

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 August 2022

Public Authority: Cabinet Office

Address: FOI-team@cabinetoffice.gov.uk

Decision (including any steps ordered)

1. The complainant requested various information in respect of the Government's 'Back to School' campaign of 2020. The Cabinet Office provided some information, but cited section 21 (information available to the applicant by other means) in respect of items 1 and 3 of the request, and section 43(2) (commercial interests) in respect of item 4. During the course of the Commissioner's investigation, the Cabinet Office also informed the complainant that information in respect of Dr Philippa Kaye (also requested under item 4) did not fall within the scope of their request.
2. The Commissioner's decision is that the Cabinet Office has failed to demonstrate that it has complied with section 1(1) FOIA in response to this request and that it was not entitled to rely on section 43(2) for information in respect of item 4 of the request.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - provide a fresh response to item 4 of the request in relation to any payments to Dr Philippa Kaye.
 - disclose the information in respect of Kirsty Gallagher relevant to item 4 of the request.

The Cabinet Office 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 9 November 2020, the complainant wrote to the Cabinet Office and requested the following information:
 - “1. I would like the total cost of the back to school campaign for 2020...
 2. Please can I find out which advertising company / companies was paid this to carry out the campaign – if this more than one, please can this be broken down into how much they were paid and for which part of the campaign that was for example, tv advert, bus stop campaign etc.
 3. Please can I request the overall costs broken down into costs for each part of the campaign, for example, tv adverts, bus stop campaigns etc.
 4. Can I specifically request how much it cost for social media influencers / celebrities to be paid for the campaign, broken down by name, including, but not exclusively, for Kirsty Gallagher and Dr Phillipa Kaye?”
5. The Cabinet Office responded on 3 December 2020. It provided the name of the company who had been paid to carry out advertising for the campaign (item 2). In respect of items 1 and 3, it informed the complainant that it publishes expenditure data monthly, on a rolling basis, provided a link confirming that the data was broken down by supplier, and cited section 21 in respect of these items. It refused to provide the information in respect of item 4 on the basis of section 43(2) (commercial interests) FOIA.
6. Following an internal review the Cabinet Office wrote to the complainant on 11 November 2021. It informed the complainant that it had not applied section 21 correctly as the link provided did not include a breakdown into payments for the Back to School Campaign and provided figures for the total cost of the campaign. However, it upheld its original decision to rely on section 43(2) in respect of a breakdown of costs (item 4) of the campaign.
7. Following the Commissioner’s investigation, the Cabinet Office provided a further response to the complainant on 1 April 2022. It explicitly provided information in respect of items 1, 2 and 3 of the request. However, it continued to rely on section 43 in respect of item 4 regarding a breakdown of costs for Kirsty Gallagher and stated that this individual was the only influencer / celebrity employed by the campaign. However, it now informed the complainant that the figures for Dr Philippa Kaye were not within the scope of their request as they asked

for costs of media influencers or celebrities, and the position of the Cabinet Office was that Dr Kaye was neither.

8. The complainant expressed dissatisfaction with the Cabinet Office response to item 4 of their request pointing out that they had stated Dr Kaye's name in their request regardless of how the Cabinet Office chose to define her role. They also disputed the fact that that Dr Kaye is not a celebrity and suggested she was chosen for her media profile as opposed to an unknown GP.
9. The Cabinet Office responded on 21 April 2022 informing the complainant that it views Dr Kaye's role as an expert rather than influencer given her medical credentials as a health professional and confirmed its position of 1 April remains unchanged.

Scope of the case

10. The complainant contacted the Commissioner on 15 April 2021 to complain about the way their request for information had been handled. The complainant was not satisfied with the Cabinet Office decision not to include Dr Philippa Kaye within the scope of their request. They are also dissatisfied with the Cabinet Office reliance on section 43(2) FOIA in respect of the costs for Kirsty Gallagher.
11. The scope of the Commissioner's investigation is to consider whether the Cabinet Office has complied with its obligations under section 1(1) FOIA and whether it was entitled to rely on section 43(2) in respect of the information relating to item 4 of the request.

Reasons for decision

Section 1 – General right of access to information held

12. Under section 1(1) FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following

the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

14. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
15. In this particular case the complainant does not accept that the information in respect of Dr Kaye does not fall within the scope of their request on the basis that her name was specifically mentioned in the request itself regardless of how the Cabinet Office chooses to define her role.
16. The complainant also disputed that Dr Kaye is not an influencer or celebrity on the basis that her:

"...Instagram profile shows she has over 24,000 followers, appears regularly on the TV show 'This Morning' and has published several books alongside her work as a GP."
17. The complainant further commented that it could be argued that the Cabinet Office clearly chose her for this audience, as opposed to hiring an unknown GP for the campaign.
18. The Commissioner notes that the Cabinet Office made no reference to Dr Kaye in either its original response or its internal review and it was not until its correspondence of 1 April 2022 that it specially referenced her, stating that it did not consider the costs for Dr Kaye to be within scope of the request.
19. The Commissioner would wish to highlight that he has recently issued a decision notice (IC-137278-J1Z0) from the same individual for related information and ruled that even though Dr Kaye was not mentioned specifically within their original request, that:

"...someone with 24,000 followers on a social media platform, who regularly appears on television, and has published several books, would fall within the definition intended by the complainant in the request. "
20. In relation to this particular request, the Commissioner considers the argument is even more clear cut than the previous request, as Dr Kaye is specifically referenced in the request itself.

21. As he does not accept the position of the Cabinet Office that information relating to Dr Kaye does not fall within the scope of the request, the Commissioner has recorded a breach of section 1 FOIA in respect of this information.
22. At paragraph 3 above the Cabinet Office is now required to provide to the complainant a fresh response to item 4 of the request on the basis that relevant information relating to Dr Kaye is within the scope of that request. That response should either confirm or deny whether information on payments made to Dr Kaye is held and either disclose that information or cite a valid basis for refusing to disclose it.

Section 43 – prejudice to commercial interests

23. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
24. In order for a prejudice based exemption such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
25. The first point for the Commissioner to consider is whether the arguments provided by the Cabinet Office relate to the relevant applicable interests.

26. The term 'commercial interests' is not defined in FOIA. However, the Commissioner's guidance on the application of section 43 explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. Their underlying aim may be to make profit, however, it could also be to cover costs or simply to remain solvent.
27. The Commissioner accepts that the agreement of fees between the Cabinet Office and the third parties was of a commercial nature.
28. The Commissioner considers that in order for the exemption to be engaged, it must be shown that disclosure of the information will result in the specified prejudice to one of the parties.
29. The Commissioner asked the Cabinet Office to provide full arguments setting out why it considers the exemption is engaged. He confirmed that its submissions should identify whose commercial interests it believes would, or would be likely to be prejudiced in the event of disclosure, and details of the nature of the prejudice itself.
30. In this case the withheld information is the fee paid to Kirsty Gallagher for her role in the Back to School campaign.
31. The Cabinet Office considers that its own commercial interests 'would be likely' to be prejudiced by the disclosure of this information and has argued that disclosure of the fee paid might suggest that it is an acceptable figure in all campaigns. It further considers that it would lead to individual influencers or agents driving fees higher than might otherwise be expected. It has argued that this would erode its commercial advantage in negotiations, thus having a negative effect on providing value for money in using such individuals in campaigns.
32. The Cabinet Office also confirmed that it is relying on the lower limb of 'would be likely' to prejudice its commercial interests.
33. The Commissioner does not consider that the arguments provided above are sufficiently detailed or robust to support the engagement of prejudice to its commercial interests and in the absence of any arguments in support of prejudice to the commercial interests of the third parties, he is not persuaded that disclosure would result in the prejudice specified.
34. However, he notes that in its public interest test arguments in favour of maintaining the exemption, the Cabinet Office considers that disclosure would be likely to adversely affect its relationship (albeit at arms length via an agency) with celebrities and influencers which in turn would be

likely to affect its ability to secure similar services at a reasonable price in the future.

35. It added that future potential influencers/ celebrities may be deterred from working with the Cabinet Office if they thought their fees would be released. It considers that this would negatively impact on the quality and quantity of the Governments' supplier base in this area and has stated that it must retain the commercial confidence of all parties when they choose to engage in commercial activities with the department.
36. The Commissioner notes these additional arguments in support of the exemption. However, in his view, any influencer or celebrity seeking to tender for such a role in a future campaign, is likely to submit the most competitive tender/fee, as it is in their interests to do so. Additionally, although some contracts may be similar in nature, they will not be the same, and different factors will be taken into account when pricing and awarding future contracts of this nature.
37. The Commissioner is not persuaded that the arguments put forward by the Cabinet Office demonstrate that disclosure of the requested information would be likely to result in the harm (prejudice) which the Cabinet Office has specified, and does not therefore accept that it was entitled to rely section 43(2) FOIA to refuse to disclose this information. Since the Commissioner has concluded that section 43(2) is not engaged, it is not necessary for him to consider the public interest test. At paragraph 3 above the Cabinet Office is now required to disclose the withheld information.

Right of appeal

38. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. 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

**Catherine Dickenson
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