

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2024

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested photographs that were submitted to the Second Permanent Secretary's Investigation¹ into alleged social gatherings on government premises during Covid restrictions. The Cabinet Office refused to provide the information citing sections 31(1) (law enforcement), 21(1) (information otherwise accessible to the applicant), 40(2) (personal information) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that section 31(1) of FOIA is engaged regarding the requested information and the public interest favours maintaining the exemption. The Commissioner has also recorded a breach of section 17(1) of FOIA.
3. The Commissioner does not require the Cabinet Office to take any steps.

¹ [Findings of the Second Permanent Secretary's Investigation into alleged gatherings on government premises during Covid restrictions - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/findings-of-the-second-permanent-secretarys-investigation-into-alleged-gatherings-on-government-premises-during-covid-restrictions)

Request and response

4. On 25 May 2022 the complainant wrote to the Cabinet Office and requested information in the following terms:

'This is a request for information under the Freedom of Information Act. I would like to request the following information:

In paragraph 20 of the "FINDINGS OF SECOND PERMANENT SECRETARY'S INVESTIGATION INTO ALLEGED GATHERINGS ON GOVERNMENT PREMISES DURING COVID RESTRICTIONS", it states the following:

"My team and I have been provided with photographs of some of the events that took place, some official and others taken on personal devices. I have considered whether any of these should be published. I concluded that the official photographs should be within scope for disclosure only where they are particularly pertinent in helping to understand the nature and purpose of a gathering. I have attached these to this report. I have limited identification of individuals in the photographs to Ministers and the Cabinet Secretary.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachmen%20t_data/file/1078404/2022-05-%2025_FINAL_FINDINGS_OF_SECOND_PERMANENT_SECRETARY_INT_O_ALLEGED_%20GATHERINGS.pdf

In light of the above, I would like to request all copies of "photographs of some of the events that took place, some official and others taken on personal devices".

If you feel that a substantive response to this request is not possible within a reasonable time frame, I would be grateful if you could contact me and provide assistance as to how I can refine the request. If you need any clarification, please contact me. I look forward to receiving a response in 20 working days. Many thanks.'

5. The Cabinet Office responded on 28 July 2022 and withheld the requested information, citing sections 21(1), 31(1), 40(2) and 41(1) of the FOIA.
6. The complainant asked for an internal review on 2 September 2022. This request was followed by several chaser emails.

7. The Cabinet Office provided an internal review on 6 December 2022 in which it maintained its original position.

Scope of the case

8. The complainant initially contacted the Commissioner on 9 November 2022 to complain about the lack of an internal review. After the internal review was provided the complainant was not content because they believed that providing the requested information was in the public interest.
9. The Commissioner considers that the scope of his investigation is to look at the exemptions cited by the Cabinet Office. Firstly, he will look at section 31 of FOIA as this exemption has been cited with regard to all the requested information in order to see if it has been appropriately applied. If not, he will go on to consider the other cited exemptions. He will also consider any procedural issues that have arisen.

Reasons for decision

10. This decision follows the same reasoning as the Commissioner's decision in IC-206979-Z9C8 which concerns the photographs provided to the Second Permanent Secretary's investigation.

11. Section 31 of FOIA states that -

"(1)Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

[...]

(g)the exercise by any public authority of its functions for any of the purposes specified in subsection (2)..."

12. The purposes (section 31(2)) the Cabinet Office has identified regarding section 31(1)(g) are:

"...(b)the purpose of ascertaining whether any person is responsible for any conduct which is improper..."

13. The Commissioner's guidance² states that the -

"exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime..."

14. The guidance also says that for the exemption to apply the Commissioner would expect there to be a formal code of conduct that members of a profession are expected to follow and a recognised definition of "improper conduct". The Commissioner would also expect a law to underpin the code though this doesn't always have to be the case.

15. To engage a prejudice based exemption such as section 31 there must be the likelihood that disclosure would, or would be likely to cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to do so:

- 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; and,
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

16. Consideration of the exemption at section 31 is a two-stage process, even if the exemption is engaged the Commissioner needs to consider where the public interest lies.

² [Law enforcement - section 31 | ICO](#)

The Cabinet Office's view

17. The Cabinet Office had outlined to the complainant which element of section 31 it was relying on and what functions would be prejudiced as -

"... section 31(1)(g) of the Freedom of Information Act. The relevant parts of section 31 exempt information if its disclosure would prejudice the exercise by any public authority of its functions for the purposes specified in section 31(2)(b). The purposes in question at section 31(2)(b) of the Act are that of ascertaining whether any person is responsible for any conduct that is improper. This includes conduct which falls below standards of proper conduct set for public office holders, MPs, ministers or civil servants as set out by the ministerial, special adviser and civil service codes."

18. The Cabinet Office explained to the Commissioner that "The Prime Minister [PM] is the Sovereign's principal adviser and is the head of the Executive branch of government." The PM "...has the power to manage the civil service (excluding the diplomatic service), which is codified in statute in the Constitutional Reform and Governance Act 2010"³. The PM is also "'responsible for the overall organisation of the Executive'". This is explained in the Ministerial Code, the need for which is also set out in this Act. The functions of the Cabinet Office are codified in the Cabinet Manual and on GOV.UK. The Cabinet Office quoted from the Ministerial Code to emphasise its point:

"the Prime Minister is responsible for the overall organisation of the Executive"...A core function of the Cabinet Office is supporting the Prime Minister on matters relating to propriety and codes of conduct...'

19. Civil servants need to "abide by the Civil Service Code"⁴. The Cabinet Office quotes from the Code as follows:

"civil servants must 'always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings' and also 'comply with the law'."

It emphasises that it "has overall responsibility for the Civil Service and for the Civil Service Code as well as the Special Adviser Code of Conduct

³ [Constitutional Reform and Governance Act 2010 \(legislation.gov.uk\)](http://legislation.gov.uk)

⁴ [The Civil Service code - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

and has a clear function in respect of investigating alleged breaches of these codes.”

20. The investigation by the former Second Permanent Secretary was completed at the request of Boris Johnson who was PM at the time, in line with its “core function to support the Prime Minister on matters of propriety and conduct...” The Cabinet Office goes on to say that -

“these investigations are necessary to ensure the proper functioning of the government, to uphold public trust and/or to ensure effective working relationships, decision-making and policy development in Government”.

It argues that, “It is vital to public trust and the public functioning of the government that the Cabinet Office can effectively conduct investigations into allegations of misconduct or improper behaviour.” This was a “high-profile investigation conducted into alleged gatherings during the period of Covid restrictions”. It was “carried out under the Government’s common law powers”.

21. The Cabinet Office points out that,

“The requester quotes the final report of the investigation in their request and specifically targets information gathered through the investigation (in this case, information about photographs)”.

22. The Commissioner had asked the Cabinet Office to outline the causal relationship between disclosure of the requested information and any prejudice which may occur. The Cabinet Office argued that disclosing information that had been provided in confidence beyond what had been published -

“...would damage the integrity of not only the former Second Permanent Secretary’s investigation, but also all future investigations undertaken by the Cabinet Office, as well as other government departments.”

23. Its view as set out in the internal review is that -

“The information you have requested not already available in the public domain contains details about matters relevant to the investigative work of the Cabinet Office and would prejudice the ability of the Cabinet Office to exercise their functions for the purposes of ascertaining whether any person is responsible for any conduct that is improper.”

24. Investigations of this nature only maintain effectiveness and integrity,

"by the understanding among those who participate in it that any information which they provide relating to conduct is kept in confidence". The Cabinet Office stated that revealing the identities of individuals would deter them from coming forward and cooperating with future investigations. As a consequence this would be likely to prejudice its function of investigating improper conduct and potentially undermine the legal requirements it has concerning confidentiality of the information it gathers which "would have a serious impact on this and all future investigations across Government".

The complainant's view

25. The complainant quoted the following from the Cabinet Office's response in support of their own view that prejudice would not follow from disclosure:

'disclosing the information would "prejudice the ability of the Cabinet Office to exercise its functions for the purposes of ascertaining whether any person is responsible for any conduct that is improper." The Cabinet Office argues that "it is vital that participants provide their information freely and openly in an environment where they can trust that their information will not be disclosed...If participants did not trust that their information would be kept in confidence then it would deter them from coming forward and cooperating with future investigations."

The complainant argued that "this is an exaggeration" and disagreed,

"with the way in which this exemption has been applied. Prime Ministers, ministers, special advisers and civil servants are meant to conduct themselves honestly, and that would mean cooperating with future internal investigations. It would be deeply problematic if Prime Ministers, ministers, special advisers and civil servants would not cooperate with future investigations if what I'm asking for is disclosed.'

The Commissioner's view

26. Firstly, the Commissioner has not been provided with the withheld information by the Cabinet Office though he does not consider it necessary to do so in this instance.
27. The Commissioner understands the complainant's point that the individuals concerned are obliged to cooperate with investigations. However, the level of cooperation would be likely to be prejudiced if all the information provided was disclosed indiscriminately with no regard to the investigation's purpose, which was to ascertain improper conduct.

The Commissioner accepts that the exemption is engaged. He agrees that there would be actual harm to the attributable interests from the release of this information and that there is a causal relationship between release and the prejudice which the exemption is designed to protect at the lower level.

Public interest test

28. As the Commissioner has accepted that the exemption at section 31(1) is engaged, he will now go on to consider whether the public interest lies in disclosure or maintaining the exemption.

Public interest factors in favour of releasing the requested information

29. The complainant contends that, "there is a public interest in disclosing the photographs. In no way does the publication of those nine, highly blurred photographs "meets the need for transparency in this case".'

30. They argue that "Words only go so far in illustrating the seriousness of the rule-breaking that occurred in Number 10 and the Cabinet Office". The complainant's view is that -

"...the public were following the rules and making huge sacrifices, people in high-powered positions were holding gatherings and having fun. The public must be shown all the photos that were provided...in order to understand the full extent as to what was happening in Whitehall".

31. Additionally, their view is that 'there were problems with the inquiry, which were elegantly expressed by the Institute for Government⁵:

"This investigation has highlighted a number of problems with how standards are enforced and investigations handled. Gray is a government official and as such, no matter how thorough her investigation, she has effectively been asked to investigate her own political boss. As a civil servant she is impartial, but not independent. Her terms of reference are set by the prime minister, and the team conducting the inquiry work in close proximity to those they are investigating."

⁵ [Sue Gray investigation | Institute for Government](#)

32. The Cabinet Office stated that there is a general public interest in the disclosure of information and recognised that openness in government may increase public trust in and engagement with the government. It also took into account that the Cabinet Office investigation received significant media coverage and acknowledged that there is public interest in this matter.

Public interest factors in favour of maintaining the exemption

33. However, the Cabinet Office's view is that transparency has been met by the publication of the findings of the Second Permanent Secretary in line with the reference terms. Additionally, "...the Prime Minister has given a statement to Parliament on the matter". The Cabinet Office considers that the publication "meets the need for transparency". It points out that the request was received on the day of the report's publication and that if sensitive investigation material had been disclosed shortly after the report's publication" it would not be in the public interest.
34. The Cabinet Office underpins its argument that it is not in the public interest to disclose the requested information because "this issue has been the subject of intense and sustained debate via several different accountability mechanisms". There has been an update on the Report, Parliamentary questions on the topic and debates in Parliament, media commentary and queries from journalists:

"We see a very limited public interest in reopening issues which have been discussed so intensely and so publicly, via the disclosure of photographs submitted to the investigation under FOIA."

The Cabinet Office went on to list events that are now outside the time for public interest considerations regarding this request, such as the Privileges Committee's "evidence and report on the conduct of the former Prime Minister" which "disclosed only a limited number of further photographs", having considered the public interest. The Commissioner notes that the time for assessing the public interest test balance is the time at which an authority is statutorily required to respond to the request under the FOIA.

35. The Cabinet Office believes that the information contains details about matters relating to its investigation and would prejudice its ability to exercise its function in order to ascertain whether any person is responsible for improper conduct. This would not be in the public interest.
36. The integrity and effectiveness of the Cabinet Office's investigations can only be maintained by participants believing that any information they have given relating to conduct is kept confidential. Its view is that

participants will only give information "freely and openly" in an atmosphere where they have "trust that their information will not be disclosed". Should this not be the case, individuals may not come forward and cooperate with future investigations. Release of information about internal investigations "would have a serious impact on this and all future investigations across Government".

37. The Cabinet Office repeated to the Commissioner what it had told the complainant in its response to the request:

"that the disclosure of the information requested would be likely to have a prejudicial effect more generally on future investigations across government. The value of investigations rely on discretion, full cooperation and frankness from all individuals involved. Individuals who are questioned as part of that process would have reason to believe that the information they provide or other details relating to their involvement might be published inappropriately in response to a request for information. This could make them more circumspect and less open in their responses, or otherwise undermine the element of discretion, damaging the effectiveness of any investigation".

The balance of public interest

38. The matter of gatherings on government premises whilst Covid restrictions were in place has been a subject of great public interest. However, the Commissioner has considered the public interest in the light of its FOI meaning – the general well-being of society and whether release or non-disclosure benefits the public overall. The Commissioner has made his decision on the basis that, although this was an internal investigation, it ended in a report which was placed in the public domain. Therefore it cannot be said that the public was kept in the dark or that the public interest was not served.
39. The report published certain pictures and the report's author made the following statement –

"I concluded that the official photographs should be within scope for disclosure only where they are particularly pertinent in helping to understand the nature and purpose of a gathering."

The complainant quoted it within the request. This seems to the Commissioner to be the correct balance to take. The published photographs did not identify individuals, apart from Ministers and the Cabinet Secretary.

40. It seems evident to the Commissioner that the investigation would not have received the level of cooperation (and the provision of photographs) without the expectation that confidentiality would be maintained as far as possible. To undermine that confidentiality by placing everything in the public domain when the author has already considered the balance necessary to serve the public interest would undermine the investigative process. Had the report been kept secret and no details released, the balance would likely have fallen on the side of disclosure. As this is not the case, the balance tips in favour of maintaining the exemption and he has not gone on to consider any of the other exemptions cited.

Procedural matters

41. In respect of exempt information, section 17(1) of FOIA requires that a public authority provide an applicant with a refusal notice within 20 working days of receiving their request.
42. The Cabinet Office received the information request on 25 May 2022 but did not provide a refusal notice until 28 July 2022 which is past the statutory timeframe.

Other matters

43. The section 45 code of practice⁶ recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from its receipt.
44. In this case the Cabinet Office did not provide an internal review for over 40 working days and therefore went beyond the recommended timeframe.

⁶ Ibid

Right of appeal

45. 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

46. 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.
47. 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

Janine Gregory
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