

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested a copy of WhatsApp correspondences from the 1 March 2020 until 1 September 2020.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 12(2) when refusing this request.
3. The Cabinet Office breached section 17 by failing to provide a refusal notice within 20 working days of the request.
4. The Commissioner does not require the public authority to take the any further steps.

Request and response

5. On 17 June 2021, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I am sending this request under the Freedom of Information Act.

Please provide a copy of all messages between all parties in the following WhatsApp groups:

-CSA-CMO-MATT-PM-DOM
-Covid: No 10 Coordination

From 1st March to 1st September 2020."

6. The Cabinet Office responded on 12 August 2021. It stated that it could not provide the requested information, as complying with the request would exceed the appropriate cost limit under section 12 FOIA.
7. Following an internal review, the Cabinet Office wrote to the complainant on 16 November 2021. It stated that it was upholding its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 17 November 2021 to complain about the way his request for information had been handled.
9. The Commissioner considers whether the Cabinet Office is entitled to rely on section 12 when withholding the requested information.

Reasons for decision

Section 1(1)(a) of the FOIA – determining whether information is held

10. Under Section 1(1)(a) of FOIA a public authority must confirm whether it holds information that has been requested.

Section 12(2) of the FOIA - Exemption where cost of compliance exceeds appropriate limit

11. However, under section 12(2) a public authority is not required to comply with Section 1(1) if the cost of establishing whether or not it holds the requested information¹ would exceed the appropriate limit². This is £600 for the cabinet office (calculated at 24 hours work at £25 per hour).
12. The Cabinet Office explained to the complainant that the cost of confirming or denying if the requested information were held, would exceed the appropriate limit under FOIA.

¹ <https://www.legislation.gov.uk/ukpga/2000/36/section/12>

² <https://www.legislation.gov.uk/uksi/2004/3244/regulation/4/made>

13. The complainant explained to both the Cabinet Office and the Commissioner, that the requested information should be easily extracted by a member of the WhatsApp group in the chat function, this would allow the information to be provided within the cost limit.
14. In response to this, the Cabinet Office explained that it was unlikely any information was still held in its original WhatsApp format. The Cabinet office explained that it would be on No 10's official record, not a device.
15. The Cabinet Office further explained that all members of 'CSA-CMO-MATT-PM-DOM' group had now left their posts and the members of staff who were part of 'Covid: No 10 Coordination group', were unknown and had also likely left their post(s). The Cabinet Office determined that even if staff members were still in post, the WhatsApp policy of No.10, is that the group administrators should delete group chats regularly and at least quarterly through the year.
16. The Cabinet Office supported this conclusion by providing the Commissioner with a copy of its Code of Practice on the management of records issued under section 46 of the Act and in particular, to paragraph 2.7.3 which it has had regard to, in its approach to messaging communications such as WhatsApp. The policy states:

"Authorities should ensure that staff are aware that there is no need to keep ephemeral material, and this may be destroyed on a routine basis. For example, by deleting trivial emails and messages after they have been read and discouraging staff from keeping multiple or personal copies of documents."
17. The Cabinet Office explained that if any information were still held, it would have been transferred to the official record, as set out in its Messaging Application and Webs Service policy which states:

"staff are required to ensure that any important conversations (such as those that need to remain part of the official record) are saved"
18. The Cabinet Office explained that when information is transferred to the official record, it is the textual content and/or the substantive decision that is recorded and not the medium by which the information was transmitted. Ephemeral information is otherwise not retained on the official record. It therefore concluded, if any WhatsApp messages had been transferred to the official record, they would not be labelled by the means they were received, but rather by any decisions made in these discussions.
19. Due to the official records design, the Cabinet office advised that it would not be possible to provide a reasonable estimate for the cost of complying with the request or determining if the information is held.

20. The Cabinet Office did confirm that it does not hold a single file with all the requested information, nor does it manage or arrange its records in a way which mirror the request.
21. In decision notice IC-127888-D6M7, the Commissioner considered a different request for WhatsApp correspondence. He concluded that the Cabinet Office might have been able to access the information via a device at the point it originally responded, but that the cost of identifying and extracting the information now would exceed the appropriate limit. His decision was based on very similar explanations to those that the Cabinet Office has provided, in respect of the present request, to explain why it would be burdensome to determine whether it holds any relevant information. The Commissioner accepts that the Cabinet Office would have the same difficulty identifying relevant information here.
22. He also notes that there was a nine month gap between the end of the time period in question and the date that this request was made – making it even more unlikely that the messages had been retained on a device. Unlike with decision notice IC-127888-D6M7, it is not apparent that the Cabinet Office would have been any more able to comply with the request when it originally responded than it would today.
23. The Commissioner decision is therefore satisfied that the Cabinet Office has demonstrated that it is entitled to rely on section 12(2) when refusing this request.

Procedural breach

24. The Cabinet Office breached section 17 by failing to provide a refusal notice within 20 working days of the request.

Right of appeal

25. 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

26. 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.
27. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF