

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 October 2022

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant has requested copies of all messages sent between Dominic Cummings and Lee Cain between 22 May 2020 and 28 May 2020. The Cabinet Office refused the request under section 12(1)(cost of compliance with the request).
2. The Commissioner has concluded that the Cabinet Office was not entitled to rely on section 12 as its basis for refusing to respond to the request, as the estimate of time required was not reasonable.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation:
  - Carry out checks and searches of information held in official records for any information held within the short time period of the complainant's request (22 May 2020 to 28 May 2020) and provide the complainant with a revised response to his request.
4. 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

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5. On 28 May 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

*'Please provide a copy of all emails, text messages, Slack messages, WhatsApp messages and Signal messages sent between Dominic Cummings and Lee Cain between 22 May 2020 and 28 May 2020'.*

The complainant noted that no FOIA exemptions are blanket in effect and that the Commissioner had previously found that private communications concerning government business are subject to the FOIA.

6. The Cabinet Office responded to the request on 24 June 2020 and advised that they had (correctly) interpreted the request to include not just communications about official government business directly between Mr Cummings and Mr Cain, but any such communications from either individual to which the other may have been a copy recipient.

7. The Cabinet Office advised that the cost of complying with the request would exceed the appropriate (£600) limit, which represents the estimated cost of one person spending 3.5 working days in determining whether they hold the information, and locating, retrieving and extracting the same. The Cabinet Office noted that the complainant had not specified a subject of official Government business in which he was interested and which would help to focus searches.

8. The Cabinet Office explained that:

*'Information about official Government business potentially relevant to your request could be held either electronically or manually, in a number of different files and locations. As well as any information held electronically, searches would necessarily involve paper records which do not support full text searching. In addition, information about official Government business within the scope of the request might also be held within attachments to e-mails. Our e-mail searches do not yield results from attachments and it would therefore be necessary to open and review each email attachment, again increasing the volume of materials that it would be necessary to review'.*

9. The Cabinet Office advised the complainant that if he were to make a new request for a *'narrower category of information about official Government business – for example, by identifying a particular issue of official Government business that you are interested in'*, then it may be that they could comply with such a request within the appropriate limit. However, the Cabinet Office added that even if such a refined request

were made, and the information requested were held, one or more FOIA exemptions may apply to it.

10. The Cabinet Office confirmed that they were not obliged to comply with the current request under section 12 of the FOIA and that they would not be processing it further as it stood.
11. It would appear from documentation seen by the Commissioner that the complainant responded to the Cabinet Office at some point prior to 23 July 2020 and confirmed that he was interested in direct one to one emails, text messages, Slack messages, WhatsApp messages and Signal messages sent between Mr Cummings and Mr Cain between 22 May 2020 and 28 May 2020.
12. The Cabinet Office wrote to the complainant on 23 July 2020 and advised that in line with their section 16 duty to provide advice and assistance, they were advising the complainant to *'specify a subject of official Government business in which you are interested because that would help to focus searches and potentially bring it within the cost threshold'*. The Cabinet Office informed the complainant that as he had not provided such specification, their position remained that his request exceeded the appropriate limit and was refused by virtue of section 12. The Cabinet Office confirmed that their use of email follows the Lord Chancellor's Code of Practice on the management of records issued under section 46 of the FOIA and the Commissioner's guidance<sup>1</sup>.
13. The Cabinet Office again invited the complainant to make a new request *'for a narrower category of information about official Government business'* as it may be that they could comply with such a request within the appropriate limit.
14. The complainant wrote to the Cabinet Office on 4 August 2020 and requested an internal review. He stated that there was no requirement under the FOIA to limit his request to a specific topic of government business, and advised that *'the purpose of this request, however, is to assess Mr Cummings and Mr Cain's role in government communication at a crucial time in the government's response to the Coronavirus pandemic, but across all of their government business responsibilities'*.
15. The complainant further contended that:

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<sup>1</sup> [Code of Practice on the Management of Records issued under section 46 the Freedom of Information Act 2000 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454222/Code_of_Practice_on_the_Management_of_Records_issued_under_section_46_of_the_Freedom_of_Information_Act_2000.pdf)

*'This is for the clear and serious purpose of holding senior officials accountable, and for transparency of government, which is clearly in the public interest. Narrowing my focus further would leave out documentation within scope of my request which serves this purpose, and given the extremely narrow time frame of this request, is not necessary or required'.*

16. The complainant contended that, given the extremely narrow scope of his request, which concerned just two officials over a short period of days, it seemed highly unlikely that the cost limit would be breached in responding to the request. He noted that no explanation of how the cost of complying with his request had been calculated, or what the cost of providing a response would be, had been provided by the Cabinet Office.
17. The Cabinet Office provided the complainant with their internal review on 14 October 2020. The review upheld the section 12 refusal but advised the complainant that, *'for the avoidance of doubt, searches of the work accounts of Mr Cummings and Mr Cain have not identified recorded information in relation to your request'.*

## **Scope of the case**

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18. The complainant contacted the Commissioner on 19 October 2020 to complain about the way his request for information had been handled.
19. In his complaint to the Commissioner, the complainant noted that, *'it seems highly unlikely that there were no communications between the government's chief adviser, and the government's head of press, in the week where a major scandal surrounded the government's chief adviser'.*
20. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 12 in respect of the complainant's request. The Commissioner will also consider whether the Cabinet Office has provided adequate advice and assistance in accordance with their obligations under section 16 of the FOIA.

## **Reasons for decision**

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21. Section 12(1) of the FOIA states that:

*'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit'.*

22. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') set the appropriate limit at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. Consequently, there is a time limit of 24 hours in this case.

*Would complying with the request exceed the appropriate limit?*

23. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs they reasonably expect to incur in:
- Determining whether they hold the information;
  - 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.
24. In submissions to the Commissioner, the Cabinet Office advised that it is their long-standing position, as clearly stated in the section 46 guidance, that where an email or other electronic communication needs to be retained, it should be properly filed in the Cabinet Office official records. Electronic correspondence that does not need to be retained is disposed of, *'in the case of ephemeral communications often after very short periods of time'*. The responsibility for this lies with the individual in question.
25. More generally, the Cabinet Office confirmed that their records are arranged by broad subject matter, and not, for example, by sender or recipient. The Cabinet Office therefore advised that it follows that it was, and remains, their position that to comply with the complainant's request, which is not restricted to direct correspondence exchanged in relation to a specific subject or subjects, would require that all records created during the specified period were checked to discover what, if anything, was held in relation to his request. Because the request was not limited to a specific topic or topics, the Cabinet Office stated that to comply with the request *'would require that we examine every record added to our official records between 22 May and the date of the reply to the request'* (24 June 2020).
26. The Cabinet Office noted the arguments advanced by the complainant about the serious purpose and public interest behind his request, but stated that these did not alleviate the burden imposed by the request.

27. The Cabinet Office also advised that very extensive searches might also identify personal or party political communications between the two individuals. Whilst these would not be within scope of the FOIA, assessing whether or not each individual communication was 'held' would count towards the cost limit.
28. The Cabinet Office explained to the Commissioner that in order to be helpful, the official email accounts of Mr Cummings and Mr Cain were searched to ascertain, as a starting point, whether any information was held that might potentially assist with the request. As the Cabinet Office had informed the complainant in their internal review, neither official email account contained any direct communications between Mr Cummings and Mr Cain. The Cabinet Office stated that this did not mean that recorded information falling within scope of the request could not be held on the official records, hence their continued reliance on section 12.
29. In submissions to the Commissioner, the Cabinet Office provided further detail about the actions which would need to be undertaken to locate information within the scope of the request.
30. Email accounts within the Prime Minister's Office retain emails for three months, after which they are automatically deleted. Any information older than that which needs to be retained for official records is saved and filed outside of email accounts. *'Crucially, for these purposes, these files are organised by subjects and topics. They are not arranged according to senders or recipients'*. The Cabinet Office therefore advised that they would be required to undertake an extensive search of all email records in these files during the relevant period to determine what was within scope of the request.
31. The Cabinet Office advised that they estimated that the total number of documents filed between 22 May and 24 June 2020 was:  
  
Policy Filing: 482  
  
Policy Correspondence: 192  
  
Hard copy documents: 301 across 71 files
32. The Cabinet Office confirmed that it would be necessary to search all of these files in order to identify and locate information within scope of the request. They estimated that it would take one minute to review each policy filing and policy correspondence, and three minutes to review each hard copy document. Looking through all the files would therefore amount to 26 hours of time. Should the searches identify personal or political communications between the sender and recipient which were not within the scope of the FOIA, additional time would be expended determining what correspondence was official and which was not.

*Commissioner's assessment*

33. A public authority does not have to make a precise calculation of the costs of complying with a request, and only an estimate is required. However, that estimate must be a reasonable one. In *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/0004), the Information Tribunal stated that a reasonable estimate is one that is '*sensible, realistic and supported by cogent evidence*'.
34. A sensible and realistic estimate is one which is based on the specific circumstances of the case. It should not be based on general assumptions, for example that all records would need to be searched in order to obtain the requested information when it is likely that staff in the relevant department would know where the requested information is stored. This does not mean that a public authority has to consider every possible means of obtaining the information in order to produce a reasonable estimate. However, an estimate is unlikely to be reasonable where a public authority has failed to consider an absolutely obvious and quick means of locating, retrieving or extracting the information.
35. In this case, the request concerned communications between just two individuals within a short time period (one week). At the time of the request both Mr Cummings and Mr Cain were in post in their respective positions as Chief Adviser to then Prime Minister Boris Johnson and Downing Street Director of Communications<sup>2</sup>. The estimate provided by the Cabinet Office covered a period of between 22 May and 24 June 2020 – the date of their refusal notice. However, the complainant had not requested any messages sent after the date of 28 May 2020 (the date of his request). As the period of time specified by the complainant in his request was between 22 May and 28 May 2020, the Cabinet Office therefore only needed to examine every record added to their official records between these two dates. The Cabinet Office erred in including, for the purposes of their costs estimate, a period of almost four weeks (29 May to 24 June 2020) which were not within the scope of the complainant's request.
36. Whilst in substantive exemption cases, it is good practice for a public authority, when responding to an FOI request, to take into account information held at the time of that response, this is not appropriate or reasonable in section 12 cases. In section 12 cases, a public authority cannot rely, for the purposes of a reasonable estimate, on a time period that is outside the scope of the time period specified by the requester.

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<sup>2</sup> Both Mr Cummings and Mr Cain left their government roles in November 2020.

Such reliance will, as in this case, produce an estimate that is neither correct nor reasonable (since it unnecessarily lengthens the search period). It is not clear why the Cabinet Office considered that they would need to examine every record added to their official records between a period which included 29 May to 24 June 2020, but it is clear, for the reasons explained above, that they did not need to do so to satisfy the complainant's request in this case.

37. As the estimate of 26 hours provided by the Cabinet Office is based on the above misapprehension, it is clear that a search of documents undertaken between the correct time period (22 to 28 May 2020) would not exceed the appropriate limit (this being a much shorter time period than the one relied on by the Cabinet Office). The Commissioner is therefore satisfied that as the estimate provided was not a reasonable one, the Cabinet Office were not entitled to rely on section 12 as a basis for refusing to respond to the complainant's request.
38. However, there is a further reason why the Commissioner considers that the estimate provided by the Cabinet Office in this case was not a reasonable one.
39. During the time period covered by the complainant's request (22 May to 28 May 2020) newspapers reported that Mr Cummings had allegedly breached the Government's Covid-19 lockdown rules by travelling to County Durham with his family at the end of March 2020. On 25 May 2020, Mr Cummings held a press conference in the Downing Street garden, where he attempted to explain his actions and took questions from the media.
40. Given that the complainant's request solely concerned communications between Mr Cummings and Mr Cain, and was not limited to their official email accounts but included *all* communication mediums (e.g. WhatsApp and Slack), the Commissioner considers that the most obvious and reasonable way for the Cabinet Office to establish whether they held the requested information, would have been for Mr Cummings and Mr Cain to be approached and asked to check whether they held any relevant information. The Cabinet Office responded to the request on 24 June 2020, only one month after the period specified in the request, so it is likely that any such messages would still have been stored and accessible (by Mr Cummings and Mr Cain) at that point.
41. In IC-40467-C7K2 (March 2022<sup>3</sup>), the Commissioner noted in his decision notice that the publication by Mr Cummings in July 2021 of

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<sup>3</sup> [ic-40467-c7k2.pdf \(ico.org.uk\)](https://ico.org.uk/subject-access/ic-40467-c7k2.pdf)



what appear to be his own private WhatsApp messages which discussed the Government's handling of the pandemic, tended to corroborate information reported by the Independent<sup>4</sup>, in that they appeared to show that Mr Cummings was in the habit of using such private communication channels to conduct official government business, and had done so since his arrival in Downing Street as the Prime Minister's Chief Adviser in July 2019. In that case, the Commissioner considered that the Cabinet Office should therefore have been reasonably aware of Mr Cummings' practice by the time of the complainant's request in January 2020.

42. Similarly, in the present case, at the time of the complainant's request in May 2020, the Cabinet Office should have been aware of Mr Cummings' aforementioned practice and of the need to include such personal communication channels in their checks and searches for any relevant information held.
43. As noted, the most obvious and simplest step to take would have been for Mr Cummings and Mr Cain to be contacted and asked to confirm whether they held any relevant information. Yet, it appears that no such step was taken by the Cabinet Office. Instead, the only checks that were made, *'in order to be helpful'*, were of the official email accounts of Mr Cummings and Mr Cain. Whilst such official email accounts came within the scope of the complainant's request, they were only one component of the same.
44. Given Mr Cummings' practice of using private communication channels to conduct/discuss official government business, and the media furore which surrounded him during the period covered by the request, the Commissioner considers it is entirely possible that Mr Cummings and Mr Cain could have communicated with each other through such private channels during the period in question, even if no communications were apparently made through their official email accounts. That is to say, relevant information may well have been held.
45. Therefore, in addition to the erroneously elongated time period relied upon by the Cabinet Office in providing their costs estimate, the Commissioner considers that the estimate was also not reasonable because the Cabinet Office did not employ an obvious and sensible means of locating, retrieving or extracting the information, namely, notifying Mr Cummings and Mr Cain of the request, and asking them to

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<sup>4</sup> [Cummings ushered in secretive Whatsapp-encrypted 'boys club' style to government communications, say former Whitehall insiders | The Independent](#)

search their communication channels, both official and private, to see whether they held any relevant information. The Commissioner considers that it is likely that both Mr Cummings and Mr Cain could, had they been asked, have carried out appropriate checks and searches of their personal communication channels within the appropriate limit, given the short time period covered by the request.

46. As the Commissioner does not consider that the estimate provided by the Cabinet Office is reasonable, for the reasons explained above, he has concluded that the Cabinet Office were not entitled, *on the basis of the search strategy proposed*, to rely on section 12 as a basis for refusing to respond to the request.
47. The unreasonable refusal of the request on the grounds of exceeding the cost limit was unfortunate and unsatisfactory, in terms of transparency and accountability, since it is highly likely, given the time elapsed since the Cabinet Office refusal notice of 24 June 2020 and the subsequent departure from government of Mr Cummings and Mr Cain in November 2020, that any relevant information, if held, could have since been lost.
48. The Commissioner therefore requires that the Cabinet Office carry out checks and searches of their official records for the period specified by the complainant in his request only, specifically 22 May 2020 to 28 May 2020, and that having done so, they provide the complainant with a revised response to his request.

## **Other matters**

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49. The Commissioner would impress upon the Cabinet Office the importance, when considering a request for information about communications between named individuals, particularly including private communication channels, of contacting (where possible) the individuals in question to ask them to carry out appropriate checks and searches of their emails/messages to most efficiently and effectively establish whether relevant information is held. A section 12 response to a request which has not considered this obvious and practical search and identification means, is unlikely to be deemed to be reasonable.
50. In addition, when refusing future requests under section 12, the Cabinet Office should ensure that they provide the requester, in accordance with their section 16 duty of providing advice and assistance, with details of the cost estimate calculations of the type that were provided (albeit they were erroneous) to the Commissioner by the Cabinet Office in this case. The Cabinet Office should also ensure that the requester is provided with assurances that all relevant information within the scope of the request, both in official and private communication channels, will have been appropriately processed and retained in official records in accordance

with the section 45 and section 46 Codes of Practice and related guidance, including that produced by the Commissioner on information held in non-corporate communication channels.

## Right of appeal

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51. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.

53. 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  
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