

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2013

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested correspondence and communications involving Sir Jeremy Heywood from a specified period on a particular subject. The Cabinet Office initially confirmed it held information within the scope of the request but argued that it was exempt under section 36 (prejudice to effective conduct of public affairs). It upheld this position at internal review and also introduced reliance on section 31 (prejudice to law enforcement). However, during the course of the Commissioner's investigation, it revised its position and argued that it did not, in fact, hold information within the scope of the request.
2. The Commissioner's decision is that the Cabinet Office was justified in stating that it does not hold information within the scope of the request. However, the Cabinet Office contravened the requirements of section 1 and section 10 of the Act by failing to respond to the complainant's request within 20 working days.
3. No steps are required.

Request and response

4. On 10 January 2013, the complainant wrote to the Cabinet Office and requested information in the following terms:

"My request is as follows:

* Please provide copies of all notes of telephone calls/conversations between Sir Jeremy Heywood and Bernard Hogan-Howe in September 2012 relating to an incident involving MP Andrew Mitchell. (Source:

<http://www.bbc.co.uk/news/uk-politics-19707950>)

* Please provide copies of all correspondence and communications between Sir Jeremy Heywood and Bernard Hogan-Howe in September 2012 relating to the incident.

* Please provide copies of all notes of telephone calls/conversations between Sir Jeremy Heywood and the Prime Minister in September 2012 relating to the incident involving Mr Mitchell (<http://www.standard.co.uk/news/politics/top-mandarin-sir-jeremy-heywood-admits-he-didnt-probe-pleb-word-8446015.html>)”

5. The Cabinet Office responded on 13 February 2013. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - Section 36(2)(b) and (c) (Prejudice to effective conduct of public affairs)
6. The complainant requested an internal review on 13 February 2013. The Cabinet Office sent him the outcome of its internal review on 3 April 2013. It upheld its original position with regard to section 36 and introduced reliance on section 31(a),(b) and (c) (law enforcement exemptions).

Scope of the case

7. The complainant contacted the Commissioner on 5 April 2013 to complain about the way his request for information had been handled.
8. Initially, he complained about the Cabinet Office's use of exemptions. The Commissioner contacted the Cabinet Office to invite its further and final arguments on the application of exemptions. After a protracted delay, the Cabinet Office wrote to advise the Commissioner that it had revised its position. It now asserted that it did not hold information within the scope of the request. The complainant disputed this assertion. The Commissioner wrote again to the Cabinet Office to ask for its full and final arguments as to why it did not hold information within the scope of the request. After a further protracted delay, the Cabinet Office provided the Commissioner with its arguments.
9. The Commissioner has therefore considered whether the Cabinet Office holds information within the scope of this request.

Reasons for decision

Background

10. On 19 September 2012, Andrew Mitchell MP allegedly used abusive language to police officers who refused to allow him to exit Downing Street on his bicycle via the main gate there. Mr Mitchell admitted swearing at the officers and apologised for doing so but denied using a pejorative term when talking to the officers. The matter became the subject of national controversy when it was reported in the media the following day and Mr Mitchell later resigned as Government chief whip in response to the continued public furore. The allegations about what Mr Mitchell said were, in themselves, called into question. As at the time of writing this decision notice, the Metropolitan Police Service had arrested individuals in connection with this matter.¹
11. According to reports, the Prime Minister, David Cameron, asked the Cabinet Secretary, Sir Jeremy Heywood, to examine whether further emails that had been received by the Deputy Chief Whip, John Randall MP, about the incident, gave rise to a reconsideration of his, the Prime Minister's, initial position that Mr Mitchell should remain in post. The extent of Sir Jeremy's investigation of events was later called into question and he appeared before the Public Administration Select Committee to answer questions about this.²

Section 1 – is information held?

12. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information described in the request and, if held, to be provided with it. Section 10(1) of the FOIA states that this response should be supplied within 20 working days.
13. In this case, after 24 working days, the Cabinet Office initially asserted that it held the information but that it was exempt from disclosure. It upheld this position at an internal review. It was only after the Commissioner began his investigation that it changed its position.
14. When writing to the Commissioner to explain that it did not hold the requested information, the Cabinet Office had given particular emphasis

¹ <http://www.bbc.co.uk/news/uk-politics-23170959>

² <http://www.bbc.co.uk/news/uk-politics-20969478>

to the fact that the request specified the relevant time period as being in September.

15. The complainant was sceptical about the Cabinet Office's revised position. He drew the Commissioner's particular attention to exchanges that had been recorded on Hansard (the official record of the UK Parliament) when Sir Jeremy Heywood was quizzed by the Public Administration Select Committee about his (Sir Jeremy's) review of evidence submitted by email that apparently challenged Andrew Mitchell MP's version of events. Sir Jeremy's evidence appeared to indicate that the Prime Minister tasked him with reviewing the email evidence in September of 2012 and that Sir Jeremy undertook to provide a prompt response. The complainant therefore disputed the Cabinet Office's view that it did not hold information from September within the scope of his request.
16. When considering whether information is held, the Commissioner considers the question to the civil standard of proof, that is, on the balance of probabilities. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches; and, or other explanations offered as to why the information is not held.
17. The Commissioner asked the Cabinet Office a series of detailed questions and drew its attention to the record of what Sir Jeremy Heywood had said to the Public Administration Select Committee about being tasked by the Prime Minister in September. He asked the Cabinet Office whether there was any record of the instruction being given. If there was, this would, in the Commissioner's view, appear to fall within the scope of the request.
18. The Cabinet Office explained that there was no record made of the instruction being given. It also set out what searches it had conducted in order to determine whether it held any information within the scope of the request. These searches included the email accounts of those involved. The Cabinet Office explained that "[o]nly a small number of senior people were involved in this issue".
19. It explained that it had initially deemed a record containing the outcome of Sir Jeremy's findings as being within the scope of the request. It was this information to which it had originally applied section 36 and section 31. However, on further reflection, it decided that this information was not a "note of telephone calls/conversations between Sir Jeremy Heywood and the Prime Minister" as described in the request. It therefore fell outside the scope of the request.
20. The Commissioner agrees that such a record would fall outside the scope of the complainant's request because it is not a note of telephone call or a conversation between Sir Jeremy Heywood and the Prime

Minister. Section 1 of the Act is clear. It provides a right of access to information "of the description specified in the request". Such a record does not match the description set out in the request.

21. That said, it would have been more helpful to the complainant had the Cabinet Office been clearer about its position from the outset. As noted above, it missed the 20 working day deadline for response to the complainant and, as it turned out, the response it eventually did give was not correct. It also failed to rectify this at internal review.
22. In any event, the complainant, or any other person, remains entitled to request the information that was originally, albeit erroneously, considered by the Cabinet Office to be within the scope of this request. If the Cabinet Office refuses to provide it (citing exemptions) and upholds this position at internal review, the requester is entitled to apply to the Commissioner for a decision as to whether the Cabinet Office is correct. The Cabinet Office is required to comply with the statutory timescales when handling such a request.

Section 1 - Conclusion

23. The Commissioner is satisfied that, on the balance of probabilities, the Cabinet Office does not hold information within the scope of the request. In reaching this view, the Commissioner has had regard for the quality and thoroughness of the Cabinet Office's searches and the detail of its response to the Commissioner's questions. However, in failing to provide a response to the complainant within 20 working days, the Cabinet Office failed to comply with its obligations under section 1(1)(a) and 10(1) of the Act – it responded within 24 working days.

Right of appeal

24. 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

25. 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.
26. 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
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