

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 January 2024

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Second Permanent Secretary's investigations into staff gatherings at No 10, Downing Street on four separate dates. The Cabinet Office initially stated that it was exempting information it held within scope of the request with reliance on section 31(1)(law enforcement), section 40(2)(personal information) and section 41(1)(information provided in confidence) of FOIA. At internal review, the Cabinet Office amended its position and sought to rely on section 12(1)(cost limit) to refuse the request.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 12(1) to refuse the request.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 31 January 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I am seeking the following information under FOIA:

Any information held by the Second Permanent Secretary of the

Cabinet Office (Sue Gray) or her staff relating to the investigations into staff gatherings in No 10 Downing Street and the Department for Education (terms of reference available here <https://www.gov.uk/government/publications/terms-of-reference-for-the-cabinet-secretarys-investigations>).

Specifically, I am interested in any information held that relates to gatherings held on the following dates:

- 15 May 2020
- 27 November 2020
- 10 December 2020
- 15 December 2020

I note that the update to the investigation (available here [<Investigation into alleged gatherings on government premises during Covid restrictions: Update - GOV.UK \(www.gov.uk\)>](#)) published today (31 January 2022) mentions that the police have considered events held on these dates do *not* meet the threshold for criminal investigation (and as such do not anticipate any issues with disclosure under any exemption for the purposes of prejudicing any criminal investigation)"

5. On 28 February 2022 the Cabinet Office wrote to the complainant to advise that it was extending the time period for complying with the request in order to consider the balance of the public interest, by virtue of section 10(3)¹(time for compliance) of FOIA, in relation to section 31. The Cabinet Office gave a provisional date of 29 March 2022 for the response.
6. On 2 March 2022 the complainant contacted the Commissioner to complain about the delays experienced in obtaining a response from the Cabinet Office. The Commissioner advised the complainant to wait for a response from the Cabinet Office before proceeding with their complaint.

¹ "(3) If, and to the extent that –
(a) Section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied,
or
(b) Section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,
the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

7. The Cabinet Office responded on 29 March 2022. It stated that it was withholding the requested information with reliance on section 31(1)(a), (b) and (g), section 40(2) and section 41(1) of FOIA. With regards to the application of section 31(1), the Cabinet Office stated that the balance of the public interest fell in favour of withholding the information as disclosure would prejudice the Cabinet Office's ability to investigate whether any person may be responsible for improper conduct.
8. In its response to the complainant the Cabinet Office stated that the exemptions outlined above were engaged as the information requested "contained details about matters relevant to the investigative work of the Cabinet Office and potential law enforcement. Disclosure of the information would thus prejudice the ability of the Metropolitan Police Service ("MPS") and the Cabinet Office to exercise their functions for the purposes of ascertaining whether any person has failed to comply with the law and whether any person is responsible for any conduct that is improper, in accordance with the terms of reference²."
9. The Cabinet Office stated that, regarding the application of the subsections at section 31 of FOIA, it had not concluded its investigation into events on the dates specified in the request, and that disclosure of the information sought amounted to disclosing information ahead of the analysis and publication of findings, which would contravene the Terms of Reference. The Cabinet Office also stated that MPS was conducting its own investigation into events that some of the requested information contains details about, and that since the request was made MPS had asked the Cabinet Office not to disclose in detail information that may overlap between the Cabinet Office's own investigation into events and the investigation conducted by MPS. The Cabinet Office did not expand on this point or specify which events or which dates MPS were investigating.
10. As a final comment on the application of section 31(1)(a), (b) and (g) the Cabinet Office asserted that disclosure of the requested information could compromise the perceived integrity of its investigation process by those who participated in it, and that participants would reasonably expect that the information they provided would be kept in confidence. It stated that disclosure may deter participants from cooperating with Cabinet Office investigations, and this would be likely to prejudice the exercise of the Cabinet Office's function in investigating whether any person is responsible for improper conduct.

² <https://www.gov.uk/government/publications/terms-of-reference-for-the-cabinet-secretarys-investigations>

11. In respect of the application of section 41(1) the Cabinet Office stated that disclosure of the information sought could expose the individuals concerned to unwarranted intrusion and attention from the media and members of the public, which could endanger their personal safety and mental well-being.
12. On 30 March 2022 the complainant requested an internal review. The Cabinet Office did not respond to the complainant's request.
13. On 6 June 2022 the Commissioner accepted the complaint for investigation without an internal review.
14. The Commissioner contacted the Cabinet Office on 3 March 2023 to request its submissions on its application of the exemptions claimed at paragraph 7 above.
15. However, on 6 November 2023 the Cabinet Office provided the complainant with an internal review. It stated that it was amending its position and applying section 12(1)(cost limit) to the request. The Cabinet Office stated that it would take 70 hours to comply with this request, exceeding the appropriate limit of 24 hours for central government as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.
16. In accordance with its duties at section 16 of FOIA to provide advice and assistance, the Cabinet Office suggested to the complainant that they could submit a refined request that focused on specific types of information, or request information relating to a smaller number of dates than that given. The Cabinet Office advised the complainant that, were they to submit a refined request for less information, that the information may be subject to one or more of the exemptions under FOIA.

Scope of the case

17. On receipt of the Cabinet Office's internal review the complainant advised the Commissioner that they wished to challenge its revised position.
18. The Commissioner considers that the scope of his investigation is whether the Cabinet Office is entitled to rely on section 12(1) of FOIA to refuse the request.
19. As the Cabinet Office is no longer seeking to apply sections 31, 40 and 41 to the requested information the Commissioner will not be considering these exemptions in his decision.

Reasons for decision

Section 12 – cost of compliance

20. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
21. Section 12(2) of FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. The Cabinet Office relied on section 12(1) in this case.
22. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the Cabinet Office is £600.
23. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively provides a time limit of 24 hours for the Cabinet Office.
24. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
25. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be “sensible,

realistic and supported by cogent evidence". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The complainant's position

26. The complainant directed the Commissioner to the update³ on the investigation into alleged gatherings on government premises during Covid restrictions, published on 21 January 2022. Within the update, Sue Gray writes:

"At the request of the police I have provided the material compiled in the course of my investigation relevant to the gatherings they are now investigating. I have also been asked to retain all the other information collected in the course of this work, which I have confirmed that I will do. I will therefore ensure the secure storage and safekeeping of all the information gathered until such time as it may be required further."

27. The complainant stated:

"The investigative lead, Sue Gray, has herself said that she has compiled and retained all information relating to the subject of my request. It is simply not possible that information that exists and has been stored in a well defined and central location can possibly take 70 hours to retrieve. My request was simply the information that Sue Gray held, so it should be a very simply request to fulfil given the information I have highlighted."

The Cabinet Office's position

28. In its initial response to the Commissioner's investigation, the Cabinet Office explained that it considered the complainant's request to engage section 12(1) due to the potential breadth of its scope. The Cabinet Office argued that the complainant had requested '*any* information that *relates to gatherings*' (emphasis added by the Cabinet Office) and that this wording therefore necessitated broad searches. The Cabinet Office stated that the two areas most likely to hold information within scope of the request were the email inboxes of the Second Permanent Secretary and the officials who supported her investigation, as well as hard copy files stored by the Cabinet Office Investigation Team.

³ <https://www.gov.uk/government/publications/investigation-into-alleged-gatherings-on-government-premises-during-covid-restrictions-update>

29. The Cabinet Office explained that it had conducted a sample search of relevant email inboxes using the dates specified by the complainant as the search terms. The Cabinet Office stated that it was possible that information within scope of the request may also be held beyond the emails returned by the sample search, as the dates referenced may not have been explicitly quoted in the body of some emails concerning events that took place.
30. Of the hard copy material, the Cabinet Office stated that officials would need to manually assess the records in order to establish whether information within scope of the request was contained within it.
31. In total, the Cabinet Office estimated that it would take approximately 70 hours to establish whether information is held, locate and retrieve the information and extract relevant information from its sources across both email inboxes and hard copy material. The Cabinet Office explained that the material held within scope of the request dates from 17 December 2021 to 31 January 2022 - the date the request was made.
32. At paragraph 21 of the finished report of the Findings of the Second Permanent Secretary's Investigation into Alleged Gatherings on Government Premises During Covid Restrictions⁴, published on 25 May 2022, the Second Permanent Secretary writes:

"The Cabinet Office investigation has accumulated a body of material in the course of its work... I have asked the Cabinet Office Knowledge and Information team to be the custodian of this material, together with my own records relating to this work, for preservation in the official record."

33. The Commissioner wrote to the Cabinet Office to request an overview of how information retained as part of the official record is held, and asked the Cabinet Office to respond to the complainant's assertion that the requested information is stored in a 'well defined and central location' and therefore it should not take 70 hours to process the request. The Cabinet Office reiterated its position that as the complainant's request is very broad, it was necessary to extend its searches beyond centrally-stored investigation files to also include the email inboxes of Sue Gray's staff and that on this basis it would take 70 hours to respond to the request. The Cabinet Office argued that:

"As a result of these broad search terms, there may be information in

⁴ https://assets.publishing.service.gov.uk/media/628e00e3d3bf7f1f446954a5/2022-05-25_FINAL_FINDINGS_OF_SECOND_PERMANENT_SECRETARY_INTO_ALLEGED_GATHERINGS.pdf

scope of the applicant's request which was not saved in a central location but is nonetheless captured in searches for 'any' information held by the former Second Permanent Secretary and her team, because it is held in their inboxes."

34. The Commissioner therefore considers that a matter central to this investigation is that of whether it was necessary for the Cabinet Office to include searches of the email inboxes of Second Permanent Secretary's team, as to do so extends the time required to comply with the request by almost thrice the appropriate limit.
35. Considering that the Second Permanent Secretary asked for the material compiled during her investigation to be held by the Cabinet Office's Knowledge and Information team for preservation in the official record (per paragraph 32 above), the Commissioner considers it logical that the complainant would assume that all information relevant to the request should be held securely in this area. Indeed, at the time of the request, the Second Permanent Secretary had made assurances that she would safeguard the information "until such time as it may be required further." (paragraph 26 above). It appears contrary to the directions of the Cabinet Office's own report for information to have been stored by Cabinet Office staff elsewhere. However, the Commissioner recognises the possibility that some information that may not have been retained by the Knowledge and Information Team for the official record may still be held in separate inboxes, and that this information may fall within scope of the complainant's request. For this reason the Commissioner understands that it was necessary to investigate these inboxes.
36. When assessing a complaint that has been refused under section 12(1) the Commissioner will typically outline the sampling exercise provided to him by the public authority in support of its position. In this instance, the Cabinet Office has requested that the breakdown of the sampling exercise remain confidential due to concerns it holds about details of the investigation entering the public domain. In particular, the Cabinet Office considers details about the volume of material held within scope of the request to be sensitive and requiring protection in itself, as confidential information could be gleaned from this.
37. The Commissioner appreciates that the investigation of the Second Permanent Secretary had been subject to a high level of national public scrutiny, and disclosure of the type and volume of information obtained during the course of the investigation carries the possibility of revealing sensitive details about how the investigation had been conducted to the general public. He recognises that the investigation has now concluded, and that revealing the volume of information does not carry the potential to undermine an active investigation. However, he does acknowledge that release of this information could jeopardize any

similar investigations in future by indicating the methods used for gathering material.

38. The Commissioner has seen the details of the breakdown provided by the Cabinet Office and finds that it provides sufficient evidence to demonstrate that section 12(1) is engaged. For the reasons given above, the Commissioner finds that the Cabinet Office was entitled to rely on section 12(1) to refuse the request.

Section 16(1) – The duty to provide advice and assistance

39. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request so far as it would be reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice⁵ in providing advice and assistance, it will have complied with section 16(1).
40. The Commissioner notes that the Cabinet Office, in its internal review response of 6 November 2023, advised the complainant that they may refine their request by focusing on a smaller number of dates or by narrowing the type of information. The Cabinet Office also advised that information captured by a refined request may be subject to one or more exemptions. The Commissioner finds that the advice and assistance provided by the Cabinet Office is appropriate in the circumstances of this case and is therefore satisfied that the Cabinet Office met its obligations under section 16 of FOIA.

Other matters

41. The Commissioner is nevertheless disappointed with the way in which the Cabinet Office has engaged with the complainant in its handling of their request. In particular, it is unacceptable for any public authority to expect a requester to wait for almost 20 months for the outcome of an internal review.
 42. The Commissioner also draws attention to the fact that after such an extended period the Cabinet Office should choose to amend its position entirely and refuse the request on the basis of the cost burden it would
-

⁵ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

impose on the department. The Commissioner considers that, given the wide scope of the request and the information captured by it, it should have been apparent to the Cabinet Office from – or soon after - the outset that the request would involve retrieving and processing a large volume of information and therefore may have engaged section 12(1). Appropriate and timely advice and assistance could therefore have been provided to the complainant at that stage to assist them in exercising their information access rights.

43. He also wishes to express his disappointment at the Cabinet Office's engagement with his investigation, specifically the amount of time taken to advise him of its revised position.

Right of appeal

44. 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

45. 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.
46. 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

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