

*A Preliminary Review, COMPLIANCE CHECK LIST and Recommendation(s) for or in respect of the Minister responsible and the Public Authorities generally, with regard to their respective roles, obligations etc. under the current PATI ACT 2010; and pursuant to specific requests and instructions contained in, particularly, e-mail correspondences from DHOCS Ms. Cherie Whitter variously dated from April 12 to April 25, 2018.*

## **1. PREAMBLE or GLOBAL VIEW:**

The overall governance, execution, regulation and/or administration of the PATI Act 2010 ('ACT') is comparatively voluminous, labour-intensive and legally onerous **both** for the 'Minister' responsible and for the "scheduled" public authorities, whose respective duties are to strictly comply (*in good faith*) with this 'ACT'. I will elucidate further, and generally expand in more detail by specifically captioning and referencing **certain key provisions** to or for the 'Minister' and/or the public authority/ies; in support of our opening comments.

The 'Minister' is of course, the **current** Minister who has overall supervision, responsibility (**impliedly** and explicitly) for the proper execution and administration of, and compliance under, the 'ACT'. This is so, **both** as the 'ACT' relates to the public authority/ties engaged by this legislation and, of course, in respect of **her very own responsibilities and obligations etc.** under this 'ACT' as well. In common parlance, *"the buck stops (and in fact and law) essentially begins in all relevant aspects and respects, with her."*

With that axiom in mind, I have **firstly**, and pursuant to my instructions, set out in large part the 'Minister's' *"responsibilities and administrative duties"* (which are on balance and in practice, *supervisory or managerial in nature*) in a **notional** Compliance Check List by specific reference (s) to relevant provisions of the current PATI ACT 2010. It must be noted, however, that other statutes or ACTS specific to a Minister/try and/or public authority (e.g. the Bermuda Immigration and Protection Act 1956 and amendments [BIPA 1956] ) as well may be engaged **both** for and by the 'Minister' **and** for and by the public authorities( e.g. the Bermuda Land Development Act or BLDC Act); when carrying out their respective roles under the 'ACT'. Where appropriate, I will illustrate the obligatory usage of "other ACTS". **Secondly**, again pursuant to my instructions; I have in seriatim, and **immediately following** the 'Minister's CHECK LIST; also

referenced and highlighted **relevant provisions** of the PATI ACT 2010 as and when they specifically appertain to the aforementioned “scheduled” public authorities (‘PA’s’).

2 (1): **The Minister:**

**A. The relevant Provisions of PATI ACT 2010 (‘ACT’):**

(i) **Section 59 (1):** is *discretionary*, wherein the ‘Minister’ *may* make **regulations** respecting matters in **subclauses (a-d)** e.g. prescribing fees, amending the Schedule, **providing management**, and generally carrying out or achieving the purposes, and seeking to fulfill, the provisions of the ‘ACT’;

(ii) **Section 60 (1):** is *mandatory or obligatory*, wherein he ‘Minister’, **after** consultation with the Commissioner, **must establish** “*codes of practice*” for public authorities regarding the administration of the ‘ACT’;

(iii) **Section 61:** is *mandatory or obligatory*, wherein the ‘Minister’ **shall** ensure training of staff, implement organizational arrangements etc.;

(iv) **Section 66:** is *discretionary*, wherein the ‘Minister’ **may** appoint different days for different provisions of the ‘ACT’;

(v) **Section 6 (6):** is *mandatory or obligatory*, wherein the ‘Minister’ **shall** publish *a List* setting out “*title and salary ranges of every position of public officers*” **under section 102 of the Bermuda Constitution Order 1968;**

(vi) **Section 37 (2):** is *discretionary*, wherein the ‘Minister **may** by order *repeal, revoke, or amend* **any statutory provision** referred to **in subsection (1);**

(vii) **Section 37 (6):** is *discretionary*, wherein in relation to **sections 35 and 36** of the ‘ACT’, the ‘Minister’ **may** insist on *non-disclosure* of records falling under the categories of ‘*legal privilege*’ (also Bar Council Act and Barristers Codes of Professional Conduct etc.) or ‘*contempt of court*’ (also Supreme Court Act 1985 and Rules of Supreme Court etc.) edits and/or principles;

(viii) **Section 26A (International Tax Agreements):** (Although neither explicitly *discretionary or mandatory or obligatory to the ‘Minister’*; this **section and sections** following, in my view, and in the interests of *prudence and good*

*governance*; should be immediately **notified** to the ‘**Minister**’ and/or relevant **personnel at Cabinet Office** and follow the usual process before ‘*actioning*’ “requests” in this regard):

This section is **strictly** a request of/for **the FS** of the **Minister/ry of Finance**, however, largely for reasons stated in parentheses immediately above, the ‘Minister’, if nothing more than to ensure strict, competent and **lawful compliance** with the ‘ACT’, as is one of her overall duties to manage etc. the ‘ACT’ particularly **under Section 28** of the ‘ACT’; **ought to be made aware** of such requests;

(ix) **Section 27 (Cabinet documents)**: I make similar comments as expressed and found in (viii) immediately above;

(x) **Section 28 (Ministerial Responsibility)**: This section goes to the very *core and heart* of “good governance”. This truism accordingly thrusts an onerous and enormous burden upon the ‘Minister’ (**and her ministry**) to attempt to ‘*consolidate or centralize under one roof*’ so to speak, this genre of “requests” from ALL ministries, in order to process them carefully, efficiently, expeditiously and lawfully. In this regard, the unbridled and enthusiastic **support and cooperation** of all ministers/tries is paramount, needed, for the efficient operation and ‘*successful outcome*’ of this section. In all other respects, I adopt the sentiments expressed in **items (viii) and (ix)** above;

(xi) **Section 31 (1): (Financial and Economic Interests)**: Again, because of the potential deleterious effects to Bermuda in general in this captioned area; the ‘Minister’ should be immediately **notified in writing** of such requests in this regard. In all other respects, I again adopt the sentiments expressed in **items (viii), (ix) and (x)** above;

(xii) **Section 32: (National Security, Defence and International relations)**: The ‘Minister’ **should be notified** as suggested above;

(Xiii) **Section 33: (Governor’s responsibilities and Communications with the UK)—particularly under section 62 of the Bermuda Constitutional Order 1968**):

Such requests (in redacted form or otherwise) should be *notified to, or there should be a liaison with*, the ‘Minister’, her ministry **and** the Premier as a matter of priority and urgency to avoid a potential breach of the ‘ACT’ and potential damage to Bermuda’s international interests generally. This *notification and /or liaison* could be diplomatically achieved without encroaching upon **the exclusive preserve** of the Governor’s responsibilities etc. **under section 62 of the Bermuda Constitution Order 1968.**

## 2 (2): The Public Authorities (PA’s):

### **B. The relevant Provisions (as indicated immediately below) of the PATI ACT 2010:**

#### **(1) Part 2 (Provision of Information By Public Authorities):**

(i) **5 (1)** Every **public authority shall** prepare an **information statement...**

(ii) **5 (2)** Every **public authority shall** update its information statement at least once a year **and may** do so more frequently.

(iii) **5 (3)** Every **public authority shall** cause its information statement, as updated from time to time, **to be made available for inspection** by the public at reasonable times by...

(iv) **5 (4)** A **public authority shall** publish a **notice** in the Gazette indicating the places where its information statement is available for inspection by the public...

(v) **5 (5)** Every **public authority shall** provide a copy of its information statement, as updated from time to time, **to the Commissioner.**

(vi) **6 (1)** A **public authority shall** provide information to the general public about information it holds, on an annual basis...

(vii) **6 (2)** **Public authorities shall** keep a **log** of all access requests **made under section 13**, excluding the names of requesters, any other

**information that could reveal the identity** of the requester and any personal information about that person.

(viii) **6 (5) Public authorities shall** make their **quarterly expenditures** available to members of the public upon request.

(ix) **6 (6) Public authorities shall** cause to be published in the Gazette on a regular basis **details of every contract** entered into by **the authority** that has a total value of **\$50,000 or more...**

**(2) Part 3 (Right of Access):**

(i) **12 (2) Public authorities shall** make every reasonable effort to-

- (a) assist persons in connection with requests; and
- (b) respond to requests completely, accurately and in a timely manner.

(ii) **13 (6) The head of the public authority** who first received the request **shall inform** the requester in writing **of the other public authority or authorities** to whom a copy of the request has been given.

(iii) **13 (7) A public authority** to whom a copy of a request has been given under subsection (5) **shall**, for the purposes of this Act, **be deemed** to have received the request at the time of the receipt of that authority of the copy, **and subsections (4), (5) and (6) shall apply** in respect of the request that has been copied **to the authority**.

(iv) **14 (1) Subject to the provisions of this Act, a public authority shall**, not later than six weeks after receipt, **or deemed receipt**, of a request **under section 13, decide-**

- (a) whether to grant or refuse to grant the request in whole or in part; and
- (b) if the request is to be granted, the form and manner in which the right of access to the record concerned is to be given,

and the amount of any fee payable for the provision of access.

- (vi) **14 (2)** A **public authority shall** immediately **after a decision** has been made **give notice in writing** of the decision to the requested, and to any third party who made representations **under section 39**...
- (viii) **14 (3)** **Subject to subsection (4)**, where the decision is to grant a request, **the public authority concerned shall provide** access to the record concerned in accordance **with section 17**...
- (ix) **14 (4)** Where **an application** has been made **under section 41** **for a review of a decision** to grant a request, **the public authority concerned shall provide access** to the record concerned in accordance **with section 17** as soon as possible after...
- (x) **15 (1)** A **public authority may** extend the original period of six weeks referred to in section 14(1) by such further period, not exceeding six weeks, **as the authority considers necessary if, in the opinion of the head of the authority, compliance with** the original period of six weeks is not reasonably practicable because...
- (xi) **15 (2)** Where a period is extended **by a public authority** under this section, **the authority shall**, before the expiration of the original period, **give notice in writing** to the requester concerned of the extension and the reasons for it.
- (xii) **16 (1)** A **public authority may** refuse to grant a request if (see **a-g**).
- (xiii) **16 (2)** A **public authority shall not** refuse to grant a request **under subsection (1)(b) or (c)**, **unless** the **authority has** assisted, or offered to assist, the requester **to amend** the

request in a manner such that it **no longer falls under those provisions.**

- (xiv) **17 (1)** A **public authority shall** give access to a record under this Act by providing the requested with the information in the record in any of the following forms or manners that it considers appropriate (**see a-g**).
- (xv) **17 (2)** Where a **public authority decides** to grant a request and the request is for access to a record in a particular form or manner, **access shall be given** in that form or manner **unless the authority is satisfied** that (**see a-b**).
- (xvi) **17 (3)** Where a **public authority decides** to grant a request **but, for reasons set out in subsection (2), does not give** access to the record requested in the form or manner specified in the request, **the authority shall** give access in such form or manner **as the authority considers appropriate.**
- (xvii) **18 (1)** **Subject to subsection (2),** where a record requested contains information that constitutes an exempt record, **the public authority concerned shall**, if it is practicable, prepare a copy...**shall be granted** by offering the requester access to the copy in accordance with section 17.
- (xviii) **18 (2)** A **public authority is not required** to prepare a copy of a record under subsection (1) if the copy would be misleading.
- (xix) **18 (3)** Where a requester is offered access to a copy of part of a record under this section, **the notice under section 14 shall specify** that such access is offered pursuant to this section and that the copy does not purport to be a copy of the complete record requested.

- (xx) **19 (1)** Where personal information in a record **held by a public authority** is incomplete, incorrect or misleading, **the authority shall**, on request in writing by or on behalf of the person to whom the information relates, **amend** the record (see **a-c below**).
- (xxi) **19 (3)** The **public authority concerned shall**, within five working days after receipt of a request, acknowledge receipt of the request **and shall**, within six weeks after receipt of the request, **decide** whether to grant or refuse to grant the request **and shall** give notice...
- (xxii) **19 (4)** A **public authority may** extend the original period of six weeks by such further period, not exceeding six weeks, **as the authority considers necessary if, in the opinion of the head of the authority, compliance with** the original period of six weeks is not reasonably practicable.
- (xxiii) **19 (5)** Where a period is extended **by a public authority** under subsection (4), **the authority shall**, before the expiration of the original period, **give notice in writing** to the requested concerned of the extension **and the reasons for it**.
- (xxiv) **19 (7)** If requested to do so by the requester, **a public authority shall** provide the requester **with evidence** that the record **has been amended** by permitting the requester to view the amended record or by giving the requester a copy of the amended record.
- (xxv) **20 (1)** The amount of any fee payable by a requested for the provision of access to a record under this Act **shall be calculated by the public authority concerned** in accordance **with regulations made under section 59**.

**3. Preliminary (at first blush) Recommendation(s) and brief Commentary:**

- a) **Minister and Ministry** to consider a coordinating or centralizing body (perhaps similar to CSE) to ‘administer’ through PSS and AG’s Chambers duties etc. under the ‘ACT’;
- b) **Public authorities** through their “heads” to create own internal ‘coordinating’ committees to efficiently and expeditiously “complete” and notify “requests” and gather requisite data in a timely fashion;
- c) **Minister/try** to, as soon as this is feasible or possible, make amendments etc. to **a)** ‘ACT’ and **b)** the Regulations to address identified concerns;
- d) **The AG’s Chambers** to provide greater and more immediate access to designated “department available” counsel or in some cases, provision of “in-house” counsel for large and/or extremely busy ministries to address legal/legislative concerns.

**Minister and DHOCS Whitter**, I look forward at our next review or ‘status’ meeting, to discussing and/or making any adjustments I may need to make with this document and to move on to the next steps/phase of this assignment when I hopefully meet specifically with Mr. Brown at PSS early next week.

Respectfully,

Mr. Philip J. Perinchief

Consultant

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