

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2020

Public Authority: The Cabinet Office

Address: 70 Whitehall

London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for emails sent to and from specified personal email addresses.
2. The Cabinet Office has refused to comply with the request on the basis of section 14(1) of the Act.
3. The Commissioner's decision is that the Cabinet Office has not demonstrated sufficient burden to engage section 14(1) of the Act.
4. The Commissioner requires the Cabinet Office to take the following steps:
 - Issue a fresh response that does not rely on section 14(1) of the Act.
5. 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

6. On 12 September 2019, the complainant wrote to the Cabinet Office and requested information in the following terms:

“Provide a copy of all the emails the following individuals – Hugh Bennett, Simon Burton, Dominic Cummings, Roy Stone, Nikki Da Costa, Tom Irvén, Christopher James, Lee Cain, Beatrice Thompson – sent to or received from the following email addresses: [three personal email addresses], over the period going from the 23 July 2019 to the day of this request, Sept 10 2019.”

7. On 4 October 2019, the Cabinet Office provided its response. The Cabinet Office confirmed that it was relying on section 12 to refuse to comply with the request as it considered that the cost of complying would exceed the appropriate limit.
8. On 4 October 2019, the complainant requested an internal review of the handling of this request. He disputed that searching eleven email accounts for a short time period would exceed the appropriate limit.
9. On 13 November 2019, the Cabinet Office provided the outcome of its internal review. The Cabinet Office confirmed that its reliance on section 12 was incorrect and that it was relying on section 14(1) of the Act to refuse to comply with the request. The Cabinet Office confirmed that it was relying on section 14(1) on the basis of burden. It explained that the *“busy and important roles”* of the named individuals meant that the amount of correspondence and the sensitivity of this correspondence would be very high.
10. The Cabinet Office explained that it considered complying with the request would place a disproportionate burden on the Department's resources. The Cabinet Office stated that as the complainant had not specified the nature of the information he was seeking, it believed that his request is pursuing a relatively trivial or highly personalised matter of little, if any benefit, to the wider public. The Cabinet Office also stated that it considered the public interest in disclosure is very weak as it would not hold any serious purpose or value.

Scope of the case

11. The complainant contacted the Commissioner on 13 November 2019 to complain about the way his request for information had been handled.

12. The Commissioner considers that the scope of this case is to determine whether the Cabinet Office is entitled to rely on section 14(1) to refuse to comply with the request dated 12 September 2019.

Reasons for decision

Section 14(1) – Vexatious Requests

13. Section 14(1) of the Act allows a public authority to refuse to comply with a request if it is considered to be vexatious.
14. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which will cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
15. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the Cabinet Office in this case.
16. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information AND
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner AND
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

The Cabinet Office's position

17. The Cabinet Office provided the Commissioner with a background to the request. It confirmed that eight of the named individuals were special advisers at the Cabinet Office within the time period specified in the request. The Cabinet Office confirmed that special advisers are

temporary civil servants¹ whose roles are to provide a party political perspective to the advice and assistance that Ministers receive. The Cabinet Office confirmed that the remaining individual, Sir Roy Stone, was a civil servant during the requested time period, working as Principal Private Secretary to the Chief Whip.

18. The Cabinet Office explained that, as noted in the Code of Conduct for Special Advisers², special advisers add a political dimension to the advice and assistance available to the Ministers and reinforce the impartiality of the permanent civil service by "*distinguishing the source of political advice and support*". The Cabinet Office set out that they assist Ministers where government and party political work overlaps and where it would be inappropriate for permanent civil servants to become involved.
19. The Cabinet Office stated that in view of the named special adviser's roles, any "*notional*" emails exchanged between the named special advisers and the named email addresses "*can be expected*" to be of a personal or party political nature and not relate to official Cabinet Office business. The Cabinet Office acknowledged that emails sent in a personal or political capacity do not fall within the scope of the Act.
20. The Cabinet Office explained that it had only considered the official email addresses of the named individuals and set out that if the complainant had intended to refer also to the private accounts of the named individuals, it would not be able to search these without approaching these individuals and asking them if those accounts hold emails containing official Cabinet Office business.
21. The Cabinet Office explained that while it would not exceed the appropriate limit at section 12, identifying the information which falls within the scope of the request would be a significant part of the burden for the purpose of section 14.
22. The Cabinet Office stated that it has no reason to believe that any of the named individuals will have sent emails containing official Cabinet Office business to the named private email accounts in breach of Cabinet Office policy.

¹ Appointed in accordance with Part 1 of the Constitutional Reform and Governance Act 2010.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832599/201612_Code_of_Conduct_for_Special_Advisers.pdf

23. The Cabinet Office explained that although any notional emails exchanged between Sir Roy Stone and the private email accounts would be more likely to contain official Cabinet Office business in view of Sir Roy's role as a permanent civil servant, the Cabinet Office emphasised strongly that it has no reason to believe that Sir Roy would have sent such emails.
24. The Cabinet Office explained that it has guidance for its staff on the use of electronic devices, including the use of email and messaging applications for the transmission of official communications.
25. The Cabinet Office confirmed that this guidance states that Cabinet Office staff *"must only send and receive information using approved applications when working at OFFICIAL³"*.
26. The Cabinet Office confirmed that its guidance to Government departments on the use of private email refers to the use of non-government email systems for official business. It observes the point that determining whether information is generated in the course of conducting official Government business is not always clear cut. The Cabinet Office set out a number of factors which are relevant:
 - The originator and recipient of the information – for example, if the sender and recipient are civil servants, this might suggest that the email is Government business.
 - The capacities of the originator and the recipient of the information – for example, Ministers can act in different capacities.
 - The function the information is being provided for – for example, whether it was to inform policy discussion or decision, whether it should be part of the public record. An exchange mentioning a departmental policy does not necessarily amount to Government business.
27. The Cabinet Office explained that consideration of the above factors in respect of information found during searches would form a considerable part of the burden undertaken by the Cabinet Office in dealing with the complainant's request. The Cabinet Office contends that, given the potentially large volume of correspondence that could have been generated and the care which ought to be taken in determining the

³ The lowest Government Security Classification of information

factors above in respect of that correspondence, it could potentially take a considerable amount of time and resources to determine what information is official (and therefore held for the purposes for the Act) and what information is private or party political (and therefore not held for the purposes of the Act). The Cabinet Office considers that such time and resources could be better deployed elsewhere.

28. The Cabinet Office considers that the grounds for not complying with the request as generating a grossly oppressive burden are strong irrespective of whether an exacting search was to find that official Cabinet Office business had in fact been contained in emails exchanged between the named individuals and the private emails accounts.
29. The Cabinet Office noted that the request was for "*all emails*" between the named individuals and the private email accounts over a period of just over six weeks. The Cabinet Office confirmed that the complainant has not sought to narrow the scope of this request so that it concerns a certain subject area or a reduced time period. The Cabinet Office explained that, as presently drafted, the request encompasses all emails irrespective of their gravity and would include correspondence in which the named individuals or the private emails accounts were copy recipients (rather than the principle recipients).
30. The Cabinet Office explained that the named individuals occupied busy roles in Government during the specified time period. It stated that this time period coincided with the appointment of a new Ministry in which there was a considerable amount of work to be undertaken to establish its agenda. It was also heavily preoccupied with the unresolved challenge of securing an exit agreement with the EU and ensuring its passage through Parliament. The Cabinet Office explained that extracting the UK from the EU in the circumstances confronted by the Government in July 2019 was one of the most demanding challenges faced by a government in recent decades.
31. The Cabinet Office considers that in view of this, the volume of searchable information sought by the complainant is potentially substantial and there would be considerable effort in determining what is held for the purposes of the Act and, if so, how it should be dealt with in view of the request.
32. The Cabinet Office explained that it had concerns about potentially exempt information as some of the individuals named in the request were intimately involved in providing advice for decisions that relate to the direction of government in the UK during the time period covered by the request. For example, Mr Cummings was a senior adviser to the Prime Minister, Mr Cain was Director of Communications and Ms Da Costa was Director of Legislative Affairs. The Cabinet Office considers

that it follows that correspondence generated by the named individuals will include content of a high level nature relating to the overall direction of Government policy and in particular, to the then consuming issue of the UK's exit from the EU.

33. The Cabinet Office considers that it is very likely to be of a sensitive nature and would warrant close attention. The Cabinet Office confirmed that where it would constitute official information that would be held for the purposes of the Act, there is a likelihood of it being exempt from disclosure either under section 35(1)(a) of the Act, being information relating to the formulation or development of government policy or under section 36(2) of the Act, being information the disclosure of which would, or would be likely to, inhibit the free and frank exchange of advice, the free and frank exchange of views for the purposes of deliberation or would, or would be likely to, prejudice the effective conduct of public affairs.
34. The Cabinet Office explained that any information which is held for the purposes of the Act would be likely to be scattered throughout that correspondence and any exempt information is likely to be scattered still further.
35. The Cabinet Office explained that isolating information would not be a simple exercise especially in view of the request seeking disclosure of "all emails" between certain individuals during a period of more than six weeks.
36. The Cabinet Office explained that it had considered the purpose and value of the request and it noted that the complainant's request closely followed, by three days, by the laying down of a motion in the House of Commons by the Rt Hon Dominic Grieve MP for the presentation of a Humble Address for Ministers to be directed to disclose communications from the same individuals concerning the prorogation of Parliament in September 2019.
37. The Cabinet Office explained that the Address was criticised in Parliament by the Chancellor of the Duchy of Lancaster as "*a trawl... a fishing expedition*". The Cabinet Office pointed out that the Humble Address concerned a specific matter which was of evident public concern and that, in contrast, the complainant is seeking communications from those same named individuals to the private email accounts on all matters, without any form of qualification at all. The Cabinet Office stated that the complainant has not stated a particular subject area for the scope of his request and, as far as it is aware, he has not done so in his submissions to the Commissioner.

38. The Cabinet Office confirmed that the complainant had stated his purpose for the request is to ascertain the extent to which Mr Cummings uses personal emails for Government business. The Cabinet Office set out that it has no reason to believe that any of the named individuals, including Mr Cummings, were using personal email accounts for the transaction of official business during the time period referred to in the request.
39. The Cabinet Office considers that the complainant's pursuit of "*all emails*" from the named individuals to accounts that it assumes belong to Mr Cummings without any reference to a particular subject area suggests that his motivation is to find out some as yet undefined information about the named individuals or Mr Cummings rather than to ascertain whether there has been a use of personal emails for official Cabinet Office business.
40. The Cabinet Office explained that it therefore believes that the complainant is pursuing what the Commissioner describes in her guidance as "*a relatively trivial or highly personalised matter of little if any benefit to the wider public*". The Cabinet Office considers that the personalised nature of the matter pursued by the complainant is underlined by his identification of nine particular individuals and the personal accounts of one of those individuals.
41. The Cabinet Office confirmed that much information about the internal discussions which were had concerning the matter of the UK's exit from the EU and the prorogation of Parliament in September 2019 was released into the public domain as evidence presented in the case of *R (on the application of Miller) v The Prime Minister [2019] UKSC41*. The Cabinet Office explained that this was one of the dominating issues on the Government's agenda during the time period referred to in the request and are likely to be the primary subject of much of the correspondence that the complainant is seeking.
42. The Cabinet Office stated that with much of the information about key Government decision-making on these matters having already been disclosed, it considers that it is suggestive that the purpose and value of the complainant's request is limited.
43. The Cabinet Office considers that while the Commissioner's guidance states that 'fishing' for information does not, in itself, make a request vexatious in character, it does acknowledge that they can impose a burden on a public authority by obliging it to sift through a substantial volume of information to isolate and extract the relevant details.
44. The Cabinet Office stated again that the complainant's request would require officials to search through a potentially large volume of emails in

order to establish whether or not information is held for the purposes of the Act. The Cabinet Office confirmed that further work would then be required to determine whether the held information was subject to an exemption under the Act.

45. The Cabinet Office considers that, owing to the very widely drafted terms of the request, it will encompass information which is personal, day to day and trivial in character, which it considers would be of no wider value.
46. The Cabinet Office has concluded that the purpose and value of the complainant's request is questionable and certainly does not outweigh the burden which would be imposed on the Cabinet Office by complying with the request.
47. The Cabinet Office considers that the request appears to be motivated by matters which might be described as *"What is interesting to the public [rather than] what is in the public interest to make known"*⁴ and that the resource which would be necessary to handle it would not be proportionate or justified.

The Commissioner's position

48. The Commissioner is not persuaded that complying with the request would impose an oppressive burden on the Cabinet Office.
49. The Cabinet Office has provided no details on the amount of information or time it considers would be involved in complying with the request.
50. The Cabinet Office does not appear to have taken adequate steps to ascertain the extent of the burden that would be imposed by complying with the request and has instead presented hypothetical arguments regarding "notional" emails that "could" be held.
51. The Cabinet Office's submissions focus on the burden of identification and extraction of information within the scope of the request and the public interest in complying with the request.
52. The arguments relating to the identification and extraction of the requested information are relevant where the cost of complying with the request exceeds the appropriate limit set out at section 12. The Cabinet Office has confirmed, however, that these activities would not exceed the appropriate limit.

⁴ *British Steel Corporation v Granada Television Ltd [1981] AC 1096.*

53. Whilst the arguments put forward by the Cabinet Office can be considered as part of the overall burden of complying with a request, given that they are not sufficient to engage section 12, they cannot engage section 14 in isolation. The Cabinet Office would need to demonstrate that it would be required to undertake further activities that would cause the burden of complying to become oppressive.
54. The Cabinet Office has confirmed that due to the nature of the work undertaken by the named individuals, the Cabinet Office would have to consider any identified information for redaction under sections 35 and 36 of the Act.
55. However, in light of the Cabinet Office's confirmation that it has no reason to believe that these emails exist, it is not apparent how the redaction burden of the "notional" emails could be grossly oppressive. If the Cabinet Office does believe this burden to be oppressive, it has provided no details regarding how it came to this conclusion. Instead, it has stated that the redactions would be scattered through the emails it does not believe exist.
56. The Cabinet Office has set out why it considers that the request is "*trivial*", "*highly personalised*" and a "*fishing*" exercise and therefore why it considers that it is not in the public interest to use its resources to comply with the request.
57. The Commissioner disagrees with the Cabinet Office's reasoning. As the Cabinet Office has helpfully pointed out to the Commissioner, the request follows a Humble Address dated 9 September 2019⁵⁵ in which, despite the criticism set out above, Parliament voted in favour of disclosing information regarding the prorogation of Parliament, which included information sent via private email accounts between the named individuals.
58. The Commissioner does not find it surprising that following this Humble Address, a member of the public may wish to understand the extent to which private, and potentially unsecured, email accounts are used for official government business.
59. The individuals named in this request are the same individuals named in the Humble Address. The Commissioner considers that the request is not therefore a "*fishing*" exercise but is following up on information gained via the Humble Address.

⁵⁵ <https://publications.parliament.uk/pa/cm201719/cmagenda/OP190909so24r1.pdf>

60. The Commissioner acknowledges the Cabinet Office's argument that a significant amount of information was disclosed into the public domain via *R (on the application of Miller) v The Prime Minister [2019] UKSC41* however she has been unable to locate this information and notes that the Cabinet Office has not referred the complainant to this information in its responses to his request. She considers that this argument carries little, if any, weight as it assumes the complainant is already aware of the information disclosed.
61. As set out in the criteria listed at paragraph 16, section 14 is most likely to be engaged where a public authority had demonstrated that the request is for a significant volume of information.
62. The Cabinet Office has argued that it would need to review a significant amount of information in order to extract the requested information, however, its position falls down on the basis that it has failed to identify how much information falls within the scope of the request, or potentially falls within the scope of the request. This is no clear evidence that this amounts to a substantial volume of information, only the Cabinet Office's assertion that it does.
63. As the Cabinet Office has failed to demonstrate that the first of the three criteria is fulfilled, the Commissioner's decision is that the Cabinet Office is not entitled to rely on section 14 to refuse to comply with the request.
64. She requires the Cabinet Office to issue a fresh response which does not rely on section 14.

Other matters

65. The Cabinet Office should ensure that it does not unduly restrict its searches by only focusing on .gov email accounts. If the named individuals have used their private emails accounts for official government business, these emails will fall within the scope of the request.

Right of appeal

66. 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

67. 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.
68. 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

Victoria Parkinson
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