

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

### **Decision notice**

**Date:** 22 January 2024

**Public Authority:** Cabinet Office

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

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

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1. The complainant requested the job titles of staff members working in Downing Street who have been fined by the Metropolitan Police Service for breaking the lockdown regulations. The Cabinet Office denied holding the requested information for the purposes of FOIA (section 3(2)(a) (public authorities) of FOIA).
2. The Commissioner's decision is that, on the balance of probabilities, the Cabinet Office holds information within the scope of the request for the purposes of FOIA by virtue of section 3(2)(a) of FOIA.
3. The Commissioner requires the Cabinet Office to take the following step to ensure compliance with the legislation:
  - provide the information, unless it can properly rely on any exemptions in FOIA to withhold all or some of the same. If relying on any exemptions to withhold all or some of the information, issue a refusal notice which complies with section 17 of FOIA.
4. The Cabinet Office must take this step 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.

## Background

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5. With regard to the subject matter of the request, the Cabinet Office provided the following background explanation to the Commissioner:

“Under regulation 10(1) of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, an authorised person could issue a fixed penalty notice to anyone in England that they reasonably believed had committed an offence under the Regulations. Under regulation 9(1) of The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, a police constable could do the same in Scotland. Similar legislation applied elsewhere in the UK”.

6. The Commissioner accepts that those Regulations state, at regulation 10(2):

“A fixed penalty notice is a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty to a local authority specified in the notice”.

## Request and response

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

“From available records, please kindly provide the job titles of staff members working in Downing Street who have been fined by the MPS [Metropolitan Police Service] for breaking the lockdown regulations to-date”.

8. The Cabinet Office responded on 3 May 2022. It denied holding the requested information.
9. Following an internal review, the Cabinet Office wrote to the complainant on 23 June 2022 maintaining its position.

## Scope of the case

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10. The complainant disputes that the requested information is not held, on the basis that at least some of the fines would have been issued to the individuals concerned using their Cabinet Office staff email address.

11. The Commissioner has had the benefit of considering the large volume of information provided by the complainant in support of their complaint. This consists of multiple emails in which they explain why they consider there are flaws and inconsistencies in the Cabinet Office responses. The Commissioner acknowledges that the complainant believes that the Cabinet Office should know the job titles of the staff concerned.
12. During the course of the Commissioner's investigation, the Cabinet Office amended its position, citing section 3(2)(a) of FOIA on the basis that any information within the scope of the request that is held, namely information in the inboxes of the individuals concerned, is not held by the Cabinet Office for the purposes of FOIA.
13. It is not in dispute that the Cabinet Office is a public authority for the purposes of FOIA. The following analysis considers whether the Cabinet Office holds information of the description specified in the request for the purposes of FOIA (section 3(2)(a) of FOIA).
14. Determining whether information is held is a factual issue, rather than a question of law<sup>1</sup>. In a case such as this, the Commissioner makes a decision based on the civil standard of the balance of probabilities - that is, more likely than not.

## **Reasons for decision**

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### **Section 1 general right of access**

#### **Section 3(2) – information held by a public authority**

15. Section 1 of FOIA states that:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/>

(b) if that is the case, to have that information communicated to him”.

16. Section 3(2) sets out the circumstances in which information is considered to be ‘held’ for the purposes of FOIA:

“For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

17. The Commissioner interprets the phrase “otherwise than on behalf of another person” to mean that a public authority holds information for the purposes of FOIA if it is held to any extent for its own purposes.
18. The Commissioner’s guidance<sup>2</sup> ‘Information you hold for the purposes of FOIA’ makes it clear that whether information is held by a public authority, or is held on behalf of a public authority, depends on the facts of the case.
19. The effect of section 3(2) and the meaning of ‘held’ in the context of FOIA were clarified through case law, in the decision of *University of Newcastle upon Tyne v Information Commissioner and BUAV*<sup>3</sup>.

### **The complainant’s view**

20. The Commissioner acknowledges that the complainant put forward a number of arguments to support their view that the Cabinet Office should hold the requested job titles.
21. For example, the complainant drew the Commissioner’s attention to the Cabinet Office’s internal review response, in particular where they

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/>

<sup>3</sup>

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i459/B UAV v IC & Newcastle University \(0064\) PI Decision 10-11-10 \(w\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i459/B UAV v IC & Newcastle University (0064) PI Decision 10-11-10 (w).pdf)

referred to the following extract from the report<sup>4</sup> by the then Second Permanent Secretary:

“It does not follow that any of those I have referred to in this report, named or otherwise have received an FPN [fixed penalty notice], or that any inference or assumption can be made about the outcome of the police investigation in any individual case. As I have set out above, I have not been informed by the Metropolitan Police of these matters.”

22. The report comprises the findings of the then Second Permanent Secretary's investigation into alleged gatherings on government premises during Covid restrictions.
23. The complainant argued that the report “does not negate the fact that the Cabinet Office could possess the job titles of the fined individuals based on the fines being delivered to government email addresses”.
24. In support of that view, they also argued that it has been widely reported that fines were delivered to government email addresses<sup>5</sup>. They do not accept that none of those email addresses belonged to the Cabinet Office.
25. In their view, it is unlikely that the Cabinet Office will not hold the requested information. They told the Commissioner that, ‘where the infractions occurred within Downing Street, the workplace of the Cabinet Office’, it is reasonable to expect that the Cabinet Office would have knowledge of the job titles of their own staff who were found to have been involved.
26. The complainant also raised a number of other considerations, including that any reports of staff involved in lockdown violations may trigger internal investigations by the Cabinet Office, that the Cabinet Office would have a duty of care towards its employees and may take action to

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1078404/2022-05-25\\_FINAL\\_FINDINGS\\_OF\\_SECOND\\_PERMANENT\\_SECRETARY\\_INTO\\_ALLEGED\\_GATHERINGS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078404/2022-05-25_FINAL_FINDINGS_OF_SECOND_PERMANENT_SECRETARY_INTO_ALLEGED_GATHERINGS.pdf)

<sup>5</sup> Although the complainant did not provide evidence to support that claim, the Commissioner is aware from his own research of the following:  
<https://www.dailymail.co.uk/news/article-10680383/Downing-Street-staff-missed-Partygate-fines-sent-junk-email-folders.html>.

address any legal issues they face, and that learning from past incidents is crucial in preventing similar violations in the future.

### **The Cabinet Office view**

27. In its submission to the Commissioner, the Cabinet Office was clear that it does not gather information on civil penalties imposed on officials. It explained that it has no reason to record information of the type specified in the request, nor to require it from officials.
28. With regard to the interpretation of the request, the Cabinet Office told the Commissioner that, while the requester may have had in mind the matters reported on by the former Second Permanent Secretary in May 2022, the request could extend to any other instances of officials who received penalties for breach of COVID-19 legislation.
29. Mindful of the nature of the requested information, it told the Commissioner that civil penalties are not criminal convictions which ought to be declared to the Cabinet Office as an employer.
30. Acknowledging the complainant's argument that information about fines was delivered to government email addresses, the Cabinet Office said that the fact that information may be stored in the email addresses of the persons concerned does not mean that it is held by the Cabinet Office for its own purposes under FOIA.
31. In its submission, the Cabinet Office referred to the BUAV case which determined that, for a public authority to 'hold' information for the purposes of FOIA, there needs to be an 'appropriate connection' between the requested information and its role and functions as a public authority. It told the Commissioner:

"We have had regard to the list of relevant factors to determine the extent to which the Cabinet Office would hold the information for its own purpose".
32. In the circumstances of this case, it considers that it does not hold the requested information for any of its own purposes and that there is no appropriate connection between the information and functions carried out by the Cabinet Office.
33. The Cabinet Office acknowledges that, as the information is contained in the inboxes of officials, it has access to - and controls - the information and has ultimate responsibility over its management.
34. However, it explained that the requested information is not information that relates to the functions of the Cabinet Office. Rather, it is private to

the individuals and would only be held by the Cabinet Office on behalf of the individuals who were the subject of penalties.

35. It told the Commissioner that the fact of an individual receiving a penalty notice to their Cabinet Office email account "does not render this official business of the Cabinet Office".
36. It argued strongly that the Cabinet Office is "merely providing storage for the information contained in the inboxes of the individuals concerned" and that it has no use itself for the information.
37. On that basis, the Cabinet Office told the Commissioner:

"The information is held by the Cabinet Office solely on behalf of the individuals concerned for the purposes of section 3(2)(a) of the Act".

### **The Commissioner's view**

38. The Commissioner's published guidance states:

"When requested, section 1 of FOIA requires you to provide information you hold as a public authority, unless you can demonstrate an exemption applies. Section 3(2) sets out in which circumstances information is considered to be 'held' for the purposes of the Act".

39. Under section 3(2)(a), a public authority has to determine if it holds the information for its own purposes or solely on behalf of another person.
40. The Commissioner's guidance explains that various factors can help a public authority decide the extent to which it holds information for its own purposes as a public authority. Those factors include:
  - the extent to which it has access to the information,
  - the degree of control it has over the information, including controlling who has access to it and how it is used,
  - the extent to which they use it for their own purposes, regardless of whether it was created by a third party,
  - the extent to which it had an input in its creation or alteration,
  - the extent to which it retains ultimate responsibility over the management of the information, including its retention and deletion, and

- whether it is merely providing storage, either on its physical premises or on its electronic and cloud systems.
41. The Commissioner acknowledges that the Cabinet Office considers that it has no use whatsoever for the information for its own purposes and that any information that may be held is not held for the purposes of FOIA.
  42. The Commissioner has taken into account the context and circumstances of the request in order to determine, on the balance of probabilities, whether the Cabinet Office holds information within the scope of the request for the purposes of FOIA.
  43. Mindful of the context in which some of the fines are known to have been issued, the Commissioner finds it implausible that the Cabinet Office would have no use for, or legitimate interest in, the information in scope of the request which it confirmed it holds.
  44. While he accepts that the penalty notices were sent by a third party to the individuals concerned, he finds it highly unlikely that, where those notices relate to offences committed as a result of its staff being involved in activities that took place on government premises, the Cabinet Office would not have an interest in that information to any extent.
  45. The Commissioner would expect that, particularly in light of the media attention such matters received, the Cabinet Office, as a responsible employer, would likely, at the very least, take some action to address any staff welfare concerns. He also considers that, in the circumstances, it would be reasonable and proportionate to take action, for example including but not limited to, making initial HR enquiries, providing support and advice to those concerned, considering whether any disciplinary action was warranted and reviewing lessons learned given that some events led to fines and others did not.
  46. With regard to whether any disciplinary action was warranted, again in view of the media coverage, it is not implausible that the Cabinet Office, as their employer, would require its staff to inform them if they received a fine.
  47. The Commissioner considers that any such follow-up action would constitute an appropriate connection between the requested information and the role and functions of the Cabinet Office as a public authority.



48. In reaching a decision in this case, the Commissioner has also considered oral evidence to the Public Administration and Constitutional Affairs Committee (PACAC) on 28 June 2022<sup>6</sup>.
49. He notes that, from Q534, the evidence relates to the matter of Downing Street parties, and the number of fines that were issued, and includes discussion about a disciplinary process being underway. The evidence suggests a link between receipt of a fixed penalty and the disciplinary process.
50. In his view, given the timing of the handling of the request in this case and the date of the PACAC, it is appropriate to take this evidence into account as it is clear that the Cabinet Office was considering matters that are relevant to the request around the time of the internal review which therefore also sheds light on consideration of this at the time of the request.
51. While the Commissioner accepts that the Cabinet Office was clear in its submission to him that they do not hold the requested information for the purposes of FOIA, the Commissioner considers that this PACAC evidence both informs and supports his decision about whether the information is 'held' in the context and circumstances of the request.
52. In that respect, he notes that the evidence states that "individuals will be considered against a number of different criteria" as part of the disciplinary process. It is reasonable to conclude that the requested information would have formed part of this.
53. In light of the above, and on the balance of probabilities, the Commissioner cannot be satisfied that the Cabinet Office does not hold any information within the scope of the request for its own purposes in addition to any other purposes that it is held for.
54. He therefore finds that the Cabinet Office was not entitled to conclude that the information was not held for the purposes of FOIA.

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<sup>6</sup> <https://committees.parliament.uk/oralevidence/10485/html>

## Right of appeal

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

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

**Michael Lea**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**