

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **2 June 2023**

Public Authority: **Department for Energy Security & Net Zero¹**

Address: **1 Victoria Street
London
CW1H 0ET**

Decision (including any steps ordered)

1. The complainant requested from BEIS a copy of the text message sent from David Cameron to Nadeem Zahawi referenced in the Office of the Registrar of Consultants Lobbyists (ORCL) investigation.
2. The Commissioner's decision is that, on the balance of probabilities, the public authority did not hold any information falling within the scope of the request.
3. The Commissioner does not require BEIS to take any further steps in this case.

¹ Although this request was submitted to BEIS, in February 2023 some functions of BEIS, which are relevant to this case, were transferred to a new government department, namely the Department for Energy Security & Net Zero (DESNZ). This decision is therefore served on DESNZ albeit that the decision notice refers to BEIS as it was the body that handled the request.

Request and response

4. On 21 October 2021, the complainant wrote to the Department for Business, Energy and Industrial Strategy (BEIS) and requested information in the following terms:

'Please provide a copy of the text message sent from David Cameron to Nadeem Zahawi as referenced in the ORCL investigation below.

<https://registrarofconsultantlobbyists.org.uk/summary-of-investigation-david-cameron/> '

5. BEIS responded on 19 January 2022 and denied holding the requested information, following searches of its records.
6. The complainant requested an internal review on 19 January 2022.
7. However, the Commissioner understands that to date, BEIS has not provided an internal review.

Scope of the case

8. The complainant contacted the Commissioner on 12 April 2022 to complain about the way his request for information had been handled. Specifically, the complainant was dissatisfied that BEIS did not respond to his request for an internal review, in which the complainant expressed his concern that it did not appear that reasonable searches had been carried out to find the information he requested.
9. On 12 July 2022 the Information Commissioner contacted BEIS and requested that an internal review be provided within 10 working days.
10. To date BEIS has not provided a review.
11. The Commissioner has considered whether, on the balance of probabilities, the Cabinet Office holds or has held at the time the request was made, recorded information within scope of the complainant's request and whether it has complied with section 1(1) of FOIA.

Reasons for decision

Section 1 of FOIA – Information held / not held

12. Section 1 of FOIA states that:

‘Any person making a request for information to a public authority is entitled –

a. to be informed in writing by the public authority whether it holds information of the description specified in the request, and

b. if that is the case, to have that information communicated to him.’

13. In scenarios where there is some dispute between the amount of information a public authority says is held and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

14. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

15. In this case the complainant’s request for internal review explained why he expected the information in question to be held. The complainant expressed concern that he did not believe that a reasonable search for the requested information had been completed, asking the following questions:

‘Whether iCloud or other backups of the minister's phone records have been searched’ and,

‘Whether the records had been forwarded on to any other party within the department and may still be held. For example, were the records provided to the ORCL as part of its investigation into whether Mr Cameron's activity constituted registrable lobbying, or could a copy of the messages be retrieved from the ORCL to provide a substantive response?’

Please note that destroying information that is the subject of a freedom of information request is a criminal offence under section 77 of FOIA’.

16. The Commissioner asked BEIS to provide detailed explanation about searches carried out to locate the requested information.

17. In submissions to the Commissioner, BEIS advised that at the time of the complainant's request, Mr Zahawi was no longer a BEIS Minister, having been promoted to Secretary of State for Education on 15 September 2021. BEIS advised that they were not aware that the text message requested had passed between Mr Cameron and Mr Zahawi. Consequently, the department made enquiries of the position with Mr Zahawi's ex Senior Personal Secretary (SPS).
18. The SPS confirmed that Mr Zahawi returned his BEIS mobile device when he left BEIS, and the device was wiped by the IT department for re-use. However, the SPS advised that they believed that no text messages were sent between Mr Zahawi and Mr Cameron to/from Mr Zahawi's BEIS device. The SPS believed that the text message in question had instead been sent to Mr Zahawi's personal phone and the message had since been deleted. It is not clear on what the SPS based this belief although it was presumably from the SPS's memory of working for Mr Zahawi. In any event the Commissioner considers it to be a reasonable supposition.
19. The text message was not forwarded to Mr Zahawi's BEIS device or to a member of his Private Office at any point.
20. Following receipt of the complainant's request for an internal review, BEIS advised the Commissioner that the SPS searched their WhatsApp messages to Mr Zahawi and there was no mention of related exchanges with Mr Cameron in those messages. However, this was a limited search as the SPS had since left BEIS (to join another government department) and only had access to messages sent on their personal phone and not their former BEIS phone, which they had used when they managed Mr Zahawi's BEIS Private Office.
21. The SPS believed that all exchanges with Mr Cameron's office about Illumina occurred over BEIS emails (rather than via text). Related emails were checked, and the following quote was found from an email exchange on 29 January 2021 from Mr Cameron's Chief of Staff to Mr Zahawi's personal parliament email account about setting up a call with Illumina:
"DC has told me about your exchanges this week"
22. BEIS advised that Mr Zahawi's private office had not been sighted on the 'exchanges' referenced here and so did not know whether they referred to text exchanges, telephone calls or in-person meetings. From memory (rather than from records held) the SPS believed Mr Zahawi forwarded the email chain to the SPS's individual BEIS email account and the SPS then forwarded the email chain to Mr Zahawi's Private Office mailbox

where the enquiry (about setting up a call with Illumina) was processed from there by Private Office colleagues.

23. BEIS advised that the SPS checked with Mr Zahawi as to when the text messages to Mr Cameron had been deleted.
24. Mr Zahawi advised that he could not remember when the messages were deleted but advised that his personal WhatsApp was set up to delete messages after 7 days. Mr Zahawi stated that if he had seen the text messages to Mr Cameron he would have submitted them for the department's official record.
25. BEIS advised that it was not known whether the text message requested was sent to Mr Zahawi's BEIS device or his personal device.
26. BEIS advised that they were not aware what (if any) search terms had been used by the SPS to search their WhatsApp messages. BEIS noted that this could have involved a manual scan of all messages. BEIS were similarly not aware as to what search terms the SPS used to find the Illumina emails, though they assumed that such search terms would have included 'Illumina'.
27. The Commissioner asked BEIS to explain its records management policy with respect to the retention and deletion of records of the type requested.
28. It explained that all its records management policies and procedures apply to all records created across BEIS. Mobile text messages which need to be kept as part of the official record are retained as part of its records management policies and procedures. All staff, including Ministers, are subject to the same policies. BEIS has specific guidance which informs users how to transfer records from their mobile devices to SharePoint.
29. BEIS further explained different documents categories and the retention periods relevant to each one of them. These include: Administration – 3 years Standard Business Use – 7 years Extended Business Use – 15 years Historical Records – 20 Years or permanent preservation.
30. In response to the complainant's questions in his request for an internal review, BEIS advised the Commissioner that SMS text messages (sent on BEIS devices) are not backed up and BEIS does not use iCloud. However, BEIS noted that the text message being requested could have been a WhatsApp message rather than an SMS text message.

31. Finally, the Commissioner asked for explanation about how the ORCL investigation came to acquire the copy of the text message.
32. BEIS advised the Commissioner that they were not aware how the ORCL investigation acquired a copy of the text message although they believed that it may have been supplied to the ORCL by Mr Cameron.
33. In response to the complainant's enquiry (in his request for an internal review) about whether BEIS provided any information to the ORCL investigation, BEIS confirmed that their Permanent Secretary's (PS) mailbox was searched and no information was found which was relevant to the request. The PS mailbox was searched because the PS office would have been the office which sent any information to the ORCL investigation. BEIS advised that the search terms used to search this mailbox were 'Office of the Registrar of Consultant Lobbyists', 'ORCL', 'David Cameron' and 'Nadhim Zahawi'.
34. BEIS confirmed that other than those detailed above, no other checks and searches relating to the complainant's request were made.
35. The Commissioner has considered the information received from BEIS and the searches that were conducted to ascertain whether the requested information was held at the time the request was made.
36. The Commissioner notes that the searches for the requested information were restricted as a result of limited access to relevant devices and accounts due to Mr Zahawi and his SPS leaving their roles in BEIS.
37. He wishes to emphasise the importance of Ministers and officials copying any exchanges concerning official government business on non-corporate communication channels to the relevant department for transparency, accountability and records preservation/official archives purposes².
38. In this case, the Commissioner considered that if Mr Zahawi had had text message or email exchanges with David Cameron about official government business via his personal device then he should have taken steps to forward such exchanges to the department for preservation in official records'.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/official-information-held-in-non-corporate-communications-channels/>

39. The Commissioner further notes the complainant's comments in his internal review request about BEIS having committing a criminal offence if it had deleted information they had requested. However, he has seen no evidence to indicate that information relevant to the request was deleted after the initial request was received.
40. The Commissioner considers that BEIS conducted sufficient searches based on the information available at the time and in the specific circumstances of this case as detailed above he must conclude that on the balance of probabilities BEIS did not hold information in the scope of the request at the time the request was received.

Procedural matters

Section 10 – Time for compliance.

41. Section 1(1) of FOIA states that:

“Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.”

42. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”.
43. In this case, the request for information was made on 21 October 2021 and BEIS provided its responses on 19 January 2022, and therefore after 20 working days had passed.
44. Consequently, the Commissioner considers BEIS to have breached section 10(1) of FOIA.

Other matters

Section 45 – Internal review.

45. 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.

46. The complainant asked for an internal review on 19 January 2022. However, to date BEIS did not provide the internal review response and therefore failed to act in accordance with the section 45 code.

Right of appeal

47. 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

48. 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.
49. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF