

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 01 March 2012

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision

1. The complainant made a request under Freedom of Information Act ("the Act") to the Department for Education (DfE) for details of emails sent by the Secretary of State for Education Michael Gove to a named individual. In response the DfE said that it held no information falling within the scope of the request. The complainant asked the Commissioner to review the DfE's handling of his request and provided the Commissioner with a copy of an email sent from a private email account. He alleged that details of this email would fall within the scope of the request. The Commissioner has reviewed this email and found that whilst it was sent from a private email account it was held on behalf of the DfE for the purposes of the Act. By failing to disclose details of the email the DfE breached section 1 of the Act.
2. Although the complainant already has the requested information, this is not as a result of official disclosure by the DfE. In order to comply with the requirements of the Act, the DfE must take the following steps:
 - Disclose to the complainant the information falling within the scope of his request of 1 August 2011; or
 - Issue a valid refusal notice in accordance with the provisions of section 17 of the Act.
3. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 5 July 2011 the complainant emailed the DfE to make the following freedom of information request:

"I would like to request the subject lines of any e-mails received by Lee Bailey from (or on behalf of):

- a) Henry de Zoete*
- b) Dominic Cummings*
- c) Elena Narozanski*
- d) Sam Freedman*
- e) Michael Gove*

that were sent between December 13th 2010 and January 17th 2011, and the dates and times when they were sent."

"I would also like the subject lines of any e-mails sent by Michael Gove from (or on his behalf) where the recipient list includes any one of the following:

- a) Henry de Zoete*
- b) Dominic Cummings*
- c) Elena Narozanski*
- d) Sam Freedman*

where the e-mails were sent between December 13th 2010 and January 17th 2011, and the dates and times when they were sent."

5. It may be helpful to say a little here about the identities of the individuals referred to in the complainant's request. First of all, the Commissioner notes that at the time of the request the individuals referred to at a) and c) were special advisers within the DfE. Often referred to as "SPADS" special advisers provide a Minister with political advice and assistance where it would be inappropriate for traditional civil servants to be involved. Special advisers are personal appointees of the Secretary of State employed as temporary civil servants. The individual at part d) was a permanent civil servant within the DfE. The Commissioner understands that the individual referred to at part b) was at the time of the request unconnected with the Department and Michael Gove (part e) was of course the Secretary of State for Education.
6. The DfE responded on 1 August 2011 when it refused the request under section 12(1) of the Act on the grounds that the cost of complying with

the request would exceed the appropriate limit of £600. There then followed further email exchanges between the complainant and the DfE the result of which was that the complainant submitted a refined request on the same day which the DfE interpreted as a request for:

"The subject lines, dates and times of emails sent from the Secretary of State's accounts to Dominic Cummings as a main or copy recipient between 26 and 30 December 2010. This excludes emails sent on his behalf by a private secretary."

7. The DfE responded to this refined request (from hereon in "the request") on 9 September 2011 when it informed the complainant that following a search of the department's electronic records it had established that it did not hold the requested information.
8. On 14 September 2011 in response to a further query from the complainant, the DfE confirmed that the Secretary of State was not asked to "sign-off" the response to the complainant's request and that a search for any information falling within the scope of the request had been conducted on the relevant "official email account" by a member of the Secretary of State's private office.
9. On 27 September 2011 the complainant asked the DfE to carry out an internal review of its handling of his request.
10. The DfE presented the findings of its internal review on 25 October 2011 at which point it upheld its decision that the requested information was not held.

Scope of the case

11. 25 October 2011 the complainant contacted the Commissioner to complain about the DfE's alleged failure to comply with his freedom of information request.
12. In submitting his complaint the complainant provided the Commissioner with a copy of an email ("the email") dated 29 December 2010 and which appeared to have been sent by the Secretary of State Michael Gove to Dominic Cummings, amongst others. The email was sent from a private, non-departmental email account. The complainant contends that details of the email would fall within the scope of his request and that by failing to identify this information the DfE was in breach of the Act.

Reasons for decision

13. Upon receiving the complaint the Commissioner approached the DfE to draw its attention to the email referred to by the complainant. The Commissioner asked the Department whether it was aware of the existence of the email at the time of the request and whether it would accept that it would fall within the scope of the request. The Commissioner also asked it to explain what steps it took to search for information falling within the scope of the request and in particular whether it searched any private email accounts when looking for any relevant information.
14. The DfE has explained to the Commissioner that it was not aware of the email at the time of the request and that it only became aware of its existence after the email was referred to in a press article. It said that it only became aware of the full contents of the email after it was sent a copy by the Commissioner.
15. In its response to the Commissioner the DfE explained that it had not searched any private email accounts when it received the request and that only the Secretary of State's official account was searched. The request was specifically for "information from the Secretary of State's accounts" excluding "emails sent on his behalf by a private secretary" and therefore no further email accounts were searched.
16. At this point in time the DfE was following the advice from the Cabinet Office which was that government departments did not have the authority to search the private email accounts of members of staff. In December 2011 the Commissioner produced guidance on the issue of information held by public authorities on private email accounts. However, at the time the request was received the guidance had not been produced and the Commissioner acknowledges that the full implications of FOIA in relation to this issue may not have been well understood at that time. This is the first Decision Notice in which the Commissioner has had to address the issue.

The public authority's view

17. In answer to the Commissioner's query as to whether the email would fall within the scope of the request, the DfE said that in its view the email was not held for the purposes of the Act. This is because, it said, the email was political rather than governmental. The Commissioner's guidance suggests that an appropriate test to decide if information on a private email account is held by a public authority is whether the

information “amounts to” public authority business, or whether information was “generated in the course of conducting the business of the public authority”. The DfE agreed that this was a reasonable test and that therefore it had considered whether the email of 29 December was generated in the course of conducting the business of the department or alternatively whether it was “generated in the course of a political discussion”. It concluded that the email was a political discussion; it was sent by the Secretary of State in his political capacity to his political advisers and colleagues.

The complainant's view

18. For his part, the Complainant argued that the information within the email related to the business of the department rather than being party political. He provided a detailed submission to support his view. The complainant stressed that his request was for only the subject line and the date/time the email was sent. He argued that this information would be subject to the Act so long as any part of the email amounted to government business, although he said that in his view the email was overwhelmingly official departmental business rather than a party political communication.

The Commissioner's view

19. The Commissioner has considered all these arguments and would say first of all that he acknowledges that this is a novel issue and one which may not have been anticipated when the Freedom of Information Act was passed. Given the unique role played by special advisers it is not always easy to draw a clear line between official information held by a public authority and party political information. However, in this particular case the Commissioner considers, on balance, that the requested information is held for the purposes of the Act. The DfE contends that the information is not held because the email in question is “political”. However, almost all the work of a special adviser, by definition, has a political dimension to one extent or another. Equally, the Secretary of State is a political figure, representing his party in government. There is therefore an inevitable overlap between matters of party policy and government policy. To accept the DfE's interpretation would be to, in effect, create a blanket exemption for communications between ministers and special advisers. In the Commissioner's view the DfE has created an artificial distinction between “official” information which is subject to the Act and “political” information which is not.
20. The Act makes no distinction between political information and non-political information. However, the Commissioner considers the nature of the disputed information to be a highly relevant factor when deciding

whether the information is held for the purposes of the Act. Political information is still held by a public authority if it amounts to the business of the public authority. Only if the information is “party political”, primarily constituting party political activity, can it be classed as private information or personal information, indicating that it is not held on behalf of the public authority. Therefore, the Commissioner has considered whether the content of the email amounts predominantly to party political activity or government activity.

21. Although the Commissioner does not accept the DfE’s argument that the email is not held because it is a political discussion, neither does he accept the complainant’s submission that so long as any part of the email amounts to government business, the requested information (the subject line, date and time sent) will be held for the purposes of the Act. Rather, the Commissioner considers that the correct approach is to consider the purpose of the email and whether the majority of the contents of the email amount to the business of the department. The Commissioner has reviewed the contents of the email and considered the identities of the sender and recipients to reach a judgement on the focus of the email. Having done so, he has decided that the majority of the contents of the email amount to the business of the department and that therefore the requested information was held for the purposes of the Act. In reaching his decision the Commissioner has taken the following factors into account.
22. The Commissioner has firstly considered the sender and recipients of the email. The sender of the email was the Secretary of State for Education Michael Gove and the recipients were two special advisers, a civil servant in the DfE, a Conservative MP and Dominic Cummings whom the complainant referred to in his refined request and who at that point was unconnected with the department but who was later employed as a special adviser in February 2011. Permanent civil servants are required to be politically impartial and therefore the fact that the email was sent to a civil servant would appear to be very relevant. The Commissioner notes that the DfE has said that this civil servant was sent the email in error. The Commissioner is not in a position to dispute this, but he also notes that the email was sent to the civil servant’s private rather than official email account. The Commissioner considers this to be particularly relevant given the allegation that the Secretary of State and special advisers were in the habit of using private email accounts to conduct official department business.
23. It is also worth considering who the email was not sent to. Under their Code of Conduct special advisers are prohibited from briefing the media on purely party political matters which instead “must be handled by the party machine”. Yet no conservative party officials were recipients of the

email. This is further evidence that the email amounts to departmental rather than party political information. In the Commissioner's view the email can be characterised as a significant step in the development of a government communications strategy. The email is essentially an action plan and a list of key events or issues in the work of the department for the month of January 2011. The focus of the email is about publicising the work of the DfE and amounts to the promotion of government policy. This is supported by the fact that much of what was discussed in the email subsequently resulted in official departmental announcements.

24. For example, one section of the email refers to the government's academies programme and how best to publicise progress made to date. It is apparent that part of the discussion in the email led to the following news story on the DfE website:

<http://www.education.gov.uk/inthenews/inthenews/a0071852/more-than-one-in-ten-secondary-schools-now-academies-with-many-more-in-the-pipeline>

25. Case studies of schools that had gained academy status were also published on the DfE website; this having previously been suggested in the email. It is also possible to identify what became of other entries in this action plan via a brief search of the DfE website. For example stories to publicise the government's Free Schools Conference were published on the website after having been discussed in the email. Other entries including references to planned speeches by government ministers were also subsequently published by the DfE. The Commissioner is not aware of any similar announcements made via the Conservative party apparatus.
26. Elsewhere, some sections of the email are clearly not party political, or indeed in any sense political, but instead are routine questions of civil servants; asking for further details on the progress of departmental policy. The Commissioner does not see how this information could be seen as anything other than government business. Indeed, the complainant had argued that if the email had been retrieved from an official, government email account there would be no question that details of the email would be considered to be in the scope of his request. The Commissioner is inclined to agree with this view.
27. Having taken all the circumstances into account the Commissioner has concluded that the majority of the contents of the email amounts to the business of the department and that therefore the subject line, details of the date and time it was sent would fall within the scope of the request. By failing to disclose this information to the complainant the DfE breached section 1(1)(b) of the Act.

Other matters

28. As stated above, the Commissioner acknowledges that this Decision Notice addresses a novel issue which may not have been anticipated when the Act was passed. In his recently published guidance on official information held in private emails, he acknowledges the practical difficulties public authorities face when the need to search private email accounts is identified. The Commissioner is conscious that in this case, he has only been able to reach a decision because the email was sent to him by the complainant. He has acknowledged in this decision notice that officials at the DfE were not aware of the full contents of the email until the Commissioner forwarded it to them. Although he has some sympathy with the officials dealing with this matter in these circumstances, consideration of the means by which the email came into the hands of the complainant is not within his remit. He notes, however, that the authenticity of the email sent to him by the complainant has not been disputed.
29. The use of private email accounts instead of departmental accounts for the conduct of official business is a matter of concern to the Commissioner for a number of reasons. Adherence to good records management practice should be encouraged to promote data security, to preserve the integrity of the public record and to ensure effective compliance with access to information obligations. The Commissioner's guidance on this subject is available here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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

Graham Smith
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