



# PUBLIC ACCESS TO INFORMATION (PATI):

A DISCUSSION PAPER

PRESENTED TO THE LEGISLATURE BY

THE PREMIER THE HONOURABLE W. ALEXANDER SCOTT, JP, MP

2005

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On behalf of the Government of Bermuda, I am pleased to table this discussion paper on public access to information in the House of Assembly. In the 2003 Speech from the Throne, the Government outlined that it "would examine proposals for public access to information legislation", or what is more commonly known around the world as freedom of information legislation.

As the public is the most important stakeholder in the development of proposals for public access to information, it is my sincere hope that you, the public, will take this opportunity to engage in a dialogue with the Government and others to help shape the way forward in creating more open and transparent government. Therefore, I encourage you to review the information contained in this document, and respond in kind by providing your views on these proposals.

Sincerely,

**The Honourable W. Alexander Scott, J.P. M.P.**  
**Premier of Bermuda**

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## THE CONSULTATION PROCESS

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### **THE DISCUSSION PAPER ON PUBLIC ACCESS TO INFORMATION**

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The purpose of this discussion paper is to consult the public on the Government's proposals for public access to information (PATI) legislation. Also referred to as a green paper or consultation paper, this document presents information that represents the policy direction the Government would like to take following this consultation process. The information in this paper is not the final policy position of the Government.

In addition to this printed document, the discussion paper is also available electronically on the Central Policy Unit (CPU) website at [www.cpu.gov.bm](http://www.cpu.gov.bm).

### **THE PURPOSE OF CONSULTATION**

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The objective of consultation is to solicit views, comments and feedback from the public, who will ultimately use and benefit from any future public access to information (PATI) legislation. The Government will gather and carefully consider feedback from the public before formalising its policy position, and will also use it to help shape the proposed PATI legislation.

**In order for the consultation process to be successful, it is necessary to hear from the public on the contents of this discussion paper.**

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### **RESPONSES TO THE DISCUSSION PAPER ON PUBLIC ACCESS TO INFORMATION**

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Comments sent in response to this discussion paper should:

- Reference a particular paragraph or section by number; and
- Include the name and contact information of the person and/or organisation submitting the comments.

In order to promote transparency in the consultation process, the Government would like to make public the general views and feedback that it receives on this discussion paper. In certain instances, it may be helpful for the Government to highlight the view of a particular individual, business, or other organisation.

**However, the Government also respects the privacy of individuals, so those members of the public who do not want their views made public, should state in their response that they would like their comments to be held in confidence.**

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The consultation period for this discussion paper will be open for the next three months and responses should be sent via letter mail, e-mail, telephone, or fax no later than Friday October 21st, 2005 to:

#### **The PATI Team**

The Central Policy Unit  
Cabinet Office  
105 Front Street  
Hamilton, Bermuda  
HM 12  
Tel: 298-7168 or 298-1092  
Fax: 296-0555  
Email: [pati@gov.bm](mailto:pati@gov.bm)

## 1.1 PREMIER'S MANDATE TO THE CENTRAL POLICY UNIT

In the 2003 Throne Speech, the Premier, the Hon. W. Alexander Scott JP, MP, outlined the Government's intention to consider proposals for public access to information (PATI) legislation. He made this commitment to support the Government's ongoing pledge to good governance and transparency. The Central Policy Unit (CPU), which was established in 1999 in order "to contribute to the delivery of better policy-making and thereby to improve the economic and social well-being of Bermuda", was charged with driving this initiative forward.

From March 2004 through October 2004, a four-person project team began developing proposals for a policy on public access to information. The members of the project team were Kimberley McKeown, Kennette Robinson, Alberta Dyer Tucker and Heather Whalen. Oversight of the entire project was provided by the Assistant Secretary to the Cabinet (Policy), Warren Jones. (See Annex A for background information on the Central Policy Unit).

## 1.2 WHAT IS PUBLIC ACCESS TO INFORMATION?

*"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"*

**Article 19, UN Universal Declaration of Human Rights 1948**

PATI legislation gives people a statutory right to access government-held information. This discussion paper serves as a starting point to further develop the Bermuda Government's policy proposal for creating such legislation here in Bermuda.

Public access to information originated in Sweden in 1776, and is a regular feature of democratic governments in over 50 countries, some of which include Australia, Belize, Canada, France, India, Ireland, Jamaica, New Zealand, Trinidad & Tobago, South Africa, Slovakia, the United Kingdom, and the United States. Public access to information is also supported in principle or through policy by a number of intergovernmental organisations such as the United Nations, CARICOM, and the European Union.

## 1.3 THE OBJECTIVES OF PATI LEGISLATION

Historically, secrecy has characterised governments around the world, and government in Bermuda has been no exception. Through this discussion paper, the Government is proposing a regime of openness that would contribute to more transparent and accountable government. The intention is to create a number of benefits for both the people and the government of Bermuda and to achieve the following objectives:

- Inform the public, including organisations, companies and the media, about the Government's activities and operations, including how decisions are made;
- Encourage people to participate actively in the political process and decision-making in Bermudian society;
- Give the community confidence that public funds are being spent as intended and effectively;



- Help improve government efficiency;
- Increase fairness in decision-making; and
- Eliminate unnecessary secrecy in government.

#### **1.4 BACKGROUND TO PROPOSAL DEVELOPMENT**

In developing these proposals, the Government relied heavily on international experience and local knowledge. The Government researched and consulted countries with long-standing public access regimes and recently implemented PATI legislation. Consultation also included countries where the legislation had passed, but was not yet been fully implemented. In short, by examining countries in different parts of the world, with different systems of government, and different levels of access to financial and human resources, the Government has been able to gain insight into best practice as well as which aspects of public access to information regimes work better than others.

Locally, the Government consulted with its various departments and other public bodies, both to provide details about developing the initiative and to gain knowledge from those who work with government information as part of their day-to-day responsibilities. In addition, the Government consulted with representatives from the media and the charitable sector. A voluntary Advisory Group which included private and public sector representatives also served as an excellent mechanism for vetting and reviewing the Government's early proposals (See Annex B for the Advisory Group Membership).

#### **1.5 GUIDING PRINCIPLES FOR PUBLIC ACCESS TO INFORMATION**

The Government's proposals for public access to information have been developed in the best interests of Bermuda, but are also in line with best practice around the world. The guiding principles for the proposals, listed below, are based on international standards:

- People's right of access to information should be legally enforceable;
- In most cases, the identity of the requester and the reasons for the request should be irrelevant;
- Access to information applies to information held by government bodies;
- As much information as possible should be made accessible;
- Information should only be exempt if it may cause harm; embarrassment does not constitute harm;
- Information whose release would cause harm should still be released if the public interest would be better served by the sharing of such information;
- Personal information should be protected; and
- There should be an independent review mechanism to hear appeals for persons or groups whose request for information is denied.



## 2.1 THE RIGHT TO PUBLIC ACCESS TO INFORMATION

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The Government proposes that public access to information should be a legally enforceable right. In order to exercise this right, a member of the public ('the requester') would be able to request and receive access to government-held information. Except in rare cases, the identity of the requester or the reasons why the information is requested should be irrelevant and would not affect their ability to access the information (See Section 2.14 for information on vexatious requests).

## 2.2 WHO CAN ACCESS INFORMATION?

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Although some older access laws impose strict limitations on who can access information, newer legislation tends not to limit access to information solely to the residents of a particular country. Rather, given recent advances in technology that facilitate the transmission of information, governments which provide access regimes generally accept that requests for information from outside of their immediate jurisdiction will be received and acted upon. In both the United States and the United Kingdom, there is no restriction of access solely to residents of those countries. Therefore, the Bermuda Government proposes that requests for access to information held locally would not be restricted solely to Bermudians or residents of Bermuda.

## 2.3 THE SCOPE OF BODIES COVERED BY PUBLIC ACCESS TO INFORMATION

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Under the access regime proposed for Bermuda, the public would have the right to ask for information held by:

- Bodies that are established by or under the Bermuda Constitution, such as individual Ministries;
- Bodies that form a part of any level or branch of government, such as the Judiciary and Legislature;
- Bodies that are owned, controlled or substantially funded by the Government, such as the West End Development Corporation and the Bermuda Housing Corporation; and
- Bodies that carry out a statutory or public function, such as the Bermuda Monetary Authority, and the National Training Board.

Information regarding functions paid for by public funds would also fall under the purview of public access to information. Therefore, public access to information would apply to charities that receive public funding and to information held by businesses relating to services they perform on behalf of government. In order to avoid burdening charities and businesses with requests for information, it is proposed that requests would be made to government, which would then obtain the information and supply it to the requester.

In addition, public bodies created after PATI legislation is passed would automatically be subject to public access to information requirements, unless specifically exempted through legislation.



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## **2.4 INFORMATION COVERED BY PATI LEGISLATION**

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Typically, there are some public bodies which fall outside of the scope of PATI legislation because certain types of information related to functions they perform might not fit within a public access to information regime. However, the complete exclusion of a public body from PATI legislation obligations would also limit the public's ability to hold that entity accountable.

The Government reviewed this possibility, and determined that it would instead be more effective to exempt certain information from the scope of the legislation. Therefore, the Government proposes that while all public bodies would be subject to PATI legislation, certain categories of information that they hold might be excluded from the purview of the legislation.

The type of information that might not be covered by PATI legislation includes Court records, as well as material held by the Bermuda Archives. This is because many of these records are already available to the public by way of the Supreme Court Records Act, 1956 and the Bermuda Archives Act, 1974. It is intended that the public have access to the administrative records of both the Supreme Court and the Bermuda Archives.

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## **2.5 RETROSPECTION**

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The Government is still considering whether PATI legislation should only apply to information created after the date that the legislation is passed, or if the law should be completely retrospective. Applying the legislation to information created before the PATI bill is enacted would provide access to a greater amount of information. However, retroactivity would also generate significant costs to establish the enhanced records management systems that would be required and to potentially hire additional staff to collect, collate and manage the information.

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## **2.6 PROCEDURES FOR REQUESTING AND ACCESSING INFORMATION**

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The proposed procedures for requesting and accessing information were designed to be easy for public servants to administer and simple for the public to understand and use:

- In most cases, requests for information should be made in writing to the department or public body where the information is held. However, if a member of the public is unable to complete a written request, the person receiving the request must transcribe it and have the requester confirm that what has been written accurately reflects the request.
- The public could make requests using either a standard form or a letter stating that a public access to information request is being made. In all cases, the request must include the requester's contact information and the nature of the request, stated as precisely as possible.
- If an application is too broad, the relevant government department or public body must take reasonable steps to help the requester revise their request to provide enough detail for the desired information to



be identified clearly.

- If necessary, the public body must help the requester to make the application to the appropriate agency.
- The public could request that access be given in a particular way, i.e. in a particular format, subject to the resources available at the public body receiving the request.
- Requests made to the wrong department must be forwarded to the correct department by the department receiving the request. The requester should be notified accordingly and directed to the correct department.
- International best practice requires that requests for information be acknowledged within 10 working days, and that decisions on the release or non-release of information be made within 20 working days. The Government is confident that it can match international best practice, although during the initial stages of the initiative, longer time limits may be necessary.

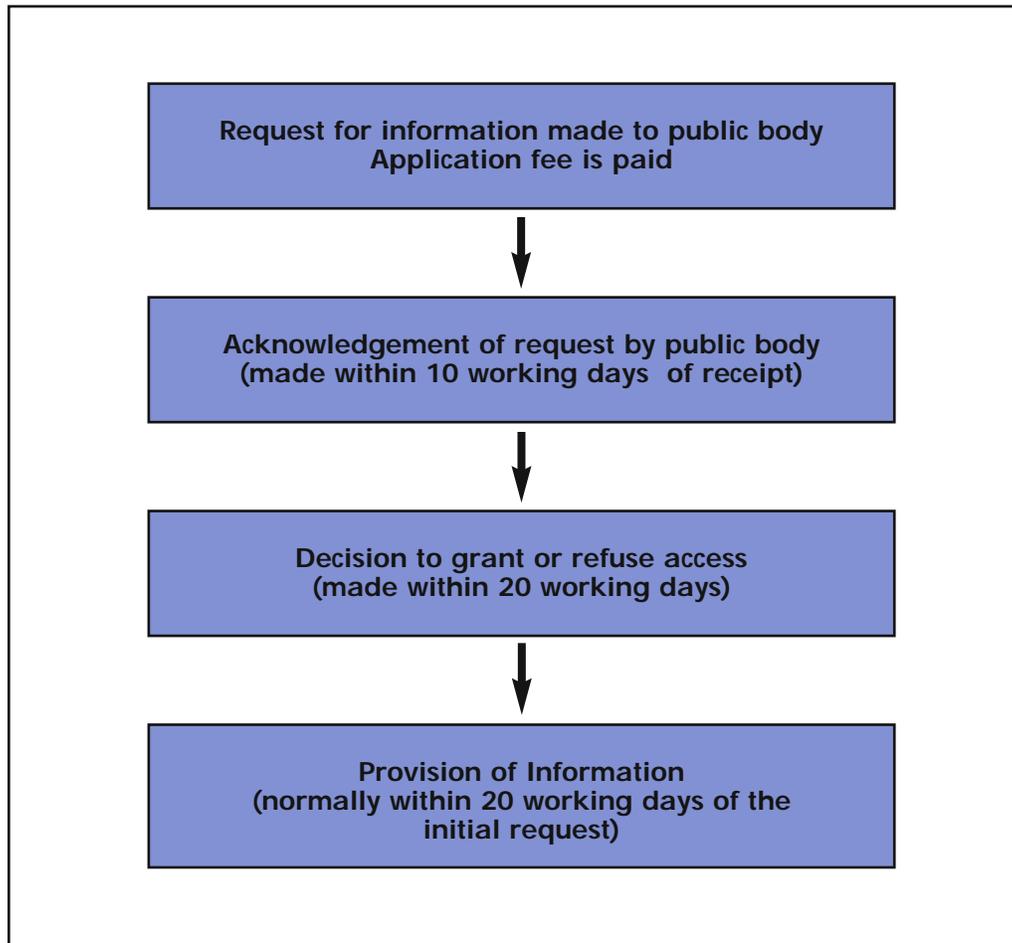
## **2.7** **DECISION-MAKING**

Within the confines of PATI legislation a person designated as a 'decision-maker', must decide whether access requests can be granted or refused. Very often the head of a department is ultimately responsible for the decision-making function, but due to high levels of workload this authority is delegated to a designated civil servant within a particular department who is then referred to as the 'decision-maker'.

## 2.8 ROUTE FOR PROCESSING REQUESTS FOR INFORMATION

The following chart illustrates the anticipated route of a request:

**Fig. A**



## 2.9 METHODS OF RESPONDING TO REQUESTS

The public could request information in various forms. In the case of a document that contains sound or visual images, arrangements may be made for the requester to view or listen to the information. Other media that may be used to respond to requests include computer disks, DVDs, audiotapes, and/or videotapes. The information may be provided in its original form or in alternate media.

If the amount of information were too large to be reproduced in its entirety, the requester would be allowed to view it and then identify and request copies of relevant/desired sections. Requesters would pay any necessary fees for access to information once they receive confirmation that their application was successful.

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## **2.10 PARTIAL DISCLOSURE OF INFORMATION**

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Sometimes a requester might ask for information, part of which cannot be released. Access could still be provided, but only to those parts of the information that can be disclosed. The relevant public body would inform the requester about the partial disclosure of the information in question, and also of the reasons preventing full disclosure. It should also take care to ensure that the details that cannot be released are removed in such a way that the information does not become intentionally misleading.

Alternatively, a public body might only hold some of the information requested while another public body or department might hold additional data that is relevant to the request. In such cases, the public body must advise a requester accordingly, and he or she could then choose to approach the other public body or department.

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## **2.11 TRANSFER OF REQUESTS**

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A request can be transferred within government and other public bodies if a Ministry or department does not hold the information requested. The relevant body should make the transfer to the public body or department where the information is held within 10 working days of the original request and would advise the requester accordingly. The 20 working day window for providing information would recommence at the point when the request was transferred to the new public body or department.

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## **2.12 EXTENSION OF REQUESTS**

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The normal turnaround time between request and provision of information would be 20 working days. However, there may be circumstances where a public body requires additional time because of a large number of requests related to the same information. In such cases, within 10 working days of the original request, the public body must inform the requester of the additional time required and why it is needed.

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## **2.13 REFUSAL TO PROVIDE INFORMATION**

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The main reason any government body would refuse access to information is because that information falls under one or more of the exemptions listed in the next section of this document. However, there are other scenarios where access may be denied:

- It is impossible to retrieve information that does not exist. Therefore, if requesters ask for information they believe exists, but in reality does not, the public body cannot grant access to the requested information.
- If a public body happens to receive a request for information it is required to publish by law, and the official publication date falls within three months of the date the request was made, it can deny access to that information. International best practice dictates that a three-month period for withholding the data should apply in order to allow the information to be published.



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## **2.14 VEXATIOUS OR VOLUMINOUS REQUESTS**

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There are also additional circumstances where access to information may be denied:

- In most cases, the requesters' identity and the reasons why they are requesting information should be irrelevant. However, there may be individuals who use PATI legislation for purposes other than obtaining information. The term "vexatious" describes requests from people who attempt to use public access to information to frustrate the day-to-day activities of government, or to harass individual public servants. Where a pattern of abuse is apparent, requests made by a particular requester can be labelled "vexatious" by the decision-maker.
- The term "voluminous" refers to requests for information that would require a large volume of information to be released. These types of requests cannot be provided without diverting substantial resources or causing disruption to the day-to-day functions of government.

Where requests for information are deemed vexatious or voluminous, government would be able to deny access. However, to prevent genuine requests being denied because they appear to be vexatious or voluminous, these cases would be automatically referred to the Information Commissioner for an independent review. (See Section 6.4.1 for information on the Information Commissioner).

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## **2.15 DISSATISFACTION WITH THE OUTCOME OF A REQUEST**

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Any requester dissatisfied with a response from a public body could launch an appeal. (See Section 6 for information on the entire appeals process).

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## **2.16 PROACTIVE DISCLOSURE**

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Nothing in any existing policy or legislation should prevent a public body from making general information available to the public prior to the Government establishing a public access to information regime. Therefore, Ministries and departments should ensure that as much information as possible is made available by means of:

- Brochures
- Annual reports
- Mailings to households
- The Internet
- Voice mail accounts
- Print and broadcast media
- Publication Schemes



### 3.1 WHAT IS A PUBLICATION SCHEME?

A publication scheme is a comprehensive and detailed document that is made available to the public in jurisdictions where public access to information is in place. Publication schemes serve as a guide to assist the public in their search for information and generally include:

- Basic information about government and other public bodies;
- The types of information readily available; and
- The location where the public should apply for the information that they are requesting.

Public access to information legislation mandates that governments and other public bodies make the above type of information available. This is a key component of proactive disclosure, because government is making information available before the public asks for it.

Not all publication schemes are created equal. Some provide extensive detail, while others only contain a minimum of information. In reviewing publication schemes from around the world, Ireland served as a model for Bermuda because its scheme provides a comprehensive view of the duties, responsibilities and publications of government and other public bodies. This information renders a high level of assistance to the requester. Therefore, the Government intends to establish comprehensive publication schemes for public bodies in Bermuda.

### 3.2 BENEFITS OF PUBLICATION SCHEMES

The community and government and other public bodies derive benefits when information is readily available. Publication schemes can be used to publicise the workings of each government department or other public bodies. Since the schemes also help the public to be better informed about where information is held, public bodies are less likely to have to field questions about matters that do not relate directly to their operation.

### 3.3 INFORMATION CONTAINED IN PUBLICATION SCHEMES

The Government proposes to mandate the following groups to identify basic information about their operation and publish this information periodically through a publication scheme:

- Public bodies, as outlined in Section 2.3 of this document;
- Bodies that receive a substantial portion of their funding from public funds; and
- Bodies that perform a function on behalf of the Government.

Publication schemes normally follow a set pattern in terms of format and content, specifying important information about the body that may include:

- A general description of its structure and organisation;
- Its mission, functions and services;
- Designated powers and duties;
- The laws governing its operation;
- The classes of information it publishes or intends to publish, and the manner in which it intends to publish the information;



- A list of documents and reports it generates;
- Rules, procedures, practices, and an index of precedents kept for decision-making (recognising that some areas within government and other public bodies would have to formally establish the above-mentioned categories of information).

Publication schemes should also include procedures that are in place for accessing the following information:

- The procedures the public can use to obtain services;
- The designations of staff members within the public body who are responsible for releasing information;
- The address to which requests for access to information can be made;
- How appeals can be made;
- Whether the material is available free of charge, or at a cost to the public;
- The statutory duties of the body under PATI legislation;
- Any additional information considered appropriate by the head of the body concerned for the purpose of providing access.

### **3.4 SANCTIONS FOR NON-COMPLIANCE**

The Information Commissioner's Office would issue a directive to any public body that fails to produce the mandated publication scheme, instructing it to provide the requested information. The entity would be obliged to comply with the directive and information on its non-compliance would be published in the Information Commissioner's annual report.

### **3.5 ADDITIONAL PROPOSALS FOR BERMUDA**

- The publication schemes would be readily available at each government office, the offices of all public bodies, on the government Internet portal, and at the Bermuda National Library;
- They would be reviewed annually to ensure that the information contained is current and therefore of the greatest possible assistance to the public;
- They would also undergo two forms of monitoring or vetting on a periodic basis: one internally by the government department or public body and one externally by the Information Commissioner.



## 4.1 GENERAL INFORMATION ABOUT EXEMPTIONS

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Under a public access to information regime, decisions on what information would be made public should be based on the presumption of openness. The Government takes the approach that information should be disclosed unless it can be demonstrated that harm would result from the release of the information. Harm generally refers to substantial damage to a particular interest and should not be confused with embarrassment. Information whose release would create embarrassment may not necessary result in any harm or damage.

What sets apart the flow of information in countries with public access to information from those without it, is that the approach to releasing information is not arbitrary, unreasoned, or purely political. Instead, legislation specifically sets out what bodies are covered (or not covered), as well as what information may be exempt from release based on its class (e.g. Cabinet records are a class of information) or its content (i.e. information that may harm the provision of free and frank advice).

## 4.2 INFORMATION COVERED BY EXEMPTIONS

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Exemptions cover information that either cannot or may not be released to the public following requests under PATI legislation. Exemptions are specifically listed in legislation and are only determined after careful consideration. Most jurisdictions with public access to information regimes have based exemptions on information they feel will or may cause harm if released to the general public.

Although PATI legislation varies from jurisdiction to jurisdiction, there are a number of interests that are protected in some shape or form from the casual release of information regarding those interests. One important example is the interest of protecting personal privacy. Governments hold a large amount of personal information about citizens, residents and visitors. Although PATI legislation is intended to make access to information a right, it does not necessarily give members of the public the ability to invade the personal privacy of others.

## 4.3 IN THE INTEREST OF THE PUBLIC (NOT WHAT THE PUBLIC IS INTERESTED IN)

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Certain information may cause harm to a particular interest if it is released, but under public access to information the public may still have the right to access that information if its release is in the public interest.

A number of countries have public interest tests within their legislation. A public interest test is used when decision-makers within government balance the potential harm in releasing certain information against the public interest in disclosing the information. The public interest does not refer to information that the public may be interested in; it is a means of allowing important information, that might otherwise be exempt, to be disclosed for the benefit of the public.

A number of factors ought to be taken into consideration to determine what is in the public interest, although legal experts from a number of jurisdictions (including Bermuda) have argued that because the public interest can change and evolve over time; it is difficult to include it formally within legislation. However, several jurisdictions have developed guidance on how decision-makers should carry out their responsibilities when determining whether or not the release of specific information is, or is not, in the public interest.

#### **4.4 KEY FACTORS FOR CONSIDERING THE PUBLIC INTEREST**

Information is generally considered to be in the public interest, and therefore should potentially be released, if it contributes to:

- Effective decision-making and accountability;
- Ensuring that a public body is adequately discharging its functions;
- The effective use and oversight of public funds;
- Debate on issues of public interest;
- Public participation in the political process and decision-making;
- Public safety and public health;
- The protection of the environment.<sup>1</sup>

Where applicable, decision-makers should take the above factors as well as any other relevant information into consideration when assessing whether information that may be covered by exemptions should be released in the public interest. Again, factors such as potential embarrassment and/or loss in confidence in government should not be used to determine what information should or should not be released in the public interest. The objective of public interest tests is to allow information to be released that would normally be exempt, if disclosure would benefit the public.

#### **4.5 PROPOSED EXEMPTIONS FOR BERMUDA**

After extensive research, deliberation and consultation, the Government has determined that the following categories of government-held information may cause harm if released and should be covered by specific exemptions, most of which should be subject to some form of public interest test:

- Personal information;
- Commercial and other third party information;
- Information received in confidence;
- Security, defence, and policing;
- Non-police investigations;
- Legal professional privilege, contempt of court and matters before the Courts;
- Health and safety of an individual and/or the public;
- The protection of the environment;
- Policy advice;

<sup>1</sup>Scotland: Scottish Executive. Scottish Ministers Code of Practice on the Discharge of Functions by Public Authorities Under the Freedom of Information (Scotland) Act 2002. Edinburgh : Office of the Queen's Printer for Scotland, 2002. 14 September 2004. <<http://www.scotland.gov.uk/library5/government/sedfpa-02.asp>>.

- Deliberations of the Cabinet;
- Management of the economy;
- Negotiations; and
- Tests, examinations and audit functions.

#### **4.5.1 THIRD PARTY INTERESTS**

Several of the proposed exemptions cover information that may have been provided by or relate to third parties, such as private or public individuals, businesses, and non-profit, or other types of organisations. In cases where third party information could possibly be disclosed, government would consult with third parties before the information could be released to the public. Third parties could also choose to give consent for their information to be disclosed to certain requesters, thereby removing any reason for government to withhold the information unless it was otherwise covered by an exemption.

If government did decide to disclose third party information, that third party must be given the opportunity to appeal the decision to the independent Information Commissioner before the information could be released. (See Section 6 for additional information on third party appeals).

#### **4.6.1 PERSONAL INFORMATION**

Countries with PATI legislation almost universally recognise that the government must protect the personal information of individuals from unchecked disclosure. Therefore in keeping with universal best practice, personal information would be exempt under PATI legislation in Bermuda.

There may be instances where it is in the public interest to release the personal information of some individuals. Therefore a strict and narrow public interest test would be instituted here to ensure that personal information is only released under compelling circumstances. In addition, personal information may be released if required by law or if the release of the information is necessary to assist in investigations.

With respect to public servants, their names, positions, and/or functions do not normally constitute personal information, and should as a matter of course be released to the public. However, the work history and performance appraisals of public servants should not be released upon request unless it is in the public interest to do so. For example, releasing information relating to an internal government investigation or information about the types of certification that public servants in certain positions possess may be in the public interest and if so should be released to the public.

#### **4.6.2. COMMERCIAL AND OTHER THIRD PARTY INFORMATION**

Government holds a great deal of commercial information – relating both to private sector businesses, and government itself (central government and quangos). In the United Kingdom, the House of Commons Select Committee on Administration, (third report May 1998, Vol., 1 xxxvi)<sup>2</sup>, classified commercial information held by government into three categories:

<sup>2</sup>United Kingdom: Parliament - House of Commons Select Committee on Administration. Third Report, Vol. 1, xxxvi May 1998. London: HMSO, 1998. 17 May 2004. <<http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmpublicadm/398-vol1/39802.htm>>



- Information gathered as a result of regulatory functions or given for monitoring purposes;
- Information relating to contracts;
- Information relating to commercial activities of the authority itself.

The Government understands the importance and complexities of commercial information and therefore does not intend to take a single approach to commercial and other third party information; instead these proposals take into consideration the purpose for which the commercial and third party information is collected, as well as the specific nature of that information.

#### **4.6.2.1 INFORMATION GATHERED FOR REGULATORY OR MONITORING PURPOSES**

The Government feels that businesses and other third parties should not be unduly prejudiced because their information can possibly be released once this legislation is introduced - unless it is in the public interest to do so.

Therefore, broadly speaking, the type of information exempted from release in this context includes:

- Intellectual property,
- Trade secrets;
- Information whose commercial value would be diminished by disclosure.

In addition, any disclosure of information that would likely prevent government from receiving similar data in the future would be exempted under PATI legislation.

Examples of commercial and other third party information whose disclosure would likely be in the public interest include issues related to the health and safety of the public. The public may also have an interest in knowing that businesses are operating as required by law, and that government is enforcing those statutory requirements.

#### **4.6.2.2 CONTRACTS**

Where funding for goods and services come from the public purse, the community has an interest in ensuring that public monies are spent wisely. Therefore, it could be argued that those businesses that successfully obtain work from the Government should be subject to a higher level of scrutiny than those who do not. This is necessary in order to uphold the Government's mandate to obtain value for money when purchasing goods and services. This principle is fundamental to maintaining effective and accountable government.

Allowing increased access to information surrounding government contracts promotes integrity in the bidding and purchasing process. It allows the public to know that the services purchased are delivered in a timely and effective manner, and that both government and businesses are following existing policies and procedures.

The following are examples of information relating to contracts, including the purchase of goods and/or services, which would be released for scrutiny to the public:

- Bidding and tendering – including why certain bids were successful and the criteria used to determine the successful bidder;
- The value of all contracts – including those provided by individual consultants; and
- Whether or not quality services were delivered.

#### **4.6.2.3 GAINING COMPETITIVE ADVANTAGE THROUGH PUBLIC ACCESS TO INFORMATION**

In other jurisdictions, most notably the United States, companies use public access to information to obtain information on their competitors. This is not the intended use of public access to information in Bermuda. The primary intent of Bermuda's PATI legislation is to foster openness, transparency and accountability between the Government and the public. However, some information that may be released could contain commercial information that might potentially be used by competitors. In cases such as these, businesses would have the right to appeal to the independent Information Commissioner before any information can be disclosed.

#### **4.6.2.4 COMMERCIAL INFORMATION OF GOVERNMENT AND QUANGOS**

In a number of capacities, government bodies (including quangos) perform commercial functions and therefore generate commercial information. The commercial functions and/or competitive position of the Government should not be unduly prejudiced by the proposed legislation. However, the public should have the right to know that all public bodies are conducting their functions effectively, and are giving value for money for the goods and services that they provide.

Therefore, the need for openness, transparency, and accountability should supersede the commercial interests of government. Government should only be able to withhold its own commercial information where non-disclosure would serve the public interest and outweighs the benefits of disclosure.

#### **4.6.3 INFORMATION RECEIVED IN CONFIDENCE**

Under PATI legislation in other jurisdictions, information that is given to government in confidence tends to be exempt from release to the public. In order for this exemption to apply in Bermuda, public bodies cannot simply stamp "Confidential" or "Secret" on a document, nor can they simply agree to keep the information confidential, or add confidentiality clauses to contracts to get around disclosing information to the public.

To ensure that this exemption is not misapplied or abused, the Government proposes to follow the example of Ireland and other jurisdictions by establishing a strict test that would have to be passed in order for information to be received in confidence legitimately:



- The information would first have to be given to a public body on the understanding that it is confidential information, and should be regarded as such by the public body.
- Second, government (in the first instance, although third parties can also make a similar case) must conclude that releasing the information would jeopardise more and similar information being provided to the public body in the future.
- The information would also have to be considered as being of such value that government or other public bodies must continue to receive similar types of information.
- In addition, a public body cannot prevent information being disclosed by attempting to release it to another public body 'in confidence'. In such cases, this exemption may only apply if the confidence is owed to a third party (a public body cannot be considered a third party), or the information is otherwise prevented from being disclosed, e.g. by another law. If the information should not be disclosed, it should be based on another exemption, not simply because the public body deems it confidential.
- Finally, unless another piece of legislation dictates that the information received in confidence cannot be disclosed, it should be subject to a public interest test. This is in line with the public interest principle, where even confidential information can be disclosed if it impacts upon public health, safety, the protection of the environment, or natural justice.

It is also very likely that other exemptions, such as those protecting personal privacy or the security, defence, and policing of Bermuda, would apply to information received in confidence.

Examples of information received in confidence in that context, and therefore restricted from being released, include:

- Reports given by confidential informants to the Police, Customs, Immigration, and other investigatory bodies;
- Medical information
- Individual company- or person-specific data gathered by surveys, such as those carried out by the Department of Statistics.

#### **4.6.4 SECURITY, DEFENCE AND POLICING OF BERMUDA**

The Government proposes that Bermuda follow the path of all countries with public access to information regimes and protect information regarding security, defence and policing. Information whose disclosure would harm the security, and/or defence of Bermuda, or that would impair the ability of the Bermuda Police Service to carry out its functions effectively would be exempt from release to the public. This exemption would apply unless those government entities responsible for protecting Bermuda in these areas determine there is a public interest in releasing the information in question.

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#### **4.6.5 NON-POLICE INVESTIGATIONS**

Departments such as Customs, Immigration, the Tax Commissioner, as well as other public bodies regularly conduct investigations. An exemption has already been proposed to cover investigations by the Bermuda Police Service. However, the release of sensitive information on matters that may not or that have not yet involved the Bermuda Police Service should not prejudice any other government investigation. There may be instances where the public interest would be better served by releasing the information; therefore this exemption would be covered by a public interest test.

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#### **4.6.6 LEGAL AND JUDICIAL INFORMATION**

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##### **4.6.6.1 LEGAL PROFESSIONAL PRIVILEGE**

The principle of legal professional privilege, also known as solicitor-client privilege has long been upheld throughout the history of common law. The purpose of this privilege is to give clients the ability to consult with their lawyer (whether for the purposes of litigation or general legal advice) without fear that the information will be disclosed and put the client at an unfair advantage in any legal proceedings.

In order to uphold the public interest, government would have the same protections as individuals and other organisations in the private sector. This is in line with public access to information regimes around the world.

Certain requirements are necessary to fulfil a claim of privilege, and legal professional privilege is not absolute. It cannot be used to conceal fraud or criminality. In most countries this type of information is covered by mandatory exemptions, while in some others, e.g. New Zealand, it is exempt, but subject to a public interest test. In Canada, the exemption is a discretionary one, which allows public bodies to determine whether or not the information should be released. This is in line with the common law tradition that the privilege belongs to the client, not the lawyer, so the client (in this case a government or other public body) has the right to waive the privilege.

The Government recommends that a discretionary exemption for legal professional privilege should apply here. This would allow public bodies the discretion to disclose privileged information if they felt there was no harm in doing so. Also, the need to protect legal professional privilege by government or other public bodies can diminish after legal proceedings have been completed, and other legal issues are resolved. If disclosing this information would not prejudice the government's legal position then it should be released if it is in the public interest.

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##### **4.6.6.2 CONTEMPT OF COURT**

The Courts may on occasion order government or other third parties not to release information because to do so would be in contempt of Court. In cases such as these, government must comply with the Court's orders, and should not be prevented from doing so because of PATI legislation.



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#### **4.6.6.3 MATTERS BEFORE THE COURT**

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Typically matters that are either before the Courts, or likely to come before the Courts, should not be prejudiced by the disclosure of information to the public. The government must demonstrate definitively that a matter is likely to go before the Courts in order to withhold related information legitimately. Once the issue has been dealt with by the Courts, the government can release relevant information not contained in Court records, subject to other exemptions.

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#### **4.6.7 HEALTH AND SAFETY OF AN INDIVIDUAL OR THE PUBLIC**

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Releasing information that would likely harm the health and/or safety of an individual or the public would be exempt. A public body would not want to disclose any information that would result in the mental or physical harm to any person or the public. There may however be cases where the public interest outweighs the potential harm that may be caused, and in such cases, the information should be released to the public.

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#### **4.6.8 THE PROTECTION OF THE ENVIRONMENT**

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Similarly, public bodies would not want to release any information that would threaten the environment, or reduce the ability of a public body or individual to protect the environment, unless the public interest outweighs the harm that can be caused.

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#### **4.6.9 DECISION-MAKING AND POLICY ADVICE**

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Internationally, there has been much debate about the extent to which decision-making and policy advice information should be released to the public either proactively or on request.

It is generally understood and respected that governments need some privacy and latitude in which to make certain decisions and to develop policy advice. Releasing information prematurely can be detrimental to the decision-making and policy advice process if governments have not been able to consider all materials and implications relevant to a particular issue without undue public scrutiny.

In Bermuda and other jurisdictions, there has been concern that releasing details of policy deliberations, including the discussions of individual public servants or departments, would impede free and frank discussion within government and affect the quality of policy advice provided in the future.

A number of countries have exempted decision-making and policy advice, or have found ways around disclosing this type of information. The Government feels that taking this approach would be a mistake. Being informed about how and why important decisions are made is fundamental to the democratic process and the community's ability to participate in public affairs. In other jurisdictions, refusing to make policy advice available publicly has undermined one of the goals of public access to information – to increase public participation in decision-making. If the public has little or no access to the background information, opinions, advice, and facts that went into a decision, then the ability to voice informed opinions would be severely undermined.

Therefore the Government proposes that decision-making and policy advice would not be completely exempted from PATI legislation. An alternative is to exempt information, the

release of which would impede the free and frank provision of policy advice.

In New Zealand, the Law Commission has stated that the "assumption that policy advice would eventually be released under the Act has in our view improved the quality and transparency of that advice"<sup>3</sup>. While some may infer that candour and frankness may undermine the quality and effectiveness of policy advice, it can also be said that policy-makers would be encouraged to make sound arguments during the deliberative and policy-making process within government if they know that their deliberations and recommendations would be made public.

This exemption would also be subject to a public interest test.

#### **4. 6.10 DELIBERATIONS OF THE CABINET**

Under public access to information in current and former Commonwealth countries, records of the deliberations and decisions of Cabinet tend to be exempt from public disclosure for periods ranging from 10 years in Ireland to 30 years in Australia, and the U.K. In Bermuda, this type of information is exempted for 30 years, although it can be withheld for shorter or longer periods based on the discretion of the relevant Minister.

Historically, Cabinet records have been exempt in order to protect ministerial responsibility, the hallmark of Westminster style governments. This principle supports the long-standing convention that decisions flowing from Cabinet are the collective decisions of the Government. Prematurely disclosing Cabinet deliberations can undermine ministerial responsibility and impair the Cabinet's ability to make important decisions based on free and frank discussion.

However, disclosing Cabinet decisions once they are implemented has no negative impact on ministerial responsibility, and would give the public that information well in advance of the existing 30-year rule.

Therefore, the Government proposes that any information that would prejudice Cabinet's ability to make decisions collectively, including Cabinet deliberations, would be exempt from PATI legislation and not be released. It is also proposed that Cabinet decisions be disclosed to the public, either proactively or on request, but after they are implemented and subject to all exemptions under the legislation.

In addition, the factual, background, and analysis information prepared by public servants that serves as the basis for decision-making would, subject to all exemptions, be made available to the public.

#### **4.6.11 MANAGEMENT OF THE ECONOMY**

Economic and financial information that would prejudice the economic interests of Bermuda or the Government's ability to manage the economy effectively would not as a matter of course be made available to the public.

Examples include prematurely releasing information about changes in rates of duty or taxation, or the terms and conditions of international borrowing.

<sup>3</sup> New Zealand: The Law Commission of New Zealand. Review of the Official Information Act 1982. 1997. 6 April 2004. <[www.law-com.govt.nz/documents/publications/R40.pdf](http://www.law-com.govt.nz/documents/publications/R40.pdf)>.

However, in cases where the public interest in disclosing this information outweighs the likely harm from disclosure, then it would be released.

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#### **4.6.12 NEGOTIATIONS, TESTS, EXAMINATIONS AND AUDIT FUNCTIONS**

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This particular exemption is designed to cover different types of information that if released would prejudice government's ability to perform its functions effectively, and/or would give unfair advantage to requesters or third parties.

##### **4.6.12.1 NEGOTIATIONS**

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Government should be able to negotiate without having those negotiations prejudiced by information being released early or inappropriately. This would include industrial relations, and commercial contractual negotiations. The passage of time reduces the impact of this kind of disclosure, so after negotiations are completed, if the information in question would not prejudice future negotiations, and subject to other exemptions, it can be released to the public.

If the public interest in releasing the information meets or exceeds any harm that would occur from its release, then the information can be made public.

##### **4.6.12.2 TESTS, EXAMINATIONS AND AUDITS**

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If access to certain tests and examinations, such as previously used school test papers, would undermine their effectiveness, then they should not be released to the public, unless the public interest would be better served by the release of the information.

#### **4.7 MINISTERIAL CERTIFICATES**

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Some jurisdictions give government Ministers and certain other public officials the power to prevent information from being released through the use of veto certificates. However, these certificates have been highly criticised by independent bodies such as Law Reform Commissions and ombudsmen because they are subject to abuse and lack the oversight necessary to ensure that PATI legislation is administered fairly. The Government feels that the proposed exemptions for Bermuda and the appeals process as laid out in Section 6 adequately address releasing or withholding information. The use of certificates is therefore unnecessary, and not in keeping with the spirit of PATI legislation.



## 5.1 IMPLEMENTATION AND OPERATIONAL COSTS

Every public access to information regime has implementation and operational costs. The reallocation of time, staff and other resources in order to respond to requests mean additional costs for government and other public bodies. The anticipated costs should not be a deterrent for introducing such a regime for Bermuda, as public access to information is an essential tool for public accountability.

In Bermuda some government departments and other public bodies already have clear and efficient procedures in place for dealing with requests for information. This information is either provided free of charge or made available according to existing charging arrangements set out in enactments or regulations. There are also cases where departments simply use their discretion to determine what should be charged for certain information.

Government intends to review such arrangements in order to streamline and standardise charging procedures and fees under the public access to information regime. While the Government is not in a position to determine specific dollar amounts for fees before these proposals are more fully developed, the proposed standardised fee structure is outlined below.

## 5.2 TYPICAL COSTS

Four categories generally make up any charging scheme under public access to information:

- Application fees;
- Search and preparation fees;
- Review of records fees; and
- Reproduction of records fees.

These fees are generally imposed in order to allow government and other public bodies to offset some of the administrative costs associated with providing public access to information. The Government feels that costs should not be met in full by requesters seeking access to information, as this may inhibit requests. This is because the true cost of providing access tends to be too high for the average individual to afford. Therefore, the cost of providing information to the public would be subsidised and not imposed as a means of generating a profit. Additionally, while public access to information may not generate additional revenue for the public purse, its benefits would create cost-savings as a result of a potentially more efficient and accountable government.

## 5.3 PROPOSALS FOR BERMUDA

In Bermuda a standard application fee would be imposed, payable at the time a request is made. This administrative fee is essential to providing public access to information, as it would be easy to monitor and would assist in preventing vexatious and voluminous requests. The fee would represent a reasonable contribution to supporting Bermuda's public access to information regime and would not be prohibitive for the average requester.

No search fees would apply for identifying, retrieving and extracting any documents required to respond to requests for information. The good record keeping that facilitates quick and easy access to records is a basic function of government. Since the public already contributes

to this function by paying duty and other taxes, they should not have to pay for it again in order to obtain access to information.

Requestors would pay review fees related to the cost of reviewing documents, which is necessary in order to determine what information can either be released or must be withheld because it is exempted under the legislation.

Reproduction fees would cover the cost of copying the information requested by applicants. They would be dependent upon the volume and format of the information being accessed. For example, the cost of reproducing a letter or a report would be different from the cost of reproducing a DVD or map. Best practice dictates that reproduction fees should match the costs government incurs to make copies. In cases where government does not have the facilities to reproduce a record and must outsource its reproduction, the fee would match the going rate charged by the external supplier.

#### **5.4 COMPLAINTS**

The Government proposes that complaints or appeals would be addressed by the Office of the Information Commissioner. The Information Commissioner would investigate and/or review whether the fees charged by government or any other public body were unreasonable or not in keeping with the spirit of the legislation.

With this in mind, departments responding to requests for public access to information would keep a record of all costs incurred in providing that service. The Information Commissioner would determine whether the general fee and charging structure set by government or other public bodies conform to the provisions set out in the legislation.

No fees would be imposed upon any requester who chooses to file an appeal; applying fees under those circumstances would be punitive and discourage legitimate complaints from being brought forward.

#### **5.5 DIFFERENTIAL FEE STRUCTURES**

In a number of countries different fees apply to different requests and requesters under PATI legislation in order to ensure that fees are:

- Reasonable and not prohibitive;
- Limited to reasonable standard charges for document review and duplication; and
- Not biased in favour of the business requester (to whom fees are less likely to be an obstacle).

Different fee structures vary as follows:

- A flat rate levied on each application requesting information; or
- A two tiered system of charges where a flat rate "entry charge" is required with each application and further charges are applied depending on the amount of work required and the identity of the requester (whether an individual or commercial operation); or

- A three-tiered system where fees are applied based on the classification of the requester, i.e. commercial use, educational, non-commercial scientific and media and any request not included in the first two.

## 5.6 PROPOSAL FOR TIERED FEE STRUCTURE

After assessing the benefits of the above-mentioned fee structures, the Government proposes a three-tiered charging system, whereby requesters would fall into one of the following categories:

- Commercial user;
- The media;
- The general public and other requesters.

Along with other jurisdictions, this Government has found it difficult to enforce tiered fee structures. As evidenced by certain requests made to the Bermuda Archives, requesters can evade paying higher fees by failing to identify their requests as being commercial in nature. However, it is worthwhile to pursue a tiered, rather than a flat rate, system, so that members of the public do not subsidise those requesters receiving information for commercial purposes. In an attempt to avoid the difficulties found in other jurisdictions, the Government would provide decision-makers with guidance on these issues. Requesters who feel that they have been misclassified in a requester category could have their cases reviewed by the independent Information Commissioner.

## 5.7 COMMERCIAL USERS

The following proposed fee structure would apply to requesters seeking information for commercial use:

- Application fee;
- Review fee;
- Duplication fee.

Commercial user refers to a request "from or on behalf of one who seeks information for a use or purpose relating to commerce, trade, or the profit interest of the requester or of the person on whose behalf the request is made."<sup>4</sup> This categorisation shifts the emphasis from the identity of the requester to the intended use of the information being sought. Ministry and department personnel would be instructed by future guidelines to seek additional information or clarification from the requester when the intended use is not clear or it is thought that the information would be used for commercial gain.

Government proposes that the fees levied on commercial users be higher than those imposed on users who fall into the other categories. The rationale for a higher fee schedule for commercial users is that the motive for requesting information is that of profit, rather than that of individual or public benefit.

<sup>4</sup> United States: Department of Justice. Freedom of Information Act. 1996. 14 July 2004.  
<[http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XVII\\_4/page2.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm)>



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## 5.8 THE MEDIA

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The following proposed fee structure would apply for requesters seeking information as representatives of the media:

- Application Fee;
- Review Fee;
- Duplication fee.

Fees for the media would be set at the same rate as the general public, but at a lower rate than commercial users as the media contribute to the public interest. Their function of disseminating information is likely to contribute significantly to public understanding of the operations and activities of government and is not primarily in the commercial interest of the requester.<sup>5</sup>

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## 5.9 THE GENERAL PUBLIC AND OTHER REQUESTERS

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The following proposed fee structure would apply for the general public and other requesters:

- Application Fee;
- Review Fee;
- Duplication Fee.

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## 5.10 FEE WAIVERS OR REDUCTIONS

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Best practice in administering public access to information regimes dictates that provisions for waiving part of or all applicable fees in certain circumstances should be embedded in legislation. In a number of jurisdictions fee waivers or reductions give regard to the circumstances of each request and/or requester. Therefore, any requester who wished to have fees waived or reduced could ask for a waiver or reduction at the time of their original request. Fees could then either be formally waived or just simply not collected.

Qualifying criteria for a fee waiver or reduction would be as follows:

- Disclosing the information would be in the public interest in terms of increasing public understanding of government operations and activities;
- The requester has the ability to disseminate information that may be in the public interest;
- The charges would cause financial hardship to the applicant; indigence is not a prerequisite;
- The administrative cost of collection exceeds the amount chargeable;
- The remission or reduction of the charge would facilitate good relations with the public or assist the department with its work.

Once the public interest requirement of a waiver or fee reduction is met, then the decision-maker would determine whether access to the requested information was primarily for public or commercial interests. Fee waivers or reductions are, therefore, less likely to be given to commercial users and more likely to be given to the public and other requesters.

<sup>5</sup> United States: Department of Justice, Office of Information and Privacy. Freedom of Information Act Guide. 2004. 14 July 2004. <<http://www.usdoj.gov/oip/foi-act.htm>>.



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## **5.11 MEMBERS OF PARLIAMENT**

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In some jurisdictions Members of Parliament (MPs) are exempted from charges for access to government information for the reasonable exercise of their official role. This encourages greater accountability, proactiveness, and participation of MPs in the political process. Therefore, the Government proposes that MPs be given special consideration and have fees either waived or reduced depending on the volume of information being accessed.



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## 6.1 THE NEED FOR AN EFFECTIVE APPEALS PROCESS

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An effective appeals process is a vital component of a public access to information regime. It is necessary in order to provide members of the public with a means of recourse if their requests for information are denied. The proposed appeals process for Bermuda has been designed to be easily accessible, user-friendly and capable of resolving disputes. It includes both internal review by government and an external and independent review by an Information Commissioner, as well as a Public Access to Information Appeals Tribunal and, in certain cases, the Courts.

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## 6.2 THIRD PARTY RIGHTS AND APPEALS

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Not all PATI legislation adequately recognises the rights of third parties. The proposal for Bermuda is that government should consult third parties whose information may be disclosed. In addition, third parties should also have the right to appeal to the Information Commissioner before the information in question can be disclosed.

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## 6.3 INTERNAL REVIEW

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In most instances the first stage of an appeal would consist of internal review, as it is an inexpensive and quick way of reviewing decisions. Requesters who had their requests for information denied, delayed, or who may have been subjected to unreasonable fees would first have their cases heard by the Government or a public body. In order to avoid duplicating the original decision, a more senior decision-maker who was not previously involved in the case would conduct the review. .

The time period for completing the internal review should not exceed 10 working days from the date when the request for the appeal is made. The timely review of appeals would prevent public bodies from using the appeals process to delay providing information to requesters.

There may be cases where internal review is inappropriate such as may be the case for small public bodies where a more senior decision-maker is not available.

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## 6.4 EXTERNAL REVIEW

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### 6.4.1 INFORMATION COMMISSIONER

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The use of an independent review mechanism for appeals is a key component of public access to information regimes around the world. Therefore the Government proposes that the independent position of Information Commissioner be established in Bermuda to hear external appeals. The role of the Information Commissioner would also involve oversight of the public access to information regime, and the review and making of recommendations on proposed changes to public access legislation. The Information Commissioner would also be responsible for creating public awareness about public access to information legislation.

In order for the Information Commissioner to be effective, he or she must be able to make binding decisions. This would encourage public confidence in the appeals process and PATI legislation. The lack of binding powers would seriously undermine the effectiveness of the appeals process, as the potential exists for government departments or other public bodies to

ignore the Information Commissioner's decisions if he or she has no power of enforcement.

The Information Commissioner would be independent in the same way as the Auditor General, meaning the person holding the position would not be "...subject to the direction or control of any other person or authority." <sup>6</sup> The Auditor is responsible for investigating, reviewing and reporting on the accounts of the Government and other public bodies. The Information Commissioner should have a similar autonomy in carrying out his or her duties and responsibilities.

The Information Commissioner would be required to review complaints against the Government, as well as decisions against other public bodies. This means it is essential that the Commissioner be an independent officeholder so that the appeals system is seen to be free of political interference. It also prevents the possibility of "political override", which can be used to resolve controversial issues in government's favour.

The proposed responsibilities and duties of the Information Commissioner include:

- Investigating complaints against government or any public body in Bermuda that has failed to comply with the requirements of PATI legislation. This includes complaints relating to refusals, delays, and the application of unreasonable fees;
- Reviewing, adjusting or waiving charges. There may be situations where disclosure would be beneficial to the larger community and it would be unfair to levy charges for disclosure on a single individual applicant;
- Requiring persons to provide information or materials/documents relevant to the review being carried out, and if necessary entering the premises of a public body to conduct an investigation;
- Ordering disclosure of information in keeping with the legislation;
- Producing an annual report regarding the outcome of investigations and providing comment on government compliance with PATI legislation. The Information Commissioner should also have the power to produce additional reports as necessary;
- Promoting the importance of PATI legislation, and raising public awareness and understanding of the legislation;
- Resolving disputes through mediation.

#### **6.4.2 PUBLIC ACCESS TO INFORMATION APPEALS TRIBUNALS**

Those not satisfied with the decision of the Information Commissioner would have the ability to go beyond this level of appeal. This right would be extended to requesters of information, third parties that may be affected by the release of information, as well as the Government itself.

<sup>6</sup>The Bermuda Constitution Order 1968.



In most jurisdictions the Courts serve this function by reviewing whether or not Information Commissioners correctly interpreted public access legislation in making their decisions. Although the Courts are an independent review mechanism, the use of the Courts is a complicated, lengthy, and financially costly method of having appeals heard. In some countries, governments have used the Courts to delay releasing information because the appeals process is either too expensive or lengthy for the average requester. Additionally, requiring the Courts to hear public access to information appeals can prove to be an additional burden on the Court system.

The proposed alternative to using the Courts as a component of the regular appeals process is the use of a Public Access to Information Tribunal. This tribunal would serve as a quasi-judicial body to hear appeals after cases have already been heard by the Information Commissioner. When contrasted with the Courts, tribunals are quicker, more efficient, and less costly both for the requester of the information and for the taxpayer who funds tribunals through government revenue.

The tribunal would consider the facts as well as the law and policy aspects of the original decision, and can make a decision to affirm, vary or set aside the original decision. The individuals or entities involved in a case can appeal to the Supreme Court against the tribunal's decision on errors of law only.

#### **6.4.3 THE SUPREME COURT**

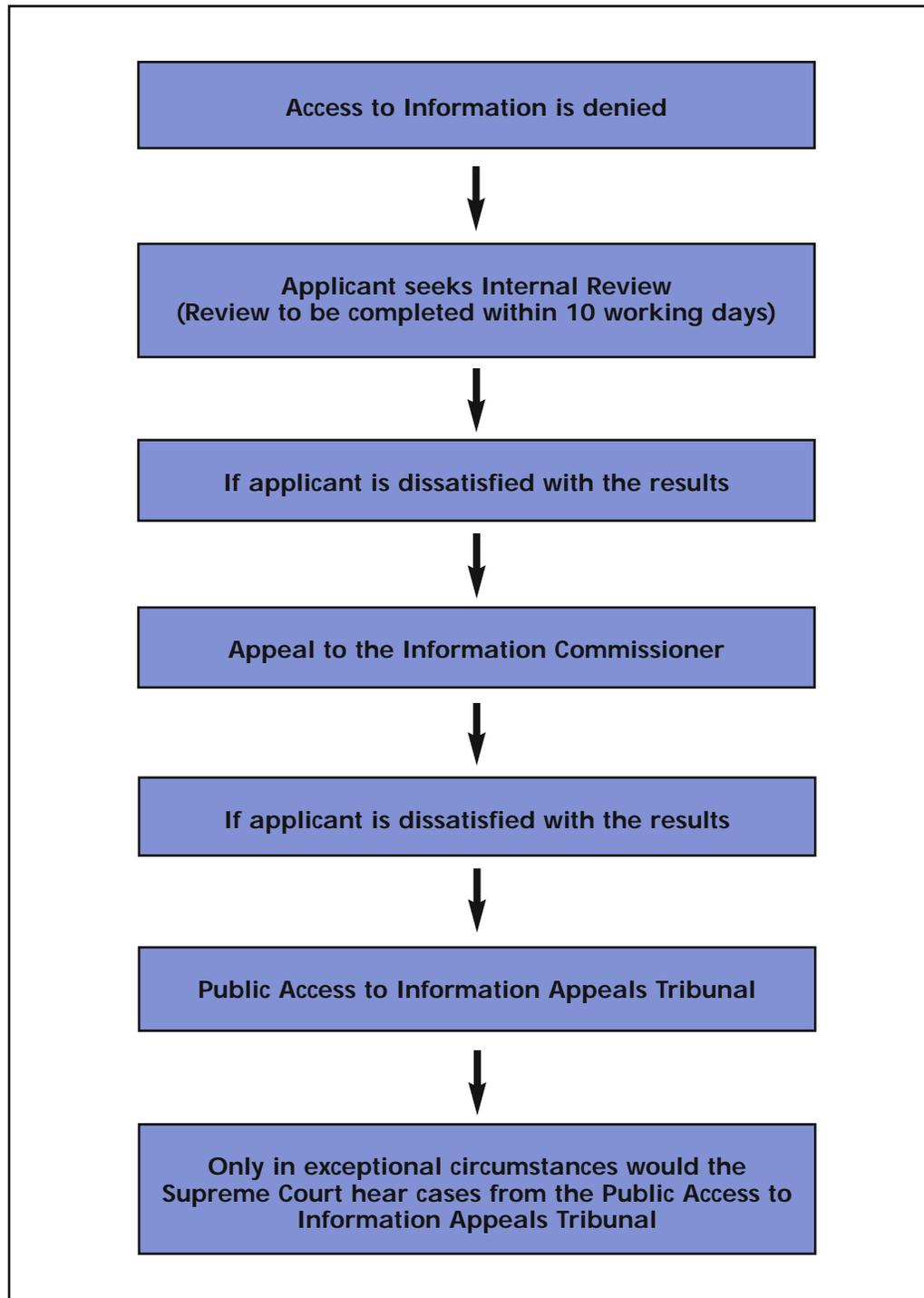
The Supreme Court should be a last resort in overseeing the functions of, and reviewing cases heard by, the Public Access to Information Tribunal. It is anticipated that in only exceptional circumstances would the Supreme Court hear cases from the Public Access to Information Appeals Tribunal in which they would determine whether or not the Appeals Tribunal had complied with the legislation governing public access to information.



#### 6.4.4 ROUTE FOR PROCESS OF APPEALS

The following chart sets out the avenue for appeal.

Fig. B



## 7.1 PERSONAL INFORMATION AND THE DATA PROTECTION INITIATIVE

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The Ministry of Telecommunications & E-Commerce has been working with the private sector to develop data protection legislation that would protect the personal information of individuals. Data protection, which is also commonly referred to as privacy legislation, is common throughout Europe and countries such as Canada, New Zealand, and Australia. This type of legislation not only protects personal information from disclosure to the general public, but also gives individuals the right to see their own personal information (generally referred to as "subject access"), and to amend factual errors within such information, such as an incorrect date of birth or retirement.

In other jurisdictions, data protection applies equally to government and the private sector. As government is the single largest depository of personal information in Bermuda, it is extremely important for Government to have in place procedures to protect personal information. Additionally, due to Bermuda's small size, an individual's personal information can easily travel through informal and inappropriate networks. Through data protection legislation, the Government intends to protect the personal information of individuals.

However, similar to other rights, the right to have personal information protected is not absolute; there are generally some exceptions, one of which includes the requirement by statute to publish certain personal data.

### 7.1.1 THE RELATIONSHIP BETWEEN PUBLIC ACCESS TO INFORMATION AND THE DATA PROTECTION INITIATIVE

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The Government proposes that Bermuda follow the model of other countries, which have both public access to information and data protection legislation. There may be a natural tension between legislation that provides public access and laws whose primary purpose is to protect personal information. However, the Government envisages that the two pieces of legislation would complement each other and proposes that requests for personal information (subject access) would be routed through data protection legislation. Public access to information would be used to handle requests for the personal information of others; however the release of personal information through PATI legislation would be rare as it would be subject to strict public interest tests.

## 7.2 NON-DISCLOSURE CLAUSES IN BERMUDA LEGISLATION

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A number of Bermuda laws prevent certain information from being released to the public. The Government intends to conduct a thorough review of such legislation to determine which of these laws should remain in place, and which should be amended or repealed if they are no longer necessary and not in keeping with the spirit of PATI legislation.



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### **7.3 THE OFFICIAL SECRETS ACT**

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The purpose of the Official Secrets Act is to safeguard government-held information and prevent its unauthorized release. While the Official Secrets Act prohibits public servants from disclosing certain levels of information, PATI legislation makes provision for access and dissemination of information. Therefore, conflicts may arise when requests for information protected by the Official Secrets Act are made under PATI legislation.

In order to reconcile any possible conflicts between the Official Secrets Act and PATI legislation, the Government is currently reviewing the Official Secrets Act and its potential relationship to public access to information.

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### **7.4 CROWN AND OTHER COPYRIGHT**

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Public access to information will have implications for Crown and other copyright in Bermuda. Copyright refers to the right of an owner of material to determine if and how that material can be used and reproduced by others. The information produced by public servants or other officials in their work for government is referred to as Crown Copyright material. This information belongs to government and should only be used and reproduced within the terms laid out by the Government.

In 2004 the Copyright and Designs Act was passed in the House of Assembly. Future PATI legislation should be developed in such a way to ensure that Crown and other copyright remains protected by the Copyright and Designs Act, and any corresponding regulations.



## 8.0 THE IMPLEMENTATION OF A PUBLIC ACCESS TO INFORMATION REGIME

The implementation of an effective public access to information regime would require a dedicated effort and additional public spending by the Government and other public bodies. As has been demonstrated in other countries, the true cost of implementing and administering PATI legislation can be difficult to estimate. In part this is because the cost of providing public access to information is heavily dependent on the number of requests for information that are received. Predictions on the level of usage of PATI legislation have historically been inaccurate and in most cases have been overestimated.

Although public access to information would require additional expenditure of funds, it has a number of cost benefits such as improved records management, and increased efficiency and accountability. The resulting improvement in government effectiveness makes public access to information worth its financial cost to Bermudian society.

The Government will consider the following requirements, as its proposals are formalised following public consultation, to determine the potential costs associated with implementing and administering PATI legislation:

- Establishing a central body within government to oversee implementation/administration of, and compliance with, the Act;
- Improving management of government records; including ensuring the records are complete, accurate, and consistent;
- Creating Publication Schemes;
- Establishing the post and office of the Information Commissioner to provide independent review and oversight of PATI legislation;
- Establishing a Public Access to Information Appeals Tribunal to serve as a quasi-judicial body to hear appeals;
- Facilitating training and awareness for public servants and the public on how to administer and/or use the Act;
- Creating guidance material that instructs public servants how to administer the Act, and informs the public of their rights under the Act.



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## 9.0 NEXT STEPS

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The Government hopes that this discussion paper will launch a public debate on its proposals for PATI legislation. The responses to this paper will help the Government to evaluate and further develop its proposals.

The Government hopes that PATI legislation can be introduced in the House of Assembly within the next 12 to 18 months, but once the legislation is passed, time will be required to implement an effective public access to information regime. After the Government has formalised its proposals in a bill; it will be better equipped to calculate when it can provide public access to information legislation to the public. Ultimately, the Government hopes to achieve implementation within 3 to 5 years of the PATI legislation being passed.

## 10.1 THE RIGHT TO ACCESS INFORMATION

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- Public access to information should be a right.
- The right to access information should be extended to any requester.
- Most information held by central government, as well as other public bodies, should be subject to PATI legislation.
- Some records such as Court and Archival records should be excluded from PATI legislation.
- Requests should be made in writing, but verbal requests would be accepted from members of the public who are not able to complete a written request.
- The Government must take reasonable steps to assist requesters.
- Departments that receive requests more appropriate to another department must transfer the request and notify the requester.
- Requests must be acknowledged within 10 working days, and decisions on the granting or refusal of a request must be made within 20 working days. If access is granted, it must be given within 20 working days of the original request.
- Government would have the discretion to refuse vexatious or voluminous requests for information; however, the Information Commissioner must automatically review these refusals.
- If access is provided for a large volume of information, the requester must be given an opportunity to review and select the specific information he or she would like copied.

## 10.2 PUBLICATION SCHEMES

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- The Government should mandate publication schemes for all public bodies, drawn up in compliance with relevant guidance.
- The publication schemes should include details about government and public bodies, where the public should apply for different types of information and the types of information available, to assist the public in searching for information.
- The Government should prescribe the types of information which relevant bodies are required to publish, as well as the format for publication.
- The publication schemes should undergo two forms of monitoring or vetting: one internal and one external.

## 10.3 EXEMPTIONS

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- Exemptions should only cover information that may cause harm to certain identified interests if released.

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### **10.3.1 THE PUBLIC INTEREST**

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- Most exemptions should be covered by a public interest test so that if harm may occur to a particular interest, but the public interest would be better served, then the information should be released.

[The letters (PI) in brackets mark exemptions that are subject to a public interest test]

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### **10.3.2 THIRD PARTIES**

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- In cases where third parties may be affected by the disclosure of information, they must first be consulted and if government decides that the information should be released, the third party should have the right to have their case heard by the Information Commissioner before the information can be disclosed.

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### **10.3.3 PERSONAL INFORMATION (PI)**

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- Personal information is to be protected; however the names, positions, and functions of public servants should not be exempt.

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### **10.3.4 COMMERCIAL AND OTHER THIRD PARTY INFORMATION (PI)**

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- Commercial and other third party information should be exempt.
- Specifically, intellectual property rights, trade secrets, information whose commercial value would be diminished by disclosure should be exempted.
- In addition, any disclosure of information that would result in preventing government from receiving similar data in the future should be exempted from PATI legislation.
- Public access to information is not intended to be used by commercial entities for competitive advantage.
- Where public monies are being spent, the public has the right to know that government is receiving value for money.
- The commercial information of government and its quangos should be exempt only if the public good in withholding it outweighs the public good in disclosing it.

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### **10.3.5 INFORMATION RECEIVED IN CONFIDENCE (PI)**

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- Information received in confidence should be exempt; however criteria must be met for this exemption to apply.

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### **10.3.6 SECURITY, DEFENCE, AND POLICING (PI)**

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- Information whose disclosure would harm the security, and/or defence of Bermuda, or that impairs the ability of the Bermuda Police Service to carry out its function effectively should be exempt from release to the public.

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### **10.3.7 NON-POLICE INVESTIGATIONS (PI)**

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- Investigations carried out by government and quangos that do not involve the Bermuda Police Service should not be prejudiced by the release of information.



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### **10.3.8 LEGAL PROFESSIONAL PRIVILEGE, CONTEMPT OF COURT AND MATTERS BEFORE THE COURTS**

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- Information covered under legal professional privilege should be exempt, however after Court proceedings and other legal matters are complete, the information should, subject to other exemptions, be made public. (PI)
- Information regarding matters before the Court should be exempt.
- Information whose disclosure would result in government or any other party being in contempt of court should be exempt.

### **10.3.9 HEALTH AND PUBLIC SAFETY (PI)**

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- Information that would harm the health and safety of the public or an individual should be exempted.

### **10.3.10 PROTECTION OF THE ENVIRONMENT (PI)**

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- Information that would threaten the environment, or the ability of government or other public bodies to protect the environment, should not be disclosed.

### **10.3.11 THE FRANKNESS OF POLICY ADVICE (PI)**

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- Decision-making and policy advice should only be exempted if its disclosure would harm the free and frank provision of advice.
- The background material, factual information, and analysis that go into decision-making should, subject to other exemptions, be made public.

### **10.3.12 THE DELIBERATIONS OF THE CABINET**

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- Cabinet's deliberations should be exempt in order to protect ministerial responsibility, but the decisions of the Cabinet, once they are implemented and subject to other exemptions should be released to the public.

### **10.3.13 MANAGEMENT OF THE ECONOMY (PI)**

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- The release of economic and financial information that would prejudice the economic interests of Bermuda or the Government's ability to manage the economy effectively should be exempt.

### **10.3.14 NEGOTIATIONS, TESTS, EXAMINATIONS AND AUDIT FUNCTIONS (PI)**

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- Information whose disclosure would negatively impact or compromise negotiations or the effectiveness of tests, examinations or the audit functions of government should be exempt.

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## **10.4 FEES FOR PUBLIC ACCESS TO INFORMATION**

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- Some, but not all of the costs of providing public access to information should be borne by requesters.
- The fees imposed should be reasonable.



- There should be a three tiered fee schedule (commercial, media, and other users) that includes a flat rate application fee and provides for recovering only the direct cost of reviewing the requested information, as well as the cost of reproduction. Charges from external suppliers hired to reproduce requests would be passed on at cost to requesters.
- There should be fee waivers and/or a fee reduction in certain cases.
- All fees are subject to review by the Information Commissioner.
- No fees would be attached to appeals or complaints made to the Information Commissioner.

## **10.5 THE APPEALS PROCESS**

- There should be an appeals process that consists of both internal and external review.
- The internal review should be conducted by a more senior decision-maker (i.e. ranking higher than the initial decision-maker who reviewed the original request) within a period of 10 working days.
- The first stage of the external review should be conducted independently by the Information Commissioner.
- The Information Commissioner should have the right of access to documents and materials and the powers to:
  - order disclosure;
  - examine and take documents;
  - enter premises;
  - review decisions taken at the internal review stage;
  - investigate complaints against any public body;
  - conduct hearings;
  - publish outcomes of investigations;
  - review decisions that do not qualify for internal review;
  - resolve disputes by mediation;
  - promote, educate and raise public awareness and understanding of the legislation; and
  - make recommendations on possible amendments to the legislation.
- Third parties affected by the disclosure of information would be given the right to appeal to the Information Commissioner before any information is released.
- The second stage of external review should be conducted independently by the Public Access to Information Appeals Tribunal.
- The Supreme Court should be able to hear cases of judicial review in reference to PATI legislation.



## BACKGROUND INFORMATION ON THE CENTRAL POLICY UNIT [WWW.CPU.GOV.BM](http://www.cpu.gov.bm)

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The Civil Service Review, carried out in 1999, recommended the creation of a Central Policy Unit (CPU) within the Cabinet Office to enable the administration to address more effectively issues that crossed the boundaries of individual Ministries in an effort to "join up" government.

### AIM

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The aim of the CPU is:

“To contribute to the delivery of better policy-making and thereby improve the economic and social well-being of Bermuda.”

### RESPONSIBILITIES

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Its main responsibilities are:

- To improve the co-ordination of policy across Ministries to deliver the Government’s platform objectives more effectively
- To assist Ministries to gain a long-term, strategic view of challenges in their policy areas
- To identify key cross-cutting policy challenges for Bermuda and ensure that these are addressed
- To undertake and oversee projects to determine policy responses to cross-cutting issues
- To develop a network of policy analysts in Ministries to facilitate joined-up policy-making and to help bring on new talent
- To draw on international best practice in policy co-ordination and strategic planning

### PROJECTS

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CPU has completed two projects on the following subjects:

- E-Government; and
- Untangling Bermuda’s Quangos

Both reports are available on the CPU website at [www.cpu.gov.bm](http://www.cpu.gov.bm), or can be obtained from the Department of Communication and Information.



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## MEMBERS OF THE PUBLIC ACCESS TO INFORMATION ADVISORY TEAM

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Ms. Anne Allain	Management Services Officer
Ms. Edmina Bradshaw	Consultant
Mr. Murray Brown	Entrepreneur
Mr. Eugene Dean	Entrepreneur
Ms. Marisa Hall	Project Manager, BTEC
Ms. Karla Hayward	Government Archivist
Mr. Warren Jones	Assistant Cabinet Secretary (Policy)
Mrs. Cheryl Ann Mapp	Lawyer
Dr. Kevin Mayall	Planning Officer
Mr. Phillip Roque	Entrepreneur
Mrs. Erica R. Smith	Assistant Director of Planning

# ANNEX C



## CHART OF PUBLIC ACCESS TO INFORMATION FEATURES AROUND THE WORLD

	Australia	Canada	England	Ireland
Date Law Passed	1982	1982	2000	1997
Year Law Implemented	1982	1983	2005	1998
Retrospective Access to Records	For 5 years	Yes, with a progressive roll out	Yes	No, unless they contain personal information or are necessary to explain other documents covered (3 year limit)
Fees for Access	Yes	Yes	Yes	Yes
Internal Review	Yes	Yes	Yes	Yes
Ombudsman or Information Commissioner	Ombudsman Commissioner	Information Commissioner	Information Commissioner	Information Commissioner Binding Decisions
Judicial Appeals	Tribunal and Courts	Courts	Tribunal and Courts	Courts
Response Times	30 Days	15 Days	20 Working Days	28 Days
Time Period for Release of Exempt Information	30 Years	20 Years	30 Years	30 Years
Access to Current Cabinet Records	No. Cabinet Records are closed for 50 years.	No. Cabinet Records are closed for 20 years, but the court has narrowed definition of Cabinet Confidences.	No. Cabinet Records are closed for 30 years.	No. Cabinet Records are closed for 10 years. General access to factual information documents relating to decision made by government.
Responsible Department/Ministry	Attorney General's Department	Department of Justice and Treasury Board	Department for Constitutional Affairs	Ministry of Finance
	New Zealand	Sweden	United States	
Date Law Passed	1982	1766 (first expressed)	1966	
Year Law Implemented	1983	1949 (Current Version)	1967	
Retrospective Access to Records	Yes	Yes	Yes	
Fees for Access	Yes	No. Fee for right of access, but optional nominal fee for record reproduction	Yes	
Internal Review	Yes	Yes	Yes	
Ombudsman or Information Commissioner	Ombudsman Binding Decisions	Ombudsman	No	
Judicial Appeals	Courts	Courts	Courts	
Response Time	20 Working Days	No Time Criteria, but must respond immediately	20 Working Days	
Time Period for Release of Exempt Information	25 Years	2 to 70 Years	30 Years, but documents can be declassified earlier	
Access to Current Cabinet Records	Yes. It is common for Cabinet documents and advice to be released	Yes	No	
Responsible Department/Ministry	Ministry of Justice	Ministry of Justice	Decentralized Responsibility and the Department of Justice	



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**LIST OF INTERNATIONAL EXEMPTIONS: A COMPARATIVE APPROACH**

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**AUSTRALIA**

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Exemptions exist for documents that relate to, defense, national security and relations between states; documents submitted to, generated by, or reveal deliberations of, the Cabinet or Executive Council; Internal working documents; law enforcement and public safety; personal privacy; the national economy; privilege; and confidentiality. Nevertheless, there are, a variety of "public interest" provisions depending on the type of information.

**ENGLAND**

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There are three categories of exemptions. The first is absolute exemption which includes: court records, most personal information, information relating to or from the security services, information obtained under confidence, or information protected under another law; these cannot be disclosed. The second is the "qualified class exemption," this includes a broad scope: government policy formulation, safeguarding national security, investigations, royal communications, legal privilege, public safety or the information was received from a foreign government. In the third category the government body must show prejudice to specified interests to withhold information. This can include: defense, international relations, economy, crime prevention, commercial interests, prejudice regarding the effective conduct of public affairs or inhibiting the free and frank provision of advice. A "public-interest test" applies to the last two categories.

**CANADA**

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Cabinet confidences are excluded from the Act and remain closed for 20 years. Records are exempt if: they were obtained in confidence from a foreign government, international organisation, provincial or municipal or regional government; would injure federal-provincial or international affairs or national defense; relate to legal investigations, trade secrets, financial, commercial, scientific or technical information belonging to the government or materially injurious to the financial interests of Canada; include personal information defined by the Privacy Act; contain trade secrets and other confidential information of third parties.

**IRELAND**

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The following records can be withheld unless the public interest is better served by releasing the document: the deliberative process; cases where the release of information would prejudice the effectiveness of investigations or audits or the performance of government functions. Records would also be withheld if disclosure would prejudice law enforcement, security, defense and international affairs. Documents relating to Cabinet meetings must be withheld, unless they relate to a decision made over ten years before, or if it relates to factual information. Contempt of court and parliamentary proceedings; legal professional privilege; information obtained in confidence; commercially sensitive information and personal information, or where (with certain exceptions) disclosure is prohibited or authorized by other legislation, records would be withheld.



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## NEW ZEALAND

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Strict exemptions exist for releasing information that would harm national security and international relations; information provided in confidence by other governments or international organisations; information that is needed for the maintenance of the law and the protection of any person; information that would harm the economy of New Zealand; and information related to the entering into of trade agreements. Additionally information can be withheld for good reason unless there is an overriding public interest, 'good reason' may include for: personal privacy, commercial secrets, privileged confidences; protection of public safety and health, economic interests, constitutional conventions and the effective conduct of public affairs.

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## SWEDEN

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Four exceptions exist: first, documents that are of little importance to the authorities activities; second, documents that are not secret and it can be ascertained whether they have been received or drawn up by the authority; third, documents that are kept in large numbers, exempted under the secrecy ordinance; and finally, electronic records already registered and available from another ministry. It should be noted that drafts, memoranda and outlines are not considered official documents unless they are filed and registered or they contain new factual information that is taken into account in decision-making. There are also discretionary exemptions under the Act to protect national security and foreign relations; fiscal policy, the inspection and supervisory functions of public authorities; prevention of crime; the public economic interest; the protection of privacy; and the preservation of plant or animal species.

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## TRINIDAD

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There are exemptions for, defence and security, international relations, internal working documents, law enforcement, privilege, personal privacy, trade secrets, confidence, documents protected by another law, and Cabinet documents less than 10 years old. There are a number of public-interest tests. The President and the judicial functions of the courts are exempt from the Act, and the President may also issue a decree exempting agencies from coverage under the Act.

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## UNITED STATES:

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There are nine categories of discretionary exemptions: national security; internal agency rules; information protected by other statutes; business information; inter and intra agency memos; personal privacy; law enforcement records; financial institutions and oil wells data. There are 142 different statutes that allow for withholding information. Since 2003, the Homeland Security Act prohibits the disclosure of voluntarily-provided business information relating to "Critical Infrastructure".



## PUBLIC ACCESS TO INFORMATION GLOSSARY OF TERMS

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### **ACCOUNTABILITY**

Having a responsibility to someone or for some activity.

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### **APPEAL**

The seeking of review of a decision by a higher authority.

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### **CLASS OF INFORMATION**

A particular category of information that shares similar content, or which is generated for a related purpose (e.g. Cabinet minutes constitute a class of information).

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### **DATA PROTECTION**

Legislation that protects the personal information of individuals, and gives individuals the right to access and amend their own personal information held by government, the private sector, and other organisations.

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### **DECISION-MAKER**

The person responsible for determining what information can be released or withheld under PATI legislation.

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### **DISCLOSURE**

Releasing or making information publicly available.

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### **EXEMPTIONS**

Provisions of PATI legislation which either require or permit a public body to withhold information.

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### **INFORMATION**

Any memorandum, book, plan, drawing, diagram, picture, pictorial work, graphic work, or other document, any photograph, file, or recording (whether of sound, or images or both), any form in which data are held, any other form or thing in which information is held or stored electronically, and anything that is a part or a copy in any form of the items listed above, or of two or more of the items listed.

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### **INFORMATION COMMISSIONER**

An independent person responsible for hearing appeals under public access to information. Information Commissioners also have responsibility for overseeing the legislation and creating public awareness.



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### **INTELLECTUAL PROPERTY**

Creative ideas and expressions of the human mind that have commercial value and receive the legal protection of a property right. Intellectual property rights enable owners to select who may access and use their property and to protect it from unauthorized use.

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### **PERSONAL INFORMATION**

Any information pertaining to an identifiable person. The names, positions, and/or functions of public servants do not constitute personal information.

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### **QUANGO**

Quasi-Autonomous Non-Governmental Organisations are bodies that exist outside of government, and are completely or partially funded by government and have been tasked to carry out a public mandate.

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### **RECORD**

A record conveys information, and may take the form of any medium. It can include notes, images, audiovisual recordings, x-rays, documents, maps, drawings, photographs etc.

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### **RECORDS MANAGEMENT**

A system governing the creation, organisation, maintenance, use, and disposal of records.

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### **REQUESTER**

A person who makes a request for information under PATI legislation.

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### **THIRD PARTY**

A person, group of persons, or an organisation who is neither the government nor the requester of information, and whose interests may be affected by the release of information by the government.

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### **TRANSPARENCY**

The extent to which laws, regulations, agreements and practices are open, clear, measurable and verifiable.

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### **TRIBUNAL**

A quasi-judicial body that hears appeals under PATI legislation.



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