

## **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 submitted a request to the Cabinet Office for information relating to when each of the communications, referenced in the Sue Gray report, were discovered, and then presented to former Prime Minister Boris Johnson.
2. The Commissioner's decision is that the Cabinet Office correctly applied section 21 of FOIA (information accessible by other means) to the information requested. However, in failing to respond to the request and issue a refusal notice within 20 working days, the Commissioner has found a breach of sections 10(1), 17(1) and 17(3) of FOIA.
3. The Commissioner does not require further steps as a result of this decision notice.

## Request and response

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4. On 26 May 2022, the complainant wrote to the Cabinet Office and requested information in the following terms. For clarity the Commissioner has numbered the parts of the request to align with the Cabinet Office's response:

"1. This is a FOI request in relation to the date and time when each of the communications (WhatsApp & Emails) referenced in the Sue Gray report were first "discovered" as in retrieved from systems post November 2021 and when if at all these were presented to Boris Johnson by any recorded means. For the avoidance of doubt this is in general terms and not specific to when the communications were discovered as part of the Sue Gray report."

5. The Cabinet Office asked for clarification on 8 June 2022, and the request was clarified, on the same day, to:

"2. When the WhatsApp and emails referenced in the "Findings of Second Permanent Secretary's Investigation into Alleged Gatherings on Government Premises during Covid Restrictions" were downloaded or otherwise 'retrieved' and when they were sent to the Prime Minister. This would be only for retrievals of the communications after November 2021 (if records exist) and would not be solely for retrievals as part of the investigation process prior to the report.

I would be happy should searching for retrieval times exceed limits or not existing, to limit the request to the date and time these communications would have been presented to the Prime Minister via any recorded means after November 2021."

6. On 27 June 2022 and 24 August 2022, the Cabinet Office informed the complainant that it was extending the time limit for providing its response, as it was considering the public interest under section 31 of FOIA.
7. After extending the time to respond, the Cabinet Office provided its response, on 22 September 2022, in which it refused the first part of the request under section 12(1) of FOIA, and applied section 21(1) to the second part of the request.
8. Upon receiving this response, the complainant requested an internal review on 22 September 2023, and on 24 January 2023, the Cabinet Office provided its internal review response and maintained its reliance on sections 12 and 21 of FOIA.

## Scope of the case

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9. In their complaint to the Commissioner, the complainant stated that they accept that part one of their request may be excessively time consuming, and so has not challenged the application of section 12
10. However, the complainant takes issue with the Cabinet Office extending the time to respond due to PIT considerations, when ultimately it did not come to rely upon the exemption it was considering the public interest test for. They also contest the application of section 21 of FOIA to part two of their request.
11. The Commissioner therefore considers that the scope of his investigation is to determine whether the Cabinet Office was correct to apply section 21 of FOIA to the information requested in part two of the request, and he will also consider certain procedural matters.

## Reasons for decision

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### Section 21 – information accessible to applicant by other means

12. Section 21 of FOIA provides that information which is reasonably accessible to the applicant is exempt information.
13. Section 21 is an absolute exemption which means that there is no requirement to carry out a public interest test, if the requested information is exempt.
14. Unlike most exemptions, the circumstances of the applicant can be considered, as the information must be deemed readily accessible to the particular applicant.
15. It is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public, until it becomes aware of any particular circumstances or evidence to the contrary.

16. In its response, the Cabinet Office provided the complainant with a link to the Hansard website<sup>1</sup>, which is the official record of the proceedings of the UK Parliament.
17. This link directed the complainant to a Parliamentary Question, dated 7 June 2022, in which the former Minister for the Cabinet Office confirmed that the Sue Gray report was made available to the former Prime Minister after 10 am on the day of 25 May 2022.
18. During his investigation, the Commissioner questioned whether the above date and time was the first time the communications, mentioned in the request, had been provided to the former Prime Minister.
19. In its response, the Cabinet Office confirmed that the provision of the report was the only, and first time, that the former Prime Minister was provided with the communications in question, and that by providing the complainant with the link to the Parliamentary Question, it provided them with publicly-accessible information.
20. The Commissioner notes that the complainant has stated that a media report suggested "briefing notes may have contained relevant information." However, as no evidence has been provided showing this, the Commissioner has to base his view on the information that he does have.
21. Furthermore, in the former Prime Minister's written evidence to the Privileges Committee<sup>2</sup>, which, granted, was after the request was responded to, Boris Johnson stated that there are internal messages between advisers, but that there is no suggestion that these concerns were passed onto him.
22. Therefore, the Commissioner is satisfied that the Cabinet Office was entitled to apply section 21 of FOIA to the information requested in part two of the request.

## **Procedural matters**

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23. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

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<sup>1</sup> <https://questions-statements.parliament.uk/written-questions/detail/2022-05-26/9843>

<sup>2</sup> <https://www.bbc.co.uk/news/65031463>

24. Section 17(1) of FOIA states that where a public authority refuses a request for information, it must provide the applicant with a refusal notice explaining the exemptions relied upon and why they apply (if not apparent) no later than 20 working days after the date on which the request was received.
25. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest.
26. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
27. In this case, the complainant submitted their request on 26 May 2022, and it was clarified on 8 June 2022. The Cabinet Office, after extending the time to respond, through consideration of the public interest, provided its response on 22 September 2022, in which it no longer relied upon the exemption it was considering the public interest for. The Commissioner reminds the Cabinet Office that extension to the PIT can only be applied once it has been determined that the exemption is engaged, and not to determine *whether* the exemption is engaged.
28. In this case, the Cabinet Office breached sections 10(1), 17(1) and 17(3) of FOIA in the handling of this request.

## **Other matters**

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29. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 Code of Practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
30. In this case, the complainant requested an internal review on 22 September 2022 and the Cabinet Office provided the outcome of its review on 24 January 2023, over 80 working days later. The Commissioner reminds the Cabinet Office of the Code of Practice and urges it to respond in a timely manner.

## Right of appeal

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31. 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)

32. 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.
33. 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

**Joanna Marshall**  
**Group Manager**  
**Information Commissioner's Office**  
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**Wilmslow**  
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