for personal information can be made at any time, regardless of when the information was created.

5.8 Refusal of Requests on Administrative Grounds

A request may be refused on administrative grounds. One such ground is that the information does not exist or cannot be found after reasonable attempts to do so have been made. In addition if a request includes a large number of records that would cause a substantial and unreasonable disruption of the work of the public authority, it may be refused.

5.9 Manner of Access

If a request for information is granted, the person requesting the information can ask to receive it in the form that he or she wishes (i.e. paper document, electronically via email, compact disc, etc.); however if the public authority determines that there is a more efficient way to provide the information, or if the provision of the information in the requested format would impact on copyright or conflict with a legal duty or

obligation of a public authority, the public authority would determine the best form of access. A requester should also be given the opportunity to inspect the record.

5.10 Access to Part of a Record

Where part of a record contains exempt information (information that cannot be made public), it is proposed that that information be redacted or blacked out, but in cases where this would make the record misleading, a public authority does not have to provide access to the record.

5.11 Amending Personal Records

The legislation also proposes to allow individuals to amend records that contain their own personal information, if that information can be demonstrated to be incomplete, incorrect or misleading. An individual would have to make an application to the public authority holding the record, and the public authority would be required to respond within 28 days, but can extend this time for another 28 days if a decision is not reasonably possible within that time period.

5.12 Fees

There may be fees charged for the provision of information, but not for requests for information. It is intended that specific fees regulations be drafted in the future.

5.13 Exemptions and the Public Interest

In line with international practice, the proposals contain exemptions, which refer to information that cannot or may not be made public under PATI legislation. This is because of the harm that disclosure would likely cause individuals, businesses or organizations, including public authorities. Harm generally refers to substantial damage to a particular interest, and must also be real, likely and significant (embarrassment does not rise to the level of harm). Each exemption was developed on this basis; however, the majority of all exemptions are also subject to a public interest test, where the public interest in disclosing information must be weighed by each public authority against the public interest in withholding the information.

5.14 List of Exemptions

Exemptions are proposed to cover the following areas:

- a) Health and safety of an individual;
- b) Personal information;
- c) Commercial information;
- d) Information received in confidence;
- e) Cabinet documents;
- f) Ministerial responsibility;
- g) Deliberations of public authorities;
- h) Operations of public authorities;
- i) Financial and economic interests;
- j) National security, defence, and international relations;
- k) Governor's responsibilities and communications with the United Kingdom;

- l) Law enforcement;
- m) Legal professional privilege;
- n) Contempt of court and parliamentary privilege; and
- o) Disclosure prohibited by other legislation.

5.15 Public Interest Test

The public interest test requires that public authorities consider factors for and against disclosure, and if it is determined that the public interest for disclosure outweighs the harm that would be caused by disclosure, then the information would have to be released.

Public interest tests for most exemptions were included in PATI legislation to allow for flexibility for the disclosure of information where there would be an important benefit for the community, or for certain important interests. Without the public interest test, all information subject to an exemption would be withheld in all circumstances, without exception.

Although, the public interest cannot be defined specifically in legislation, the release of information would be in the public interest if, for example, its disclosure would contribute to any one of the following outcomes:

- a) Better policy-making, transparency and accountability;
- b) The adequate discharge of a public authority's functions;
- c) The effective use and oversight of public funds;
- d) Debate on issues in the public interest;
- e) Increased public influence in the political process and decision-making;
- f) Public safety and public health;
- g) The protection of the environment; and/or
- h) Exposing or prosecuting alleged or actual human rights violations.

The above list is not meant to be exhaustive, and there are other beneficial outcomes that would be in the public interest.

One example of the public interest test in effect arises from another jurisdiction where a government claimed that its travel expenses were exempt because they constituted personal information. However, upon weighing the public interest, it was determined that knowing how public authorities spend money outweighed the interest of protecting personal privacy, allowing the travel expenses information to be made public.

5.16 Description of Exemptions

The following are a list of exemptions as proposed in the legislation. Where an exemption is followed by a (PI), this means that it is subject to a public interest test.

5.17 Health or safety of an individual (PI)

A record is exempt from disclosure if its disclosure would, or would be likely to endanger the physical or mental health or safety of an individual.

5.18 Personal Information (PI)

Personal information means any identifiable recorded information about an individual, and can include information relating to a person's race, ethnicity, age, sex, religion, marital status, etc.

Personal information does not refer to information about an individual who is or was an officer of a public authority as related to positions or functions of the individual, information about an individual performing services under contract to a public authority, information relating to a discretionary benefit, or information relating to an individual who has been dead for more than 20 years.

A record containing personal information (including of a deceased person) is exempt from disclosure. This exemption does not apply if:

- a) the information requested relates to the person making the request;
- b) the information requested is included in a body of information that includes general reference to a large number of individuals and is readily available to the general public;
- c) the information was given by an individual who was informed that it belonged to a class of information that would or might be made available to the general public;
- d) the disclosure of the information is necessary to avoid a serious and imminent danger to the life or health of an individual.

Where the disclosure of information to the requester might be prejudicial to the physical or mental health, well-being or emotional condition of the requester, a public authority may refuse to disclose the record. However, upon request, the public authority must provide such a record to an appropriate health professional identified by the requester, who would then be expected to share that information with the requester in an appropriate way.

5.19 Commercial Information (PI)

Three classes of commercial information are exempt: information consisting of a trade secret, information whose commercial value would be or could be reasonably expected to be destroyed or diminished by disclosure, and information which, if disclosed, would have or could reasonably have an adverse effect on the commercial interests of any person, excluding the requester.

5.20 Information Received in Confidence (PI)

Information is exempt if it is given to a public authority by a third party in confidence under the understanding that it would be treated as confidential. Information is also exempt if its disclosure would likely prevent the public authority from receiving similar types of information and this would impair the public authority from properly fulfilling its functions. If the disclosure of information would constitute a breach of a duty of confidence provided for by a provision of law, it would also be exempt.

5.21 Cabinet Documents

Cabinet documents, including draft legislation are exempt from disclosure. This does not apply to records that are older than 30 years, or to records that contain purely statistical, technical or scientific material unless the disclosure of the record would reveal the deliberations or a decision of Cabinet. Cabinet Committees

are also included within the meaning of “Cabinet.”

5.22 Ministerial Responsibility (PI)

Information that would undermine individual Ministerial responsibility, including the free and frank discussion and advice between Ministers or between Ministers and public officers in the course of their public duties would be exempt.

5.23 Deliberations of Public Authorities (PI)

Information relating to the deliberative process of public authorities, including opinions, advice, recommendations and the results of consultations are exempt. This does not include factual or statistical information, information relating to the performance, efficiency or effectiveness of a public authority in relation to its functions, information produced by a scientific or technical expert, or information regarding the reasons why a public authority made a particular decision.

5.24 Operations of Public Authorities (PI)

If information could reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, etc., or have a significant adverse effect on the performance of a public authority, or would disclose positions on negotiations of a public authority, then it is exempt.

5.25 Financial and Economic Interests (PI)

Information whose disclosure or premature disclosure could reasonably be expected to have a serious adverse effect on the financial interests of Bermuda or on the ability of the Government to manage the national economy would be exempt.

5.26 National Security, Defence and International Relations (PI)

Information whose disclosure would prejudice the security or defence of Bermuda and the United Kingdom or relations between Bermuda and the United Kingdom or another State or international organization of States would be exempt, as well as information communicated in confidence by a State or an organization of States.

5.27 Governor’s Responsibilities and Communications with the United Kingdom (PI)

A record is exempt if it contains information that relates to the responsibilities of the Governor under section 62 of the Bermuda Constitution Order 1968, or consists of communications between the Office of the Governor and Departments of the Government of the United Kingdom relating to the Office of the Governor.

5.28 Law Enforcement (PI)

A record is exempt if its disclosure would:

- a) prejudice the prevention, detection or investigation of a breach or possible breach of the law;
- b) prejudice the enforcement of, compliance with, or administration of, any law;

- c) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- d) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law;
- e) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;
- f) endanger any person's life or safety;
- g) prejudice the security of any building, structure, vehicle, ship, boat or aircraft; or
- h) facilitate the commission of an offence.

The above does not apply to a record if it consists of:

- a) information revealing that the scope of a law enforcement investigation is not authorized by law, or has exceeded the limits imposed by law;
- b) a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law;
- c) a report on the degree of success achieved in a program adopted by a public authority for dealing with any contravention or possible contravention of the law;
- d) a report prepared in the course of a routine law enforcement inspection or investigation by a public authority whose functions include that of enforcing the law; or
- e) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation;

and disclosure would be in the public interest.

5.29 Legal Professional Privilege (PI)

A record is exempt if it would be excluded from production in legal proceedings on the ground of legal professional privilege.

5.30 Contempt of Court and Parliamentary Privilege

A record is exempt if its disclosure would be in contempt of court or contrary to an order made by a court, tribunal or other judicial body or would be an infringement on parliamentary privilege.

5.31 Disclosure Prohibited by Other Legislation

Information that is prohibited from release under other legislation is exempt; however, the Minister responsible for PATI legislation may by order repeal, revoke or amend any statutory provision that prohibits the disclosure of information.

5.32 Third Parties

It is proposed that where a request is made for information pertaining to a third party, the public authority must consult the third party before a decision can be made to release the information. A third party will have 14 days to make a representation to a public authority regarding the release of the information.

6.0 Internal Review

A requester may apply to a public authority for a review of its decision if, for instance, the requester was denied access to the requested information, or for any perceived failure of a public authority to meet their statutory responsibilities under this legislation. An internal review must be conducted by an officer of a higher rank in seniority than that officer who made the original decision. An internal review must also be conducted within 28 days. If the original decision was made by the head of the public authority, ensuring that there is no officer of a higher rank in seniority to conduct the review, the request for internal review will be automatically referred to the Information Commissioner.

7.0 Information Commissioner

It is proposed that an independent Information Commissioner be established to hear appeals related to this legislation. The decisions of the Information Commissioner are binding, and where a decision of the Information Commissioner has been filed with the Registrar of the Supreme Court, it will have the same effect of an order of the Supreme Court and shall be enforceable in the same manner as an order of the court.

The Information Commissioner will be appointed by the Governor after consultation with the Premier, who shall have first consulted the Leader of the Opposition. It is proposed that the Information Commissioner be appointed for a period of 5 years, and may be appointed for an additional 5 year term.

The Information Commissioner is required to submit an annual report regarding appeals and the compliance of public authorities with PATI legislation. The Information Commissioner may also prepare additional reports regarding his or her findings regarding an investigation if he or she deems this necessary.

Within two years after the coming into effect of the legislation, he or she will also prepare a report regarding the implementation and practices and procedures of public authorities under this legislation. The Information Commissioner may also make recommendations on possible improvements to the legislation.

8.0 The Minister for Responsibility for PATI Legislation

It is proposed that the Honourable Premier have responsibility for this legislation. He or she will have the power to make regulations relating to fees; he or she may by way of regulations add, modify or exclude public authorities from being subject to this legislation; and he or she may develop codes of practice for public authorities regarding the administration of this legislation.

The Minister responsible for PATI legislation is also responsible for ensuring appropriate training in support of this legislation, and must complete an annual report regarding the operation and implementation of the legislation.

In addition, it is proposed that two years after full commencement of PATI legislation, a review of the Act be conducted with an eye to making amendments for its improvement.

9.0 Commencement of PATI Legislation

Different parts of the legislation can be commenced (i.e. brought into effect) at different times. This determination will be made by the Honourable Premier, as the Minister responsible for PATI.

10.0 Implementation

The question of implementation is an important one. It is intended that a PATI Unit be established to develop a plan for implementation and assume overall responsibility for the facilitation of implementation and integration of the requirements of PATI legislation into the work of public authorities. This is in addition to supporting the statutory responsibilities of the lead Minister for PATI for regulations, guidance, policies, etc.

In order to allow public authorities to properly prepare for PATI, it is anticipated that the legislation be implemented within 2-3 years following its commencement.

11.0 Next Steps

All submissions on proposals for PATI legislation will be duly considered, and where appropriate amendments to the draft PATI bill will be made. Following this time, it is proposed that a final bill will be tabled for the consideration of the Legislature.