

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 May 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on WhatsApp communications between the Prime Minister at the time, Boris Johnson, and particular individuals. The Cabinet Office eventually relied on FOIA section 12(1) to withhold the requested information, on the basis that the cost of compliance would exceed the appropriate limit.
2. The Commissioner's decision is that the Cabinet Office is entitled to refuse the request in reliance of section 12(1). The Commissioner finds a breach of section 17(5) in the late reliance on section 12 and a breach of section 16 by failing to engage sufficiently with the complainant to provide meaningful advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide appropriate advice and assistance to the requester to enable them to refine their request.
4. The public authority 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 June 2021 the complainant made the following request for information:

"Please provide copies of any Whatsapp communication sent and received by the Prime Minister between 1 February 2020 and 31 May 2021 with, or about, the following individuals and entites [sic]:

- Anthony Bamford, and/or any representatives of JCB
- Michelle Mone
- Douglas Barrowman
- Any representatives of the firm PPE Medpro
- David Meller, and/or any representatives of Meller Designs
- James Dyson, and/or any representatives of Dyson
- Irwin Armstrong, and/or any representatives of CIGA Healthcare

This request applies to all messages that relate to the Prime Minister's official business and, as such, would be covered by the Act."

6. The Cabinet Office responded on 27 July 2021. It stated that it was relying on FOIA sections 24(2) – national security and 31(3) – law enforcement, prevention of crime, to neither confirm or deny ('NCND') holding information in the scope of the request.
7. Following an internal review request on 27 July 2021 the Cabinet Office wrote to the complainant on 13 October 2021. It stated that it was upholding its initial response.

## Scope of the case

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8. The complainant contacted the Commissioner on 7 September 2021 to complain about the way their request for information had been handled. Following the Commissioner's intervention the internal review was provided. The complainant wrote again to the Commissioner on 20 October 2021 explaining:

"The Cabinet Office has again sought to argue that disclosing whether the Prime Minister uses Whatsapp is an issue of national security. This is clearly nonsense as no less a figure than the Prime

Minister's own chief adviser has published messages he has received from the PM on this channel for the world to see."

9. In his initial investigation letter to the Cabinet Office on 24 August 2022 the Commissioner pointed out his report<sup>1</sup> to Parliament which at page 32 acknowledges the messaging systems in regular use by the Department of Health and Social Care (Google Mail, Hotmail, WhatsApp). It goes on to state:

"The Prime Minister's former Chief Advisor, Dominic Cummings, provided detailed oral evidence to Parliament on 26 May 2021. This included extensive reference to WhatsApp exchanges with the Prime Minister and others about matters relevant to the handling of the pandemic. The extent to which the Cabinet Office itself has retained these records remains unclear. Although, this is an issue we are keeping under review as we consider FOI complaints that may be relevant in this area."

10. The Cabinet Office advised the Commissioner, and the complainant, on 24 January 2023 that it was withdrawing its reliance on FOIA sections 24(2) and 31(3).
11. At this time the Cabinet Office determined that it was not obliged to comply with the request under FOIA section 12(1).
12. The complainant was not satisfied by the change in reliance and explained:

"It is plainly unacceptable for the government to change their position 20 months after I submitted this request. Nor has it made any attempt to talk to me about refining the request within the cost limit.

If the Cabinet Office is now claiming it is too expensive to search a former prime minister's phone for WhatsApp messages, can I point out that this request was submitted when he was still prime minister and when it should have been a straight-forward task. Any difficulties they now face in complying are entirely of their own making in having dragged this out for so long.

I really can't see how searching for a short list of names through someone's WhatsApp messages could exceed the cost limit anyway."

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<sup>1</sup> <https://ico.org.uk/media/about-the-ico/documents/4020886/behind-the-screens.pdf>

13. The Commissioner considers the scope of his investigation to be the application of section 12(1) to refuse the request.

## Reasons for decision

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14. Section 12(1) of FOIA states that a public authority does not have to comply with a request if it estimates that to do so would exceed the appropriate limit.
15. The appropriate limit is charged at a flat rate of £25 per hour, with a total limit of £600, or 24 hours work, for a central government department such as the Cabinet Office.
16. When considering section 12, a public authority can only take into account the following costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004<sup>2</sup> ('the Regulations'):
  - (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
17. When citing section 12, the Commissioner expects a public authority to provide a reasonable estimate as to how long compliance with the request would take. This estimate should be based on cogent evidence, on the quickest method of gathering the requested information and will usually involve the public authority conducting a sampling exercise.
18. The Cabinet Office referred the Commissioner to the section 46 Code of Practice<sup>3</sup> and explained that it had had regard to the code in its approach to messaging communications via means such as WhatsApp. The code at paragraph 2.7.3 states:

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<sup>2</sup> <https://www.legislation.gov.uk/ukxi/2004/3244/made>

<sup>3</sup> <https://www.gov.uk/government/publications/code-of-practice-on-the-management-of-records-issued-under-section-46-the-freedom-of-information-act-2000>

"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."

19. It added that the Cabinet Office's policy "Messaging Applications and Web Services" states:

"...staff are required to ensure that any important conversations (such as those that need to remain part of the official record) are saved."

20. The Cabinet Office explained that the Prime Minister's Office ("PMO") has a retention and disposal policy consistent with the above policy. It explained:

"The retention and disposal policy of the Prime Minister's Office (PMO) is consistent with this. It is devised so that trivial information is not retained and that pertinent information is captured in official records. When it is decided that information should be retained for the official record, the PMO does so in accordance with Cabinet Office guidance, The National Archives guidance and the Public Records Act 1958."

21. In its internal review the Cabinet Office advised the complainant:

"The Prime Minister's Office does not use digital communications channels themselves for the long-term preservation of records – whether that be email, or any other channel of electronic communications. Instead, where it is identified that a communication needs to be kept, it is properly transferred into our official records for permanent preservation. ...The Prime Minister's Office organises its record by broad subject area."

22. The Commissioner asked the Cabinet Office for details on the digital transfer process it used, details on the structuring of Cabinet Office records and how often it routinely captured and deleted information from messaging systems such as WhatsApp, Hotmail, Google Mail etc. It responded:

"Within No 10, such digital information is transferred to the official record from time to time by copying it to a system for retention in the Prime Minister's Private Office.

We refer to paragraph 2.7.3 of the Code of Practice issued under section 46 of the Act, which states that there is no need to keep ephemeral material, and this may be destroyed on a routine basis.

No 10's WhatsApp policy explains that, in respect of group chats, the administrators should delete chat contents on a regular basis and at least quarterly throughout the year.

The policy also states that:

'Staff are required to save a record of any conversations that should form part of the OFFICIAL record or otherwise may give rise to any FOI, Public Records Act or similar data protection legislation requirements such as GDPR. Please see the Cabinet Office Guidance on Managing Information.'

23. The Cabinet Office explained that to determine whether the requested information is held a search of the PMO's official record is required. It added:

"...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 follows that WhatsApp messages transferred to the official record would not be labelled as such for the purposes of identification."

24. The Cabinet Office advised the Commissioner that officials searching for information in the official record would be required to search through the records of each subject area considered to be relevant to the particular correspondence cited in a FOIA request. In this case the Cabinet Office stated that no subject area was identified by the complainant in making their request. It added that the request is broad, requiring communications with or about specific individuals and companies. It explained:

"The PMO does not hold a list of employees from JCB, PPE Medpro, Meller Designs, Dyson or CIGA Healthcare. This means there is not a list of names to search records against, all message contents would therefore need to be examined to check whether they were from, to or about a representative of a company listed."

25. The Cabinet Office explained that the estimate regarding the time required it was providing is a "speculative estimate". It advised the Commissioner:

"It would be necessary for an official to coordinate the searches. Searches would need to be identified and conducted and any information would need to be reviewed to ascertain whether or not it is within the scope of the request. As an example of the sort of

volumes of digital files that would need to be searched within the PMO, during the relevant period the PMO filed 15,927 items. Even if an official managed to review four documents a minute (a conservative estimate as some files will also have attachments to check and review), this generic sample represents almost 66 hours of time."

26. The Commissioner acknowledges that no subject area was explicitly identified in the request. However, he considers that it could be reasonably understood as referring to procurement related to the Covid-19 pandemic.
27. The Commissioner notes that the time period set out in the request included very recent communications, at the time of the request, approximately only one month later than the end timeframe of the request. The Commissioner also notes the complainant's view as set out in paragraph 11. He understands that the complainant could reasonably have expected WhatsApp communications to have been easily accessible at the time of his request prior to transfer to an official record.
28. The Commissioner further questioned whether there was any way of determining the origin of messages on the official record, in this case WhatsApp. The Cabinet Office advised that it is not possible to determine definitively whether a message on the official record originated as a WhatsApp message (as opposed to being sent via another medium). It explained:

"The time estimate which has been provided in respect of the request which is the subject of this case should therefore be interpreted to be the estimate for locating *correspondence* within the scope of the request (rather than WhatsApp messages in particular).

In this particular instance, it would appear that it could never be established that the information is held and so it would take an infinite amount of time to determine."
29. The Commissioner questioned the Cabinet Office on whether it wished to rely on section 12(2) rather than 12(1) as it was not clear to him whether it could actually find any WhatsApp messages within the time limit. It responded:

"We wish to rely on section 12(1) as we are not asserting that it would go beyond the cost threshold to confirm or deny whether we hold the information."
30. The Commissioner asked the Cabinet Office how information such as that covered by this request is being retained so as not to result in section 12(1) applying in all cases requesting information from a

particular electronic communications channel. The Cabinet Office explained:

“The answer to this depends on whether information is stored on an electronic device or on the official record. While WhatsApp messages are stored on an electronic device it would be possible to search that device for those messages, although that searching would have to be carried out by each staff member that was the subject of the request.

However, once a WhatsApp message is transferred to the official record then it would not be possible to search for particular messages exchanged using WhatsApp.”

31. If the requested information cannot be identified, it cannot be provided. Based on the Cabinet Office’s statements above the Commissioner accepts that as the platform origin of correspondence is not recorded on the official record the ability to identify and therefore process a request for such information is prohibited. In these circumstances the Commissioner has no alternative but to accept that the Cabinet Office is entitled to rely on section 12(1) to refuse the request. He has reached this view as he is satisfied that the Cabinet Office’s search strategy and estimates are reasonable in regard to section 12, although he considers that it could have been clearer in aligning the wording of its explanations with section 12(1).
32. Notwithstanding this finding the Commissioner agrees with the complainant that the Cabinet Office’s handling of their request is hardly satisfactory.
33. The Commissioner notes that if the Cabinet Office had properly considered the request at the time it was submitted, rather than relying on an NCND response, the Cabinet Office could have asked the Prime Minister, who was still in post in 2021, to search his WhatsApp communications.

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

34. Section 16(1) of FOIA provides that a public authority should provide advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45



code of practice<sup>4</sup> in providing advice and assistance, it will have complied with section 16(1).

35. The Cabinet Office at the time of the internal review, when it was maintaining its position of neither confirming or denying holding the requested information, advised the complainant:

"The Prime Minister's Office organises its record by broad subject area. You may therefore wish to submit a refined request specifying a specific subject or policy in which you are interested, as well a shorter time period."

36. This does not seem to be helpful advice as it does not provide assistance in any meaningful way regarding the specific request. The Commissioner cannot determine how the complainant could have refined their request by following this advice.

37. The Cabinet Office informed the complainant of its change of position and reliance on FOIA section 12 in a brief email with no advice or assistance on how to refine the request to fall within the appropriate limit.

38. In its submissions to the Commissioner the Cabinet Office advised him as follows:

"...we would like to bring to the attention of the requester a statement made by the Prime Minister's Office on the matter of messages exchanged between the Prime Minister and the industrialist James Dyson:

<https://www.gov.uk/government/news/information-relating-to-the-ventilator-challenge-and-the-statutory-residence-test>

39. Following its section 12 reliance the Commissioner asked the Cabinet Office to explain what it would consider to be reasonable advice and assistance ie beyond that quoted in paragraph 38, as none had been provided to the complainant. It suggested that the complainant could consider requesting correspondence rather than WhatsApp messages as it is not able to establish whether information on the official record originated from WhatsApp or not.

40. The Commissioner considers that this advice does not assist if the complainant's focus was the use of WhatsApp. However, if the focus was the content of the communications between the parties, by

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<sup>4</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

providing the advice given to the Commissioner at paragraph 39 the complainant could have been assisted in refining their request.

41. The Commissioner's view is that the Cabinet Office should have provided meaningful advice and assistance when advising the complainant of its change in position to rely on section 12(1). He also notes that a more detailed and explanatory internal review in relation to section 16 would have been useful, in accordance with the guidance provided by the section 45 Code of Practice.
42. The Commissioner is satisfied that the Cabinet Office did not meet its obligations under section 16 of FOIA. It must now provide appropriate advice and assistance to the requester.

### **Procedural matters**

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43. Section 17(5) of FOIA provides that "A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."
44. In making a late reliance on section 12(1) the Cabinet Office breached section 17(5).

## Right of appeal

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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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**