

## Decision Notice

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### Decision 03/2024: Cabinet Office

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#### **Records about fintech and the Fintech Unit**

**Reference no:** 2021007

**Decision date:** 28 February 2024

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Cabinet Office Headquarters (**Cabinet Office**) for records about fintech and the Fintech Unit and Office. The Cabinet Office decided that it did not hold any responsive records and transferred the request to another public authority in accordance with section 13(5) of the PATI Act.

The Information Commissioner has found that the Cabinet Office was not justified, in part, in relying on section 13(5) to transfer the request. In accordance with section 48 of the PATI Act, the Information Commissioner affirms in part and annuls in part the internal review decision by the Cabinet Office. The Information Commissioner has required the Cabinet Office to conduct a search for items 1 and 4 of the request and issue a new initial decision to the Applicant.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 13 (transfer of request).

Public Access to Information Regulations 2014: regulation 5 (reasonable search) and regulation 8 (transfer of request).

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

## Background

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1. In 2017, the Government of Bermuda announced its “Fintech Strategy” to launch a new pillar of economic activity.<sup>1</sup> ‘FinTech’ is short for financial technology, which refers to the use of technology to improve and automate financial services and processes. It encompasses a wide range of innovations, including mobile, banking, cryptocurrency, robo-advisors, and peer-to-peer lending among others. Bermuda has been actively fostering its FinTech sector and establishing its regulatory framework to attract fintech companies since the establishment of the Government’s FinTech Business Unit in 2018 and subsequent Office of Fintech in 2020<sup>2</sup>. The Government has implemented regulations under the Digital Asset Business Act 2018 to facilitate fintech innovation particularly within the areas of

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<sup>1</sup> See [The Bermuda Fintech Strategy](#).

<sup>2</sup> Appleby, ‘[Overview of fintech laws and regulations in Bermuda 2024](#)’ (12 February 2024).

digital assets and blockchain technology. The other laws governing digital payments and transactions include:

- a. Banks and Deposits Companies Act 1999
  - b. Bermuda Monetary Authority Act 1969
  - c. Electronic Transaction Act 1999
  - d. Money Service Business Act 2016
2. The Premier of Bermuda in a 2019 press conference<sup>3</sup> referenced the establishment of the Fintech Business Unit in October 2018 “to manage and oversee Bermuda’s rapidly expanding fintech activities”. The Fintech Business Unit, established under the Cabinet Office had administrative oversight over the establishment of fintech initiatives in Bermuda from 2018 until 2020. In 2020, the responsibility of the Fintech Business Unit was transferred to the Economic Development Department under the Ministry of Economy as the Office of Fintech.
3. On 18 November 2022, the Applicant made a PATI request to the Cabinet Office, asking for records about fintech and the Fintech Unit. The request read:
- a. a list of all memorandum of understanding signed between the Government and digital asset businesses (**DABs**) or fintech businesses, including the date they were signed on (**item 1**),
  - b. any record or log that the Fintech Unit keeps of the number of jobs in Bermuda’s fintech sector, from whenever the log or record was first begun (**item 2**),
  - c. Fintech Unit’s list of fintech or DAB companies with a physical presences and staff on the island (**item 3**), and
  - d. Details of the staffing and budget of the Cabinet Office’s Fintech Office since its formation (**item 4**).
4. The Cabinet Office did not issue an initial decision by the statutory deadlines, 30 December 2022. On 1 February 2023, the Cabinet Office informed the Applicant that the PATI request was transferred to the Ministry of Economic and Labour Headquarters (**Ministry Headquarters**), who in-turn transferred the request to the Economic Development Department (**EDD**) on the same day.

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<sup>3</sup> Fintech Bermuda, ‘[Denis Pitcher appointed to Fintech Business Unit](#)’ (15 January 2019).

5. On 6 February 2023, the Applicant asked for an internal review from both the Cabinet Office as well as the Ministry Headquarters. The Applicant had not yet received an initial decision on their PATI request.
6. On 14 February 2023, the Applicant emailed the Cabinet Office to share that the EDD had acknowledged the transferred PATI request and that the Applicant was still seeking an internal review by the Cabinet Secretary of the decision to transfer the request. The Applicant maintained that some records must be held by the Cabinet Office. That same day, the Cabinet Office responded that the request had been transferred and Cabinet had no further role with respect to the request.
7. On 16 February 2023, the Applicant sought an internal review by the Cabinet Secretary in accordance with section 41 of the PATI Act of the decision to transfer the entire PATI request to another public authority. The Applicant confirmed that an internal review decision was due on or before 20 March 2023. The Cabinet Office failed to issue the internal review by this statutory deadline.
8. On 18 May 2023, the Cabinet Office issued an internal review decision, affirmed that the PATI request had been transferred to another public authority, and that the EDD had issued an initial decision on 21 March 2023.<sup>4</sup> The Cabinet Office attached a copy of the EDD's initial decision.
9. On 21 March 2023, the Applicant asked for an independent review by the Information Commissioner on 21 March 2023, to challenge the reasonableness of the Cabinet Office's search for records to support its conclusion that it did not hold any responsive records prior to transferring the PATI request.

## Investigation

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10. The Information Commissioner's Office (**ICO**) accepted the application as valid on 8 June 2023, on the basis that the Applicant had made a PATI request to a public authority and had asked that public authority for an internal review. The ICO also confirmed the issues the Applicant wanted the Information Commissioner to review.
11. The Information Commissioner decided that early resolution under section 46 of the PATI Act was not appropriate for this application, because submissions were required from, the public authority to justify its decision to transfer the request.

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<sup>4</sup> The internal review decision was issued in compliance with the Information Commissioner's [Decision 05/2023, Cabinet Office](#).

12. The ICO notified the Cabinet Office of the valid application on 9 June 2023.
13. As required by section 47(4) of the PATI Act, in October 2023, the ICO invited the Cabinet Office and Applicant to make representations to the Information Commissioner. The ICO received submissions from both parties, in addition to their correspondence during this review. On 13 February 2023, the ICO Investigator shared a preliminary view with both parties, and inviting them to narrow the issues considered in this review. To date, no responsive has been received from either party to this invitation.

## Information Commissioner’s analysis and findings

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14. The Investigator has considered all relevant evidence, being satisfied that no matter of relevance has been overlooked unless otherwise noted.

### *Transfer of request – section 13(5) and regulations 5 and 8*

15. Section 13(5) of the PATI Act requires a public authority to transfer a PATI request when it does not hold the record that is requested, but to its knowledge, the record is held by one or more other public authorities.
16. Under section 3(3) of the PATI Act, a record is “held by” a public authority if it is in the possession or custody, or is under the control, of that authority. With this definition in mind, the public authority must take reasonable steps under the circumstances to locate the responsive records and ensure that it has reasonable grounds to justify the transfer.
17. The Information Commissioner has set out the standards for the transfer of a PATI request in [Decision 11/2018](#), [Bermuda Police Service](#).<sup>5</sup> In short, before making a transfer, the original public authority must consider:
  - [1] whether the original public authority holds any record responsive to the request; and if not,
  - [2] whether the original public authority knows that one or more other public authorities holds records responsive to the request.
18. If the public authority is satisfied, after taking reasonable steps, that it does not hold the responsive record and it is aware that the record is held by one or more public

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<sup>5</sup> To date, the Information Commissioner has discussed the transfers of PATI requests in [Decisions 11/2018](#), [Bermuda Police Service](#); [20/2019](#), [Ministry of Finance Headquarters and Accountant General’s Department](#); [03/2020](#), [Ministry of Education Headquarters](#); [17/2021](#), [Ministry of Education Headquarters](#), and [01/2023](#), [Ministry of Legal Affairs & Constitutional Reform Headquarters](#).

authorities, then the public authority should transfer the PATI request to the more appropriate public authority.

19. To satisfy the first part of the test, a public authority must have a reasonable basis for determining that it does not hold the record. This may be achieved by conducting a reasonable search, as discussed in [Decision 04/2017, Department of Health](#), or by otherwise verifying that the record is not held by it, such as an Information Officer confirming in writing with the head of the public authority that no such records are held. An unverified assumption that a public authority does not hold categories of records is not sufficient.
20. When assessing the reasonableness of a public authority's determination that it does not hold the record, the Information Commissioner will consider the steps taken to search for the records. This includes an evaluation of (a) the quality of the public authority's analysis of the request, (b) the scope of the search that it decided to make based on that analysis, and (c) the rigour and efficiency with which the search was then conducted.<sup>6</sup> The specific circumstances of each case will inform the extent of the reasonableness of these efforts.
21. Notably, regulation 5 of the PATI Regulations 2014 (**PATI Regulations**) requires a public authority to "make reasonable efforts to locate a record", which is not the same thing as requiring a public authority to prove the existence or non-existence of a responsive record to the point of certainty. Further, having knowledge that another public authority holds the requested record is a lesser standard than requiring the original public authority to prove that the public authority receiving a transferred request holds the responsive record. Such a burden of proof exceeds what could reasonably be expected of one public authority regarding its knowledge about the record-keeping practices of another public authority.
22. Until the transfer is complete, the original public authority is not relieved of its normal duties under the PATI Act and the PATI Regulations, such as the duty to assist the requester, which continue to apply even when it holds none of the records requested.<sup>7</sup>
23. Finally, a public authority bears the burden of demonstrating that, on the balance of probabilities, it has properly transferred a PATI request in accordance with section 13(5) of the PATI Act.

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<sup>6</sup> See [Decision 02/2018, Department of Human Resources](#), paras. 49-51.

<sup>7</sup> See Phillip Coppel, *Information Rights Law and Practice* (4<sup>th</sup> ed. 2014), p. 428.

### *Public authority's submissions*

24. The Cabinet Office's correspondence and formal submissions in this review, as well as any relevant submissions for [Decision 05/2023](#), are considered. The Cabinet Office explained that it proved challenging trying to reconstruct how the PATI request was handled. It was able to confirm, though, that it did not conduct any search for records before the request was transferred in its entirety to another public authority.
25. Instead, the Cabinet Office maintained that this PATI request was not viewed as a matter for the Cabinet Office because the responsibility for fintech moved to EDD in November 2020, prior to the November 2022 PATI request. The Cabinet Office did not respond to specific questions from the ICO about the transfer of any existing fintech records to EDD when the EDD assumed responsibility for fintech initiatives from the Cabinet Office.
26. The Cabinet Office's internal review decision noted that the EDD had already issued an initial decision to the Applicant on the transferred PATI request on 21 March 2023 and the Applicant had sought an internal review of that initial decision by the EDD. The Cabinet Office queries whether the Applicant had informed the ICO that they had received decisions from the EDD for essentially the same PATI request and argued that the initial PATI request has been properly considered and a response provided. In the Cabinet Office's view, the response by the EDD that provided some of the requested information affirmed that the Cabinet Office was correct to transfer the request and that the Cabinet Office had no additional response for the request.

### *Applicant's submissions*

27. The Applicant maintained that the Cabinet Office held at least some responsive records to their PATI request. The APP was aware that the Fintech Office or Unit, moved from the Cabinet Office to the EDD in November 2020, but was unsure if the listed Fintech Office Unit under the EDD was the same as the reported Fintech Business Unit previously listed on the Bermuda government website. The Applicant further explained their understanding that before it went to EDD, the Fintech Office or Unit fell under the Cabinet Office. The Bermuda Business Development Agency's 2021 Annual Report that stated that BDA worked alongside the Premier's 'Office of Fintech'. The Applicant queried whether the 'Office of Fintech' under the Premier's Cabinet Office was the same as the Fintech Unit under EDD. Further, at the time of the PATI request, the Government website listed a Fintech Business Unit located at 43 Church Street, but the EDD was located at 129 Front Street, according to its PATI statement.
28. The Applicant also confirmed that their initial PATI request was split between two different public authorities (the Cabinet Office and the EDD) of which they are following the appeals

process for both public authorities after being dissatisfied with both public authorities' responses to the PATI request. The Applicant reiterated that they were unsure which authority held responsive records for the individual items in the request, but they maintained that the Cabinet Office held certain responsive records and therefore, they are choosing to exercise their right under the PATI Act to independent review by the Information Commissioner.

29. The Applicant further stated that they followed the correct procedure under the PATI Act for appealing a transfer of their PATI request to another public authority. The Applicant noted that they shared with the ICO a detailed timeline of the handling of this PATI request prior to the issuance of the Information Commissioner's [Decision 5/2023](#), which stated that the Economic Development Department had already issued an initial decision on the PATI request. This was not concealed from the ICO as the Cabinet Office had questioned. The Applicant also noted that requesters often do not know which records are held by a public authority but may have reason to believe that they are held by a public authority or may have a reasonable expectation of the type of records that a public authority should hold.

#### *Discussion*

[1] Whether the original public authority holds any records responsive to the request

30. The Cabinet Office based its decision to transfer the request solely on the fact that responsibility for fintech initiatives moved to the EDD in November 2020. This does not provide a reasonable basis for transferring items 1 and 4, but does for items 2 and 3.

#### Item 1

31. Item 1 seeks records related to Fintech MOUs. The Cabinet Office had remit for at least some of the Government's fintech initiatives from at least 2017<sup>8</sup> to November 2020. As the EDD's Office of Fintech explains:

In 2018, the Government of Bermuda created the Fintech Business Unit to manage and oversee Bermuda's rapidly expanding Fintech initiatives.

In 2020 the Fintech Business Unit became the Office of Fintech and incorporated into the Economic Development Department.<sup>9</sup>

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<sup>8</sup> See [The Bermuda Fintech Strategy](#), announced in 2017.

<sup>9</sup> See [Fintech Bermuda](#), a brochure published by EDD.



32. EDD's initial response to the transferred PATI request that the Cabinet attached to its internal review decision provided a list of six MOUs between the Government and fintech or DAB companies. All six MOUs were entered into while the Cabinet Office was responsible for fintech initiatives: five in 2018 and one in 2019. Four of these MOUs were ongoing at the time of the EDD's initial response to the PATI request and two were terminated only after fintech was transferred to EDD.
33. In light of these facts and in the absence of further information from the Cabinet Office, it was unreasonable for the Cabinet Office to rely solely on the transfer of fintech responsibilities to EDD as the reason for concluding that the Cabinet Office does not hold a list of MOUs between the Government and fintech or DAB companies. This is so for two reasons.
34. First, the list from EDD does not contain any MOU's that were terminated prior to November 2020, and the Cabinet Office has not indicated whether such additional MOUs exist. This leaves a gap of two years when the Government was actively developing its fintech initiatives and no search has been conducted for MOU's held by the Cabinet Office. This is not a situation where a public authority is asked for records that have no connection to the subject matter of the request. Instead, all of the MOUs listed by EDD were actually entered into when the Cabinet Office was responsible for Fintech and, objectively, it raises the question of whether other MOUs were entered into that concluded prior to the transfer of fintech to EDD in November 2020.
35. Second, and relatedly, the Cabinet Office did not explain in response to the ICO's queries whether it could confirm that all its fintech-related records were transferred to the EDD, along with remit for supervision over the Fintech Unit as the new Fintech Office. The Cabinet Office did hold these records as of November 2020, and perhaps others. While the Information Commissioner appreciates that the supervisory responsibility for the Fintech Office moved, the question under section 13(5) of the PATI Act is different. Instead, section 13(5) requires the Cabinet Office to consider the records it currently holds and to have a reasonable basis for concluding that it has not retained copies of responsive records. Both the Applicant and the ICO previously raised the need for the Cabinet Office to conduct a reasonable search prior to issuing its internal review decision, as well as during this review.
36. In the absence of submissions from the Cabinet Office concerning the retention or movement of its fintech records to the EDD, and in light of the existence of MOUs entered into prior to November 2020 and the Cabinet Office's acknowledgement that no search was conducted, the Cabinet Office was not justified in concluding that it did not hold responsive records for item 1.

#### Item 4

37. As with item 1, the Cabinet Office relied on the transfer of responsibility for fintech initiatives to EDD as the basis for concluding that it did not hold records responsive to item 4.
38. Item 4 seeks details of the staffing and budget of the Cabinet Office's Fintech Office. As the Applicant highlights, some confusion exists with the naming of this project over the years, having been referred to as both the Fintech Unit and the Fintech Office within the Cabinet Office. Item 4, though, specifically seeks the staffing and budget information from the beginning of the Unit's formation by the Cabinet Office, which was in 2018. The Cabinet Office did not clarify with the Applicant that the only information sought was details from November 2020.
39. For similar reasons as set forth in paragraph 35 above, the Cabinet Office was not justified in concluding that it did not hold records related to the staffing and budget of the Fintech Unit within the Cabinet Office from at least 2018 to November 2020. The Information Commissioner also observes that some information responsive to item 4, such as the actual budget expenditures for the Fintech Unit might be available to the public without the need for a PATI request, by virtue of section 6(5) (requiring public authorities to make their quarterly expenditures available to the public when asked for).
40. The Cabinet Office's justification for transferring items 1 and 4 is not considered further.

#### Items 2 and 3

41. In contrast, items 2 and 3 reasonably appear to be records that the Cabinet Office would not be expected to hold, but instead would be held by the EDD or another public authority as the current information related to fintech or DAB companies. Specifically, for item 2, 'job creation' is referred to on the FinTech Bermuda website hosted by the EDD, as being a core socio-economic benefit of fintech business establishment on the island. Given that the Office of Fintech lists jobs as a benefit of fintech business on its official website, it was reasonable for the Cabinet Office to initially conclude that EDD holds records about the number of jobs in Bermuda's fintech sector.
42. The Cabinet Office was justified in concluding that because it no longer had responsibility for the Fintech Office, it did not hold records responsive to items 2 and 3.

[2] Whether the original public authority knows that one or more other public authorities hold records responsive to the request

43. The Cabinet Office had a reasonable basis for initially concluding that the EDD would hold records responsive to the request because the EDD holds records related to the current information about the Fintech Office and its work.<sup>10</sup>
44. EDD's response to the transferred PATI request explained that EDD does not actually hold information about the number of jobs created (item 2), but indicated that the most recent Budget Brief from the Minister for Economy and Labour may provide some information. The Information Commissioner notes that if this is so, that Ministry Headquarters may have additional records to support the figures included in the Budget Brief.
45. EDD also explained that it does not hold a list of fintech or DAB companies with a physical presence on the island (item 3) Instead, the Bermuda Monetary Authority publishes a list of companies licensed under the Digital Assets Business Act 2018.
46. In hindsight, the Cabinet Office would have benefitted from first asking EDD if it held these types of records, prior to transferring items 2 and 3 and consistent with paragraphs 14.4.5, 16.1 and 16.2 of the [Minister's Practice Code on the Administration of the PATI Act \(Practice Code\)](#). The Practice Code emphasises that the original public authority should contact the other the other public authority to confirm the likelihood that it holds the requested records, which is often done in practice via a phone call by one Information Office to another.<sup>11</sup> This does not appear to have been done with this PATI request. If the Practice Code had been followed, it may have resulted in the Applicant promptly receiving more accurate information about where the requested records were held. The Cabinet Office may wish to revisit its adherence to the Practice Code when handling future PATI requests.
47. In any event, the Cabinet Office had a reasonable basis to know that another public authority held records responsive to items 2 and 3 of the PATI request, and any procedural missteps concerning specifically where to transfer the request have already been remedied.

## *Conclusion*

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<sup>10</sup> The Cabinet Office initially transferred this request to the Ministry Headquarters with supervision over EDD, but this misstep was corrected the same day and the transferred PATI request was sent to EDD.

<sup>11</sup> These paragraphs of the Practice Code also requires the original public authority to establish that it does not hold the requested records, prior to considering a transfer.

48. The Information Commissioner is satisfied that the Cabinet Office was justified in transferring items 2 and 3 of the PATI request in accordance with section 13(5) of the PATI Act.
49. The Information Commissioner is not satisfied that the Cabinet Office was justified in transferring items 1 and 4 of the PATI request in accordance with section 13(5).

## Decision

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The Information Commissioner finds that the Cabinet Office was justified in transferring items 2 and 3 of the request in accordance with section 13(5) of the Public Access to Information (**PATI**) Act 2010. The Information Commissioner further finds that the Cabinet Office was not justified in transferring items 1 and 4 of the request.

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

- affirms that part of the internal review decision by the Cabinet Office transferring items 2 and 3,
- annuls that part of the internal review decision by the Cabinet Office transferring items 1 and 4, and
- orders the Cabinet Office to conduct a reasonable search for records responsive to items 1 and 4 of the request as instructed in the confidential search instructions attached to the Information Commissioner's over letter to the Cabinet Office, and to issue a new initial decision on any newly located records to the Applicant in accordance with the PATI Act and PATI Regulations 2014.

The Information Commissioner requires the Cabinet Office's compliance, as directed by this Decision and accompanying Order on or before **Wednesday, 10 April 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 enforcement in the same manner as an Order of the Supreme Court.

Gitanjali S. Gutierrez  
Information Commissioner

**28 February 2024**

## Appendix: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Request for access

- 13 (5) where a request under this section is received by a public authority and any record requested is not held by that authority but to the knowledge of that authority, is held by one or more public authorities, the public authority that received the request shall no later than five working days after the receipt of the request cause a copy of the request to be given
- (a) to that other public authority: or
  - (b) in the case of more than one other public authority, to the authority whose functions are, in the opinion of the head of the public authority that first received the request, most closely related to the subject matter of the request.

### 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.

#### Transfer of Request

- 8 (1) As soon as practicable after receipt by the public authority of an application the information officer shall make a determination under section 13(5) of the Act as to whether the application should be referred to another public Authority.
- (2) where an application is transferred to another public authority under section 13(6), the information officer shall within five working days dispatch correspondence to the applicant indicating that the public authority has transferred the application to the appropriate public authority, naming the authority.

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