

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2022

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested correspondence and other communications, relating to the 9 September 2019 prorogation of Parliament, sent or received by Dominic Cummings (then Chief Adviser to Prime Minister Boris Johnson). The Cabinet Office has asserted that aside from a memo of 15 August 2019 from Nikki Da Costa (Director of Legislative Affairs) they hold no other information within scope of the complainant's request. The complainant also made a meta request for all communications relating to the handling of his substantive request. The Cabinet Office withheld that information under section 36 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that, based on the information available to him at the time of his investigation, on the balance of probabilities, the Cabinet Office does not hold any further relevant information within scope of the complainant's request. However, the Commissioner considers that the Cabinet Office should have carried out more comprehensive and thorough checks and searches at the time of the request. The failure to do so, coupled with Mr Cummings' subsequent departure from the Government, means that the Commissioner has been unable to reach a determination in respect of any relevant information which may have been held by Mr Cummings in his private email account(s) or other personal devices.

Request and response

3. On 11 January 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'All correspondence and other communications (whether formal or informal, in both written and electronic form, including but not limited to messaging services including WhatsApp, Telegram, Signal, Facebook messenger, private email accounts both encrypted and unencrypted, text messaging and iMessage and the use of both official and personal mobile phones) to, from or within the present administration, since 23 July 2019 relating to the 9th September prorogation of Parliament, sent or received by the following individual: Dominic Cummings'.

4. Not having received a response within the required 20 working days, the complainant sent a chaser email to the Cabinet Office on 8 February 2020 and asked for an explanation for the delay.
5. The Cabinet Office provided a belated response to the request on 13 February. The response simply advised that, following a search of their paper and electronic records, they had established that the information requested was not held by the Cabinet Office.
6. The complainant wrote to the Cabinet Office on 16 February 2020 to request an internal review of the response. He advised that there were communications in existence which related to his request and he cited a memo of 15 August 2019 from Nikki Da Costa (Director of Legislative Affairs) on the subject of prorogation, which had been copied to Mr Cummings. The memo had come to light during the judicial review proceedings the previous year, which ruled that the prorogation was unlawful. The complainant contended that this information should have been provided to him in response to his request.
7. The complainant stated that he would like the internal review to address four points:
 - 1) An explanation for the (4 day) delayed response to his request;
 - 2) A list of all sources/ accounts which were checked in relation to his request.
 - 3) All communications relating to his request, which were sent/received by the Cabinet Office, FOI team and Dominic Cummings/his associates during the handling of his request.
 - 4) All communications which should have been provided in the initial response to his request.
8. On 13 March 2020 the Cabinet Office wrote to the complainant and advised him that they had (correctly) treated point 3 of his internal review request as a new 'meta' request and provided him with a

different reference number for that request. In response to the meta request, the Cabinet Office confirmed that they held the requested information but that they were extending the time limit for responding to the request under section 10(3) of the Act. The response informed the complainant that the information was exempt under section 36(2)(b)(i) and (ii) of the FOIA, *'which relates to information that, if disclosed, would adversely affect the delivery of effective central government and other public services'*. The Cabinet Office advised that they had not yet reached a decision on whether the balance of the public interest favoured disclosure of the information and that they hoped to have a response by 14 April 2020.

9. In the event the Cabinet Office did not provide the substantive response to the meta request until 10 June 2020. The Cabinet Office apologised for the delay in responding and confirmed that the information was being withheld under section 36.
10. In respect of the public interest test, the Cabinet Office recognised the public interest in citizens being confident that decisions are taken on the basis of the best available information and the public interest in transparency so as to allow public scrutiny of the manner in which a public authority fulfils its statutory obligations under the Act. The response also acknowledged the general public interest in ensuring that requests were properly considered and that the reasons for the response are justified and recorded.
11. The Cabinet Office stated that public interest factors in favour of withholding the information were that disclosure would be likely to jeopardise the effective handling of FOI requests and internal reviews in future, particularly in the provision of frank advice and opinions. Officials needed to be able to think through all the implications of particular options, and if the requested information were to be disclosed, this would have, or at least would be likely to have, a detrimental effect on the quality of the advice and the way in which it is given. The ability of officials to discuss FOI requests freely and frankly with colleagues would be adversely affected by the disclosure of the information. Taking into account all of the circumstances of the case, the Cabinet Office concluded that the balance of the public interest favoured withholding the requested information.
12. On 3 July 2020 the complainant wrote to the Cabinet Office and requested an internal review of their response to his meta request. The complainant correctly noted that in order for section 36 to be engaged, the exemption required the opinion of the qualified person. He advised that he wanted the internal review to explain why section 36 had been applied by a non-qualified individual, stating, *'as experts representing the Cabinet Office in this matter, you must surely be aware of the qualified person requirement'*. The complainant advised that until he

received a response from the qualified person, he could not comment on the public interest test, as the qualified person may decide to release the requested information to him.

13. The Cabinet Office provided the complainant with their internal review in respect of the meta request on 28 July 2020. The review advised that where the Cabinet Office was relying upon section 36 they would normally include wording to the effect that a Cabinet Office Minister, as the qualified person, had given their opinion that the exemption applies. The Cabinet Office explained that this had been missing from their response on this occasion because, at the time, they did not have the opportunity to seek the qualified person's opinion. The Cabinet Office accepted that they should have done so and apologised for not having done so and for any confusion this may have caused.
14. The Cabinet Office noted that ICO guidance on section 36 states that the exemption can still be engaged if the qualified person gives their reasonable opinion by the completion of the internal review. The Cabinet Office advised that they had now sought the opinion of the qualified person, who was the Minister for the Constitution, and she had given her reasonable opinion that the exemptions at sections 36(2)(b)(i) and (ii) of the Act were engaged.
15. The Cabinet Office referred the complainant to ICO guidance on section 36, which notes that the qualified person is not required to conduct the public interest test, and this test can be carried out by officials. The review confirmed that a fresh public interest test had been conducted, which was similar to that set out in the first request response. The review recognised that the requester was interested in the handling of their own request, *'but beyond this individual interest I see little wider public interest in or benefit from disclosure'*.
16. On 9 August 2020 the complainant wrote to the Cabinet Office in response to the provision of the internal review. He thanked the Cabinet Office for their apology and recognised that although he had *'used up'* his internal review option he was writing in respect of the public interest. The complainant contended that it would be unfair for him not to have the opportunity to provide his arguments regarding the public interest test, since the Cabinet Office public interest test response and qualified person's opinion only came with their internal review response. The complainant stated that, *'it was the fault of the Cabinet Office in creating the need to use my internal review option to challenge your unlawful section 36 exemption'*.
17. The complainant stated that he disagreed with the Cabinet Office contention that the public interest was weighed in favour of non-disclosure. He contended that the basis for the public interest being weighed in favour of disclosure *'is several suspicions of wrongdoing'*.

The complainant asserted that *'it is in the wider public interest if individuals within the Cabinet Office are not acting with the transparency required by the FOI Act'*. He noted that his meta request and his original FOI request were related to communications about the prorogation of Parliament, which the government had been found to have illegally invoked in a Supreme Court case the previous year. The complainant contended that, *'if communications related to this are being actively prevented from disclosure, it is in the wider public interest to know the discussions leading to non-disclosure and any possible implications for the government's illegal action'*.

18. The complainant set out a number of specific grounds for his suspicions of wrongdoing in the matter and stated that whilst he appreciated that there is a need for full and frank discussions, if those discussions had in any way been an attempt to prevent disclosure of an FOI request, *'the individuals are not acting within the spirit, word or intent of the law and are benefitting from the section 36 exemption to hide their wrongdoing'*.
19. On 16 September 2020, the Cabinet Office provided the complainant with their internal review concerning his original request of 11 January 2020. The Cabinet Office apologised for the delay (seven months) in providing the review but gave no explanation for this lengthy delay. The review confirmed that the original response that the Cabinet Office held no information within scope of the request was correct.
20. The review addressed the points which the complainant had made in his internal review request of 16 February 2020.
21. The Cabinet Office apologised for having been *'unable'* to respond to his original request by the statutory deadline and for not having replied to his chaser email of 8 February 2020. They advised that the information search did not conclude until 13 February and a response was cleared and issued immediately.
22. The review confirmed that an email search was conducted on behalf of Dominic Cummings, and Number 10 conducted a wider search. In confirming that no relevant information was held, the review noted that in respect of the complainant's reference to the information provided for the judicial review proceedings, those documents had been re-checked as part of the review and *'there is nothing to or from Dominic Cummings'*. The Cabinet Office advised the complainant that:

'Your FOI request clearly states 'sent or received by the following individual: Dominic Cummings'. Your request does not say 'and/or copied to' Dominic Cummings. Therefore, any information (such as that you refer to in your internal review request) is out of scope'.

Scope of the case

23. The complainant contacted the Commissioner on 13 May 2020 to complain about the way his original request for information had been handled and subsequently contacted the Commissioner on 17 August 2020 to complain about the way his meta request had been handled.
24. As part of his investigation the Commissioner had sight of the information withheld under section 36 in respect of the complainant's meta request of 16 February 2020.
25. During his investigation the Commissioner advised the complainant that this information did not reveal or indicate any wrongdoing or impropriety on the part of the Cabinet Office or individuals involved in processing his original request for information. The Commissioner therefore informally advised the complainant that the public interest in disclosure of the withheld information would be outweighed by the public interest in maintaining the exemption, for the reasons advanced by the Cabinet Office in their response to his meta request. Consequently, the Commissioner proposed to the complainant that the scope of the Commissioner's decision be confined to the Cabinet Office handling of his original information request only.
26. The complainant confirmed that he was happy to accept the Commissioner's independent assessment in respect of his meta request and for the Commissioner's decision notice to focus on the Cabinet Office handling of his substantive (original) request only. The Commissioner is grateful for the complainant's consideration and cooperation in this matter.
27. In submissions to the Commissioner, the Cabinet Office advised that they accepted that they should have relied on section 21 (information already reasonably accessible to the applicant) to withhold the memo of 15 August 2019 from Nikki Da Costa, which the complainant brought to their attention in his request for an internal review. The Cabinet Office apologised for this error.
28. Therefore, the focus of the Commissioner's investigation is to determine whether the Cabinet Office holds information falling within the scope of the complainant's original request of 11 January 2020, other than the Da Costa memo which was already known and accessible to the complainant.

Reasons for decision

Section 1(1): General right of access to information

29. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that may apply. A public authority is not obliged under the Act to create new information in order to answer a request.
30. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner, follows the lead of a number of First-Tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
31. In the circumstances of this case, the Commissioner will determine whether, on the balance of probabilities, the Cabinet Office holds recorded information that falls within the scope of the request.

The Cabinet Office's position

32. In submissions to the Commissioner, the Cabinet Office accepted that it was incorrect for them to have stated, as they did in the internal review of 16 September 2020, that any communications copied to Dominic Cummings were out of scope of the request. The Cabinet Office recognised that, *'clearly, were an email sent to Mr Cummings as the primary recipient or as a copy addressee, he would still have 'received' the communication'*.
33. Whilst the Commissioner welcomes the Cabinet Office's recognition that they were wrong to consider 'copy' emails as being out of scope of the complainant's request, he is concerned that the Cabinet Office could have made such a basic error in respect of a well established position. Although the Commissioner considers that it is unlikely that any 'copy' emails within scope of the request were overlooked/missed by the Cabinet Office when they undertook their checks and searches for the information requested (given the searches described in paragraph 36 below), the Commissioner cannot entirely rule out this possibility, given the Cabinet Office's previous misconception as to the correct scope of the request and its extent.
34. In order to assist his determination as to whether, on the balance of probabilities, the Cabinet Office, at the time of the request, would have held information within scope of the request, the Commissioner posed a number of questions and enquiries to the Cabinet Office with regard to what checks and searches were carried out to try and identify and locate relevant information and what policies were in place with regards to the retention and disposal of information.

35. The Cabinet Office advised the Commissioner that in response to the request, Mr Cummings' acting Private Secretary was asked to carry out relevant searches. She was asked to ensure that a search was undertaken of the relevant *'e-files/paper files and emails to see whether you hold any information that falls within the scope of the request'*. On 27 January 2020 the acting Private Secretary confirmed, following a search of Mr Cummings' records that *'there is nothing referencing "prorogation"'*.
36. In submissions to the Commissioner the Cabinet Office confirmed as follows:
- 'The record management policy on the handling of emails etc within the Prime Minister's Office was introduced in 2004. Under this policy a limit of 3 months was introduced on the No 10 IT system before emails were automatically deleted. There has been no change in that policy. The policy was introduced on the basis that e-mail systems etc should not be used for storing public records for which established systems are in place. It is incumbent upon the person who holds any non-trivial information, including attachments within emails, to ensure that they are retained as an official record. The relevance of this is that at the time of the complainant's request, which was received on 13 January 2020, emails prior to 13 October 2019 would have been deleted from No.10's email systems'.*
37. The Cabinet Office advised the Commissioner that the acting Private Secretary would have searched Mr Cummings' official email account. When a user deletes an email from their No.10 official mobile phone it is automatically moved to an 'archive' folder within their inbox, rather than the 'deleted items' folder used by the desktop client. The Cabinet Office confirmed that emails in the archive folder are subject to the email policy referenced above and automatically deleted after 3 months as with all other email correspondence not otherwise selected for permanent preservation.
38. The Cabinet Office advised that, as with all members of staff, Mr Cummings was provided with a single **official** (Commissioner's emboldening) email account. No shared mailbox was operated on his behalf (as might happen for example with a Ministerial private office having a shared mailbox between a Minister and Private Secretary).
39. In main submissions to the Commissioner the Cabinet Office advised the Commissioner that *'apart from the search noted above (i.e. that undertaken by the acting Private Secretary) no other searches were conducted for the purposes of compliance with the FOIA request'*. However, as the withheld information provided to the Commissioner in respect of the complainant's meta request suggested that further searches for relevant information may have been undertaken, the

Commissioner requested further information and clarification from the Cabinet Office.

40. In supplemental submissions to the Commissioner, the Cabinet Office clarified that No.10 Direct Communications Unit (DCU) asked PMPOST (Prime Minister's Private Office Support Team) to search the official PM's Office records at the same time they asked Mr Cummings' acting Private Secretary to do the same.
41. The Cabinet Office confirmed to the Commissioner that the searches at the time of the request did not include any private email accounts or other personal devices. The Cabinet Office explained that, *'there is a policy that says official business should be carried out on department-provided IT accounts. It will generally be reasonable to search only within those accounts when a request has been received. It was not therefore necessary to ask for searches of private email accounts etc'*.
42. In supplemental submissions to the Commissioner the Cabinet Office cited their current guidance on the use of personal emails which *'makes clear what the expectation is (and the fact that the onus is on the individuals in question)'*. The guidance states that:

'Other forms of electronic communication may be used in the course of conducting Government business. Departments' security policies will apply when generating and communicating information. The originator or recipient of a communication should consider whether the information contained in it is substantive discussions or decisions generated in the course of conducting Government business and, if so, take steps to ensure the relevant information is accessible (e.g. by copying it to a government email address'.
43. The Commissioner does not agree with the Cabinet Office contention that it was not necessary for them to ask for searches of private email accounts or other personal devices. The Commissioner recognises and accepts that the responsibility for ensuring that important and non-trivial information about official government business contained in private email accounts or other personal devices is safely and securely retained lies very much upon the account(s) holder, but that is separate to the factual issue as to whether, at the time of the request, the Cabinet Office held recorded and relevant information within the scope of the request.
44. The complainant's request was widely and clearly worded to encompass *'all'* correspondence and communications in all formats and mediums (e.g. WhatsApp, Signal and private email) within the defined period of 23 July 2019 to 9 September 2019 sent or received by Dominic Cummings.

45. At the time of the request, the ICO's guidance on Official information held in private email accounts¹ confirmed that FOIA applies to official information held in private email accounts (and other media formats) when held on behalf of the public authority.
46. It is important to note that the ICO has recently issued new and updated guidance on Official Information Held in Non-Corporate Communications². The new guidance reflects the emergence of new technology since the FOIA came into force and the practical realities of how some working within public authorities have, at times, communicated. However, the Commissioner does not consider that it would be fair or reasonable to assess the Cabinet Office response to the complainant's request with reference to guidance which post-dated the same. Consequently, the Commissioner's decision in this case has been made with reference to the aforementioned ICO guidance which was in place and well established at the time of the request (the Guidance).
47. The Guidance stated that, *'it may be necessary to request relevant individuals to search private email accounts in particular cases. The occasions when this will be necessary are expected to be rare'*. However, at the time of issuing the previous Guidance the Commissioner could not have envisaged the extent to which some aspects of official government business would be conducted through non-official channels (e.g. private email accounts and WhatsApp), in the intervening years. Consequently, the occasions on which such searches of private email accounts would be necessary, were (and are) not as rare as originally envisaged.
48. The Guidance stated 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'*.
49. The Commissioner notes that it is in the public domain (largely through Mr Cummings publishing his private WhatsApp messages) that Mr Cummings had a practice of discussing official government business (most notably the Government's response to and management of the Covid-19 pandemic) through his private WhatsApp account(s).

¹ [official information held in private email accounts.pdf \(ico.org.uk\)](https://ico.org.uk/official-information-held-in-private-email-accounts)

² [Official information held in non-corporate communications channels | ICO](https://ico.org.uk/official-information-held-in-non-corporate-communications-channels)

50. On 24 April 2021, The Independent reported that former Whitehall insiders had said that the arrival in No.10 of the Prime Minister and his (then) Chief Adviser, Mr Cummings, 'brought a new, more secretive style to Downing Street'³. One former insider was quoted as saying that:

'The starkest immediate difference to working life when the Cummings team came in was that so much was no longer on email but on your phone. Things were done in a much more cryptic way. There was an effort to make sure that conversations weren't traceable as much as possible, unless there was a deliberate reason to make them traceable. Where they were quite clever was that if there was something they were OK with being leaked, that would go on email'.

51. The Independent reported that one former insider speculated that this aversion to email 'was driven by an incident in 2011 when Michael Gove was forced to release messages sent on his wife's email account under the Freedom of Information Act because they related to government business. A ruling at the time that all government information, even if transmitted by text message, private email or Twitter, is covered by the Act, appeared to have convinced Mr Cummings – an adviser to the then education secretary – that alternative means of communication were needed that would not be liable to discovery by future inquiries'.
52. Though the Commissioner is mindful that they post-date the complainant's request, the publication by Mr Cummings in July 2021 of what appear to be his own private WhatsApp messages which discussed the Government's handling of the pandemic, tend to corroborate the information reported by the Independent, in that they appear to show that Mr Cummings was in the habit of using such private communication channels to conduct official government business, and had done so since his arrival in Downing Street as the Prime Minister's Chief Adviser in July 2019. The Commissioner considers that the Cabinet Office should therefore have been reasonably aware of Mr Cummings' practice by the time of the complainant's request in January 2020.
53. The Commissioner also notes that in a previous information request to the Cabinet Office for emails which nine named individuals (eight of whom were special advisers) sent to or received from three email accounts belonging to Mr Cummings, the Cabinet Office advised the Commissioner in submissions that:

³ [Cummings ushered in secretive Whatsapp-encrypted 'boys club' style to government communications, say former Whitehall insiders | The Independent](#)

'We note in any event that if (redacted) intended to refer also to the private accounts of the named individuals that the Cabinet Office would not be able to search these without approaching all of the named individuals and asking them if those accounts hold emails containing official Cabinet Office business. However, as we have stated above, we have assumed that (redacted) request does not include the named individuals' private accounts and we have therefore taken no steps to gain access to them'⁴.

54. It logically follows from the above that if the complainant in the previous case had specified the private email accounts of the individuals in question then the Cabinet Office would have recognised the need to arrange to gain access to such accounts, even if that access was made by the individuals themselves checking to ensure that their accounts did not contain any relevant held information.
55. By contrast, the complainant in the present case **did** specify the private email accounts and other modes of communication of Mr Cummings in his request and yet the Cabinet Office have confirmed that no searches were made of his private email and other non-official accounts.
56. Asked by the Commissioner why no such checks and searches of the private accounts were undertaken, the Cabinet Office referred to paragraph 9 of their email guidance, which states that:

'The FoI Act allows people to request information; it does not give the requestor any power to dictate where the department should search for that information. It is for the department to consider where the information might be and to take reasonable steps to find it. As set out above, it is expected that Government business should be recorded on government record systems. It will generally be reasonable to search only within those systems when a request has been received'.

57. Whilst it is reasonable to expect that information concerning government business will be recorded on government record systems, it does not necessarily follow that it will therefore be reasonable for a public authority to carry out checks and searches of such government record systems **only**, in response to an FOI request. The complexity and speed of government business in the technological age is such that other non-corporate communication channels might quite conceivably be utilised to conduct official government business, as Mr Cummings' high profile published WhatsApp messages have shown.

⁴ IC-45402-H6S2

58. As the ICO Guidance makes clear, what constitutes reasonable checks and searches will depend on a number of relevant factors in any given case, such as the focus and wording of the request, the subject matter of the information falling within scope of the request, how the issue(s) to which the request relates has been handled within the public authority, and by whom and to whom was the information sent and in what capacity⁵.
59. In the present case the focus of the complainant's request was the 9 September 2019 prorogation of Parliament, which the Supreme Court of the United Kingdom subsequently found, on 24 September 2019, to be both justiciable and unlawful⁶. Dominic Cummings, the Prime Minister's Chief Adviser at the time, was widely reported as having been closely involved in the decision to prorogue Parliament. As the Guardian newspaper reported on 31 August 2019:

'For much of August the plan to shut down parliament for five weeks was kept a very tight secret at the heart of government. For the few Whitehall officials who were made aware of it early on, however, it was not difficult to decipher whose fingerprints were all over it. It was clear to that small group that the bombshell idea had been hatched by Boris Johnson's closest adviser, Dominic Cummings, and No 10's director of legislative affairs, Nikki da Costa'⁷.

60. The newspaper further reported that, *'emails were exchanged between a wider group of government officials as the planning intensified, Cummings will have known that shutting down parliament when MPs wanted to debate urgent issues around Brexit would provoke uproar among Remainers and MPs who were against no deal'*.
61. Therefore, the complainant's request in this instance concerned an issue of national public interest and gravity, the unlawful prorogation of Parliament, one which Dominic Cummings had been closely associated with. His request was clearly worded to encompass private emails and other private communication channels (e.g, WhatsApp) and the Commissioner has noted above that at the time of the request, the Cabinet Office would reasonably be presumed to be aware of Mr

⁵ The ICO's recent (2021) and updated guidance also notes as a relevant factor *'whether there is a practice of staff using private communication channels to discuss particular issues or topics, or if there is a practice of particular officials using such channels, or both'*.

⁶ R (Miller) v The Prime Minister / Cherry v Advocate General for Scotland

⁷ [How a secret plan to close parliament sparked uproar across Britain | Dominic Cummings | The Guardian](#)

Cummings' practice of using such private, non-corporate communication channels to conduct (at least some) official government business.

62. That being the case, the Commissioner does not consider that it was reasonable, in this particular case, for the Cabinet Office to fail to ensure that appropriate checks and searches were carried out of Mr Cummings' private email account(s) and other personal communication devices.
63. The Commissioner's Guidance made clear 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'*. This was a case where the Cabinet Office ought to have asked Mr Cummings to carry out checks and searches of his private email account(s) and other personal devices. The Commissioner is strengthened in this view by some of the withheld information concerning the complainant's meta request, for reasons explained in a Confidential Annex attached to this notice.
64. Mr Cummings departed his Government role in November 2020. Therefore the Commissioner unfortunately cannot now order any steps for the Cabinet Office to take to ensure that appropriate checks and searches are made of Mr Cummings' private email account(s) and other personal devices.
65. Based on the information which the Commissioner has had access to (including the withheld information in the complainant's associated meta request), the Commissioner is satisfied, on the balance of probabilities, that the Cabinet Office do not hold any further relevant information within scope of the complainant's request, aside from the Da Costa memo of 15 August 2019, which is exempt under section 21 (information reasonably accessible to the applicant by other means) of the FOIA and which the complainant already had at the time of his request.
66. However, the Commissioner's decision has been necessarily based on the information available to him at the time of his investigation. Had the Cabinet Office carried out more comprehensive and thorough checks and searches at the time of the request, the Commissioner would have been able to reach a determination in respect of any relevant information which may have been held by Mr Cummings in his private email account(s) or other personal devices at the time of the request.

Section 10

67. The Cabinet Office failed to respond to the complainant's original request within 20 working days (as required by section 10 of the FOIA) as the complainant submitted his request on 11 January 2020 but did

not receive a response until 13 February 2020. Although the Cabinet Office contravened section 1(1)(a) and section 10(1) by their late response, the Commissioner notes that the response was not significantly late, being only a few days.

Other matters

68. The Cabinet Office did not provide a substantive response to the complainant's meta request of 16 February 2020 until 10 June 2020, at which point the Cabinet Office confirmed that the information was being withheld under section 36 of the Act.
69. Section 17(3) of the FOIA states that where a public authority is relying on a qualified exemption, it can have a 'reasonable' extension of time to consider the public interest in maintaining the exemption or disclosing the information.
70. Although the FOIA does not define what constitutes a reasonable time, the Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days. This means that the total time spent dealing with the request should not exceed 40 working days, unless there are exceptional circumstances. A public authority would need to fully justify any extension beyond 40 working days. In this case the total time taken by the Cabinet Office considerably exceeded 40 working days (almost four months). Whilst the Commissioner acknowledges that there were exceptional circumstances in that the Cabinet Office, in keeping with all public authorities, was dealing with the unprecedented pressures caused by the pandemic, he considers that even making appropriate allowance for such circumstances, the Cabinet Office failed to complete their deliberations on the public interest within a reasonable time frame and therefore did not comply with section 17(3). The Commissioner notes that the Cabinet Office apologised to the complainant for their delay in providing the substantive response.
71. Although internal reviews are not subject to statutory time limits, the Commissioner's well established guidance is very clear in that he expects public authorities to complete most internal reviews within 20 working days, with a maximum of 40 working days in exceptional cases.
72. In this case the complainant requested an internal review of his original request on 16 February 2020 but the review was not provided by the Cabinet Office until 16 September 2020. The Commissioner recognises and appreciates that this period coincided with the emergence of the Covid-19 pandemic, and the resources and efficiencies of public authorities were inevitably restricted and adversely impacted as a result. The Commissioner made due allowance for this extraordinary situation

and recognised that some measure of delays in the usual FOI processes were inevitable and unavoidable. However, a delay of seven months in providing an internal review is manifestly excessive and unacceptable, even taking into account the Covid-19 constraints. Such delays are clearly contrary to the purpose and spirit of the FOIA and the Commissioner would not expect to see similar delays in future cases.

73. Finally, an unusual feature of this case was that the Cabinet Office knowingly applied section 36 to the complainant's meta request, without first obtaining the reasonable opinion of the qualified person. The Commissioner notes that the Cabinet Office rectified this procedural failure at the internal review stage, and accepted that they should not have applied the exemption without first obtaining the reasonable opinion of the qualified person. Nevertheless, the initial application of the exemption without the necessary reasonable opinion was a surprising and unsatisfactory misjudgement by the Cabinet Office, given their experience and awareness of the FOIA and its requirements. The Commissioner recognises and appreciates the time constraints which central government FOI officers are often working within, particularly during the pandemic, but would expect the Cabinet Office to ensure that before any application of section 36, the required reasonable opinion of the qualified person has first been obtained.

Right of appeal

74. 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

75. 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.

76. 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

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