

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **22 August 2023**

Public Authority: **Cabinet Office**

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

Decision (including any steps ordered)

1. The complainant has requested full copies of all email and other electronic messages between Dominic Cummings and Lee Cain between 22 May 2020 and 28 May 2020. The Cabinet Office originally refused the request under section 12 of FOIA (cost of compliance with request). In a fresh response to the complainant ordered by the Commissioner, the Cabinet Office relied upon section 40(2) of FOIA (personal data) to withhold the information in its entirety.
2. During the course of the Commissioner's investigation, the Cabinet Office also applied section 21(1) (information accessible by other means) and section 36 (prejudice to the effective conduct of public affairs) to withhold the information in its entirety.
3. The Commissioner has found that section 21(1) applies to the press statement in Item 5 of the withheld information (the "press statement").
4. The Commissioner has found that section 36 applies to the remainder of the withheld information.
5. As section 36 has been found to apply to the majority of the withheld information (save for the press statement, to which section 21 applies), it was not necessary for the Commissioner to go on to consider whether section 40(2) applied to the withheld information.
6. The Commissioner does not require the public authority to take any steps.

Request and response

7. 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”.
8. On 24 June 2020, the Cabinet Office refused the request on the basis of section 12 of FOIA.
9. On 13 October 2022, the Commissioner issued a Decision Notice to the Cabinet Office concluding that it 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. The Commissioner required the Cabinet Office to conduct checks and searches for any information held within the period of the complainant’s request (22 May 2020 to 28 May 2020) and to provide the complainant with a revised response to his request (Decision Notice IC-65636-X2P7¹).
10. On 24 January 2023, the Cabinet Office provided a fresh response to the complainant, informing them that some requested information was held, but that all of the information held was exempt under section 40(2) of FOIA because:

“We consider that there would be no overriding legitimate interest or necessity in disclosure that overrides the reasonable expectations of privacy.”
11. The Cabinet Office further stated that it had consulted the ICO guidance on what constitutes personal data and had a duty of care to its employees and former employees. The Cabinet Office highlighted this wording from the ICO guidance:

“When considering whether information ‘relates to’ an individual, you need to take into account a range of factors, **including the content of the information, the purpose, or purposes for which you are processing it and the likely impact or effect of that processing on the individual.**” (Cabinet Office emphasis).

¹ [ic-65636-x2p7.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/our-work/decision-notices/decision-notice-ic-65636-x2p7)

Scope of the case

12. On 29 January 2023, the complainant contacted the Commissioner to raise a complaint about the Cabinet Office's fresh response dated 24 January 2023 arguing that, as senior government officials, both Mr Cain and Mr Cummings had no reasonable expectation of privacy around their professional affairs, and that any genuinely personal messages could easily be redacted.
13. During the course of his investigation, the Commissioner has had sight of the withheld information, which comprised a small number of emails.
14. The Commissioner noted in his Decision Notice IC-65636-X2P7² that the Cabinet Office did not ask Dominic Cummings and Lee Cain to check their messages at the time the original request was made and that, as a result, by the time the Cabinet Office responded to the complainant on 24 January 2023, any messages had most likely been deleted as Mr Cain and Mr Cummings both left their employment at No 10 Downing Street in November 2020.
15. Therefore, on the balance of probabilities, the Commissioner is satisfied that, at the time the fresh response was provided to the complainant on 24 January 2023, it was unlikely that any text messages, Slack messages, WhatsApp messages or Signal messages between Dominic Cummings and Lee Cain were still held by the Cabinet Office.
16. In its submission to the Commissioner on 16 June 2023, the Cabinet Office argued that since the majority of the requested information related to a personal matter and not official government business it, therefore, fell outside the scope of the request.
17. In its submission to the Commissioner, the Cabinet Office went on to state that if the Commissioner did not accept that the majority of the information was not in scope, it was of the view that section 21(1), section 36(2)(b)(ii) and (c) and section 40(2) applied to various parts of the withheld information.
18. The Commissioner notes that the request is for "all emails, text messages, Slack messages, WhatsApp messages and Signal messages" sent between Mr Cummings and Mr Cain. It does not specify that the communications had to relate to official government business.

² [ic-65636-x2p7.pdf \(ico.org.uk\)](https://ico.org.uk/decision-notice/65636-x2p7)

Consequently, the Commissioner does not accept the Cabinet Office's argument that the majority of the withheld information is not in scope because it relates to a personal matter.

19. The Commissioner, therefore, considers the scope of his investigation is to determine whether the Cabinet Office correctly applied the stated exemptions to withhold the information requested by the complainant.

Background

20. Dominic Cummings served as Chief Adviser to then Prime Minister, Boris Johnson, between July 2019 and November 2020. Mr Cummings then left the Civil Service. Special advisers are temporary civil servants who can provide a political dimension to the advice and assistance available to Ministers.
21. Lee Cain served as Downing Street Director of Communications to the then Prime Minister, Boris Johnson, between July 2019 and November 2020.
22. In March 2020, Dominic Cummings relocated his family from London to County Durham to self-isolate during the Covid-19 pandemic which resulted in extensive press coverage.
23. On 28 May 2020, Durham Constabulary informed Mr Cummings that it would not take action against him for any alleged breaches of the lockdown protocols which were in place nationwide at that point in time.
24. On 28 May 2020, a spokesperson for 10 Downing Street was quoted in the press confirming that Durham Constabulary would not be taking action against Mr Cummings.³

Reasons for decision

Section 21 – information accessible to applicant by other means

³ [Dominic Cummings potentially broke lockdown rules, say Durham police | Dominic Cummings | The Guardian.](#)

25. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under FOIA is exempt information.
26. In the Commissioner's guidance for section 21⁴, he explains that, in order to be exempt, the requested information must be reasonably accessible to the applicant by another route. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA.
27. On receipt of the withheld information, the Commissioner noted that the press statement had appeared in the Guardian online at 15:26 on 28 May 2020⁵
28. The complainant's request was made at 13:52 on 28 May 2020. There is no information from the Cabinet Office of the exact time the press statement was made public. Therefore, it is not clear whether the press statement was "reasonably accessible" to the complainant at the time the request was made at 13:52 on 28 May 2020.
29. However, whilst the publication of the press statement may have post-dated the complainant's request, it pre-dated the Cabinet Office's initial response to the complainant on 24 June 2020, and the Commissioner notes that the complainant could have been directed to the press statement at that stage.
30. The Commissioner is therefore satisfied that section 21(1) does apply to the press statement.

Section 36(2)(b)(ii) and (c)

31. Section 36(2) states that:

⁴ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

⁵ [Dominic Cummings potentially broke lockdown rules, say Durham police | Dominic Cummings | The Guardian](#).

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act: –

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

32. In deciding whether section 36(2) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.
33. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
34. The Cabinet Office provided the Commissioner with a copy of the reasonable opinion given by the qualified person, Baroness Neville-Rolfe, Minister of State at the Cabinet Office (the Minister), as well as the advice as to why the exemptions could apply which had been provided to the Minister on 28 April 2023 and copies of the withheld information.
35. The Minister provided her opinion that the exemptions were engaged on 2 May 2023. Whilst the rationale as to why the exemptions applied is contained in the advice to the Minister, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
36. The Cabinet Office submissions to the Minister advised that disclosure of the information contained within Items 1 to 5 of the withheld information would be likely to inhibit the free and frank exchange of

views for the purposes of deliberation and to prejudice the effective conduct of public affairs by undermining the ability of the Cabinet Office to manage media enquiries. In respect of Items 1, 2, 4 and 5 of the withheld information, the Cabinet Office advised that it was important that officials should have the freedom to be able to react to specific media enquiries instinctively and frankly in suggesting how an enquiry should be handled or responded to. The submissions stated that officials must have the freedom to draft press statements and that it is important that they are able to do this without undue concerns about premature disclosure.

37. The Cabinet Office advised the Minister that disclosure "would be likely to have an inhibiting effect on the free expression of officials in the handling of media matters." There would also be "a detrimental impact upon the coherence and effectiveness of Government communications," which the Cabinet Office considered would be prejudicial to the effective conduct of public affairs.
38. In respect of Item 3 of the withheld information, the Cabinet Office advised the Minister that it was important that "officials retain the freedom to discuss wider communications handling around particular policies or decisions and not feel inhibited from giving full expression to their views." The Cabinet Office again advised that this ability to communicate effectively would be likely to be prejudiced if officials felt that they were constrained in what they could discuss with colleagues.
39. Having considered the submissions provided, the Minister's reasonable opinion was that disclosure of the information within scope of the request "would inhibit the free and frank exchange of views for the purposes of deliberation" and so section 36(2)(b)(ii) was engaged. The Minister was also of the reasonable opinion that section 36(2)(c) was engaged, as disclosure would "otherwise" prejudice the effective conduct of public affairs (i.e., it would have a detrimental impact upon the coherence and effectiveness of Government communications).
40. In its submissions to the Commissioner, the Cabinet Office stated that it considered that officials and advisers should be able to freely discuss press releases and policy decisions and that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
41. In subsequent submissions to the Commissioner, the Cabinet Office reiterated the above arguments. They stated that: "We consider that the disclosure of the requested information would be likely to have an inhibiting effect on the free expression of officials in the handling of media matters. We consider that it follows that there would also be a detrimental impact upon the coherence and effectiveness of

Government communications if press statements were less considered or less comprehensive because of the reticence of officials. We regard such an outcome as being likely to prejudice the effective conduct of public affairs.”

42. Having had sight of the withheld information, the Commissioner does not consider that it is unreasonable for the qualified person to contend that disclosure of the information would be likely to impact upon/inhibit the ability of officials to have free and frank expression in the handling of media matters. Nor does the Commissioner consider it to be unreasonable to argue that disclosure of the withheld information would be likely to have a detrimental impact upon the coherence and effectiveness of Government communications.
43. The Commissioner is therefore satisfied that the opinion of the qualified person was a reasonable one and that consequently sections 36(2)(b)(ii) and 36(2)(c) are engaged.
44. Section 36 is a qualified exemption and, in accordance with the requirements of section 2 of FOIA, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

45. As noted, in their submissions to the Commissioner, the Cabinet Office recognised that “there is a public interest in there being better knowledge of the communications between senior advisers to the Government, particularly surrounding a matter which was the subject of controversy and public scrutiny.”
46. In his complaint to the Commissioner, the complainant argued that, as senior government officials, both Mr Cain and Mr Cummings had no reasonable expectation of privacy around their professional affairs, and that any genuinely personal messages could easily be redacted. That is to say, the complainant clearly considered that the public interest balance favoured disclosure of the information apart from genuinely personal messages.

Public interest arguments in favour of maintaining the exemption

47. In its submissions to the Commissioner, the Cabinet Office contended that “the public interest in maintaining the robustness of the Government’s communications is a stronger - and more enduring - factor. It is an important function of government that it is able to communicate clearly and effectively with the public. Confused and

incoherent messaging serves only to undermine confidence in the Government. Officials who are responsible for responding to media enquiries and for the communications that accompany policy announcements must have the confidence that they can work on draft statements, give opinions about enquiries, and discuss preparations without concerns for premature disclosure. It is not in the public interest if officials cannot have such assurances and the result is that the Government is not able to express itself with the clarity and precision that it would like to.”

Balance of the public interest arguments

48. In considering complaints regarding section 36, where the Commissioner finds that the qualified person’s opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur, but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
49. The Commissioner considers (as the Cabinet Office has recognised and accepted) that there is a specific public interest in Mr Cummings’ communications during May 2020. Mr Cummings had a particularly influential position as Chief Adviser to the Prime Minister during the Covid-19 pandemic and was the subject of a Downing Street press statement on 28 May 2020.
50. As the Upper Tribunal recently confirmed in *Montague v The Information Commissioner and The Department of Trade* (UA – 2020-000324 & UA[1]2020-000325) [13 April 2022]⁶, the time for judging the competing public interests in a request is the time when the public authority should have given a response in accordance with the timeframe required by FOIA. Therefore, the appropriate time in this case is 25 June 2020 (i.e., 20 working days after the complainant’s request of 28 May 2020). At the time of the Cabinet Office’s response to the request on 24 June 2020, the press statement of 28 May 2020 which addressed the allegations surrounding Mr Cummings and his movements during lockdown in March 2020 was in the public domain: “The police have made clear they are taking no action against Mr

⁶ [Montague v The Information Commissioner and Department for International Trade: \[2022\] UKUT 104 \(AAC\) - GOV.UK \(www.gov.uk\)](#)

Cummings over his self-isolation and that going to Durham did not breach the regulations. The Prime Minister has said he believes Mr Cummings behaved reasonably and legally given all the circumstances and he regards this issue as closed.” The Commissioner considers that the information contained in the press statement provides a significant and important degree of transparency and accountability as regards the relevant movements of Mr Cummings and the allegations these attracted.

51. The Commissioner considers that the Cabinet Office has advanced clear and persuasive arguments in favour of maintaining the exemption cited and that there is public interest in officials having the freedom to discuss Government communications freely and without fear of premature publication. The Commissioner accepts the Cabinet Office’s argument that disclosure would be likely to act to inhibit the free and frank discussion of press releases in the future.
52. The Commissioner recognises that the complainant has advanced arguments about a matter of important and legitimate public interest. However, having had sight of the withheld information, the Commissioner does not consider that disclosure of the information would appreciably add to the public interest served by the issuing of the aforementioned press statement. The Commissioner considers that the press statement satisfied the due and proportionate public interest in transparency and accountability in this matter and that any additional public interest weight and value of the withheld information is outweighed by the stronger and wider public interest in providing officials with the freedom to frankly discuss government communications and responses to journalist enquiries without the fear of premature publication.
53. In conclusion the Commissioner is satisfied that section 36 applies to the withheld information, apart from the press statement.
54. Having found the withheld information to be exempt from disclosure under section 36, the Commissioner has not gone to formally consider the applicability of section 40(2) to the same. However, he would note that had the information not been exempt under section 36, it is highly likely that he would have found it to be exempt under section 40(2).

Right of appeal

55. 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

56. 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.
57. 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

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