

Decision Notice

Decision 08/2023: Ministry of Finance Headquarters

Finance Minister's correspondence related to Gencom

Reference no: 20220421

Decision date: 24 May 2023

Summary

The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Ministry of Finance Headquarters (**Ministry Headquarters**) for all the Minister of Finance's correspondence related to the investment firm Gencom, its subsidiaries and specified individuals. The Ministry Headquarters' internal review decision denied access to its records under section 25(1)(d) of the PATI Act, because the Government of Bermuda had ongoing negotiations concerning the Fairmont Southampton Hotel.

During the Information Commissioner's review, the Ministry Headquarters acknowledged that, prior to denying access to its records, it had not searched to locate responsive records. The Information Commissioner therefore revised the issue to only consider whether the Ministry Headquarters had conducted a reasonable search in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014.

The Information Commissioner has found that the Ministry Headquarters failed to conduct a reasonable search for records responsive to the PATI request. The Information Commissioner has annulled the Ministry Headquarters' internal review decision and ordered it to respond to the Applicant, as directed by this Decision and the accompanying Order.

Relevant statutory provisions

Public Access to Information Act 2010: section 12(2)(b) (reasonable search).

Public Access to Information Regulations 2014: regulation 5 (reasonable search).

The Appendix provides the text of the statutory provisions and forms part of this Decision.

Background

1. This Public Access to Information (**PATI**) request related to Gencom and connected persons. On its [website](#), U.S.-based Gencom describes itself as: "one of the industry's leading real estate investment and development firms", which "focuses on executing distressed, turnaround and repositioning opportunities and actively invests in . . . branded residential projects and hospitality operating platform strategies".
2. Gencom has had a presence in Bermuda since 2017 when it [acquired](#) Rosewood in Tucker's Point. In June 2018, Gencom [announced](#) how its \$25 million renovation "further

underscore[d] the firm’s steadfast commitment to the long-term growth of the island’s tourism and hospitality sector”.

3. In 2019, a Gencom affiliate [acquired](#) Bermuda-based Westend Properties Limited, as part of its purchase of the Fairmont Southampton Hotel (**Fairmont Southampton**)—our largest hotel, which sits on nearly 100 acres of land.
4. Not being fully operational since March 2020 due to the global pandemic and reduced air travel, Fairmont Southampton [announced](#) that it would temporarily close in October 2020 to undergo a complete renovation. It has not yet reopened. Although Fairmont Southampton is a private company, the Government has been involved with its owners and managers on several issues, such as a Westend Properties [guarantee](#), [redundancy](#) payments for its more than 700 hotel employees, and redevelopment-related tax and custom duty [rebates and relief](#).
5. With this background in mind, the Information Commissioner notes that the Applicant has been seeking information on the topic through PATI requests since January 2021. As explained below, this Decision finds that the Ministry Headquarters’ repeated failure to have met its obligations under the PATI Act 2010 for this PATI request has been detrimental to the Bermuda public’s right of timely access to public records about the Minister of Finance’s communications with Gencom and connected persons. It follows on from [Decision 07/2022](#), where the Information Commissioner had to order the Ministry Headquarters to fulfil its outstanding duty to respond to the Applicant’s request, in March 2022.
6. On 25 November 2021, the Applicant made a written PATI request to the Ministry Headquarters, as follows:

Please provide copies of all correspondence between the Minister of Finance—formerly David Burt and then Curtis Dickinson—as it related to investment firm Gencom, and/or its subsidiaries, and/or its founder . . . , and/or its [local affiliate] representative . . . since 18 July 2017.

With regards to the individuals named, please include any and all correspondence, whether or not it relates to Gencom activities.

This should include but not be limited to:

- letters, emails and faxes
- letters of intent and memoranda of understanding
- text and WhatsApp messages
- minutes of meetings or telephone calls, and
- Zoom or Webex meeting recordings.

7. In the PATI request, the Applicant expressly asked the Ministry Headquarters to contact them if finding its scope “too wide or unclear”, so they could “discuss ways to amend the request appropriately”.
8. The Applicant did not receive an initial decision within six weeks of the Ministry Headquarters’ receipt of the PATI request, i.e., by 6 January 2022. On 10 January 2022, the Applicant requested an internal review by the head of the public authority. The Applicant also did not receive an internal review decision within six weeks of the Ministry Headquarters’ receipt of their request for one, i.e., by 21 February 2022.
9. After the Applicant asked for an independent review, the Information Commissioner issued [Decision 07/2022](#), finding that the Ministry Headquarters had failed to issue an internal review decision within the statutory deadline, and ordering it to issue its outstanding decision by 19 April 2022.
10. On 18 April 2022, the Ministry Headquarters issued the internal review decision currently under review, which denied access to records under section 25(1)(d) of the PATI Act due to the Government’s ongoing negotiations in respect of Fairmont Southampton.
11. On 21 April 2022, the Applicant requested an independent review by the Information Commissioner of the Ministry Headquarters’ decision to withhold its records as exempt.

Investigation summary

12. The application was accepted as valid. The Information Commissioner confirmed that the Applicant had made a PATI request to a public authority and had asked the public authority for an internal review. Additionally, the Information Commissioner confirmed the issue the Applicant wanted her to review.
13. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because examining the withheld records was needed to evaluate the Ministry Headquarters’ reliance on the exemption.
14. On 25 April 2022, the Information Commissioner’s Office (**ICO**) notified the Ministry Headquarters of the valid application and requested to receive its withheld records within two weeks (the ICO’s standard deadline).
15. On 11 May 2022, the Ministry Headquarters requested until 30 May 2022 to send its records due to travel, and this was accommodated.

16. When updating the ICO on 24 August 2022 about its records status, the Ministry Headquarters explained that actually it had not searched to locate records that would be responsive to the PATI request. Prior to this discussion, the ICO had expected the Ministry Headquarters would be providing its records to enable this review to progress.
17. During subsequent discussions with the ICO, the Ministry Headquarters advised that it faced challenges in meeting its obligations under the PATI Act and Regulations, which the Information Commissioner has discussed in more detail below.
18. Between November 2022 and May 2023, the ICO met the Ministry Headquarters several times in an effort to extend the opportunity for the authority to meet its PATI obligations. Specifically, the ICO encouraged the Ministry Headquarters to engage in a reasonable search for responsive records, which the ICO would supervise during this review. In addition to efficiently locating potentially responsive records, the ICO-supervised search would offer its staff informal guidance on efficient searches. The ICO set out a number of options for the Ministry Headquarters to support its compliance and progress its outstanding response on this PATI request.
19. The Ministry Headquarters advised the ICO on 21 December 2022 that it had secured a consultant Information Officer to assist in meeting its PATI obligations, including those outstanding in this review. During meetings and discussions between January and March 2023, the ICO agreed that the Ministry Headquarters should address its outstanding matters before the Information Commissioner in a staggered manner. The ICO requested that the Ministry Headquarters first address its outstanding compliance with the Information Commissioner's [Decision 29/2022](#), and then address the outstanding search in this review. The ICO also highlighted for the Acting Financial Secretary another pending review involving a government department for which the Acting Financial Secretary was the head of authority by virtue of the schedule to the PATI Act. For each matter, the ICO detailed the matter's status and actions expected of the Ministry Headquarters or the Acting Financial Secretary. The Ministry Headquarters agreed with this approach.
20. The Ministry Headquarters also raised its other pending PATI requests, including one that asked for Gencom-related records but for a different time period. The ICO specifically noted that it would be important for the new Information Officer to understand how to manage complex PATI requests properly from the outset, to reduce the possibility that missteps would compound as the PATI request was progressed. The ICO answered questions and offered suggestions about meeting the PATI Act's requirements, as would regularly occur if a public authority had made an inquiry to the ICO.

21. In communications about this review, the ICO informed the Ministry Headquarters that the ICO intended to revise the issue to the reasonableness of the search, and maintained an expectation that the Ministry Headquarters would bring itself into compliance during this review under the ICO's supervision.
22. On 21 February 2023, the ICO notified the Ministry Headquarters to formally revise the issue under review to consider only whether a reasonable search had been conducted in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations. In this letter, the ICO Investigation Officer shared their preliminary view that, because the Ministry Headquarters had acknowledged its failure to conduct any search, a reasonable search had not yet been conducted for records. The Ministry Headquarters therefore was invited to accept the preliminary view and make submissions. A similar notice was sent to the Applicant on 7 March 2023, inviting any submission they wished to make on the search issue.
23. On 8 March 2023, the Ministry Headquarters advised that it had been unable to meet the ICO's usual two-week submission deadline, due to demands of the 2023-2024 budget process, and would be unable to respond until after that process.
24. With no further update, the ICO sent a follow-up on 26 April 2023, setting a final deadline of 5 May 2023 to receive any submissions the Ministry Headquarters wished to make, before the Information Commissioner would issue her decision. That same day, the Ministry Headquarters communicated that the consultant's last day was 18 May 2023 and asked to meet about this review.
25. On 2 May 2023, the Ministry Headquarters met the Information Commissioner and the ICO Investigation Officer. It was clarified that the Ministry Headquarters had this review and a separate PATI request on the topic of Gencom. While the Ministry Headquarters shared that it had progressed its record search for the other PATI request, it would now be unable to conduct a reasonable search as expected for this review. Instead, the Ministry Headquarters made submissions on 5 May 2023 on the revised issue.
26. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. As noted above, the Ministry Headquarters and the Applicant were invited to comment on the reasonableness of the Ministry Headquarters' search, and both made submissions.

Information Commissioner's analysis and findings

27. In coming to this Decision, the Information Commissioner considered all of the relevant submissions, or part of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.

Reasonable search – section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations

28. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to PATI requests completely and accurately. Regulation 5 of the PATI Regulations requires the public authority to make reasonable efforts to locate records responsive to the request. A public authority is required to document its efforts if it has been unable to locate records. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.
29. In cases where the reasonableness of a public authority's search is in question, the Information Commissioner's task is to assess whether such search was reasonable, in accordance with the provisions of the PATI Act and Regulations. It is not her role to assess whether a public authority should or should not hold a record as a matter of good public administration.
30. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following:
- [1] the quality of the public authority's analysis of the request;
 - [2] the scope of the search that it decided to make on the basis of that analysis; and
 - [3] the rigour and efficiency with which the search was then conducted.
31. The public authority bears the burden to establish that the search they conducted to locate records responsive to a PATI request was reasonable.¹

Public authority's submissions

32. The Ministry Headquarters acknowledged "it has been overwhelmed with the volume of outstanding PATI requests, due primarily to the significant resource challenges in the Ministry Headquarters", including that it continued to receive PATI requests during the period of this review. The Ministry Headquarters explained that it had "worked to resolve

¹ See [Decision 04/2017](#), [Department of Health](#), at para. 49, and more recently [Decision 20/2022](#), [Department of Public Lands and Buildings](#), at para. 17.

these expeditiously”, staying in communication with ICO Investigation Officers throughout.

33. The Ministry Headquarters submitted “that a comprehensive search of all records was not conducted prior to issuing an internal review decision, in accordance with section 12(2)(b) of the PATI Act”. It explained that it could not comply with regulation 5 because it did not have a dedicated Information Officer when originally processing the PATI request and faced challenges caused by resource constraints. The Ministry Headquarters also maintained the correctness of its internal review decision on 18 April 2022, to exempt the requested documents under section 25(1)(d) of the PATI Act because their disclosure would prejudice highly sensitive, ongoing contractual negotiations.
34. In its submissions, the Ministry Headquarters explained that it dedicated its consultant Information Officer to clearing the backlog of PATI matters “that were agreed to with [the ICO] to be of greater urgency”. The Ministry Headquarters characterised the purpose of a 8 February 2023 meeting with the ICO, as being “to obtain guidance on the outstanding PATI requests within the Ministry of Finance [Headquarters]”, and stated that “during the meeting we were able to agree a priority list to progress outstanding PATI requests”. The Ministry Headquarters remarked that it had been able to complete its compliance with the Information Commissioner’s Order in Decision 29/2022 and had closed another pending PATI request.
35. The Ministry Headquarters acknowledged that, on 8 March 2023, it had sought an extension to make submissions in this review. The Ministry Headquarters had proceeded on the assumption that the extension would be accepted, “given the ICO’s awareness of the agreed priorities”. It was not until the Ministry Headquarters received the ICO’s follow-up letter of 26 April 2023 that the Ministry Headquarters sought to understand the ICO’s “current position” and provide an update on the departure of its consultant Information Officer.
36. Following its final meeting with the ICO, the Ministry Headquarters explained that its resource constraints continued and highlighted the “magnitude of the request” at issue, “which includes text and WhatsApp messages dating back to 2017, in some cases from persons who are no longer with the Ministry”. It also stated that preliminary work revealed that conducting a search would cause a substantive and unreasonable interference and disruption to its other work. The Ministry Headquarters acknowledged that “trying to advance such a huge volume of work at this time, would significantly set back [its] ability to comply overall with the PATI requirements”.

37. The Ministry Headquarters submitted that it had not engaged in an ICO-supervised search during this review “simply because of the agreement with the [ICO] to tackle other requests first”, and that it “took the approach of responding to new requests expeditiously to avoid further buildup of [its] backlog”. In light of its consultant Information Officer’s departure, the Ministry Headquarters indicated that it would accept the ICO’s offer and “engage in a supervised search [to] take place once [it could] appoint a new PATI Officer within the Ministry”.

Applicant’s submissions

38. The Applicant noted in their application for an Information Commissioner’s review that their PATI request asked for records from 2017–2021, which the Applicant stated should have predated negotiations about Fairmount Southampton as the Ministry Headquarters referred to in the internal review decision.
39. The Applicant maintained that responsive records should exist. The Applicant submitted that it was a matter of record that the specified individuals were in correspondence with the public authority over at least part of the period covered by their PATI request. The Applicant referred to several news articles to support their view, including one with a reference, attributed to the former Minister of Finance, to a draft memorandum of understanding, for which public access was sought in this PATI request.
40. The Applicant submitted that earlier PATI disclosures made by the Cabinet Office had shown communication with those specified individuals over at least part of the relevant period. The Applicant expected that other records held by the Ministry Headquarters would provide a more complete picture of the correspondence, and that a reasonable search should locate them.

Discussion

41. During this review, the Information Commissioner confirmed that the Ministry Headquarters did not attempt to locate records responsive to the PATI request before issuing its internal review decision denying access to records. As a result, it did not conduct a reasonable search in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations. Nonetheless, the Ministry Headquarters’ submissions raised several points, which the Information Commissioner now addresses.

[1] The quality of the public authority’s analysis of the request

42. From the Ministry Headquarters’ assertion of the correctness of its internal review decision—which denied access in full based on the exemption for ongoing contractual

negotiations in section 25(1)(d)—it appears that it has understood the PATI request to have only sought records related to current negotiations with Gencom about the Fairmont Southampton. The plain language of the request was not stated so narrowly.

43. As the Applicant correctly pointed out, a number of responsive records would be expected to exist that involved either prior dealings between Gencom and the Government, or an existing relationship between the Ministers of Finance and Gencom, its founder or its local affiliate representative. As described at paragraphs 1-4 above, Gencom's dealings in Bermuda have extended beyond the current project at Fairmont Southampton. Some correspondence between the relevant parties about Fairmont Southampton could involve past dealings, such as those related to managing the 2020 redundancy payments.
44. The Information Commissioner is not satisfied that the quality of the Ministry Headquarters' analysis of the PATI request was adequate.

[2] The scope of the search that it decided to make on the basis of that analysis

45. Since the Ministry Headquarters did not conduct any search for responsive records for this PATI request, it could not have identified an adequate scope for the search based on the limited analysis of the request as its submissions implied.
46. In highlighting the scope of the search that it understood would be required, the Ministry Headquarters referred to 'preliminary work' that has been completed. Though the results of this work were not shared with the ICO during this review, the Ministry Headquarters suggested the scope of search for this PATI request would be burdensome because it required searching text and WhatsApp messages dating from 2017, and included messages from persons who were no longer with the Ministry Headquarters. The Information Commissioner notes that, in some respects, the scope of search could be narrowed in a number of ways. For instance, because the request focused on correspondence received or sent by, or copied to, the Ministers of Finance, it would require a search of email accounts and other types of records held by the Ministry Headquarters for two individuals only: former Minister Dickinson (2018–2021), and the current Minister of Finance (2017–2018).
47. As the Information Commissioner has previously noted, the records of former employees and other individuals, which are held by a public authority (electronically or in hard copy), continue to be institutional records managed by the public authority, not an individual.²

² See [Decision 11/2022](#), Ministry of National Security Headquarters, at paras. 52-55.

48. Further, any search for responsive records should be skilfully structured in its scope. For example, a search of the government-held email accounts of the Ministers should be designed to make use of keywords, parameters and operators, which would likely narrow as much as possible the scope of search to retrieve responsive results. Here, that would require, for example, limiting the email sender or recipient to the Minister.
49. In any event, the Ministry Headquarters did not conduct a search and, consequently, it has not offered an adequate scope of search based on its analysis of the PATI request.

[3] The rigour and efficiency with which the search was then conducted

50. In light of the fact that no search has occurred, the Ministry Headquarters has not shown adequate rigour and efficiency.
51. In its submissions, the Ministry Headquarters stated “a comprehensive search of all records was not conducted prior to issuing an internal review decision”. The Information Commissioner notes that section 12(2)(b) does not require a “comprehensive search of all records”. Rather, a reasonable search is required. This would include an efficient search of obvious locations conducted with reasonable rigour. Here, the Ministry Headquarters has not conducted any such search.

Conclusion

52. For the reasons above, the Information Commissioner is not satisfied that the Ministry Headquarters conducted a reasonable search, in accordance with section 12(2)(b) of the PATI Act and regulations 5 of the PATI Regulations.

Conclusion

53. Accordingly, the Ministry Headquarters is directed to issue a new initial decision to the Applicant on this outstanding PATI request. Its initial decision should consider any change in circumstance as of the date of its new initial decision. For instance, where relevant, this would include the completion of any negotiations related to the development and reopening of Fairmont Southampton, which might preclude further reliance on section 25(1)(d) of the PATI Act. The Information Commissioner also expects that the records currently held by the Ministry Headquarters should remain the same as those held on the date of the original PATI request on 25 November 2021, during which time this PATI request has remained pending.
54. The Information Commissioner highlights for the Ministry Headquarters that the Applicant made an express offer to discuss any concerns if their PATI request was “too wide or unclear”. The Information Commissioner also recognises that the Ministry

Headquarters has raised concerns that processing this PATI request may be burdensome. Should the Ministry Headquarters continue to have these concerns, section 16(2) requires it to offer to assist the Applicant to amend the request in a manner that avoids an administrative denial under section 16(1)(c).

55. In addition, this request may involve the potential need to notify third parties under section 39 of the PATI Act if any records are intended for disclosure. This Decision affords the Ministry Headquarters a longer period for issuing a new initial decision that is consistent with the timeframes allowed for an extension of time under section 15.
56. The Information Commissioner acknowledges the resource challenges faced by the Ministry Headquarters, which many other public authorities face. Given the significance of its role, it is expected that the Ministry Headquarters would regularly receive PATI requests. Its inability to meet the requirements of the PATI Act and Regulations has been compounded by years of accumulated requests with outstanding responses. The Information Commissioner appreciates the Ministry Headquarters' strategy to have used its consultant Information Officer to prevent more backlog. Here, though, the Ministry Headquarters appears to have operated under a misunderstanding that it had an agreement with the ICO to delay its obligations in this review while it processed other pending PATI requests. Unfortunately, no such agreement existed. The Information Commissioner also appreciates the Ministry Headquarters' acceptance to engage in a supervised search. However, upholding the public's right of access to public records, which are legally enforceable, is not dependent on waiting for the Ministry Headquarters to appoint a new Information Officer.
57. After a year of delay, this review ends where it began essentially: with responsive records not yet readied for this outstanding PATI request, and the public authority again without dedicated resources to meet its PATI obligations.
58. As the Information Commissioner has noted in [Decision 07/2022](#), the difficulties within the Ministry Headquarters are systemic and undermine the public's right to hold government accountable. The Information Commissioner renews her recommendation that the Ministry Headquarters allocate appropriate resources and seek appropriate training and support to improve its administration of its PATI responsibilities. This, in turn, strengthens its capacity to uphold Bermudians and residents' rights to request access to records held by the Ministry Headquarters.
59. As the Ministry Headquarters seeks to continue improving its practices, the Information Commissioner welcomes a more robust adherence to the rights afforded to Bermudians and residents under the PATI Act in the future.

Decision

The Information Commissioner finds that the Ministry of Finance Headquarters (**Ministry Headquarters**) did not conduct a reasonable search for records responsive to the Applicant's Public Access to Information (**PATI**) request, as required by section 12(2)(b) of the PATI Act 2010 and regulation 5 of the PATI Regulations 2014.

In accordance with section 48 of the PATI Act, the Information Commissioner:

- annuls the Ministry Headquarters' internal review decision;
- orders the Ministry Headquarters to conduct a reasonable search to locate records responsive to the PATI request, under the supervision of the Information Commissioner's Office (**ICO**) and as instructed in this Decision's confidential cover letter, and to meet the requirement of section 16(2) of the PATI Act, if necessary; and
- orders the Ministry Headquarters to issue a new initial decision to the Applicant, with a copy to the ICO.

The Information Commissioner requires the Ministry Headquarters to comply with above, as directed by this Decision and the accompanying Order, on or before **Wednesday, 16 August 2023**.

Judicial Review

Should the Applicant, the Ministry of Finance Headquarters, or any aggrieved party wish to seek judicial review according to section 49 of the PATI Act against this Decision, they have the right to apply to the Supreme Court for review of this Decision. Any such appeal must be made within six months of this Decision.

Enforcement

This Decision has been filed with the Supreme Court, according to section 48(3) of the PATI Act. If the Ministry of Finance Headquarters fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez

Information Commissioner

24 May 2023

Appendix: Relevant statutory provisions

Public Access to Information Act 2010

Access to records

- 12 (2) Public authorities shall make every reasonable effort to—
- ...
- (b) respond to requests completely, accurately and in a timely manner.
- ...

Public Access to Information Regulations 2014

Reasonable search

- 5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.
- (2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.

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