

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2012

Public Authority: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall
London SW1A 2WH

Decision (including any steps ordered)

1. The complainant requested photographs taken by Andrew Parsons during the period he was an employee of the Cabinet Office. The Cabinet Office provided publically available photographs. On internal review it argued that any unused photographs were exempt under section 36 (effective conduct of public affairs). It reviewed the matter again once the Commissioner began his investigation. Following a further review, it stated that, in fact, it did not hold any unused photographs taken by Mr Parsons and that it had relied on section 36 in error.
2. The Commissioner's decision is that the Cabinet Office does not hold any unused photographs within the scope of the complainant's request. However, it contravened the Act by failing to tell the complainant about this within 20 working days of his request.
3. The Commissioner does not require the Cabinet Office to take any further steps in relation to its request. This is because it has already written to the complainant to advise that it does not hold any unused photographs.

Request and response

4. On 17 November 2010, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I would like to apply under freedom of information laws for copies of all photographs taken by Andrew Parsons during his time as a civil servant along with details of -
 - * The time, date and location of where they were taken*
 - * Who they feature*
 - * The nature of the event*
5. The Cabinet Office responded on 15 December 2010. It provided links to publicly available photographs via Flickr (an online facility). It explained that the supporting information that Mr Lyons had requested could be accessed when viewing the photographs on Flickr.
6. The complainant requested an internal review, asking about unpublished photographs. Following an internal review, the Cabinet Office wrote to the complainant on 25 January 2011. It stated that any photographs not already in the public domain would be exempt under section 36(2)(c) of the Act. It commented that routine publication of such photographs "*could impact on the effective conduct of public affairs*". It provided no comment as to the balance of public interest contrary to the requirements of section 17(3) of the Act.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner first sought the Cabinet Office's comments regarding the application of section 36 and also a copy of the withheld information. There was a delay of almost two months on the Cabinet Office's part before it provided any response to the queries. Eventually, it wrote to explain that it did not hold any further information within the scope of the complainant's request. It admitted it was in error when it said that the information was

exempt under section 36. It admitted that it had not sought to check whether any information was actually held when the original request came in. It also admitted that it had not sought the opinion of its qualified person as to the application of section 36 before citing this exemption. Section 36 is engaged only where, in the reasonable opinion of its designated qualified person, the exemption applies.

9. At the Commissioner's urging, the Cabinet Office wrote to the complainant directly to advise that it did not hold the requested information. It explained that the comments it had originally made about section 36 were untested and it asked the complainant to disregard them.
10. The complainant wrote to the Commissioner and expressed his disbelief and suspicion about this response. He raised concerns that a criminal breach of the Act may have occurred under Section 77 of the Act. For reasons set out in the Other Matters section of this Notice, the Commissioner has concluded that no criminal breach of the Act has occurred.
11. This Notice focuses on whether or not the Cabinet Office held unused photographs taken by Mr Parsons at the time of the request.

Reasons for decision

12. Section 1(1)(a) of the Act requires a public authority to confirm or deny whether it holds information within the scope of any request made to it under the Act. Where it holds such information, the public authority must (under Section 1(1)(b)) provide it or explain why it is not obliged to do so under the Act. Both elements of section 1(1) are subject to exemptions but none fall to be considered in this case.
13. When considering a dispute as to whether requested information is held, the Commissioner considers the matter as at the time for compliance with the request.
14. The Commissioner applies the normal standard of proof in determining whether the information is held, that is, the civil

standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority and any reasons offered by the public authority to explain why the information is not or would be unlikely to be held. The Commissioner will also consider any evidence that relevant information is, in fact, held and the likelihood that the information which has been located represents all the information held.

15. Mr Parsons was employed as an official photographer for the Prime Minister by No.10 Downing Street (which forms part of the Cabinet Office for the purposes of FOIA). No.10 Downing Street then announced a change to Mr Parsons' employment arrangements. The matter was discussed at a press briefing of 16 November 2010¹. The complainant submitted his request the following day.
16. The Commissioner has learned the following details during the course of his investigation:
 - Mr Parsons left employment as a public servant at the Cabinet Office on 17 November 2010, the date of the request.
 - During his period of employment there he primarily used his own equipment for taking and storing photographs.
 - At some point during Mr Parsons' period of employment, the Cabinet Office purchased computer equipment that was compatible with Mr Parsons' own so that his photographs could be uploaded and stored there.
 - After this purchase and while attempting to create an account for Mr Parsons, the Cabinet Office suffered a catastrophic loss of data on the computer equipment it had bought for storing Mr Parsons' photographs. All photographs stored on that computer equipment were lost.
 - Following a query from the Commissioner, the Cabinet Office was unable to establish when the data loss actually happened

¹ <http://www.number10.gov.uk/news/afternoon-press-briefing-from-16-november-2010/>

but believes it was towards the end of the period of Mr Parsons' period of employment there.

- There was no agreement between the Cabinet Office and No.10 regarding any photographs taken by Mr Parsons using his personal equipment that were taken before Mr Parsons left the Cabinet Office but not used by the time he left.
 - Mr Parsons retained his equipment upon leaving the Cabinet Office's employ.
 - The Cabinet Office has no specific document retention or destruction policy in relation to photographs. However, it adhered to guidance issued by The National Archives on this topic. Specifically, it held Image Library Records until no longer required.²
 - At some point in the middle of 2011, the Cabinet Office undertook a thorough review of its request handling procedures. Following or as part of this review it revisited its handling this request.
17. The Cabinet Office is firmly of the view that any photographs taken by Mr Parsons did not constitute official records and were therefore not caught by the requirements of the Act. It emphasised that the photographs were not, for the most part, held on Cabinet Office equipment.
18. The Commissioner, by contrast, considers that any photographs taken by Mr Parsons during the period of his employment as a photographer at the Cabinet Office in the course of that employment would constitute information held by, or on behalf of, the Cabinet Office for the purposes of the Act, regardless of who owned the equipment that was used to capture and store it.
19. This changed once Mr Parsons left the Cabinet Office. As is clearly explained in the press briefing (see above), Conservative Party Headquarters became responsible for any official photographs of the Prime Minister, David Cameron, given that he is also the leader of that party. The Conservative Party is not a public authority for the purposes of the Act. This means that any

² . http://www.nationalarchives.gov.uk/documents/information-management/sched_press.pdf (see para 3.2)

material it commissions to promote the party and its members is, essentially, held privately by the party for its own purposes, not on behalf of any public authority. Such information would not fall to be considered for disclosure under the Act.

20. It is clear to the Commissioner that most, if not all, of Mr Parsons' photographic work while he was employed by the Cabinet Office was carried out on his own equipment.
21. Public money was spent on new computer equipment that was compatible with Mr Parsons' own. The Commissioner has no evidence to contradict the public authority's assertion that there was a catastrophic loss of data from this publicly funded equipment. It has been difficult to establish what happened to any photographs taken after this data loss. However, the Commissioner has concluded that the Cabinet Office reverted to Mr Parsons' equipment for storage after this data loss.
22. Where unused photographs existed at the time of the request and were only held on Mr Parsons' equipment, it could be argued that they were, at that time, held for the purposes of the Act by Mr Parsons on behalf of the Cabinet Office. The Cabinet Office advised that no arrangement was made between itself and the Prime Minister's office regarding the further use of photographs that were unused at the time Mr Parsons left his employment. The Commissioner accepts that this might suggest that the Cabinet Office failed to make appropriate arrangements for unused photographs that were held for the purposes of the Act. There may have been an assumption that unused photographs would simply be deleted, in which case there would be no unused photographs for which arrangements were needed.
23. The Commissioner conducted a brief online search to establish whether there were any photographs taken by Mr Parsons while he was in the Cabinet Office's employ that: a) were not used during his period of employment; and b) were subsequently used by, for example, the Conservative Party, No. 10 Downing Street or Mr Parsons himself for promotional purposes. The Commissioner searched Mr Parsons' own website and the Flickr pages of the Cabinet Office, No. 10 Downing Street and the Conservative Party. He did not find any such photographs. With the passage of time and the importance of using the most recent photographs for promotional purposes, it seems increasingly

unlikely that such photographs, if they existed at the time of the request, would be brought into use.

24. The Commissioner also notes that the Cabinet Office followed The National Archives guidelines for the retention of library images that it no longer required. Once the Conservative Party took responsibility for official photographs of the Prime Minister, the Commissioner has concluded that the Cabinet Office would have no business need to retain any unused photographs itself.
25. The Cabinet Office was not clear with the complainant from the outset and has given confusing and contradictory responses. As a consequence, the Commissioner thinks it is not unreasonable for the complainant to be sceptical about the Cabinet Office's revised position.
26. The Commissioner has concluded, on the balance of probabilities, that no unused photographs within the scope of the complainant's request were held by the Cabinet Office at the time of that request. He has had particular regard for the fact that the Cabinet Office had no business need to continue to hold such photographs after Andrew Parsons had left its employ.
27. He notes that the Cabinet Office initially appeared somewhat muddled as to what constitutes recorded information for the purposes of the Act. However, he does not think that this lack of clarity on its part indicates that such information was held at the time of the request. He is satisfied that the Cabinet Office now has a fuller understanding of its obligations and how it should have dealt with this request from the outset.
28. In failing to advise the complainant within 20 working days that it did not hold any unused photographs, the Cabinet Office contravened the requirements of section 1(1)(a) and Section 10 of the FOIA.

Other matters

29. Section 77 of the Act states that a criminal offence is committed if any person alters, defaces, blocks, erases, destroys or conceals any information with the intention of preventing the applicant

from receiving any of the information he is entitled to receive. In order to secure a conviction in criminal proceedings, each element of an offence must be proven to the criminal standard, that being 'beyond reasonable doubt', as opposed to the lesser civil standard of 'balance of probabilities'. If this standard of proof is not met, any prosecution will fail.

30. The Commissioner has considered all the circumstances of this case. Whilst he has found that the Cabinet Office mishandled the complainant's request from the outset, the Commissioner has not seen any evidence to suggest that any material that may have been held by or on behalf of the Cabinet Office has been deliberately withheld or deleted to avoid disclosure to the complainant.
31. The Commissioner would like to record his concerns in relation to the Cabinet Office's initial reliance upon section 36. It would appear that when applying this exemption, the Cabinet Office had failed to establish whether any unused photographs were held and sought to rely on section 36 on a general basis. This resulted in significant and unnecessary delays in the progress of this matter.

Right of appeal

32. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.
34. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF