

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information about the release of the 'Spycatcher' files to the National Archives. The Cabinet Office refused the entire three-part request stating that it did not constitute a valid request for recorded information as outlined in FOIA. During the course of the Commissioner's investigation the Cabinet Office amended its position and stated that parts 2(ii) and parts 3(i)-(iv) of the request were not valid under FOIA.
2. The Commissioner's decision is that parts 1, 2(i)-(iii) and 3(i) meet the definition of a valid request under section 8 of FOIA, therefore the Cabinet Office were not entitled to refuse these parts of the request, however, parts 3(ii)-(iv) are not valid under section 8 of FOIA. The Commissioner considers that the information provided by the Cabinet Office in its response to his investigation satisfies part 1 and 2(i)-(iii) of the request, and that, due to its wording, it is not obligated to provide a response to part 3(i) of the request.
3. The Commissioner does not require any steps.

Request and response

4. On 3 January 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Dear Sir or Madam

I write to make a Freedom of Information Act request concerning the present status of Cabinet office series of files CAB 164/1870 – 1901 ("Peter Wright – Spycatcher case").

Please note: this request is NOT a repeat of previous FOIA requests (FOI327910 & FOI329115, inter alia) which sought release of these files.

Rather, it is a request for clarification of the Cabinet Office's apparently conflicting statements to both me and to ICO, set out in Decision Notice IC-44198-H4B5 (22 November 2021), concerning the present status and proposed disclosure schedule for these files.

For clarity, those statements were:

"The information you have request is one of many records that is being prepared for transfer to The National Archives later this year. There is a very strong public interest in maintaining established processes once they have started and it is important that release work being conducted on very many records isn't interrupted to accelerate one of the many records. To do so would disrupt the preparation of other records due for release".

Cabinet Office s.22 refusal of FOIA request, 14 April 2020. (ICO DN Para 9)

"As you will appreciate, the current COVID-19 lockdown requirements has created difficulties for business as usual activities to be carried out. For example, from 18 March The National Archives (TNA) have not been accepting new record transfers. Similarly, travel and health restrictions have prevented us from progressing our own preparations for transferring files. We will restart the process of transferring records to TNA as soon as possible...

"Our application of Section 22 FOIA applies because the intent to transfer existed prior to the lockdown measures being put in place. That intent remains and we will reinstate the transfer records to TNA when we are next able to do so."

Cabinet Office s.22 confirmation of FOIA request, 29 April 2020. (ICO DN Para 15)

"Some, but not all, of the Spycatcher files will be transferred to the National Archives (TNA) ... the files will be open, with some redactions ... Some of the files are still being reviewed by one department where additional redactions may be identified."

Cabinet Office Internal Review response, 16 June 2020. (ICO DN Para 17)

"During the course of the Commissioner's investigation, the Cabinet Office confirmed in submissions to the Commissioner that in addition to section 22(1) of the FOIA, they were also relying upon section 23(1) of the Act to withhold the requested information ... The Cabinet Office confirmed that they considered that section 23(1) applied to all the information contained in the two files and that separately, under the Public Records Act 1958, they were considering whether any of the information needed to be retained.

"The Cabinet Office advised the Commissioner that the [first] two files [CAB 164/1870 – 1871] were undergoing review for transfer to TNA and it would become apparent during that process what proportion of the information is exempt from disclosure under section 23(1) of the Act (i.e what information would not be in the public domain even after the files had been transferred to TNA for publication)."
ICO DN Paras 20 & 21 (Undated, but post-June 2020)

"In main submissions to the Commissioner, the Cabinet Office advised that in 2016 the Secretary of State for Digital, Culture, Media and Sport granted the Cabinet Office a three year extension of the deadline to transfer the Spycatcher series of files to TNA. That was due to expire in December 2019.

"As the two files requested by the complainant are at the beginning of the Spycatcher series of files the Cabinet Office advised the Commissioner that they are certain that (had it not been for the disruption cause by the COVID-19 pandemic) the files would have been transferred to TNA in accordance with the timetable agreed with the Secretary of State.

"As it was clear that the COVID-19 pandemic, as reasonably and correctly noted by the complainant, could not possibly have played a role in the Cabinet Office failing to have transferred the files by the agreed timetable (i.e December 2019), this date having preceded the pandemic by at least two months, the Commissioner sought an explanation from the Cabinet office for this discrepancy. The Commissioner also enquired as to whether there had been any further extension to the deadline for transfer of the files (i.e beyond December 2019) by the Secretary of State.

"In supplemental submissions to the Commissioner the Cabinet Office stated that the Public Records Act 1958 (PRA) imposes a general duty on departments to transfer records to TNA once they have reached the

age of being treated as an historic record(s), previously 30 years after creation but falling to 20 years. Section 3(4) of the PRA 1958 permits departments to retain records if 'they are required for administrative purposes or ought to be retained for any other special reason', subject to the approval of the Secretary of State for DCMS.

"Before a machinery of government change in 2015, the responsibilities of the Secretary of State in relation to public records were the responsibilities of the Lord Chancellor. The Cabinet Office advised that successive Lord Chancellors have accepted that records relating to security and intelligence fall within the 'other special reason' requirement of section 3(4) of the Act and have, at the request of departments and other bodies likely to hold such records, issued a blanket authority to retain them beyond the point laid down in the PRA 1958. This is the Security and Intelligence Instrument (SII).

"The Cabinet Office advised the Commissioner that the SIIs are generally issued every 10 years and, during the period they are in force, records that meet the criteria set down in the SII may be retained when they fall due for transfer. The current SII was issued by the then Lord Chancellor Kenneth Clarke and commenced on 1 January 2012. The Cabinet Office provided the Commissioner with a link to the publicly viewable current SII2 which provides for the retention of public records under section 3(4) of the PRA 1958...

"The Cabinet Office advised the Commissioner that the two files which are the subject of the complainant's request 'were not transferred to TNA before the end of December 2019 because they were withheld under the SII and, that being so, were not subject to the usual rules that apply to non-SII files. It also follows that there was not a breach of the PRA 1958 because SIIs are made under that legislation'." ICO DN Paras 34-45 (Undated, but post-June 2020)

Since there appears to be some conflict between these statements, this FOIA requests the following information.

1. Does the Cabinet Office still intend to release the Spycatcher series of files [CAB 164/1870-1901] to TNA.
2. If so:-
 - (i) Which files in the series are intended for transfer and release?
 - (ii) On what date does the Cabinet Office expect this transfer and release to take place ?
 - (iii) Under which provision of FOIA, or under which SII, are the remaining files to be withheld ?

3. If not:

(i) Under which provision of FOIA, or under which SII, are the files to be withheld ?

(ii) Why did the Cabinet office state, in April 2020, that these files were being "prepared for transfer to The National Archives later this year" ?

(iii) Why did the Cabinet Office inform ICO that "the [first] two files [CAB 164/1870 – 1871] were undergoing review for transfer to TNA" ?

(iv) Further, why did the Cabinet Office inform ICO that it was "certain that (had it not been for the disruption caused by the COVID-19 pandemic) the files would have been transferred to TNA in accordance with the timetable agreed with the Secretary of State" – an assertion which ICO notes "could not possibly have played a role in the Cabinet Office failing to have transferred the files by the agreed timetable (i.e December 2019), this date having preceded the pandemic by at least two months" ?

Please advise if there is any further information you need to process this FOIA request.

5. The Cabinet Office responded on 1 February 2022. It stated that the request did not constitute a valid request as outlined in FOIA. The Cabinet Office stated that as the correspondence was not a valid FOIA request, a response would be provided outside of FOIA by its Public Correspondence Team.
6. Following an internal review the Cabinet Office wrote to the complainant on 22 February. It stated that it was upholding its original decision to refuse the request as it was not considered to be a valid request under FOIA.
7. On 24 May 2022 the Cabinet Office Public Correspondence Team responded to the complainant with an explanation in the following terms:

"In response to your questions about the future release of records related to the 'Spycatcher' affair, it may be helpful if I explain that as these records have been selected for permanent preservation, the Cabinet Office is obliged by section 3(4) of the PRA to transfer them to The National Archives in due course. The records are retained relying on Retention Instrument 106, the Security and Intelligence Instrument (SII), issued under the proviso to section 3(4) of the PRA. The Cabinet Office is required to review the retention of records under the SII at

least every 10 years. These records will, therefore, fall due for review and possible transfer in 2029. Retention may be extended beyond this for all or part of these records if this is required to protect national security.”

8. On 18 August 2022, the Cabinet Office, following the issue of the Commissioner’s decision referenced in paragraph 4 above, provided the complainant with further clarification in the following terms:

“In your letter of 3 January 2022, you sought clarification concerning the present status and proposed disclosure schedule for the files referred to above.

In our response to you on 24 May 2022 we stated that:

‘The records are retained relying on Retention Instrument 106, the Security and Intelligence Instrument (SII), issued under the proviso to section 3(4) of the PRA. The Cabinet Office is required to review the retention of records under the SII at least every 10 years. These records will, therefore, fall due for review and possible transfer in 2029.’

It may be helpful for us to clarify that we intended to explain the position under the Security and Intelligence Instrument (under which the files are currently retained).

We also consider that it may assist if we updated you on our expectations concerning the transfer of these files to The National Archives (TNA).

The first tranche of the ‘Spycatcher’ files are presently undergoing review with the intention that they should be transferred to TNA within the next year.

We concede that our responses to you of 24 May 2022 and 13 June 2022 were not as clear or as helpful as they might have been.

Notification of our intention to transfer these records under the Public Records Act 1958 is without prejudice to our contention that section 23 of the Freedom of Information Act 2000 applies to the information in these records.”

Scope of the case

9. The complainant contacted the Commissioner on 23 February 2022 to complain about the way their request for information had been handled.
10. In their grounds of complaint, the complainant explained that their request sought “clarification of the Cabinet Office’s apparently conflicting statements to both me and to ICO, set out in Decision Notice IC-44298-H4B5, concerning the present status and proposed disclosure schedule for these files”.
11. During the course of the investigation the Cabinet Office amended its position and stated that it considered questions 1, 2(i) and (iii) of the request to be valid requests for information, and the remaining questions in the request (2(ii) and 3(i) to (iv)) to be invalid. In response to the requests it considered valid, the Cabinet Office provided the following information:

1. Does the Cabinet Office still intend to release the Spycatcher series of files [CAB 164/1870-1901] to TNA.

Answer: yes

2. If so –

- (i) Which files in the series are intended for transfer and release?

Answer: all of them

- (iii) Under which provision of FOIA, or under which SII, are the remaining files to be withheld?

Answer: Retention Instrument 146 (the Security and Intelligence Instrument)

12. The Commissioner considers the scope of the investigation to be whether the Cabinet Office is entitled to refuse the remaining parts of the request (parts 2(ii) and 3(i)-(iv)) as not a valid requests for recorded information it holds.

Reasons for decision

13. Section 8(1) of FOIA defines a valid request for information under FOIA as a request which:

- (a) is in writing,
 - (b) states the name of the applicant and an address for correspondence, and
 - (c) describes the information requested.
14. Section 84 (Interpretation) of FOIA defines "information" as "...information recorded in any form".
 15. Therefore, in order to constitute a valid request for information under FOIA, not only must the complainant's request satisfy the criteria in section 8 of FOIA, but it must also be a request for recorded information.
 16. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA, which gives the public a general right of access to recorded information held by public authorities. However, FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless these are already held as recorded information.
 17. The request in this case was made in writing and the complainant provided an address for correspondence. It follows that the only issue remaining for the Commissioner to consider is its validity in respect of whether it describes the information requested.
 18. The Commissioner considers that a request will meet the requirements of section 8(1)(c) if it contains a sufficient description of the requested information required that allows such information to be distinguished from other information a public authority holds.

The Cabinet Office's position

19. The Cabinet Office commented that questions 2(i-iii) and 3(i-iv) were contingent on the response to question 1:

"In view of the Cabinet Office responding to request 1 in the affirmative, it serves to activate requests 2(i) to 2(iii) and deactivate requests 3(i) to (iv). We consider that the Cabinet Office can therefore treat requests 3(i) to (iv) as if they had never been sent."

20. The Cabinet Office argued that it did not consider questions 2(ii) and 3(i) to be valid requests on the grounds that they do not describe distinguishing characteristics of information. The Cabinet Office also argued that it is not obliged by FOIA to state what it considers shall happen in the future and that question 2(ii) serves as an invite for the

Cabinet Office to provide speculation on when it expects the transfer of files to occur, rather than asking for recorded information. The Cabinet Office directed the Commissioner to his decision in IC-226399-P0D7¹, in which he found that part [3] of the request² did not seek recorded information and, instead, invited the public authority to take a particular course of action.

21. The Cabinet Office also argued that questions 3(ii) to 3(iv) are not requests for recorded information and are instead requests for an explanation or justification of why the Cabinet Office stated that certain files were being handled in a particular way.

The Commissioner's decision

22. As the Cabinet Office has changed its position and accepts that parts 1, 2(i) and (iii) are valid under FOIA, as explained at paragraph 11 above, the Commissioner will not consider these parts of the request in his decision. The Commissioner notes that the Cabinet Office has provided the complainant with information within scope of parts 2(i) and (ii) via letters issued by the Public Correspondence Team.
23. In respect of part 2(ii), the Commissioner understands that the question arises from the complainant's belief that a timetable is held by the Cabinet Office which gives a date on which the files will be transferred to TNA. The Commissioner considers this is a reasonable belief to hold, considering the complainant had previously been informed that a timetable had been agreed with the Secretary of State (see paragraph 4 above). The Commissioner's position is, therefore, that question 2(ii) of the request is not asking the Cabinet Office to speculate, rather, it is asking the Cabinet Office for information the complainant believes is held based on prior narrative information they have been provided. The Commissioner also takes the position that question 2(ii) contains sufficient description of the information sought and considers it to be valid under section 8(1)(c) of FOIA.
24. In their correspondence to the Commissioner the Cabinet Office explained:

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025146/ic-226399-p0d7.pdf>

² "Will DfT take action to publish the contract documents including any contract amendments as soon as possible?"

"A timetable existed for the transfer of files to the TNA prior to the Spycatcher series of files being handled under the SII. However, once the files fell under the SII they were subject to a different schedule for transfer.

The requester is therefore not correct in his assertion that the 'timetable' is information which is held which enables the Cabinet Office to deal with his request 2(ii)...

Given the sensitivity of the documents and the need for detailed review by stakeholders, it is impossible to be precise about the timing of the transfer. As the review is well under way, we anticipate transfer either in December 2023 or July 2024. They may transfer in two batches, although this will be determined closer to the time."

25. The Commissioner considers that this narrative information is sufficient for the purposes of responding to part 2(ii) of the request.
26. In respect of part 3(i) of the request, the Commissioner considers that the complainant has provided a sufficient description of the information sought, such that it would allow the Cabinet Office to differentiate the information requested from other recorded information it holds, and therefore considers part 3(i) to be valid under FOIA. However, recognises that as the Cabinet Office provided an answer to part 1 of the request in the affirmative, this negates the requirement to provide an answer to part 3(i).
27. While coming to a decision on part 3(i) of the request the Commissioner referred to his guidance on conditional requests³, which states that a request conditional on a change in circumstances will not be valid as it is expressing an intention to ask for information in the future. The Commissioner understands that part 3(i) is conditional on the response to part 1, however is of the opinion that it is seeking to establish the current circumstances of the files rather than any potential, future circumstances.
28. In respect of parts 3(ii) to (iv) of the request, the Commissioner's decision is that the Cabinet Office are entitled to refuse these parts of the request as not valid under section 8. The Commissioner recognises that parts 3(ii) to (iv) of the request give clear descriptions of the

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/recognising-a-request-made-under-the-freedom-of-information-act-section-8/#howshouldwe3>

information sought, however they are targeted questions prompting narrative explanations by response, and it would be highly unlikely that the Cabinet Office already holds pre-existing explanations that specifically address the matters raised. Therefore, it would require the Cabinet Office to generate new information in order to respond to the request. As explained at paragraph 15 above, FOIA does not require public authorities to provide explanations unless they are already held in as recorded information.

29. The Commissioner does not require any steps.

Right of appeal

30. 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

31. 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.
32. 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
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