

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2019

Public Authority: Department for Environment, Food and Rural Affairs (DEFRA)

Address: Nobel House
Area 4a
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested DEFRA to disclose all correspondence and communications between Michael Gove and the European Research Group (ERG). DEFRA confirmed that it considers all communications of this nature are party political, do not relate to departmental business and so are not covered by FOIA. However, it has carried out all necessary searches and no information is held.
2. The Commissioner's decision is that on the balance of probabilities DEFRA does not hold any recorded information falling within the scope of the request. She therefore does not require any further action to be taken.

Request and response

3. On 29 August 2018, the complainant wrote to DEFRA and requested information in the following terms:

"It was reported today that Michael Gove contributed to a WhatsApp conversation with the European Research Group.

"A rare sighting of @michaelgove in the ERG @Whatsapp group. He tells them all to basically calm down about the French fisherman attacking

British fisherman. It has been a long journey from Aberdeen to Surrey,"
<https://twitter.com/EuroGuido/status/1034833531107770368>

Since June 2017 I would like to request all correspondence and communications between Michael Gove and the European Research Group. I ask you to search through WhatsApp records.

By 'correspondence and communications', I define this as including, but not limited to, the following:

- Emails (and their attachments)
 - Text/WhatsApp messages
 - Newsletters from the ERG
 - Reports/briefings/press releases produced/written by the ERG
 - Letters"
4. DEFRA responded on 11 September 2018. It stated that it does not hold any correspondence or communications between the Secretary of State and the ERG and so the requested information is not held. It also said that it cannot verify whether the information in the tweet referred to in the request is correct. But if it is DEFRA would not hold that information as the WhatsApp group referred to in the request would fall under Mr Gove's political, rather than ministerial, role.
 5. The complainant requested an internal review on 7 October 2018.
 6. DEFRA carried out an internal review and notified the complainant of its findings on 3 December 2018. It upheld its initial decision.

Scope of the case

7. The complainant contacted the Commissioner on 20 December 2018 to complain about the way her request for information had been handled. She stated that she is concerned about DEFRA's determination of what counts as a political role and a ministerial role and that DEFRA should conduct further searches of its records. She believes the request engages Mr Gove's ministerial role and that DEFRA should carry out further searches, especially among WhatsApp messages, for the Secretary of State's communications with ERG.
8. The Commissioner considers the scope of her investigation to be to determine whether on the balance of probabilities DEFRA holds any recorded information falling within the scope of the request and therefore the FOIA.

Reasons for decision

9. Section 3(2) of the FOIA states that for the purposes of this Act, information is held by a public authority if –
 - (a) it is held by the authority, otherwise than on behalf of another person, or
 - (b) it is held by another person on behalf of the authority.
10. When information is held by a public authority solely on behalf of another person, it is not held for FOIA purposes. However, information will be held by the public authority if the information is held to any extent for its own purposes.
11. The Upper Tribunal considered the meaning of section 3(2)(a) in the case of *University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection* [2011] UKUT 185 (AAC, 11 May 2011). It explained that the concept of 'holding' information for FOIA purposes:

"is not purely a physical concept, and has to be understood with the purpose of the Act in mind". This means that information may be present on a public authority's premises (or even its IT network) but not held by the authority for FOIA purposes. To be considered 'held' for FOIA purposes, there has to be "an appropriate connection between the information and the authority".
12. Each case needs to be viewed individually to determine whether a public authority holds information for its own purposes or solely on behalf of another person.

DEFRA's arguments

13. DEFRA stated that the ERG is a political entity, specifically a group of Conservative Party MPs funded by parliamentary allowances. The Independent Parliamentary Standards Authority (IPSA) lists the ERG as a "pooled service organisation", specifically "for Conservative MPs" and has no involvement over DEFRA's functions in policy making.
14. Given the above, it maintains that any political correspondence that the Secretary of State may have had on *all* communications equipment with members of the ERG is not relevant to its business as it would not have influenced any policy formulation and is therefore not held by DEFRA for the purposes of FOIA. It argued that departmental correspondence which does impact policy formulation would indeed be relevant

information to the request but it has not identified any recorded information to that effect.

15. It went on to say that section 3(2) of the FOIA sets out the legal principles that establishes whether information is held for FOIA purposes and section 3(2)(a) is relevant to this case. It stated that the definition of this section is when information is held by a public authority solely on behalf of another person, it is not held for FOIA purposes. However, information will be held by the public authority if the information is held to any extent for its own purposes.
16. It maintains that any potential political information would not fall within the definitions set out in section 3(2)(a).
17. That being said, DEFRA confirmed that it has checked with the Secretary of State's office in relation to all records *outside* of the WhatsApp messages and has been informed that reasonable searches of potential depositories have been made. The search consisted of seeing if DEFRA had any communications with the entirety of the ERG or any individual/group explicitly representing the ERG. It also searched for any communications not just communications relating to the tweet and the fishing incident. These searches resulted in no recorded information being located.
18. Regarding WhatsApp messages, it stated that considering the ERG is made up solely of Conservative MPs, it follows that any communications in relation to this WhatsApp group are political and parliamentary, rather than official departmental business relating to DEFRA. For this reason, it confirmed that no searches have been undertaken in relation to this form of communication aside from confirming with the Secretary of State that no departmental communications took place on that chat. DEFRA advised that it believes this is a reasonable approach to this part of the request because the focus of the request is specifically about speculative political information.
19. DEFRA referred to the case of *University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection* [2011] UKUT 185 (AAC, 11 May 2011) as detailed in paragraph 11 above and advised that it acknowledged what the Upper Tribunal said.
20. In this case DEFRA argued that the subject matter of the request is a speculative tweet from a political gossip website on a topic which, according to the complainant, was a dispute with a French scallop fisherman rather than governmental policy on the EU exit. DEFRA said that even if the tweet is correct, the information would be Conservative party members politically discussing an issue with other Conservative

party members, rather than a minister discussing or formulating government policy, and therefore there is not an appropriate connection.

The complainant's arguments

21. The complainant considers the request engages Mr Gove's ministerial role. She stated that according to the IPSA in 2017/18 and 2016/17 Mr Gove subscribed to the ERG – a research service provider. She stated that it is well known that the ERG sends research materials to its subscribers and also arranges meetings. These materials are about the UK's relationship with the EU and the ERG is known for its hard Brexit stance. The complainant believes that Mr Gove has been receiving communications, such as newsletters and other research materials from the ERG and therefore she asked DEFRA to conduct searches.
22. The complainant advised that, acting under Mr Gove's lead, DEFRA is having to make preparations for Brexit. The ERG's materials contain research on Brexit and would highly likely include topics which fall within DEFRA's remit. She stated that these materials received by Mr Gove could potentially inform him of issues relating to Brexit or even influence DEFRA policies, thereby engaging his ministerial role.
23. The complainant went on to say that at the time of the request there was much press coverage over Mr Gove's comments on the fishing industry, which clearly falls under DEFRA's remit. As an example, the complainant stated in the July the Secretary of State said that the fishing industry will get a larger share of domestic catch after Brexit once the UK decides access to its own waters and also said that the UK would be in the "driving seat" in quota negotiations once the UK leaves the EU's Common Fisheries Policy. Additionally, the complainant referred to late August and Mr Gove defending British scallop fishermen involved in the clashes with French rivals. The complainant confirmed that DEFRA put out the following statement on its news blog:

Environment Secretary Michael Gove said:

24. *“ My heart goes out to the British fishermen who were caught up in the terrible scenes that we saw happen earlier this week. They were fishing entirely legally, they had every right to be in those waters and we talked to the French authorities in order to ensure that we have a protocol. These are French waters - it's the responsibility of the French to ensure that those who have a legal right to fish can continue to fish uninterrupted .”*
25. The complainant argues that for Mr Gove to make a statement on the situation it clearly involved his ministerial role. The complainant said

that it was then reported by the website Guido Fawkes that Mr Gove had discussed the clashes in the ERG WhatsApp group, again making a statement on the situation that clearly involved his ministerial role.

26. The complainant stated that DEFRA must have access to its Secretary of State's WhatsApp messages when FOIA requests are made. The complainant believes the type of information falling within the scope of her request would be the type of information held for the purposes of the FOIA and therefore DEFRA should carry out further searches, especially among WhatsApp messages.

The Commissioner's decision

27. The Commissioner considers the likelihood of any communications between Michael Gove and the ERG containing departmental business to be small. The ERG is a research support group for those Conservative MPs who choose to subscribe. The likelihood therefore is that any communications between Michael Gove and the ERG will be party political. However, the Commissioner would expect DEFRA to make the necessary searches if a request is received to check whether in fact any communications are held which do contain departmental business and which would therefore be caught by FOIA.
28. In its submissions to the Commissioner DEFRA clarified that its reference to the 'original Policy Team' in its internal review response was referring to Michael Gove's private office. Therefore Michael Gove's private ministerial office was contacted whilst conducting the necessary searches, all reasonable searches of potential depositories were made and no recorded information was found. It explained that the search consisted of seeing if DEFRA had any communications with the entirety of the ERG or any individual/group explicitly representing the ERG which resulted in no information held within the scope of the request being located.
29. With regards to WhatsApp, DEFRA confirmed to the Commissioner that no physical searches of this form of communication have taken place. However, it did make enquiries to Michael Gove and he confirmed that no departmental communications took place on that chat. In her guidance on official information held in personal email accounts, the Commissioner states that:

"Where a public authority has decided that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the public authority's own system, it will need to ask that individual to search their account for any relevant information."

The relevant guidance can be accessed here:

https://ico.org.uk/media/for-organisations/documents/1147/official_information_held_in_private_email_accounts.pdf

The Commissioner is satisfied that this is a reasonable approach to take in this particular case and would not require any further searches of this form of communication to be performed. It has directly asked Michael Gove whether any departmental business took place on this chat and he has confirmed that no departmental communications took place via WhatsApp.

30. Additionally it is noted that the request referred to it being reported that day that Michael Gove contributed to a WhatsApp conversation with the ERG. The Commissioner can find no evidence to verify this statement or anything in the public domain. It is therefore an unverified report. Even if the report could be verified, the Commissioner considers what was being said is party political – it was allegedly telling them all to 'calm down' about the fishing incident – rather than being departmental or government business.
31. Overall the Commissioner is therefore satisfied that on the balance of probabilities DEFRA does not hold any recorded information falling within the scope of the request.

Right of appeal

32. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Samantha Coward
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