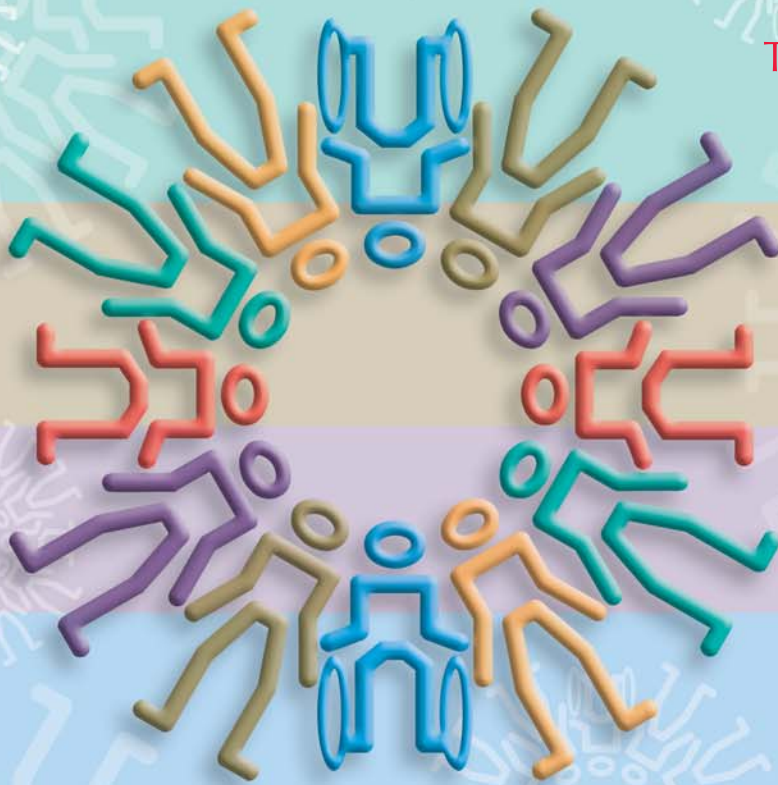


THE TRUTH  
COUNTS



OMBUDSMAN<sup>FOR</sup> BERMUDA  
Fourth Annual Report 2009



*For The  
Good Of  
The Public*

*And Those  
Who Serve  
The Public*

# Table of Contents

Transmittal Letter to the Speaker of the House of Assembly.....	1
Ombudsman's Message.....	2
International Ombudsman Institute.....	3
First Reference to the Ombudsman in Bermuda Courts.....	4
Special Thanks.....	5
No Maladministration, but a Gap Nonetheless: Consumer Complaints about Financial Services.....	6
Selected Summaries of Closed Complaints.....	7
Staff Members, Training and Presentations.....	14
Statistics.....	15
Excerpts from Special Report: Allegations of Barriers to Access to the Archives.....	20
The Truth Counts.....	26
How to Make a Complaint to the Ombudsman.....	Inside Back Cover
Complaint Process Flowchart.....	Back Cover

Photo: Gibraltar Chronicle



On Wednesday, May 27, 2009, our Investigations Officer, Mrs. Quinell Kumalae (4th from left) had an unusual yet stimulating experience while visiting Gibraltar. The Gibraltar Public Services Ombudsman, Mr. Mario Hook (2nd from left) kindly extended an invitation to Mrs. Kumalae to join him and his staff in distributing his 2008 Annual Report. The group stood outside of Parliament House and greeted passers-by with the reports, which were accepted with smiles and appreciation. A novel approach to interfacing with the public, it certainly offers opportunities to meet and interact with people who may not ordinarily seek the services of or even be aware of the Ombudsman's office.

Included in the Annual Report were Mr. Hook's gracious comments regarding the Caribbean Ombudsman Association's conference held in

Bermuda in April 2008 – *"I thoroughly enjoyed participating in the conference which was very well organised and had a well balanced agenda. All the speakers gave presentations of a very high calibre which made the conference a very successful event. My congratulations to the Bermuda Ombudsman, Ms Arlene Brock, and her team for organising a first class event."*

## OMBUDSMAN FOR BERMUDA

Suite 102 • 14 Dundonald Street West • Hamilton HM 09 • Bermuda  
 TEL 441-296-6541 • FAX 441-296-7734 • [www.ombudsman.bm](http://www.ombudsman.bm) • [complaint@ombudsman.bm](mailto:complaint@ombudsman.bm)



26th January, 2010

The Speaker, The House of Assembly  
The Hon. Stanley Lowe, OBE, JP, MP  
Sessions House  
21 Parliament Street  
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present my fourth Annual Report which covers the year 1st August, 2008 to 31st July, 2009.

This Report is submitted in accordance with Section 24(1) and (3) of the *Ombudsman Act 2004* which provides:

**Annual and Special Reports**

- 24 (1) The Ombudsman shall, as soon as practicable and in any case within six months after the end of each year, prepare a report on the performance of his function under the Act during that year.
- 24 (3) The Ombudsman shall address and deliver his annual report and any special report made under this section to the Speaker of the House of Assembly, and send a copy of the report to the Governor and the President of the Senate.

Yours sincerely,

Arlene Brock  
Ombudsman for Bermuda

## Ombudsman's Message



Bermuda is in the throes of a crisis. Recent gang violence has shattered our self and international image as an idyllic 'other world'. This has fuelled an unprecedented introspection – how did we get to this point? What are we to do?

There is no one solution. We have to deploy a variety of short and long term approaches in order to overturn the poor self esteem, unbalanced economy, political cynicism, materialism and widespread erosion of values that led in large part to our current crisis. More effective parenting, education, moral leadership and policing are needed. It is heartening to see the

emergence of grass-roots initiatives and the recognition that each of us living in Bermuda must play a part in renewing our community.

There is a Masai saying that *"a person without culture is like a zebra without stripes"*. Since at least the 1969 Berkeley Institute student sit-in for Black Studies, Bermuda's youth have been searching for stripes. They have borrowed cultural touchstones from Jamaica and urban America with little sense of our own cultural assets.

Our Systemic Investigation into Allegations of Barriers to Access to the Archives unearthed a treasure trove that many Bermudians know almost nothing about. Yet, the Archives hold almost all of the written history of who we are. There are myriad stories of blacks, whites, women, slavery, maritime heritage, colonialism, the environment and much more. *Atlantica Unlocked* – the report on this investigation – includes over 55 images of Bermuda's story from 1560 through 1962. (See excerpts on pages 20-25 of this Annual Report; the full report is on [www.ombudsman.bm](http://www.ombudsman.bm)).

*Atlantica Unlocked* was submitted to Parliament in June 2009. I wrote then that: *"The Archives must play a fundamental role as Bermuda shapes a national identity. As we lament the increase today in our community of violence, intolerance and other forms of acrimony, it is instructive to consider to what extent the rich content of the Archives can contribute to our collective and mutual esteem. By facing our history, we can perhaps embrace ourselves."*

This Annual Report (briefer, due to budgetary constraints) also accounts for the work of the fourth year of our office through Complaint Summaries, Statistics and special comments. I thank complainants for bringing their concerns to us which often leads to enduring improvements in the delivery of public services. I also thank Civil Servants for their cooperation and commitment to finding practical resolutions to complaints. Finally, but hardly least, I thank my staff for their consistent exemplary and passionate work.

This special 200th anniversary year for the Ombudsman institution is highlighted on the next page, as is our participation in the International Ombudsman Institute. Such networks keep us on the leading edge of information and practice in this amazing role of promoting a culture of service.

Arlene Brock  
Ombudsman for Bermuda



# International Ombudsman Institute

## Ms. Brock is elected to the Board of Directors 2009-2012

In June 2009 the quadrennial conference of the International Ombudsman Institute ("IOI") was held in Sweden to celebrate the 200th anniversary of the modern Ombudsman concept. The Conference was opened by Mr. Kofi Annan, former Secretary-General of the United Nations (who Ms. Brock met briefly) and closed with a Gala Dinner hosted by the King and Queen of Sweden.

This and other Ombudsman conferences around the world reflected on the institution's rich history and evolution into a *"standard feature of modern democracy."* Ombudsmen function as *"catalysts for good governance"* and *"canaries in the mine"* to bring under-the-radar issues to the attention of Legislatures and the public. Our value as *"touchstones of Governments' receptivity to citizens' concerns"* is evidenced by the 'tonic' effect of our work: *"the mere knowledge that they can be inspected keeps public authorities awake."* Ombudsmen were urged to strive to be *"not only a check on government activity but a producer of governance."*

Members of the IOI include over 130 national, provincial and state Ombudsmen from around the world. Every four years, three Ombudsmen are elected to the IOI Board of Directors from each of six geographical regions. Amongst the three Regional Directors, one is also elected as the Regional Vice-President ("RVP"). The Directors for Latin America & the Caribbean are the Ombudsmen for Mexico, Trinidad & Tobago and Bermuda. Ms. Brock was also elected as the RVP.



*IOI Board (from left): Caroline Sokoni (Zambia) • Dr. Peter Kostelka (Austria, Secretary General)  
Lynette Stephenson (Trinidad & Tobago) • William Angrick (USA / Iowa, President) • Arlene Brock (Bermuda, RVP) • Gord Button (Canada / Alberta, Treasurer) • Beverley Wakem (New Zealand, RVP) • André Marin (Canada / Ontario, RVP) • Tou Wai-fong representing Cheong U (Macau) • Mafarma Sanogo representing Amina Quédraogo (Burkina Faso) • Giorgos Kaminis (Greece) • Rafael Ribó (Spain / Catalunya, RVP) • Chronox Manek (Papua New Guinea) • Alan Lai (Hong Kong) • Mats Melin (Sweden, Vice President) • Jaechoong Lee (Korea, RVP)  
Dr. Tom Frawley (UK / Northern Ireland) • Absent from photo: Ombudsmen for Malawi, Mexico, Pakistan*

Bermuda will have the honour of hosting the Annual Board Meeting of the IOI in October 2010. Members of the Board have agreed to make a public presentation on Ombudsman principles, practices and developments. Date and venue will be announced.

## *First Reference to the Ombudsman in Bermuda Courts*

To our knowledge, the very first mention of the Ombudsman for Bermuda in the Supreme Court was a 2009 Appeal Judgment of Mr. Justice Kawaley. In this case the Appellant was not aware that her rental unit had come under rent control and appealed the lower Court's Order that she reimburse the excess rent paid by the tenant. She argued that information about changes in the Annual Rental Value ("ARV") level for rent control ought to be sent to households (just like the garbage collection schedule). Although Appellant had acted in good faith, she lost her appeal because *"ignorance of the law is no excuse."*

The Court noted, however, that *"It seems likely that the Land Valuation Act does not require flyers to be sent to individual property owners, something which would seemingly be a **simple and citizen-friendly procedure to adopt**. These matters do not fall within the scope of the present proceedings, and the Appellant may wish to take them up with the responsible Government authorities and / or the Ombudsman."*

This statement:

- supports the role of the Ombudsman in promoting a Culture of Service that goes beyond the minimum levels of service set out in the statutes governing each Government authority. This is

also consistent with our remit under s.5(2)(b) of the *Ombudsman Act 2004* to make recommendations *"generally about ways of improving administrative practices and procedures;"* and

- echoes the UK Ombudsman's standard of **Customer-Focus**: *"Public bodies should treat people with sensitivity, bearing in mind their individual needs, and respond flexibly to the circumstances of the case. Where appropriate, they should deal with customers in a coordinated way with other providers to ensure their needs are met."* (see [www.ombudsman.org.uk/improving\\_services/principles/](http://www.ombudsman.org.uk/improving_services/principles/)).

Complainant heeded Mr. Justice Kawaley and brought her concern to us. Further to our discussions with the Rent Commissioner and Director of Land Valuation, each household will be informed of any legislative changes to the rent control ceiling resulting from the land valuation review that takes place every five years. As of 1st January 2010 residential premises with an ARV of \$27,000 or less will fall under rent control.

The Rent Commission will send flyers to all households in the island, post public notices and also advertise on radio, CITV and print media. **Simple and Citizen-Friendly!**



*Sessions House: Home of Bermuda's House of Assembly and Supreme Court*

## *Special Thanks:*

### **Bermuda Hospitals Board (“BHB”): Mediation of long-term care issue**

Patient and family complained about unprofessional care and substandard equipment at King Edward VII Memorial Hospital (“KEMH”). They also felt that certain local care-givers dismissed the knowledge that they had gained during treatment abroad. Mutual distrust had developed between the family and care-givers to the extent that cordial and productive communication about medical issues was often difficult. This was complicated by a degree of intra-professional class issues that all hospitals face. Given the various and problematic relationships, I decided to deal with this complaint through mediation rather than an investigation.

This entailed: pre-mediation questionnaires for the family and staff; several meetings with the patient and family; six diagnostic interviews with various staff groups; two multi-party meetings of (approximately 18) representatives from all groups. While KEMH staff generally did their best, they had rarely worked before with a patient with similar medical issues. My discussions with the specialized overseas facility revealed that extreme family anxiety is a normal part of the care interface for this population of patient.

The BHB accepted – without hesitation – my recommendation to bring in two specialists for two days to provide training on care, equipment, psychology and trouble-shooting. This was helpful, not only for this patient, but for various professionals within KEMH. I commended: the family for their persistence in advocating for the best possible care; staff for their honesty and open-minded eagerness to learn; and the BHB administration for agreeing to this unprecedented effort to resolve the underlying complaints. I hope that communication will improve and grace will prevail so that the parties can begin to work together to advocate for a more appropriate physical facility.

### **Department of Planning (“Planning”): No maladministration, but Planning helped with resolution**

A 75 year old widow owned an apartment that her husband had purchased – a few months before he passed away – as a financial cushion for their retirement years. She complained that the Land Valuation Department (“Land Valuation”) unreasonably declined to assign an assessment number (thereby affecting how much she could rent it for).

Actually, the developer had not applied for planning permission to create the apartment. Planning was never aware of the existence of the apartment and therefore could not issue a Certificate of Use and Occupancy Permit. Without such Certificate or other evidence of the legal use of the site, Land Valuation could not assign an assessment number. Although the widow was an innocent owner, I found no maladministration on the part of either Planning or Land Valuation.

Planning did agree to my requests to **(a)** delay enforcement action in order to allow retroactive applications and appeals to proceed on behalf of the widow and **(b)** conduct a detailed inspection of the entire development to assess overall compliance with planning laws. To the great relief of the widow, and with the assistance of her attorney, the apartment was legalized. This could not have been accomplished without the expert and sensitive assistance of Ministry and Planning leadership, staff and inspectors.



## *No Maladministration, but a Gap Nonetheless:*

### **Consumer Complaints about Financial Services**

For two years we have received persistent complaints from an individual that the Bermuda Monetary Authority (“BMA”) has never exercised its array of sanctioning powers against a large financial institution and that whistle-blowers are not protected. He insisted that Bermuda is not adequately protected from financial fraud and regulatory loopholes that might bring the island’s financial reputation into disrepute.

This Complainant was not personally harmed by a specific administrative action and therefore we had no jurisdiction to investigate. In such cases, we try to refer complainants to more appropriate authorities:

- The Department of Consumer Affairs does investigate and attempt to resolve complaints about individual account activity, identity theft and bank charges, but it does not conduct forensic or regulatory investigations.
- The BMA conducts confidential investigations of complaints about breach of regulations by financial institutions. However complaints from individuals about unfair treatment, breach of contract or other non-regulatory matters are not within the BMA’s responsibility. The BMA will soon supervise impending disclosure requirements aimed at protecting consumers of retail financial services.
- The International Monetary Fund has reviewed the BMA and other oversight of the financial sector over the years. Their 2008 assessment notes that *“Bermudian authorities have made impressive progress in developing and implementing a risk-focused approach to supervision across the range of their sectoral supervisory responsibilities.”*
- In 2008 the Government of Bermuda established a National Anti-Money Laundering Committee which advises the Minister of Justice on legislative and structural compliance with international standards.
- Also as of 2008, concerns about suspicious transactions (proceeds of crime and potential financing of terrorism) may be made online to the Financial Intelligence Agency: [www.fia.bm](http://www.fia.bm).

There is still a gap with respect to independent investigation of complaints about non-criminal and non-regulatory complaints. For example, we received a complaint that a bank improperly gave information about an individual to a third party. It is likely that, in the future, proposed privacy legislation will provide for investigations of complaints relating to the protection of personal information.

If these are still gaps after these various mechanisms become operative, then consideration should be given to establishing an appropriate complaints-handling body. This can, for example, be either through specialized capacity in the Department of Consumer Affairs or through a private industry-funded scheme (such as the Financial Services Ombudsman in the UK and Ontario, Canada).





## *Selected Summaries of Closed Complaints*

### **Department of the Accountant General**

#### **Additional interest paid on pension contribution**

**Pension Contributor A** was a former government employee who, after terminating his employment, requested a refund of his superannuation contributions because he was not yet vested. Fourteen months later he received his refund, which included interest calculated up to the date of his termination but no explanation for the delay. He claimed that he lost the opportunity to invest his money because of the delay. He wrote to the Department on three occasions asking for a more detailed explanation of the Department's decision but he did not receive a response.

In response to our preliminary inquiries the Department explained that pursuant to the Public Service Superannuation Act 1981, Pension Contributor A was entitled to a refund of all of his superannuation contributions and interest earned up to the date of his termination. However, in September 2007 an amendment to the legislation entitled a contributor to additional interest if, after three months, their refund was not paid. As a result of our inquiries, Pension Contributor A was paid the additional interest.

### **Department of the Accountant General**

#### **Government Employee Health Insurance ("GEHI")**

#### **Charitable donations + GEHI reimbursement = Paid expenses**

**Parent B** requested reimbursement from GEHI of her hotel expenses incurred during an overseas medical visit for her child. GEHI did not reimburse her for the expenses because a charitable organization had advanced funds for her accommodation (in the same amount of the requested reimbursement). GEHI took the view that Parent B was double-paid for accommodation. Parent B faces the reality of having to take her child abroad for medical treatment indefinitely and the enormous financial burden is partially alleviated by reimbursements received from GEHI and charitable donations. The charity explained that recipients were allowed to apply the advance to any expenses associated with overseas travel (not just hotel), and stated that it does not expect reimbursement.

The Ombudsman found that GEHI's reasoning was technically rational and did not find maladministration. However it was not fair that Parent B was penalized for the charity's description of its donation as "hotel" expenses. The donation by the charity was not a windfall as Parent B's total expenses were in excess of this. Given

#### **FROM THE PUBLIC:**

*Further to our recent telephone conversation, I am pleased to confirm that the Accountant General's office has now paid the interest on my pension entitlements.*

#### **DID YOU KNOW?**

Suspicious financial transactions may be directed to the Financial Intelligence Agency at [info@fia.bm](mailto:info@fia.bm).

#### **FROM THE PUBLIC:**

*I wish to thank you and Ms. Brock for your hard work and persistence in this long, outstanding problem. It has taken nearly four years -- two years with your office. Had it not been for your concern with our plight and your belief in us, justice would not have prevailed. Thank you to the Ombudsman's Office. Without you, we would have been forgotten and left to fend for ourselves.*

#### DID YOU KNOW?

Creditors must mark in the Cause Book of the Supreme Court that a debt was paid. Supreme Court Rules do not stipulate who is responsible. By custom and practice, it is the creditor (as the Court cannot accept the word of a debtor that the debt has been paid).

#### FROM THE PUBLIC:

*Sincere congratulations on all your office's hard work to date. Bermuda is very fortunate to have such incredibly bright and hardworking people like you to make a difference!*

#### MANY THANKS TO:

**Mr. Preston Swan**, Vice President of Quality and Risk Management, Bermuda Hospitals Board – responsive, follows up

#### FROM THE PUBLIC:

*Thank you, thank you and again, thank you.*

the charity's refusal to be reimbursed, the Ombudsman found that Parent B was entitled to apply the donation to her additional expenses and recommended that GEHI reimburse Parent B. GEHI agreed to the recommendation and reimbursed Parent B her covered expenses.

#### GEHI allows reimbursement request for eyewear to be made during calendar year

**Patient C** had two eye exams within GEHI's 2007/2008 policy year. GEHI paid for the first exam and not the second because GEHI's policy does not permit reimbursement for a second eye exam if both exams were completed within one policy year. Patient C was also denied reimbursement for the glasses that he purchased four days into the 2008/2009 policy year. GEHI's policy terms allow reimbursement for eyewear even if the exam that was the genesis of the recommendation to purchase the eyewear cannot be reimbursed, only if the purchase is within the same policy year as the exam.

A patient may have an eye exam just before the end of a policy year but is unable to purchase the eyewear prior to the policy year end or, a patient may order eyewear prior to the year end but not receive delivery or pay for them until the following policy year (April 1 - March 31). After some consideration GEHI changed its submission deadlines and now reimburses individuals who have had an eye exam and purchased eyewear within the same calendar year rather than within the same policy year. Patient C was reimbursed.

#### Bermuda Hospitals Board ("BHB")

##### Hospital not in the wrong but will monitor doctor

**Worker D** sustained an injury and was admitted to King Edward VII Memorial Hospital ("KEMH") for treatment. Hospital x-rays showed no broken bones and Worker D was informed by his physician that his injury would take time to heal. Concerned that it was not healing, Worker D sought a second opinion and learned that gangrene had set in, which resulted in complications. Worker D complained to KEMH but did not receive a response. Further to the Ombudsman's inquiries, KEMH conducted a clinical investigation of the care given to Worker D. Based upon this investigation, the Ombudsman found no maladministration on the part of KEMH. She agreed that further intervention and review would be required for the physician who provided the care to Worker D.

## Department of Social Insurance

### War Veteran benefit paid to widow

**Widow E** claimed that she had not received her war veteran's pension payment since October 2008. Our inquiries revealed that the issue affected several pension payees and was a result of the Department's transition from writing cheques to depositing funds electronically, which the Department hoped would be cleared up once the transition was complete. As the Department promised early payment we did not launch a formal investigation. However, one month later Widow E returned to our office and complained that she did not receive her January or February 2009 pension payments or the payments that should have started in April 2007 (not April 2008).

Further to our additional inquiries the Department confirmed (within four days) that instructions would be given that day for all outstanding payments to be made to Widow E, including those payments due from April 2007.

#### GENERAL RECOMMENDATIONS: DEPARTMENT OF SOCIAL INSURANCE

The Ombudsman recommended that the Department review its practice for determining an employer's insurance liability so that the burden of compliance with the Hospital Insurance Act 1970 is not placed on the employer but on the employee.

## Department of Immigration

### Lost opportunity regained

**Applicant F** submitted applications for Naturalisation and Bermuda Status to the Ministry of Labour, Home Affairs & Housing. Four months later Applicant F contacted the Ministry for an update. He was informed that the matter would be resolved. However, the matter still remained outstanding over the next several months. Applicant F had lost his opportunity to have the applications considered within the stipulated timeframe. Further to the Ombudsman's preliminary inquiries and some eighteen months after submitting the applications, Applicant F's applications were processed as if they were received before the deadline. The Department apologized for the delay and confusion.

#### MANY THANKS TO:

**Mr. Ronald Smith**, *Benefits Manager, Department of Social Insurance* – quick and helpful response to Widow

#### FROM THE PUBLIC:

*I would like to take this opportunity to thank you, Mrs. Kumalae (and Ms. Brock) for your kind assistance in this matter.*

#### FROM THE PUBLIC:

*You all must have clout. You know how long I have been dealing with this? It seems once you guys get involved the sun comes out.*

#### FROM THE PUBLIC:

*Just a note of appreciation thanking you for the advice to follow-up with the Registry and Immigration Depts. The proper birth certificate has been issued and the passport obtained.*

#### FROM THE PUBLIC:

*I would be remiss if I did not express my appreciation of all the work and advice that you and your staff afforded me. Thank you for the valuable time in concretizing the concept of a “Gatekeeper,” based on case law and proper opinions. I hope others who protest and challenge will now have a straightforward path.*

#### MANY THANKS TO:

Mr. Chris Farrow, Director, Department of Land Valuation and Mr. Eugene Foley, Rent Commissioner, Rent Commission, for consulting together on ways to improve notifying the public about how changes to the Annual Rental Value of rent controlled premises will impact landlords.

#### FROM THE PUBLIC:

*Thank-goodness you exist – there is no one else for people to go to.*

## Department of Labour & Training

### Written response provides more clarity

**Employee G** was terminated after three weeks of work and felt she was entitled to monetary benefits from her employer in lieu of notice. She and her husband sought the assistance of the Department to determine the validity of her claim. Her initial contact was via telephone (where she received a response). However her follow up questions were sent via emails, but she did not receive an answer.

The Ombudsman investigated and found maladministration in the Department’s unresponsiveness to Employee G’s correspondence (despite the Department’s stance that the complaint was closed after the telephone conversation with Employee G). The Ombudsman reminded the Department of her previous General Recommendation that it should revise its communication protocols so that it gives written conclusions to complainants about the disposition of their complaints in order to alleviate the confusion and misinterpretation that too often result when complainants are upset. The Department apologized for its unresponsiveness and agreed to implement the General Recommendation that complainants should be informed in writing of the outcome of the Department’s investigation.

## Department of Land Valuation (“Land Valuation”)

### Tourism tax on residential home

**Condo Owner H** was paying a tourism tax rate on a condo that she owned and occupied as a residence since 2004. At one time, her condo was used for tourism purposes. However in 2003 the use of Condo Owner H’s condo was changed from tourism back to residential by an appeal decision of the then Minister of the Environment (“the Minister”).

Land Valuation did not accept the Minister’s decision as evidence of a change in use. The condo continued to be assessed for tax purposes at a tourism rate. Land Valuation insisted that it required a Certificate of Use and Occupancy Permit (“Certificate”) from the Department of Planning as proof that there was a change in use.

Our inquiries revealed that:

- the purpose of a Certificate is to provide evidence that a site is fit for its intended use in accordance with the Building Act 1988



- The Land Tax Act 1967 and The Land Valuation and Tax Act 1967 do not provide a statutory or regulatory basis for Land Valuation to require a Certificate as proof that there has been a change in use
- an application for a change in use is not a building control matter (for which Certificates are issued) but rather a planning matter
- the Development Applications Board approval of an application for a change in use and developer's compliance with any conditions set out in such approval should constitute adequate evidence to Land Valuation of a change in use for tax purposes. In this case the 2003 appeal decision of the Minister provides the primary evidence of a change in use for the purposes of determining the correct tax rate.

The Ombudsman recommended that Land Valuation submit a written proposal to the Land Valuation Tribunal ("the Tribunal") for the draft valuation list to be amended to reflect the Minister's decision that the use of the condo was changed to residential.

Land Valuation accepted the recommendation but indicated that the Tribunal could not request the Tax Commissioner to exercise his discretion to alter previous tax bills.

The Ombudsman also consulted with the Tax Commissioner. He agreed to exercise his discretion pursuant to s. 48(1) of the Land Valuation and Tax Act 1967 to determine that administrative justice constitutes a "good and sufficient reason" to amend the earlier demand notes. As a result, Condo Owner H was reimbursed for taxes paid at the incorrect, higher tourism rate.

## Department of Planning ("Planning")

### Terms of Agreement not Implemented

**Homeowner I**, neighbouring developer and Planning Officers had agreed (and put on the plan drawing) that a 6 ft. boundary fence would be built with PVC materials. This was considered to be the most practical material since the fence, which is at the end of a cul-de-sac, also borders the ocean-front. Homeowner I had stipulated PVC as a condition of her agreement to the fence being over four feet. The developer did not honour the agreement and erected a wooden fence.

Further to her investigation the Ombudsman recommended that Planning should require the developer to remove the wooden fence and erect the agreed PVC fence.

#### FROM THE PUBLIC:

*Thank you so much for all of your help – it's been 25 months since we first came to you but you kept at it – I hope this doesn't happen to someone else.*

#### FROM THE PUBLIC:

*Thank you for resolving this long-standing issue*  
(Complainant brought gifts of flowers and posters).

#### FROM THE PUBLIC:

*Mrs. Kumalae was very responsive and helpful to us.*

#### MANY THANKS TO:

**Mr. Gordon Ness**, Building Control Officer, Department of Planning – As a result of the general recommendation made on October 2, 2007 Mr. Ness checks to see if all of the complaints regarding an application are resolved before issuing a Certificate of Use and Occupancy Permit.

#### FROM THE PUBLIC:

*Thanking you all for your efforts to date.*

#### FROM THE PUBLIC:

*We greatly appreciate the Office of the Ombudsman's assistance.*

#### DID YOU KNOW?

Even if you are purchasing a newly built residence, your lawyers should conduct a title search to make sure that there are no encumbrances and also that there is full compliance with all planning laws.

#### DID YOU KNOW?

Worldwide, the Ombudsman institution is noted for having a "tonic effect". Here, we have been told of instances where we may have assisted without actually launching inquiries. Potential Complainants either told an Authority that they were going to the Ombudsman or copied us on their complaints – and received highly responsive and timely attention.

This recommendation was declined by Planning on the ground that the wooden fence complied with s. 6.7 of the Bermuda Plan 1992 and wood was more in keeping with a "rustic appearance". The Ombudsman found this response to be inadequate because the building material was a prerequisite of Homeowner I's consent for the height of the fence, which could not be seen by the public. However, she decided not to write a special report because the harm could be improved with landscaping.

The Ombudsman's second recommendation was that Planning should require the developer to build a retaining wall to retain the unstable fill caused by poor construction of the 6' boundary fence which did not comply with the Building Code 1998. Planning agreed to the Ombudsman's recommendation to conduct inspections and, as a result, required that a retaining wall should be constructed. Eventually this was remedied and completed by Planning.

#### Department of Planning ("Planning")

##### Delay of Enforcement Notice

**Neighbour J** sent an email to Planning with a request to meet in order to discuss her neighbour's encroachment on her property. Planning did not respond to the email. Two months later and on two separate occasions Neighbour J followed up with Planning and was informed that an Enforcement Notice would be served the following month. One month after the Enforcement Notice was scheduled to be served Neighbour J was advised that the Enforcement Notice was still being drafted to ensure compliance with the legislative requirements of the Development & Planning Act 1974; Neighbour J would be notified in due course. Neighbour J complained that Planning was avoiding the situation.

The Ombudsman found that while Planning did respond to Neighbour J's first email it should apologize for not acknowledging her subsequent emails. As there was no other appropriate remedy to put Neighbour J in the position that she would have been in had there not been an unreasonable delay in responding, the Ombudsman found that the apology was appropriate. She also found that the delay in issuing an Enforcement Notice was due to the need to clarify certain legal issues. This was a reasonable delay. The Ombudsman pressed for a speedy conclusion and the Notice was duly served soon after.

#### GENERAL RECOMMENDATIONS: DEPARTMENT OF PLANNING

1. Where the Department recommends to the Development Applications Board ("DAB") that an authority other than the Department should be involved in the oversight of a development, then formal notice should be sent to that authority advising them of the desired responsibilities

*RESPONSE: The Department has introduced an amended format for reports submitted by the technical officers to the DAB. Prior to applications receiving final clearance for submission to the DAB the technical reports are reviewed in a team meeting attended by at least one senior manager e.g. Director and / or Assistant Director.*

2. Where building works are not the primary reason for the planning application, then the applicant should be given guidelines on the process for requesting a non-building inspection.

*RESPONSE: The Department has advised that requests for non-building inspections will be dealt with through the inclusion of appropriate conditions attached to the planning permission.*

3. The Department should have a clear check-off process to ensure that Certificates of Use and Occupancy Permits are not issued until the conditions of disputes, revision applications and other outstanding matters have been resolved.

*RESPONSE: Before the Certificate of Use and Occupancy Permit is signed off the Building Control Officer will now check to see if all of the complaints regarding the application are resolved.*

#### GENERAL RECOMMENDATIONS: MAGISTRATES COURT – BAILIFF'S OFFICE

The Ombudsman recommended that the Bailiff exercise systemic due diligence to ensure accurate identification of properties to be advertised for the purposes of enforcement of judgment debts.

#### DID YOU KNOW?

Persons operating small businesses from their homes may not realize that permission to do so may be required from the Department of Planning. The planning issue to be determined is whether or not the business activities are a change of use to the extent that such activities are not normally associated with or incidental to the original residential use. If the business done in the home is limited to e.g. billing from a home computer, then that is probably not enough to require planning permission. However, if there are other business activities, such as parking of commercial vehicles or the use of the home for storage of supplies, goods and equipment, then it is likely that the Department would consider this a material change of use in the residence for which planning permission would be required. The Department would encourage persons to enquire on a case by case basis for an opinion.

#### MANY THANKS TO:

**Ms. Lee Sylvester**, Chief Engineer, Department of Works & Engineering – helpful, prompt

## Staff Members, Training and Presentations



### THANK-YOU

To the entire Ombudsman staff who redesigned the website [www.ombudsman.bm](http://www.ombudsman.bm). We invite you to visit and give us your comments for improvement.

*Staff (from left): LaKai Dill, Research Consultant • Georgia Symonds, Administrative Assistant • Arlene Brock, Ombudsman • Tikitta Suhartono, Administrative Officer • Quinell Kumalae, Investigations Officer*

### Training

- Quinell Kumalae attended the week-long “Sharpening Your Teeth” Advanced Investigations course at Ombudsman Ontario.
- Three staff attended the International Ombudsman Institute 200th Anniversary Conference in Sweden.

### Presentations by Ms. Brock

#### LOCAL PRESENTATIONS

Two presentations to the Bermuda Bar Association • Heads of Government Departments meeting • BPSU Shop Stewards’ Conference • Bermuda College Ethics Panel • Bermuda College (High School) Student Leadership Development Programme • Bermuda Monetary Authority • Department of Environmental Protection • Department of Labour & Training • West End Development Corporation • Ministry of Works & Engineering • Ministry of Environment & Sports (Senior Team)

#### INTERNATIONAL PRESENTATIONS

“The People Matter,” Human Rights Conference, hosted by the Ombudsman for Haiti and the Pan-American Development Foundation

“Toward a Common Ombudsman Identity,” 200th Anniversary Conference, hosted by the Association of Brazilian Ombudsmen and the Pro-Citizen Institute of Brazil (see photo pg 2)

Ms. Brock noted: “while we owe to Sweden the idea of a constitutional mandate, there can be no doubt that the yearning for justice is a universal theme. We can find in almost every tradition and culture on earth the concept of the Wise Arbiter who gives voice to the ordinary person vis-à-vis the powerful. Perhaps this would explain why the modern Ombudsman concept, in varying forms, has caught fire all over the world.”

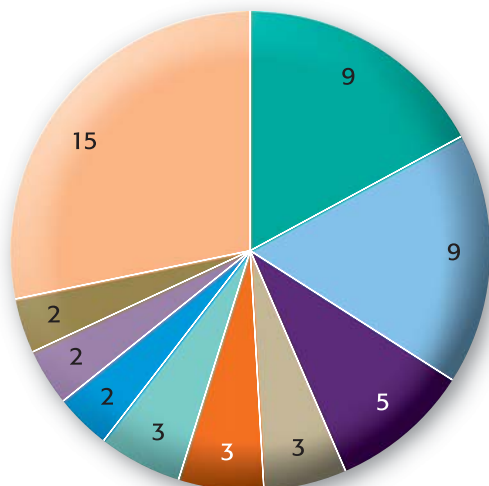
[Examples of such traditions include: The Listeners dating back to mid-sixteenth century Brazil; the Amapakati (Middle Ones) of South Africa; and the Kadis of Turkey (which likely inspired the Swedish model).]



## Statistics

### COMPLAINTS REFERRED

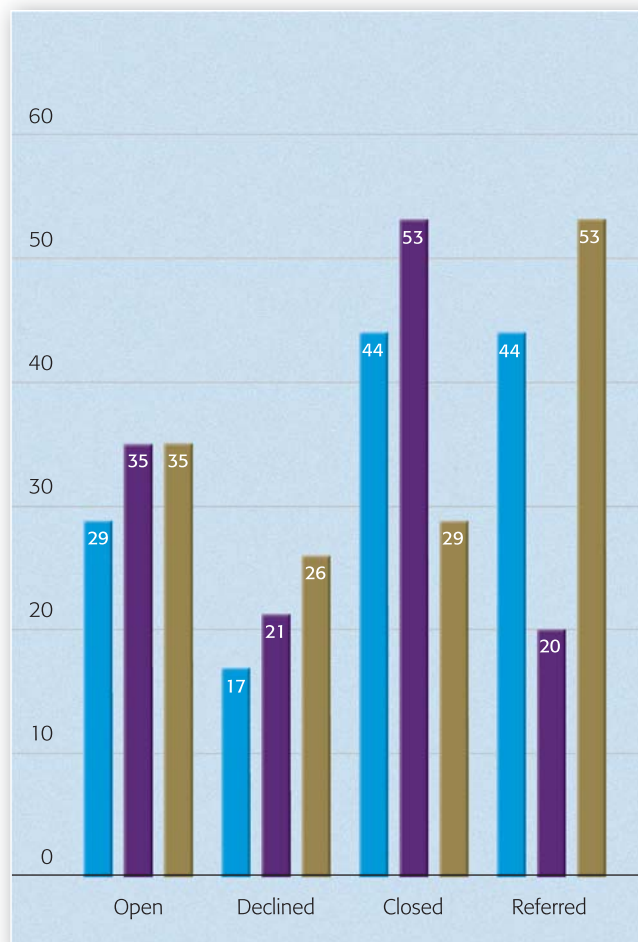
Number (53 total) / Where Referred



- Department of Labour & Training
- Magistrates' Court
- Other
- Consumer Affairs
- Bermuda Hospitals Board
- Bermuda Bar Association
- Bermuda Public Services Union
- Legal Aid Office
- Human Rights Commission
- Department of Social Insurance

### STATUS OF COMPLAINTS

Number / Status at July 31, 2007, 2008 and 2009



- 2007 – Total Number of Complaints **134**
- 2008 – Total Number of Complaints **129**
- 2009 – Total Number of Complaints **143**

Complaints Not Referred	2005-2008	2008-2009	Total
Complaints Brought Forward at July 31	50*	–	<b>50</b>
New Complaints Not Referred	–	90	<b>90</b>
Complaints Closed / Declined During the Year	< 31 >	< 55 >	<b>&lt; 86 &gt;</b>
Complaints Open at July 31	19	35	<b>54</b>

#### Note: Open Complaints

“Open” indicates that complaints were still being investigated or a resolution was being considered at the cut-off date of our July 31 year-end.

\* Prior Reports included statistics only for the reporting year. This Report adjusts for all years.

MINISTRY (at 31 / 07 / 09)				
TYPES OF COMPLAINTS		INEFFICIENT	IMPROPER	UNREASONABLE DELAY
<b>Cabinet</b>	<b>1</b>			
Public Service Commission	1			
<b>Culture &amp; Social Rehabilitation</b>	<b>6</b>			
Department of Financial Assistance	2			1
Department of Child & Family Services	2			
Human Rights Commission	2			1
<b>Education</b>	<b>3</b>			
Bermuda College	1			
Department of Education	2			
<b>Environment &amp; Sports</b>	<b>9</b>			
Department of Environmental Protection	1			
Department of Land Valuation	1			
Department of Parks	1			1
Department of Planning	5			2
Department of Youth, Sport & Recreation	1			1
<b>Finance</b>	<b>14</b>			
Accountant General – GEHI	3			1
Accountant General – Superannuation	1			1
Bermuda Monetary Authority	2			
HM Customs	3			
Department of Social Insurance	4	1	1	1
Pension Commission	1			1
<b>Health</b>	<b>14</b>			
Bermuda Hospitals Board	12			2
Bermuda Health Council	1			
Health & Safety	1			1
<b>Justice</b>	<b>4</b>			
Department of Public Prosecutions	1			1
Bailiff's Office	1			1
Legal Aid Office	1			
Magistrates' Court	1			1
<b>Labour, Home Affairs &amp; Housing</b>	<b>26</b>			
Bermuda Housing Corporation	4			1
Bermuda Police Service	1			
Department of Corrections	1			
Department of Immigration	11	1		3
Department of Labour & Training	9		1	4
<b>Energy, Telecommunications &amp; E-Commerce</b>	<b>3</b>			
Department of Telecommunications	1			
Registry General	1			
Rent Commission	1			
<b>Tourism &amp; Transport</b>	<b>5</b>			
Board of Trustees – Golf Courses	1			
Transport Control Department	3			
Department of Marine & Ports Services	1			
<b>Works &amp; Engineering</b>	<b>3</b>			
Department of Operations & Engineering	2			
West End Development Corporation	1			
<b>Other</b>	<b>5</b>			
<b>TOTALS</b>	<b>93</b>	<b>2</b>	<b>2</b>	<b>24</b>

Total number of complaints is increased to 93 as a result of three complainants making complaints against two separate departments regarding a single matter.

ABUSE OF POWER	CONTRARY TO LAW	UNFAIR/ OPPRESSIVE	MISTAKE OF LAW OR FACT	ARBITRARY	NEGLIGENT/ UNRESPONSIVE	OTHER
					1	
				1	1	1
	1					
					1	2
		1			1	
					3	
		1		1		
		2				
1		1		1		1
		1			8	2
			1			
		1			2	1
1		3			2	2
	1				2	1
					1	
				1		
		1				
	1	3				
		1				
					1	1
					1	
					1	4
2	3	15	1	4	25	15



MINISTRY (at 31 / 07 / 09)	# of new Complaints	OPEN	DECLINED	
DISPOSITION OF COMPLAINTS NOT REFERRED			Not in Jurisdiction	Time Bar/ Withdrawn
<b>Cabinet</b>	<b>1</b>			
Public Service Commission	1		1	
Bermuda Archives (Systemic Report)	(6)			
<b>Culture &amp; Social Rehabilitation</b>	<b>6</b>			
Department of Financial Assistance	2		1	
Department of Child & Family Services	2	1	1	
Human Rights Commission	2	1	1	
<b>Education</b>	<b>3</b>			
Bermuda College	1	1		
Department of Education	2		2	
<b>Environment &amp; Sports</b>	<b>9</b>			
Department of Environmental Protection	1	1		
Department of Land Valuation	1			
Department of Parks	1			
Department of Planning	5	3		
Department of Youth, Sport & Recreation	1	1		
<b>Finance</b>	<b>14</b>			
Accountant General – GEHI	3	2		
Accountant General – Superannuation	1			
Bermuda Monetary Authority	2		2	
HM Customs	3			1
Department of Social Insurance	4			
Pension Commission	1			
<b>Health</b>	<b>14</b>			
Bermuda Hospitals Board	12	8	3	
Bermuda Physiotherapy Board	(1)			
Bermuda Health Council	1	1		
Department of Health	(1)		1	
Health & Safety	1			1
<b>Justice</b>	<b>4</b>			
Department of Public Prosecutions	1		1	
Bailiff's Office	1	1		
Legal Aid Office	1			
Magistrates' Court	1		1	
<b>Labour, Home Affairs &amp; Housing</b>	<b>26</b>			
Bermuda Housing Corporation	4	1		
Bermuda Police Service	1		1	
Department of Corrections	1	1		
Department of Immigration	11	2	2 / 1	
Department of Labour & Training	9	4	1 / 1	2
<b>Energy, Telecommunications &amp; E-Commerce</b>	<b>3</b>			
Department of Telecommunications	1	1		
Registry General	1	1		
Rent Commission	1			
<b>Tourism &amp; Transport</b>	<b>5</b>			
Board of Trustees – Golf Courses	1		1	
Transport Control Department	3	1	1	
Department of Marine & Ports Services	1	1		
<b>Works &amp; Engineering</b>	<b>3</b>			
Department of Operations & Engineering	2	1	1	
West End Development Corporation	1		1	
<b>Other</b>	<b>5</b>	2	2	
<b>TOTALS</b>	<b>93 / 31</b>	<b>35</b>	<b>22 / 4</b>	<b>4</b>

Figures in red represent complaints open at the end of 2008 which were closed in 2009.

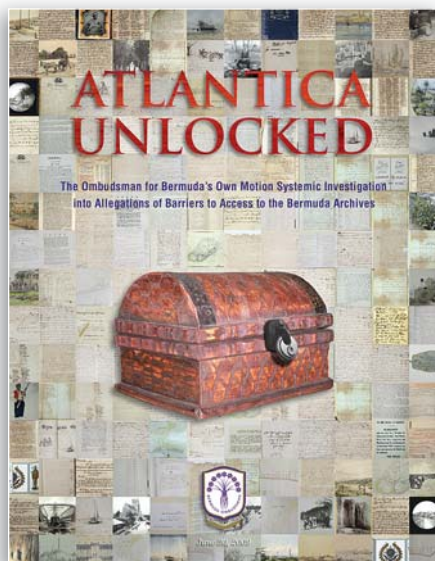
Number of dispositions exceeds number of complaints as some complaints had both specific and general resolutions.





## Special Report: Allegations of Barriers to Access to the Archives

The full Special Report, with over 50 photos and images, can be found on [www.ombudsman.bm](http://www.ombudsman.bm)



Although under most people's radars, the Bermuda Archives ("Archives") are a central asset of the country. Comprised of the historical repository and modern records, the Archives tell and knit together the written story of Bermuda.

The Ombudsman received six complaints from researchers and donors about **a. Unclear and inconsistent administration and policies**; **b. Inadequate and outdated research tools and capacity**; **c. Arbitrary assistance and selective cordiality** at the Archives. The four researcher Complainants expressed varying degrees of apprehension that, by being frank, they may put their own research and therefore careers at risk. Accordingly, I was careful not to divulge either their names or the specific incidents that would identify them, unless agreed. On balance, it was more prudent to conduct a systemic investigation and thereby err on the side of protecting the identities of persons who, due to the risks to their research of giving information, could be characterized as whistleblowers.

A systemic investigation is warranted when the issues are of public interest, there is evidence on the face of the complaints of maladministration and there is little chance of resolving problems informally without an investigation.

### Report Extracts (original paragraph numbers)

**57** Of 111 persons interviewed, 62 were local and overseas Archives users (casual and professional researchers, historians, writers, Government users). We interviewed 26 former and current staff and 14 senior Civil Servants who were aware of concerns at the Archives or contributed technical expertise. Nine interviewees were donors and non-users with limited use of the Archives. We gained insight from experts including four archivist managers, a director of an archivist training programme and one work environment expert.

**61** 76% of all interviewees cited poor policies and guidelines  
**62** as barriers to access; 72% of users and staff (the two inter-  
**63** viewee groups directly affected) experienced problems with research tools; 58% of users reported 'people' challenges of some form.

#### **A. Administration (Systems and Policies)**

**64** Users were concerned generally about the lack of guidelines

on how the Archives work and specifically about perceived arbitrary restrictions on the private collections and original records.

#### **B. Resources (Research Tools / Technology)**

**91** The process steps for achieving access are **(a)** identification and request of records; **(b)** retrieval; **(c)** transfer; and **(d)** use.

**92** 63 of 88 users and staff (the two interviewee groups directly affected) are concerned about the lack of a credible general catalogue and inadequate finding aids. This presents a significant barrier to access at the very beginning of research projects.

#### **TEST 1: STACKS TO FINDING AIDS**

**129** To test claims that *"there are tons of stuff in the Archives that no one really knows are there"*, we randomly selected items from the stacks (except from the aisles where records have not been accessioned). We then back-tracked to the finding aids and index cards to see if the records were listed. **Result:** reference information could be located for 5 of 9 items.

## TEST 2: FINDING AIDS TO STACKS

**131** To test claims that *"even when you identify items, they cannot be located"*, we randomly selected items from the research tools and then looked for them in the stacks. **Result:** 15 of 16 items tested were found in the correct locations. Only one item was not found in the correct box and one other required extraordinary effort to find. This is comparable with 'pull' results elsewhere. Complaints in this regard are not substantiated by the tests. However, there were specific photographs that previous staff knew existed but could not be found in either the finding aids or the stacks.

## TEST 3: ACCESSIONS: to test whether:

**132 (a)** items randomly selected from the Accessions Register could be found in the stacks and whether restrictions are noted. **Result:** 6 of 13 items were found.

**133 (b)** unaccessioned items in the stacks were receipted. **Result:** receipts were found for 2 of 8 items selected from stacks.

**134 (c)** items receipted but not accessioned could be found in the stacks. **Result:** 5 of 8 items receipted were located in stacks.

**135 (d)** purchases are listed in the Accessions Register. **Result:** Government's accounting system does account for amounts paid out but descriptions of exactly what the amounts are paid for are often vague (e.g. antique books and maps). There is no cross-referenced register or catalogue of exactly what the items purchased are. Our team had to rely on the memory of the Director.

## TEST 4: SUBJECT-MATTER RESEARCH

**137** From January through March 2009, to test claims that *"only one person knows what is there"*, we conducted subject-matter research. This was more typical than the above tests of the way that the public uses the Archives. Due to the (necessarily) slow nature of archival research, we conducted these tests in several visits to the Archives over the course of three months. This entailed my staff identifying specific documents to be pulled and also general subject matter research.

**142** These various tests confirm that documents identified by the finding aids can be located. However the Archives also holds records that are hard to identify and access. Accordingly, the

completeness and quality of the finding aids are of paramount importance as there are few other routes to identification and retrieval of records. A general catalogue as suggested by the International Council on Archives is an even more critical and immediate need. The tests also confirm that researcher trust of Archives staff is pivotal.

## DUPLICATION

**143** Once records have been identified and retrieved, researchers usually want to photocopy or otherwise duplicate them. At the Archives, this is done either by microfilm print-outs, photocopying or professional photographs. Users complain that each of these options presents significant barriers to access. Professional photography is prohibitively expensive and microfilm and photocopy prints are of poor quality: *"The microfilm needs updating – it is often unreadable."*

**164** The Archives has charged commercial use fees on a contractual basis since 1995 but legislation was introduced in 2002 through the Government Fees Act 1965 (Amendment (No 3) Regulations 2002). Users are charged for each image: \$110 (national) and \$166 (international). From a maladministration perspective, the issue is whether the fees are arbitrary, in accordance with best practices or effectively erect untenable barriers to access. At its July 2001 meeting the AAC was advised that "use fees were only imposed on individuals exploiting public and private collections for commercial purposes, not for academic or personal research."

**171** The Archives does allow for a single copy of scholarly works. When there are two or more copies, the commercial rate applies. Other Bermuda repositories such as the (private) Maritime Museum and the Natural History Library at the Aquarium do not charge use fees as their philosophy is to aggressively promote scholarship and cultural work.

**172** The Archives notes *"the intent of our legislation is to avoid the commercialization of the national collection"*. The concern is about coffee table photo books or lucrative advertising that could produce profit. This is a valid concern. However, two distinct decisions must be made: **(1)** which items do the Archives have a right to charge use fees for and **(2)** what constitutes "commercial" use.

## STAFF KNOWLEDGE AND ASSISTANCE

175 The work of an archivist entails a range of activities: soliciting acquisitions; appraisal (how does this set of documents tell the story of this department); arrangement (in order deposited); description from a general to box and even item level (on the box in the stacks as well as in catalogues and finding aids); reference services; and outreach. The first four tasks facilitate institutional capacity to carry out the latter two tasks that are the primary interface with the general public. Cross-fertilization of the tasks can be important. In appraising modern records to select what is of enduring value, staff benefit from working with historical repositories and seeing how researchers use government records.

176 In our interviews, 24 of the 62 users had problems with the knowledge of the staff however 47 of the 62 found them to be as helpful as possible. Users consistently applaud the staff for taking interest in their research and for persistence and enthusiasm to facilitate access to the best of their ability and knowledge.

184 Four prior staff testified under oath that the Director had instructed:

- *"Don't tell them that we have this."*
- *"She doesn't need to know about that."*
- *"It's best that we don't give that information right now."*

Moreover,

- *"Staff feel under threat if they go out of their way to assist researchers. There is an atmosphere of fear permeating in the Department."*
- *"One day you'll be in trouble for showing the originals, the next day for not showing them."*
- *"Staff second-guess themselves on whether to give information to the public for fear of being castigated."*
- *"People don't need to know the size or format we have that in. I'm not trying to hide anything but they do not need to know."*

185 In response to these statements, the Director stated: *"Oh for pete's sake, you do not have to bring out everything you have if asked for a specific question."* Further: *"we have a different approach in what we show different people.*

*It's even handed. It's not overkill. I think when you have inexperienced staff everything comes out and they don't know how to do a reference interview for instance, they'll forget to ask for a date...so they'll bring out a whole bunch of records."*

206 The issue is one of organizational effectiveness. If there is a pattern of ways in which staff input is discouraged and they are unable to perform their jobs, then management is getting into the way of the delivery of the public service. If staff are more worried about upsetting their boss, then they cannot deal effectively with the public.

## Leadership

207 The quality of the public service is usually set by the tone at the top. Many public complaints were related in some way to the Director. However, 60% of users (38) and staff (15) did laud her knowledge.

208 On the other hand, 34 of 62 users complained of the Director's unhelpfulness and/or partiality. 38% of users and staff believe that the Director is partial in that some users are treated differently from others – due to their status, influence or perceived importance of their projects.

## ACCOUNTABILITY

220 A number of formal staff and user complaints in 2007 highlighted concerns about the public service generally and access specifically. Many interviewees were jaded about Government's response to the *"background noise"* about problems at the Archives.

221 In a print media story following announcement of this investigation, a senior Civil Servant is quoted as saying that the media should *"not accept the version of those who say 'nothing has been done' and instead accept that they (a) may not be happy with what was done or (b) may not know what was done"*. The evidence submitted to me is that the Director was told to *"handle the issues, including properly addressing staff concerns and fostering workplace morale"*. The approach was that, as an experienced and senior head of department, the Director should be *"afforded the opportunity to address the issues identified"*. I have received no evidence of follow-up accountability.



**The Ombudsman made the following 22 Recommendations** with respect to administration, resources and people issues. S.16(2) of the Ombudsman Act 2004 requires that the Authority (the Archives reports to the Cabinet Office) specify what the Authority has done or proposes to do to effect the recommendations or reasons, if no action is proposed.

The Recommendations have certain financial, legislative and administrative implications which require adequate consultation and planning. Accordingly, the statutory deadline for the Authority to respond has been extended to 31st March, 2010.

### **Recommendations: Administration**

*“Four concepts are particularly relevant when designing repository access policies: (1) privacy (2) confidentiality (3) right to know, and (4) equality of access. A well-considered, written access policy that reconciles these elements is a basic requirement for sound archival management. It should be written as one of the repository’s founding documents, adopted by its governing authority, and reviewed regularly. Its provisions must be known to all – staff, donors, and users.”<sup>1</sup>*

The Archives should:

- (1)** Establish and/or publicize written access policies regarding
  - (a)** updated search room procedures, including handling of documents
  - (b)** which collections are freely available for view, duplication and use
  - (c)** which collections are subject to access restrictions
  - (d)** procedures, where applicable, for requesting permission to restricted documents
- (2)** Submit annual, itemized accounts of the Fund to the AAC.
- (3)** Update donor and loan agreements, and advise donors of current archival standards. (Note: in the US, users may request reviews of restrictions to determine whether the original conditions for restrictions still exist.)
- (4)** Develop step-by-step user friendly guidelines and/or flowcharts about how to do historical and genealogical research.
- (5)** The AAC should
  - (a)** act as a recourse to receive complaints from the public and advise the Minister on resolution of disputes about access
  - (b)** include members who are engaged in promoting heritage but may not be part of the traditional research community (for example, include representatives of the Departments of Education and Cultural Affairs as ex-officio members)
  - (c)** assist in establishing policies for de-accessioning (public records may not be de-accessioned, but in the absence of donor agreements, private records may be).

### **Recommendations: Resources**

The Archives should:

- (1)** Prioritize
  - (a)** Adlib catalogue project, using available expertise as needed and resolve security issues that might prevent web access
  - (b)** accessioning of unaccessioned collections
  - (c)** updating finding aids

<sup>1</sup> Society of American Archivists, The Reference Process, Ch. 4

- (2)** Establish and post a policy to allow for digital photography and scanning
  - (a)** provide a space with adequate lighting for photography
  - (b)** purchase a flatbed or book scanner
  - (c)** digitize (at highest resolution) and catalogue negatives, photographs and film reels. (Negatives still deteriorate even in the conservation conditions of the Archives.)
  - (d)** allow the Department of Communication and Information to photograph images for any Government project
- (3)** Establish a policy and system for access to materials in process of arrangement and description
- (4)** Install a computer terminal on-site for user access to
  - (a)** Hallett Civil Records CDs <sup>2</sup>
  - (b)** the donated Slave Register index (with appropriate caveats)
  - (c)** negatives database
  - (d)** Adlib as it comes online
- (5)** The AAC should review, consult with the Archives and advise the Minister
  - (a)** whether usage fees should be charged for items in the public domain
  - (b)** whether there should be a waiver for scholarly and cultural works
  - (c)** of a more practical and intellectually rigorous definition of 'commercial' use (to exclude break-even ventures of cultural value to the country)
  - (d)** on criteria for discretion by the Archives to place other restrictions on use
  - (e)** criteria and strategy for purchases, solicitation of collections, archival recovery (of Bermuda related material overseas),<sup>3</sup> including
    - guidelines for what is of "historical value"
    - clear agreements for joint purchases regarding responsibility for conservation, restrictions on access, permissions for use
    - public disclosure of what is purchased and cost (an expert advises that it is doubtful whether this information could be denied under FOI)
  - (f)** on appropriate preparation for PATI
- (6)** Establish guidelines for staff to assist them to respond to public queries about
  - (a)** acquisition policies
  - (b)** restrictions on access
  - (c)** copyright
  - (d)** use fees
  - (e)** archival research
- (7)** Partner with other heritage entities and venues for exhibits and other public education
- (8)** Update and post guidelines regarding search room procedures and how to handle documents (the latter is set out on the current web page).
- (9)** Conduct annual audits of the stacks to ensure that materials are in proper locations
- (10)** Discontinue charging veterans copying costs for their own service records

<sup>2</sup> By permission of the Bermuda Maritime Museum which reserves the right for the Museum's website to be the place where such publications may eventually be made available to the public over the Internet.

<sup>3</sup> As provided by s.7 of the Archives Act, there is an Archives Fund which receives an annual sum that does not revert to the Consolidated Fund if unexpended. Our cursory review for the purposes of tracking information shows that the fund, which now stands at a substantial sum, has been used prudently.

## Recommendations: People

- (1)** The Archives should work with the Department of Human Resources to
  - (a)** institute best practices for training, mentoring and experiential learning of staff <sup>4</sup>
  - (b)** offer management training and mentoring to the Director to improve skills in strategic and workflow planning, staff development and public relations.
- (2)** The Archives should expand on relationships with other depositories in the local heritage community especially in order to leverage exhibit opportunities.
- (3)** The Director must refrain from making: disparaging comments about staff in front of researchers, and similarly, comments about researchers to staff; and also from making unproven allegations about the professionalism of other exhibit spaces (one comment made to our on-site expert without any current evidence could severely damage public confidence in that space if believed).
- (4)** The Archives should follow international standards and best archival practice. In particular, deposits should not be re-arranged without consultation with the depositing authority to confirm the factual, rather than theoretical, provenance of the records.
- (5)** The work of the Records Centre is a priority which has entailed the use of overseas experts in 2001 and 2008 to train Government departments in how to manage records for eventual deposits to the Archives. It appears that retention schedules (guidelines to determine items of enduring historical or administrative value) have been completed for only four Government departments. Retention schedules have yet to be done for some 61 departments and quangos (five are in process). This area of archival work is important because the modern records become the historical depository of the future. This is a monumental task to which the Archives must assign senior resources. <sup>5</sup>
- (6)** Accordingly, both the Director and new Deputy Director should focus on the Records Centre tasks for a period of one year, if that is required to tackle the tasks noted above. General policies and procedures of the Records Centre are likely to require some adjustments to respond to the introduction of PATI and this should be taken into account in achieving the tasks above.
- (7)** An overseas archivist with expertise in administration, auditing of repositories, cataloguing and FOI should be contracted to manage the Archives overall for a period of not less than one year. Tasks for this person would include
  - (a)** auditing the state of tasks required to bring both the Repository and the Records Centre to efficiency
  - (b)** developing and/or updating all relevant policies, procedures and tools
  - (c)** rationalizing and speeding up the current five year plan for electronic access)
  - (d)** training staff in accessioning, appraisal, arrangement, cataloguing and outreach tasks as well as reference interviews
  - (e)** developing an orientation module for new staff
  - (f)** supervising the strategy to prepare for PATI legislation, including any implications for the Records Centre
  - (g)** mentoring the Director in administration, public relations and management of people

<sup>4</sup> Specialization, such as the designation of "Trainee Appraisal Archivist" is rare at the beginning of a career. Also, the trainees' experience may be so narrow as to disqualify them from succession track. By analogy, staff with post-secondary training in library science become 'librarians' immediately, without an extended training or internship period. The one-year intensive masters programme in archival science is accepted throughout the world for entry-level professional positions. It is unclear why Bermuda is pressing for a two year programme or requires people with this post-graduate degree to remain designated as "trainees" for 2 or 3 more years. Even large archives deliberately move junior (and senior specialized) staff around so that they gain experience in various areas and are better qualified when opportunities for promotion arise.

<sup>5</sup> Semi-active modern Government records are held in the Records Centre. Until rehoused in the historical repository (usually after 30 years) these records are available only to the Department that created them. There appear to be no problems locating records from the Records Centre for internal Government users.



## The Truth Counts

The standard of proof for evidence considered by the Ombudsman is the civil (not the criminal) standard. That is – is it more likely than not that a particular fact asserted by the witness is true?

From the UK House of Lords in *Onassis v. Vergottis* [1968] 2 Lloyd's Rep 403 at 431: *"'Credibility' covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist...And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability."*



*The core of an issue can be subtle or camouflaged, as is the figure on the right in this 1887 photo of the Natural Arches in Tucker's Town by N.E. Lusher.*

# *How to Make a Complaint to the Ombudsman*

## **How do I make a complaint?**

By letter, email, fax, telephone or in person...

Suite 102, Dundonald Place , 14 Dundonald  
Street West, Hamilton HM 09

Monday-Thursday, 9:00 a.m.-5:30 p.m.

Friday 9:00 a.m.-5:00 p.m.

Tel: 441 296 6541

Fax: 441 296 7734

[complaint@ombudsman.bm](mailto:complaint@ombudsman.bm)

[info@ombudsman.bm](mailto:info@ombudsman.bm)

***NOTE: Please submit relevant documents  
when making your complaint.***

## **What can I complain about?**

- Any administrative action\* – that is, a decision, recommendation made or act done or omitted (including failure to provide reasons for a decision);
- Administrative action that appears to be bad, unfair, arbitrary, discriminatory, unreasonable, oppressive, inefficient, improper, negligent, unreasonably delayed or based on a mistake of law or fact;
- Please complain only after you have already tried to work things out with the Authority or resolve the matter through existing remedies (unless it is unreasonable to expect you to resort to such remedies).

*\* Administrative action was done within the 12 months prior to complaint*

## **Who can make a complaint?**

Anyone who feels personally unjustly treated by an administrative action of a Public Authority. A family member or other suitable person may make the complaint if you cannot.

The Ombudsman can also investigate matters on her "own motion" although there is no specific complaint

## **How long does it take?**

The Ombudsman investigates complaints as quickly as possible and therefore requests timely responses from Authorities. Many cases can be resolved in a few weeks, but more complex cases can take much longer.

## **How much does it cost?**

Services are free and available to anyone



**JULY 31, 2010 WILL MARK  
THE FIFTH ANNIVERSARY OF  
THE ESTABLISHMENT OF THE  
OMBUDSMAN OFFICE IN BERMUDA**

The public is invited to attend  
**Lunchtime Chats with the Ombudsman**  
every Wednesday in June 2010 from noon to 1 p.m.  
Liquid refreshment will be available.  
Limited space – reserve your attendance online at  
**[www.ombudsman.bm](http://www.ombudsman.bm)**.



## NOTES

- "Own Motion Investigation"

## COMPLAINT PROCESS – FREE AND AVAILABLE TO ANYONE

Ombudsman may investigate in the public interest even if no complaint

- Complaints may be
  - Oral, electronic, written
  - by persons aggrieved (or family if persons cannot act for themselves)
  - Within 1 year of event

- Is complaint about a Government Board, Department, or Public Authority?
- Is matter exempt (Cabinet, court proceeding, crime or employment Issue)?

- Ombudsman can investigate even if matter cannot be further appealed or is final

- Inquiries resolve complaint; or
- Investigation or mediation; or
- Ombudsman declines

- Ombudsman may visit sites, require documents, question under oath, summon any witness
- due process to respond
- update case periodically
- Obstruction=Contempt of Court

- Ombudsman makes
  - specific recommendations re complaint *and/or*
  - general recommendations on how to improve practices and procedures

- Notify Ombudsman of steps taken or proposed to implement or reasons for not doing so
- Ombudsman accepts if adequate or appropriate

- For other complaints, Ombudsman may summarize (without names) in Annual Report

