



## Decision Notice

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**Decision 50/2023: Cabinet Office**

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**Premier's correspondence related to Gencom and others**

**Reference no: 20220127-02**

**Decision date: 20 December 2023**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Cabinet Office for the Premier’s correspondence related to Gencom, its subsidiaries, its founder and its representative. The Cabinet Office’s initial decision disclosed a number of responsive records. The Applicant’s internal review request challenged the Cabinet Office’s initial decision because the Applicant believed that further records, including specific phone notes and a memorandum of understanding, existed.

The Cabinet Office’s internal review decision upheld the initial decision, explaining that all responsive records were released and no further records existed. Accordingly, this Decision considers the Cabinet Office’s reliance on the administrative denial in section 16(1)(a) of the PATI Act.

In this Decision, the Information Commissioner has annulled the Cabinet Office’s internal review decision administratively denying the request under section 16(1)(a) because it had not conducted a reasonable search before concluding that further records did not exist. The Information Commissioner has also ordered the Cabinet Office to conduct a reasonable search in accordance with the confidential search instructions, to process any newly located records and to issue a new initial decision, as directed by this Decision and the accompanying Order.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 16(1)(a) (record does not exist).

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

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

## Background

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1. On 15 January 2021, the Applicant made a Public Access to Information (**PATI**) request to the Cabinet Office asking for “all correspondence to and from the Premier, David Burt, as it relates to investment firm Gencom<sup>1</sup>, and/or its subsidiaries, and/or its founder Karim Alibhai and/or its representative Chris Maybury since July 18, 2017. With regards to the individuals named, please include any and all correspondence, whether or not it relates to Gencom activities”. The PATI request then gave examples of the format of the

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<sup>1</sup> Any reference to Gencom in this Decision is a reference to both Gencom and its subsidiaries, such as WestEnd Properties Limited (**WestEnd**), unless stated otherwise.

records being sought, e.g., emails, letters, minutes of meetings, notes of telephone conversations or video calls, faxes, WhatsApp messages and Zoom or Webex meeting recordings.

2. After communications with the Cabinet Office, on 1 March 2021, the Applicant narrowed the scope of their PATI request. Instead of asking for records from 18 July 2017 to 15 January 2021, the Applicant asked for records from 1 March 2020 to 1 March 2021. This revision of the dates of the responsive records was accepted by the Cabinet Office.
3. In its initial decision on 21 September 2021<sup>2</sup>, the Cabinet Office granted access to a number of records. The disclosed records consisted of email correspondence from 25 March 2020 to 16 October 2020.
4. On 5 October 2021, the Applicant asked for an internal review of the Cabinet Office's initial decision. The Applicant asserted that additional records existed, including a memorandum of understanding (**MOU**). The Applicant also referred to a phone call on 12 June 2020 which was referred to in one of the disclosed records. The Applicant expressed that they would like to receive the notes of the said call.
5. The Cabinet Office issued its internal review decision on 28 January 2022<sup>3</sup>. The internal review decision addressed two separate, though related, internal review requests. Relevant to this review is para. 8 of the internal review decision, which informed the Applicant that all responsive records had been released at the initial decision. The Cabinet Office's internal review decision also stated that the MOU and the call notes the Applicant referenced did not exist.
6. On 27 January 2022, the Applicant asked for an independent review by the Information Commissioner.

## Investigation

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7. The Information Commissioner's Office (**ICO**) accepted the application as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issue the Applicant wanted her to review.

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<sup>2</sup> The initial decision was issued out of time. Because they did not receive an initial decision within the statutory timeframe, the Applicant asked for an internal review on 9 September 2021. This 9 September 2021 correspondence was later replaced by the Applicant's internal review request of 5 October 2021 described in para. 4.

<sup>3</sup> This was issued in response to the Information Commissioner's 'failure to decide' review that was decided in [Decision 18/2021, Cabinet Office](#).

8. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate because submissions were required from the public authority to determine the reasonableness of its search and to assess its reliance on the administrative denial.
9. The ICO notified the Cabinet Office of the valid application on 8 March 2022.
10. 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. The Cabinet Office and the Applicant were invited to comment on the reasonableness of the Cabinet Office's search. The Applicant made submissions. Their submissions in [Decision 49/2023](#), [Cabinet Office](#), for the related review no. 20220127-01, are also considered here. The Cabinet Office did not make submissions but similarly, its submissions in [Decision 49/2023](#) for the related review are considered below.
11. On 17 November 2023, the ICO offered the Cabinet Office the option of submitting evidence of its original search or searching the relevant locations in the presence of the ICO Investigator to verify the search. The ICO did not receive a response from the Cabinet Office.

### Information Commissioner's analysis and findings

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12. The Information Commissioner has considered all relevant submissions, or parts of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.

#### ***Record does not exist – section 16(1)(a)***

13. Public authorities are entitled under section 16(1)(a) to administratively deny a request if a requested record does not exist or cannot be found after all reasonable steps have been taken to find it. The administrative denial in section 16(1)(a) should be read in conjunction with regulation 5 of the PATI Regulations 2014, which requires public authorities, through their Information Officers, to make reasonable efforts to locate records responsive to a PATI request. Regulation 5(2) requires a public authority to document its efforts if it has been unable to locate any record.
14. When a public authority denies a PATI request under section 16(1)(a) because a record does not exist or cannot be found, the Information Commissioner's review does not determine to a point of certainty if a record exists or can no longer be located. Rather, the Information Commissioner is required to assess whether the public authority took all

reasonable steps to find a record. Further, section 16(1)(a) does not concern whether a public authority should hold a record as a matter of good public administration.

15. 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 PATI 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.

16. The specific circumstances in each case will inform the Information Commissioner's assessment.

17. Finally, the public authority bears the burden to establish, on the balance of probabilities, that responsive records do not exist or cannot be found after all reasonable steps have been taken to find them.<sup>4</sup>

#### *Public authority's submissions*

18. The Cabinet Office did not respond to the formal invitation to make submissions. Its initial decision granted access to a number of responsive records and noted that these records included "the parties named in the request" within the 12-month timeframe in the revised request. The Cabinet Office's internal review decision informed the Applicant that all records responsive to the PATI request had been disclosed at the initial decision stage.

19. In a related review, no. 20220127-01 for [Decision 49/2023](#), the Cabinet Office submitted that it searched the Premier's email and accepted that it was reasonable to search it. The Cabinet Office maintained, though, that it was not reasonable to search any other locations for the Premier's records, such as his smartphone, laptop or shared drive folders. It explained that during the period in question, the Ministry of Finance Headquarters (**Ministry Headquarters**), the then-Minister of Finance, technical officers, and consultant advisors within the Ministry Headquarters had sole responsibility for the negotiations in question.

20. The Cabinet Office also maintained that the notes of the phone call of 12 June 2020 as well as the MOU referred to by the Applicant did not exist.

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<sup>4</sup> See [Decision 04/2017](#), [Department of Health](#), at paras. 37-49, and more recently [Decision 01/2023](#), [Ministry of Legal Affairs and Constitutional Reform Headquarters](#), at paras. 30-35.

*Applicant's submissions*

21. The Applicant emphasised that the PATI request sought “correspondence to and from the Premier, David Burt, as it relates to investment firm Gencom etc.” The Applicant maintained that, because of the language “as it relates to” Gencom, its subsidiaries, its founder and its representatives, the responsive records should not be limited to correspondence only between the Premier and the company but include any internal correspondence between the Premier and his advisors, other members of Cabinet, permanent secretaries and others.
22. The Applicant believed that there would be correspondence between the Premier and Gencom’s founder or representative that did not relate to Gencom and was responsive to the PATI request. The Applicant gave an example of the £35,000-a-year scholarship to St Andrew’s University that was established in 2018 for four years by Gencom’s founder and representative. The Applicant highlighted that the Premier was photographed with the company’s representative when the scholarship was first announced in 2018 and that the first recipient received the funding in 2020. The Applicant argued that it is clear that the Premier had engaged with these individuals beyond their resort-specific matters.
23. The Applicant also pointed out that the revised PATI request asked for records from 1 March 2020 to 1 March 2021. The earliest date of the record disclosed by the Cabinet Office was 25 March 2020 and the latest was 16 October 2020. The Applicant stated that given the critical nature of the talks at this time, and the timelines, it might reasonably be expected that further correspondence took place between the dates in the revised PATI request.
24. The Applicant referred specifically to the disclosed emails from August 2020, which included the Cabinet Secretary’s email forwarding Gencom’s email of 11 August 2020 requesting a discussion between the Premier, Gencom’s founder as well as the company’s representative. There was no response from the Premier included in the disclosed records. The Applicant submitted that the absence of a response was at odds with the earlier exchange when the Cabinet Secretary was asked for his thoughts on a different email from Gencom.
25. The Applicant further highlighted that there has been a great deal of activity around the hotel redevelopment. The Applicant maintained that there would likely have been significant discussions before and after 31 December 2020, as this was the expiration date of Letter of Intent that related to a government guarantee. The Applicant submitted that, given the Premier’s interest and frequent reference to the talks with Gencom and

WestEnd, it was fair to assume that the Premier would have been involved or kept abreast of developments.

26. The Applicant also highlighted that in January 2022, the Premier said that he had spent a significant amount of time during a recent holiday in California “working with the Minister of Finance, working through the challenges with the developer, there’s been numerous meetings this week, there’ll be meetings over this weekend”. In the Applicant’s view, given the Premier had highlighted in January 2022 how much work—including his own—had gone into the project, it would be surprising if there was not a significant amount of responsive correspondence in the preceding months.
27. Referring to emails dated 11 and 15 June 2020, which were disclosed by the Cabinet Office at the initial decision stage, the Applicant submitted that a call between Gencom’s founder and the Premier and others took place on 12 June 2020. The Applicant highlighted that no notes from the call were included in the records disclosed. The Applicant maintained that given the high-level critical nature of these talks, one could reasonably consider that such notes would exist.
28. The Applicant referred to the emails of 14 and 15 October 2020 disclosed by the Cabinet Office, which mentioned different versions of a MOU being attached to the emails. The Applicant highlighted that none of the MOUs were included in the disclosure.

#### *Discussion*

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

29. The revised PATI request asked for “all correspondence to and from the Premier, David Burt, as it relates to the investment firm Gencom, and/or its subsidiaries, and/or its founder Karim Alibhai and/or its representative Chris Maybury” from 1 March 2020 to 1 March 2021. The PATI request further clarified that “[w]ith regards to the individuals named, please include any and all correspondence, whether or not it relates to Gencom activities”.
30. Based on this language, the PATI request sought all correspondence between Premier Burt and anyone else from 1 March 2020 to 1 March 2021 that related to either (1) Gencom, (2) its subsidiaries, (3) its founder, or (4) its representative. For clarity, the correspondence relating to the individuals, i.e., the founder or representative, did not need to relate to Gencom. It could have been, for example, about the scholarship highlighted by the Applicant or any other topic. Further, the responsive records would have included the Premier’s correspondence with public officers or Ministers about Gencom, its subsidiaries, its founder or its representative.

31. In confirming this understanding of their PATI request in their submissions to the ICO, the Applicant also emphasised that the phrase “as it relates to” in the PATI request refers the Premier’s internal correspondence (such as with public officers or Ministers) and external correspondence (such as with Gencom’s founder or others).
32. In light of this understanding of the PATI request, the Cabinet Office’s analysis of it was inadequate in two ways. First, it limited both the recipients and senders of correspondence to only the Premier, Gencom, its founder and its representative. Second, the Cabinet Office then further limited the subject of these emails to only those related to Gencom.
33. With respect to the recipients and senders, the Cabinet Office informed the Applicant in its email attaching the disclosure at the initial decision, that the disclosed records were correspondence that included “the parties named in the request” within the timeframe in the revised request. The Cabinet Office appeared to be misreading the PATI request as asking only for correspondence between the Premier and Gencom, its founder or its representative. Although the records disclosed by the Cabinet Office included the correspondence between the Premier and the Cabinet Secretary on 9 and 11 August 2020, this correspondence included emails from Gencom, which were forwarded by the Cabinet Secretary for the Premier’s attention. This alone does not suggest that the Cabinet Office understood the PATI request to be asking for correspondence between the Premier and any individuals that related to Gencom, its founder or its representative.
34. As noted above, given the manner in which the PATI request was framed, any correspondence to or from the Premier that was about Gencom, its subsidiaries, its founder or its representative within the relevant timeframe would be responsive. This would include correspondence between the Premier and other individuals not named in the request, such as correspondence between the Premier and other Ministers or public officers about Gencom or the individuals.
35. With respect to the subject matter of the records, the Cabinet Office further limited the responsive records to only correspondence that related to Gencom. The PATI request expressly stated that with respect to the named individuals (Gencom’s founder and its representative), the Applicant sought all correspondence related to them regardless of whether it relates to Gencom. In their submissions, for example, the Applicant highlighted other activities between the Premier and Gencom’s founder and its representative. Additionally, this limitation is apparent in the Cabinet Office’s submissions in the related review for [Decision 49/2023](#), which stated that a search of the Premier’s email was unnecessary because the sole responsibility for negotiations with Gencom was with individuals within the Ministry Headquarters. The Cabinet Office did

not appreciate that the request sought correspondence related to Gencom's founder and its representative regardless of whether it refers to Gencom.

36. In light of the above, the Information Commissioner is not satisfied that the Cabinet Office's analysis of the PATI request was adequate.

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

37. Because the Cabinet Office's analysis of the PATI request was not adequate, it is unnecessary to consider the scope of the search conducted by the Cabinet Office. The Information Commissioner notes, however, that the PATI request asked for the Premier's correspondence in various forms, such as emails, letters, virtual meeting recordings and WhatsApp messages. The records disclosed by the Cabinet Office were all emails.
38. Further it is unclear to the Information Commissioner whether the Cabinet Office searched both of the official government email accounts used by the Premier. If only one of these email accounts was searched, no explanation was given as to why this was considered reasonable. Based on the information available and in the absence of further explanation from the Cabinet Office, the Information Commissioner is not satisfied that the scope of the Cabinet Office's search was adequate.
39. Further, the Applicant highlighted that the latest date of the disclosed records is 16 October 2020, even though the request sought records through 1 March 2021. This was particularly notable because during this period the Government announced its decision to give loans to cover the redundancy payments for Fairmont Southampton workers<sup>5</sup> and Gencom repaid the loan in the full amount of approximately \$11 million<sup>6</sup>. The absence of responsive records, on its own, is not necessarily an indication that a public authority's analysis of a PATI request was inadequate or that its search was not reasonable. The Cabinet Office may have a perfectly reasonable explanation, for example, as to why the Cabinet Office did not locate any correspondence relating to the scholarship<sup>7</sup>.

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<sup>5</sup> Bernews, [Govt To Loan Redundancy Money To Workers](#), 9 November 2020.

<sup>6</sup> See the Minister of Finance's [statement on 1 February 2021](#).

<sup>7</sup> It was reported that Gencom's representative approached the Premier in 2017 with the idea of introducing a scholarship for young Bermudians (see Bernews, [New Scholarship For University Of St. Andrews](#), 28 March 2018). It is then reasonable for one to believe that there would be discussions between the Premier and Gencom about the scholarship at the time. But the revised PATI request relevant to this review only asked for records from 1 March 2020 to 1 March 2021 and did not cover the period where the initial discussion about the scholarship might have taken place. Once the initial discussions had been finalised, for example, the matter might have then handed over

40. Given the Cabinet Office's narrow reading of the PATI request, which was never confirmed with the Applicant, and in the absence of sufficient explanation from the Cabinet Office, though, the Information Commissioner is not satisfied that the Cabinet Office conducted a reasonable search for responsive records.

***Conclusion***

41. In sum, the Information Commissioner is not satisfied that the Cabinet Office was justified to rely on section 16(1)(a) of the PATI Act to administratively deny the PATI request.

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to the Minister of Education Headquarters, which might explain why there was no correspondence between the Premier and Gencom about the scholarship in 2020 and 2021.

## Decision

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The Information Commissioner finds that the Cabinet Office was not justified in relying on section 16(1)(a) of the Public Access to Information (**PATI**) Act 2010 to administratively deny the PATI request.

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

- annuls that part of the internal review decision by the Cabinet Office concluding that no additional records exist, and
- orders the Cabinet Office to conduct a reasonable search in accordance with the confidential search instructions attached to the Information Commissioner's cover letter to the Cabinet Office, to process any newly located records, and to issue a new initial decision to the Applicant.

The Information Commissioner requires the Cabinet Office to conduct a reasonable search and to issue an initial decision, as directed by this Decision and the accompanying Order, on or before **Wednesday, 7 February 2024**.

## Judicial Review

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The Applicant, the Cabinet Office, or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

## Enforcement

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

Gitanjali S. Gutierrez  
Information Commissioner  
20 December 2023

### **Public Access to Information Act 2010**

#### **Refusal of request on administrative grounds**

- 16 (1) A public authority may refuse to grant a request if—
- (a) the record requested does not exist or cannot be found after all reasonable steps have been taken to find it;
  - ...

### **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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