



CENTRE FOR LAW
AND DEMOCRACY

Bermuda

**Analysis of the Public Access to Information
Act 2010**

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Introduction¹

The Bermudian Public Access to Information Act 2010 (PATI Act) came into force only in 2015.² The primary aim of the PATI Act, like other such enactments, is to give Bermudians a right to access information held by public authorities, often referred to as right to information (RTI) or access to information (ATI) laws. This Analysis reviews the PATI Act, along with the Public Access to Information Regulations 2014 (Regulations)³ and any other relevant legal provisions, highlighting strengths and weaknesses, and pointing to areas for reform along with specific recommendations.

The PATI Act has a number of both strengths and weaknesses. It creates a strong and independent oversight body, in the form of the Office of Information Commissioner (Commissioner), and it puts in place a strong system of promotional measures to support implementation. At the same time, it has a number of weaknesses including in relation to its scope, the procedures for making and processing requests and the regime of exceptions.

This Analysis is based on international standards regarding the right to information, as reflected in the RTI Rating, prepared by the Centre for Law and Democracy (CLD) and Access Info Europe.⁴ It also takes into account better legislative practice from democracies around the world.⁵ An assessment of the PATI Act based on the RTI Rating has been prepared⁶ and should be read in conjunction with this Analysis; the relevant sections of this assessment are

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² The PATI Act was adopted in 2010 but it did not come into force until 2015. The Act is available at: <http://www.bermudalaws.bm/laws/Consolidated%20Laws/Public%20Access%20to%20Information%20Act%202010.pdf>.

³ Available at:

<http://www.bermudalaws.bm/laws/Consolidated%20Laws/Public%20Access%20to%20Information%20Regulations%202014.pdf>.

⁴ The RTI Rating, which was first launched in September 2011, is based on a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional mechanisms such as regional courts. The Rating is continuously updated and now covers 123 national laws from around the world. It is the leading tool for assessing the strength of the legal framework for the right to information and is regularly relied upon by leading international authorities. Information about the RTI Rating is available at: <http://www.RTI-Rating.org>.

⁵ See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available in English and several other languages at: <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/freedom-of-information-a-comparative-legal-survey-2nd-edition/>.

⁶ Note that this was an informal rating that did not go through the rigorous process that applies before a rating can be uploaded to the RTI Rating website.

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pasted into the text of this Analysis at the appropriate places. The overall score of the PATI Act, based on the RTI Rating, is as follows:

Section	Max Points	Score	Percentage
1. Right of Access	6	3	50
2. Scope	30	19	63
3. Requesting Procedures	30	18	60
4. Exceptions and Refusals	30	17	57
5. Appeals	30	22	73
6. Sanctions and Protections	8	4	50
7. Promotional Measures	16	14	88
Total score	150	97	65

This score places the PATI Act in 45th place out of the 123 countries around the world whose laws are assessed on the RTI Rating, or in the middle one-third of all countries. While this may seem a respectable score, in fact it would be a lot weaker if the comparison were limited to laws of its more recent vintage, since these laws tend to be a lot stronger. It would thus be appropriate at this time, some nine years after it was adopted, for Bermuda to do a review of the PATI Act and to consider amending it to make it stronger.

1. Right of Access and Scope

Part of the reason for Bermuda's poor score in the RTI category of Right of Access is that it does not have a constitutional guarantee for the right to information. Specifically, the rights section of the Constitution found in Chapter 2 of Schedule 2 to the Bermuda Constitution Order 1968⁷ protects the right to freedom of expression but not the right to information.

The PATI Act provides for a guarantee of the right to information in section 12(1) but this is procedural in nature – stating that citizens and residents may make a request and, subject to the PATI Act, shall be given access to information – rather than rights based – stating that individuals have a right to access information (for which the PATI Act then provides the procedures). While this may seem a small difference, a rights based statement is quite important, especially in guiding interpretation of the PATI Act, particularly given the lack of a constitutional guarantee.

Section 2 of the PATI Act, setting out its purposes, refers to certain general benefits of RTI – such as increasing accountability and informing citizens about

⁷ Available at:

<http://www.bermudalaws.bm/laws/Consolidated%20Laws/Bermuda%20Constitution%20Order%201968.pdf>.

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how public authorities make decisions – as well as direct transparency values, but it fails to refer to wider benefits such as combating corruption and facilitating participation in public affairs. Furthermore, the PATI Act does not specifically provide for its provisions to be interpreted in the manner that best promotes its purposes.

According to section 12(1), “every person who is a Bermudian or a resident of Bermuda has a right to and shall, on request, be given access to any record that is held by a public authority”. The PATI Act is thus limited to citizens and residents, unlike better practice RTI laws, which apply to everyone. This wider scope is also mandated by the fact that the right is, under international law, recognised as a human right. This formulation also appears to exclude legal entities, again contrary to better practice.⁸

The definition of a “record”, in section 3(1), is broad enough to cover all recorded information, regardless of the form in which it is held. Furthermore, section 3(4) makes it clear that records held by third party contractors under contracts with public authorities are also covered. However, the PATI Act only appears to apply to records as such, and not necessarily to information *per se*, which might need to be compiled from various records. Thus, section 12(1), referring to the right to make a request, refers only to records and the same is true of section 13(1), referring to the manner of making a request.

The scope of the PATI Act in terms of coverage of public authorities is defined by a list of these authorities found in column one of the Schedule to the PATI Act, which lists 18 public authorities or types of public authorities (such as departments). This covers bodies created by statute, but only if they carry out functions of a governmental or quasi-governmental nature, whereas better practice is to cover all bodies created by statute, as well as all bodies which carry out public functions – which would normally be interpreted more broadly than governmental functions – whether or not they are created by statute. It also includes bodies that are owned or controlled by government, or substantially funded by monies authorised by the legislature, which is positive. However, it is not clear whether this list effectively covers the entire working of the executive branch of government.

In terms of the legislature, the PATI Act covers the Office of the Clerk of the Legislature and the Office of the Parliamentary Registrar, but not the legislative body and its members as such, contrary to better practice.

Sections 4(1) and (2) of the PATI Act limit the scope of the PATI Act in relation to the judiciary and a number of oversight bodies (including the Office of the Information Commissioner) to information relating to their “general

⁸ Section 7 of the Bermuda Interpretation Act 1951 defines a 'person' as including legal entities but the language of section 12(1) of the PATI Act seems to be quite explicitly limited to natural persons.

administration". This is a substantial and unnecessary limitation, although a number of other countries also apply this limitation to the judiciary.

Recommendations:

- In due course, consideration should be given to amending the Constitution to include a guarantee for the right to information.
- A rights based guarantee for the right to information should be added to the PATI Act, in addition to the procedure guarantee found in section 12(1).
- Section 2 should refer to a wider range of general benefits which flow from the right to information and should require the provisions of the PATI Act to be interpreted so as best to give effect to those benefits.
- Everyone, including legal entities, rather than just citizens and residents, should have the right to make requests for information.
- The PATI Act should make it clear that requests may be made for both records and information.
- The PATI Act should cover all bodies which are created by statute or which undertake a public function, as well as all of the activities of the judicial and legislative branches of government and oversight bodies (i.e. not just their administrative functions).

Right of Access

Indicator		Max	Points	Article
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	0	
2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	2	2	12(1)
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information.	2	1	2
TOTAL		6	3	

Scope

Indicator		Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	0	12(1)
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	4	4	3(1), (2)
6	Requesters have a right to access both information and records/documents (i.e. a right both to ask for information and	2	1	2, 3(1), (2),

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	to apply for specific documents).			12(1), 13(1), (2)
7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, security services, and bodies owned or controlled by the above.	8	6	3(1), 4(1), (2), 59(1)(b), Schedule
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	1	Schedule 6, 9A
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	2	4(1)(a), (aa), 4(2), Schedule
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	2	Schedule
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	2	1	4(1)(b), 4(2)(b), Schedule
12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.	2	2	3(4), Schedule 13, 14
TOTAL		30	19	

2. Duty to Publish

Part 2 of the PATI Act, sections 5-11, established the rules for proactive publication. Section 5(1) is at the heart of the system, providing a long list of items that must be published. While this is a good list, it is generally weak on information relating to budgets and financial information about public authorities. Section 6(5) does at least refer to making quarterly expenditures available, albeit upon request, whereas this sort of information should be published proactively, without waiting for a request. Section 6(6) calls on public authorities to publish the details of contracts valued at over \$50,000 in the Gazette. It would be useful also to publish these at a dedicated place on each authority's website – because it will be difficult for individuals to find them if they are spread out over multiple Gazettes⁹ – and to reduce the value substantially. In Canada, for example, contracts over \$10,000 must be published and even lower figures apply in some countries.

The overall approach taken here – which centres around each public authority preparing an “information statement” which shall be updated annually with copies being made available at the principal office, the Bermuda National Library and the Bermuda Archives, and forwarded to the Commissioner (sections 5(1),

⁹ Since late 2018 the Gazette is available online but it is still harder to search through these documents than if the contractual information were made available in one place.

(2), (3) and (5)) – is very old-fashioned and works against the efficient dissemination of information released proactively. While it is good practice to make certain information available in hard copy at the office and in other places, there is certainly no need to do this with all of the information listed in section 5(1). Keeping this requirement will place barriers in the way of expanding the scope of proactive publication.

Sections 7-10 give the Commissioner a number of roles in relation to oversight of proactive publication which are very positive. It would also be useful to give the Commissioner the power to expand the scope of proactive publication over time, as public authorities gain experience and capacity in this area.

Recommendations:

- The list of types of information subject to proactive publication in section 5(1) should be expanded to include more financial information, including the quarterly expenditure reports that section 6(5) currently provides may be requested.
- Consideration should be given to requiring public authorities to publish information about contracts of a much smaller value – say \$10,000 or even less – and to provide this via their websites in addition to the Gazette.
- The core approach to proactive publication – which revolves around the idea of physical information statements – should be reconsidered in favour of a more digital approach which would reduce costs and allow for substantial scaling up of the scope of proactive publication over time.
- Consideration should be given to allocating the power to the Commissioner to add additional categories of information to the list of information which is subject to proactive publication.

Note: The RTI Rating did not assess the duty to publish and so no excerpt from it is provided here.

3. Requesting Procedures

The system for making and processing requests is, overall, an area where the PATI Act could do a lot better. It scores 18 out of the possible 30 points in this category of the RTI Rating, or 60%. While this is roughly equal to the overall score of the PATI Act on the RTI Rating, procedures is an area where it is generally easy to do well.

An initial problem is barriers to making requests. Schedule 1 of the Regulations sets out the information that needs to be provided on a request, which includes the title, name, postal address, email address and telephone number of the

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requester. All of this is unnecessary since all that is required is to have an address for purposes of communicating with the requester, which could be either an email or postal address. Even the condition of proving Bermudian citizenship or residence does not require all of this information to be provided.

A second problem is that neither the PATI Act nor the Regulations make it clear how a request may be lodged, beyond indicating that it must be in writing. Better practice here is to provide for requests to be made electronically, via email and/or a website, as well as in person or via mail.

The timelines for responding to requests are also problematical. Clause 4 of the Regulations provides for requests to be answered as soon as practicable, which is positive. However, section 14(1) of the PATI Act gives public authorities six weeks to respond to a request, which is normally 30 working days. This is substantially longer than the 30 calendar days which are applicable under many RTI laws and certainly longer than better practice laws which reduce this to ten working days. Given that the PATI Act provides for an extension to this initial period for complex requests, it is simply not necessary to give public authorities that long for ordinary requests. This is all the more important given that the practice in many countries is for most public authorities to take the full initial allocation of time for almost all requests.

The problematically long period for responding to requests is exacerbated by section 14(3). This provision is confusing, with section 14(3)(a) providing that, where it is reasonably practicable, access shall be provided “before the date” for lodging an internal review under section 42 (which is another six weeks after the decision has been notified), while section 14(3)(b) provides access shall be provided “after the date” for lodging an internal appeal. Assuming that the proper meaning is that the public authority should wait until the period for lodging an appeal has expired where a third party is involved, this means that the overall time to provide the information in such cases would be 12 weeks. This is unreasonable (see the part on third parties below, under Exceptions).

The timelines are even more extended due to the once again unduly long extensions that public authorities may claim under certain conditions – basically where there is insufficient time to consider third party representations or dealing with the request within the initial six weeks would be unduly burdensome – of another six weeks. Better practice here is to limit extensions to twenty working days.

A schedule of fees for responding to information requests in different formats is provided for in Head 53 of the Government Fees Regulations 1976. This is positive inasmuch as it ensures consistent charging among public authorities for providing information. However, the fees appear to be almost absurdly high, being set at \$1 for either a black and white or colour photocopy versus a commercial rate in most countries of closer to around one-twentieth of this or five cents. In addition, there is no provision for a set number of pages – say ten

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or twenty – to be provided for free, meaning that public authorities could be burdened with collecting very small amounts, which would almost certainly cost more than the value of the fee collected. The PATI Act also fails to provide for fee waivers in the case of impecunious requesters.

The PATI Act does not include any rules relating to the reuse of information. It is not clear what the default position on this is under Bermudian law or whether rules on reuse of information are set out elsewhere. If the matter is not already dealt with satisfactorily as a matter of either law or policy, it would be useful to include a framework of rules on reuse of information in the PATI Act. These could make it clear that there is a strong presumption in favour of open reuse of information created or owned by public authorities (while respecting intellectual property rights held by third parties). It might also be useful to provide in the law for the development of a system of open licences for this information, perhaps within a set timeframe (for example of six months).

Recommendations:

- When making a request for information, applicants should only be required to provide an address for delivery of the information rather than details such as their names, emails and physical addresses.
- The law should make it clear how a request for information may be lodged, which should include the possibility of filing them electronically.
- Consideration should be given to reducing the initial time limit for responding to requests, for example to ten working days or at least not longer than twenty working days.
- Once a decision on releasing information has been made, the information should be provided forthwith. While any third parties should have the right to lodge appeals against a decision to disclose, that should not delay the release of the information.
- Consideration should be given to reducing the amount of time that may be claimed for extensions to the time limit for responding to requests to twenty working days.
- The fee for photocopying information to satisfy a request should be substantially reduced, for example to five cents per page, and consideration should be given to providing the first ten or twenty pages for free and to introducing fee waivers for impecunious requesters.
- Consideration should be given to including a basic framework of rules in the law on the right to reuse information, including by creating a strong presumption in favour of open reuse of information created or owned by public authorities.

Indicator		Max	Points	Article
13	Requesters are not required to provide reasons for their requests.	2	2	12(3)

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14	Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	2	0	Reg. Schedule 1
15	There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	2	0	13
16	Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.	2	2	12(2)(a), 16(2)
17	Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.	2	2	Reg. 17(1)
18	Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	2	2	13(4), Reg. 6(3), Schedule 2
19	Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	2	2	13(5), (6), (7), Reg. 8
20	Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	2	2	13(3), 17
21	Public authorities are required to respond to requests as soon as possible.	2	2	Reg. 4
22	There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	2	0	14(1)
23	There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.	2	0	15(1), (2)
24	It is free to file requests.	2	2	20(2)
25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	2	1	59(1)(a), Reg. 13(1), Bermuda Fees Reg. 1976, Head 53
26	There are fee waivers for impecunious requesters	2	0	59(1)(a)
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	2	1	
TOTAL		30	18	

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4. Exceptions and Refusals

The PATI Act is relatively weak in terms of the regime of exceptions, garnering only 17 of a possible 30 points on the RTI Rating, or 57%. The regime of exceptions is the most complicated part of any RTI law and yet it is very important since it determines which information shall be disclosed and which is secret. Getting the right balance here is important since legitimately confidential information should be protected but an overbroad regime of exceptions can undermine the whole thrust of an RTI law.

International standards maintain this balance by imposing three conditions on exceptions. First, they must only protect legitimate confidentiality interests. These are very similar in most laws since the types of interests that need protecting do not really vary from country to country. Second, information should be confidential only if its disclosure would pose a risk of harm to a protected interest and not just because information “relates” to a particular interest (the harm test). Third, even where disclosure of information would pose a risk of harm, it should still be disclosed where the benefits of this – for example in terms of combating corruption or facilitating participation – would outweigh that harm (the public interest override).

A first issue here is the relationship between the PATI Act and other laws which provide for secrecy. Better practice is to protect all secrecy interests in the RTI law, even if in a rather general way, subject to a harm test and a public interest override, and then provide that if secrecy provisions in other laws go beyond this, the RTI law shall override them. Under such an approach, other laws may elaborate on secrecy interests recognised in the RTI law, but not extend them (including by failing to include a harm test or public interest override).

The PATI Act does not take this approach. Instead, section 37(1) clearly preserves secrecy provisions in other laws, regardless of how they are worded. Furthermore, pursuant to section 40(2), the 30-year time limit for information that is rendered secret under most exceptions does not apply to section 37. The problem with preserving secrecy provisions in other laws is that many of these provisions may have been drafted a long time ago and did not have the goal of achieving an appropriate balance between openness and secrecy. As a result, they do not conform to the three conditions noted above.

This approach is mitigated somewhat in two ways. First, sections 37(2)-(4) allow for the Minister, by order subject to affirmative resolution by Parliament, to repeal or amend secrecy provisions in other laws. Experience in other countries where this approach has been taken suggests that such repeals are rare and, to the best of our knowledge, no secrecy provision has so far been repealed on this basis in Bermuda. Second, section 37(5) provides that subsequent secrecy provisions shall only have effect if they provide specifically that they apply

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notwithstanding the PATI Act. While positive, this does not address the main weakness with preserving secrecy provisions in other laws, namely that many were drafted earlier and did not seek to establish an appropriate balance between openness and secrecy.

In terms of the specific exceptions, a number are not considered legitimate under international standards while some others fail to incorporate a harm test. In terms of the former, we have the following comments:

- Section 16(1)(c) allows a public authority to refuse to process a request (which is tantamount to creating an exception) where, “in the opinion of the head of the authority”, granting the request would cause a “substantial and unreasonable interference” in the work of the authority. This is problematical inasmuch as it hinges on the opinion of the head, although this is subject to review by the Commissioner and the courts. We note that Clause 9 of the Regulations imposes a number of both procedural and substantive conditions on the exercise of this power, which certainly helps. More importantly, however, there are more appropriate ways to address burdensome requests, taking into account that, in many cases, very large requests are of important social value, for example when posed by academics, the media or civil society organisations. One option is to provide for the payment of actual processing costs in such cases, potentially including a requirement for advance payment. Alternative means for addressing large requests should be employed in the law.
- Section 26A applies to a number of records which, as classes of records, there is no need to protect, including records submitted to the Minister of Finance that were created “in connection with an international tax agreement”, records of any “deliberation or decision” by the same Minister again “in connection with an international tax agreement”, any copy of or extract from the above and even any record which reflects any deliberation or decision at all of the Minister of Finance, apart from where such records have been officially published. This casts a broad veil of secrecy over the work of the Minister of Finance which is simply not legitimate. Section 26A should be repealed or substantially amended.
- Section 27 protects all records which were prepared for and submitted to Cabinet, official records of the deliberations and even decisions of Cabinet, unless these are officially published, and all draft bills. This assumes that everything which takes place in cabinet meetings is by nature confidential, which is simply not the case, even though the laws of a number of Westminster-style democracies take this approach (while others do not). A better approach is to protect the underlying interests involved here, such as the free and frank provision of advice and the integrity of policy making processes, rather than to rule out entire categories of information. It may be noted that section 28 already protects individual ministerial responsibility and that this is enough to protect the integrity of

Cabinet decision-making, while section 29 provides general protection for deliberations of public authorities. Section 27 should be repealed.

- Section 30(1)(b) protects against disclosures which would have a significant adverse effect on the “performance by a public authority of any of its functions relating to management”. Although it is welcome that this is subject to a strong harm test, the phrasing of this exception is simply too broad to be legitimate. Exceptions to the human right to information need to be drafted in narrow, specific terms. Section 30(1)(b) should be repealed.
- Section 31(1) protects the ability of the government to manage the economy, which is legitimate, but also anything which might have “a serious adverse effect on the financial interests of Bermuda”. Once again, while this incorporates a strong harm test, it is cast in terms which are simply too broad. For example, access to an environmental report exposing pollution in the waters around Bermuda might be refused on the basis that it could be harmful to the tourism industry. As with section 30(1)(b), exceptions to the right to information need to be cast in narrow terms. Furthermore, the overall economy of a country is not, under international law, a legitimate restriction on freedom of expression generally, including the right to information. The reference to the “financial interests of Bermuda” should be removed from section 31(1).
- Section 33(1) is again too broad, referring to information that “relates to the responsibilities of the Governor under section 62 of the Bermuda Constitutional Order 1968” and which could be expected to prejudice “the effective conduct of public affairs”. Broadly speaking, these responsibilities relate to external affairs, defence and public order. While it is helpful that a harm test has been provided here, the conduct of public affairs is not a sufficiently precise interest to pass muster as an exception according to international standards. In any case, all of the areas covered by section 62 are already protected by another exception in the PATI Act. Section 33(1) should be repealed.

A number of exceptions also do not incorporate a proper, or any, harm test, as follows:

- Section 4(3) excludes from the entire scope of the PATI Act any record which “contains information about a protected person”, defined essentially as those subject to witness protection. While it is legitimate to protect the identity of witnesses, this exception goes well beyond that and, since it excludes these records from the scope of the PATI Act *ab initio*, as it were, the rule on severability does not apply to them. Furthermore, the disclosure of this information is not subject to a harm test (such as “would prejudice the protection of a protected person”). This provision should be moved to the regime of exceptions part of the law and a harm test should be added.
- Section 30(1)(c) exempts records which disclose positions taken in ongoing negotiations. While it is legitimate to protect negotiations

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against harm, this exception fails to refer to any harm. Furthermore, section 25(1)(d) already protects contractual and other negotiations and public authorities can rely on this avoiding the need for this provision, which should therefore be removed or at the very least be limited to cases where disclosure of the information would pose a risk of harm to an ongoing negotiation.

- Section 32(1)(b) exempts records which contain “information communicated in confidence by a State”. While this may appear to be legitimate, in fact it would cover anything provided by another State which happened to have a classification mark on it, whether or not that information was at all sensitive (noting that classification practices in many States are massively over-inclusive) or the disclosure of the information would in any way negatively affect relations with the other State. In other words, it lacks any harm test. Given that Section 32(1)(a) already protects relations with other States, section 32(1)(b) is completely unnecessary and should be repealed.

There are also a number of other issues with the regime of exceptions:

- Section 16(1)(e) allows public authorities to refuse to grant a request where the head of the authority deems the request to be “frivolous or vexatious”. This is legitimate if limited to truly frivolous or vexatious requests. To ensure this, the law should include a clear and narrow definition of these terms.
- Section 16(1)(f) allows public authorities to refuse to grant a request where the information is “reasonably accessible” under any other law. Once again, this is legitimate as long as it is interpreted narrowly to apply only where the terms of access are not materially inconsistent with the provisions of the PATI Act. To ensure this, the law should clarify that this is what “reasonably accessible” means.
- Section 23(1) exempts “personal information”, which is then defined in a non-exclusive manner in section 24, which also excludes certain categories of information from the scope of the definition. The problem with section 23 is that it invokes the idea of personal data protection, rather than privacy. This may reflect a more general confusion between data protection and privacy. Data protection regimes are, at root, systems for preventing the unwarranted processing of personally identifying data, regardless of whether or not that data is actually private (and much of it is not). This is fundamentally different from the (proper) purpose and scope of a privacy exception to an RTI law, which should be limited to information the disclosure of which would in fact cause harm to a privacy interest. The specific list of examples of “personal information” in section 24 all fall pretty clearly within the scope of privacy, *per se*, which is helpful. But section 23 should be amended to refer explicitly to privacy instead of “personal information”, so as to avoid any possibility of confusion.

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- Section 25(1)(c) protects against the disclosure of information where this would harm the commercial interests of a third party, which is legitimate. In contrast, section 25(1)(b) refers to the idea of non-disclosure of information where disclosure would harm the commercial value of the information. This is not the right test since, if no third party would be negatively affected by the disclosure (which is already covered by section 25(1)(c)), a negative impact merely on the information itself is of no relevance. In other words, given section 25(1)(c), there is no need for section 25(1)(b), which should be repealed.
- Section 35 already provides for appropriate protection for legally privileged information. As a result, section 37(6), which reiterates this protection for information held by the Attorney General or the Director of Public Prosecutions, is unnecessary and should be repealed. While the test in section 37(6) is not inappropriate *per se*, in light of the widespread practice of defining the scope of this type of exception far too broadly in relation to actors like the Attorney General, it is distinctly unhelpful for the PATI Act to repeat this exception.
- Section 38 appears to aim to prevent the disclosure of the very existence of a record where this would itself result in one of the harms set out in the other exceptions. However, it employs the wrong test for this, applying whenever the record itself, whether or not it exists, would be exempt. The proper test here is where mere confirmation or denial of the existence of the record would, of itself, result in harm. This section should be amended to provide for a proper test for withholding acknowledgement of the very existence or otherwise of a record.

Most of the exceptions in the PATI Act are subject to a public interest override, although five are not, namely those found at section 26A (international tax agreements and decisions of the Minister of Finance), section 27 (Cabinet documents), the part of section 35 (legal privilege) relating to the Attorney General and Director of Public Prosecutions, section 36 (contempt of court and parliamentary privilege) and section 37 (disclosure prohibited by other legislation). Further, the application of public interest override in section 34 (law enforcement) is limited to only certain law enforcement records. Better practice is to apply the public interest override to all exceptions and these exclusions are particularly problematical given that two of the exceptions to which they apply, namely those in sections 26A and 27, are identified above as illegitimate *per se*. Furthermore, the tendency to overuse the concept of privilege as it relates to actors like the Attorney General, also noted above, means that the public interest override is particularly important in relation to this exception.

The Act sets out a comprehensive regime for consulting with third parties, mostly in section 14, which is generally positive. However, it does not align with international standards inasmuch as it allows third parties to substantially delay

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the release of information simply by lodging an internal review. While this may seem to be fair to third parties, in practice most RTI laws do not take this approach, given that a third party can easily lodge both an internal review and apply for a review to the Commissioner – see section 14(4) – thereby delaying release of the information for a very substantial period of time, even if there is no substance at all to their appeals. Instead, the information is released and third parties can appeal after this happens. The potential harshness of this is largely mitigated by the fact that in the vast majority of cases public authorities err on the side of caution against releasing information rather than the other way around, so that it is rare that third parties suffer from inappropriate disclosures.

Recommendations:

- The PATI Act should override secrecy provisions in other laws to the extent of any conflict, while the power of the Minister to repeal or amend other laws should be retained.
- The exceptions should be carefully limited to narrow and specific interests which can justify secrecy; the problematical exceptions listed above should be removed or narrowed in scope.
- All of the exceptions should be made subject to a harm test.
- Similarly, all of the exceptions should be subject to a public interest override.
- The other problems with exceptions noted above should also be addressed as recommended.
- The right of third parties to be consulted in relation to requests for information provided by them and to appeal against decisions to release this information should be retained, but the release of information should not be delayed until the time for lodging an appeal by a third party has expired and neither should the lodging of such an appeal further delay the release of information.

Indicator		Max	Points	Article
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	4	1	37, 40(2)
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to information which is already publicly available, for example online or in published form.	10	5	4(3), 16(1)(c), 22-36, Reg. 9

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30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	4	2	4(3), (4), 30(1)(c), 32(1)(b)
31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	4	2	21, 22- 36, Reg. 2
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	2	2	40
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	2	1	3(1), 14(2)- (4), Reg. 10, 11
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	2	2	3(2), 18(1), (2)
35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	2	2	14(2)
TOTAL		30	17	

5. Appeals

The PATI Act does relatively well in this category of the Rating, scoring 22 out of the possible 30 points or 73%, its second best score by category. It establishes an independent Commissioner who has extensive powers to investigate complaints and to make binding orders where breaches of the PATI Act have occurred.

The PATI Act also provides for a fairly comprehensive set of rules regarding internal review of decisions by public authorities. One weakness here is that section 42(1) gives the heads of public authorities six weeks to complete the internal review process. Given that the authority has already had ample time (too long, as noted above) to consider the matter, there is no need to allocate such a long time for the review. Ten working days or, at the very most twenty, should be sufficient.

There are generally robust protections for the independence of the Commissioner, which is important. The Commissioner reports to Parliament through an annual report, the accounts are audited by the Auditor General and the budget process is similar to that of government departments. However, the PATI Act fails to set out any rules for this. The PATI Act also fails to establish

formal prohibitions on individuals with strong political connections from being appointed as commissioner, which is better practice in this area.

The PATI Act fails to stipulate that appeals to the Commissioner are free and can be undertaken without legal assistance. This is the case in practice, and so points were awarded for this on the RTI Rating (Indicator 45), but it would be preferable for this to be explicit.

Better practice is also to place the burden of proof on public authorities, in case of an appeal, to show that they acted in accordance with the rules in the PATI Act. This flows from the facts both that the right to information is a human right and that the public authority is normally in a far better position to do this than the applicant. For example, where an authority claims that information is exempt, it can justify that based on the content of the information whereas it is extremely difficult for the applicant, who does not have access to the information, to show that it is not exempt.

The Commissioner has the power to order appropriate remedies for the applicant, pursuant to section 48(1) of the PATI Act. Section 48(1)(b) also gives the Commissioner a very general power to make “such other orders, in accordance with this Act, as the Commissioner considers appropriate”. It is not clear whether this extends to ordering public authorities to put in place structural measures – such as appointing an information officer, improving their records management or adopting a protocol for the processing of requests – where they are having general challenges in processing requests in accordance with the PATI Act.

Recommendations:

- The timeframe for deciding internal reviews should be shortened to ten or at most twenty days.
- More detailed provisions on the allocation of the budget of the Commissioner, which protect the independence of that office, should be included in the law.
- Individuals with strong political connections should explicitly be prohibited from being appointed as Commissioner.
- Consideration should be given to making it explicit in the law that appeals to the Commissioner are free and do not require a lawyer.
- It should be made explicit in the law that in an appeal before the Commissioner, the concerned public authority should bear the burden of proving that it acted in accordance with the PATI Act.
- The law should explicitly grant the Commissioner the power to order public authorities to put in place such structural measures as may be required to ensure that they are able to comply with their legal obligations in relation to the processing of requests.

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Indicator		Max	Points	Article
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	2	1	41-43, Reg. 11(2)
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	2	2	44, 45, Reg. 11(2)
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	2	2	50
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	2	1	55(1)
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	0	
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	2	2	56
42	The decisions of the independent oversight body are binding.	2	2	48(3)
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	2	2	48(1)
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	49
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	2	2	
46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	4	4	41, 45
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	2	47
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	0	
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	2	0	
TOTAL		30	22	

6. Sanctions and Protections

The PATI Act performs relatively poorly in this category, scoring just four out of a possible eight points, or 50%. It includes fairly comprehensive provisions on sanctions for obstructing access to information. However, there is no provision establishing the corporate responsibility of public authorities for systemic

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failures to respect the provisions of the PATI Act. This is important since such failures are often not the fault of an individual officer but, instead, result from more general corporate cultures, misaligned incentive structures or even messages from senior officials not to respect the law.

Better practice is, in addition to protecting those who release information in good faith pursuant to the PATI Act (as set out in sections 54 and 63), to provide protection for individuals who release information in good faith with a view to exposing wrongdoing or serious problems of maladministration (whistleblowers). This is an important information safety valve, encouraging the release of these high public importance types of information. In many countries, this form of protection is found in a dedicated (i.e. separate) whistleblower law. However, where such a law has not (yet) been adopted, including at least basic protections on this in the RTI law is good practice. Bermuda does not have dedicated whistleblower law and the PATI Act does not include any provisions on this.

Recommendations:

- Consideration should be given to adding rules to the law that establish a practical system for imposing responsibility on public authorities and senior officials for general (systemic) failures to respect the PATI Act.
- At least basic protection should be provided in the PATI Act for individuals who release information about wrongdoing.

Indicator		Max	Points	Article
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.	2	2	56(4), 64, 65
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	2	2	54, 63
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	2	0	
TOTAL		8	4	

7. Promotional Measures

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This is the category where the PATI Act does by far the best, earning 14 of the possible total of 16 points or nearly 88%. There are only two areas where points are deducted.

The first is in relation to the system for records management. Section 59(1)(c) authorises the Minister to adopt regulations on the “management and maintenance of records”, while section 60(2) requires the Minister, after consulting with the Commissioner and the Director of the Department of Archives, to adopt a code of practice on this. This is helpful but a proper records management system includes, in addition to setting minimum central standards, the provision of training to build the capacity of public authorities to apply these standards. Furthermore, some system for monitoring performance in this area and for addressing cases where public authorities are failing to meet the standards should be put in place.

According to section 5(1)(d), public authorities are required to publish a description of the classes of records they hold. This is positive but better practice in this area is to require these authorities to produce full lists of at least the more important records they hold. Such lists can be very useful for requesters as they represent a mapping of the information each public authority holds. This, in turn, makes it much easier to identify the right public authority when lodging a request for information as well as to know whether the information you are seeking is available at all.

Recommendations:

- The PATI Act should include provisions creating a proper records management system involving not only the setting of records management standards but also the provision of training on this and a system to monitor performance and to address cases where public authorities are not meeting minimum standards.
- Consideration should be given to requiring public authorities to publish lists of the main records they hold.

Indicator		Max	Points	Article
54	Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	2	2	62, Reg. 19
55	A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	2	2	51, 57
56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	2	2	51
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	1	59(1)(c), 60(2)

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58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	1	5(1)(d)
59	Training programmes for officials are required to be put in place.	2	2	61, Reg. 17(1)
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	2	2	58(3)
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	2	2	58
TOTAL		16	14	