

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 November 2018

**Public Authority:** The Cabinet Office

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

#### Decision (including any steps ordered)

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1. The complainant has requested information regarding ministerial misconduct complaints. The Cabinet Office has asserted that the requested information is not held.
2. The Commissioner's decision is that, on the balance of probabilities, the Cabinet Office does hold the requested information and has failed to fully consider and respond to the request in accordance with section 1(1). In failing to comply with section 1(1), the Cabinet Office has breached section 10(1).
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation:
  - Issue a fresh response to the request that does not deny that the information is held (ie the Cabinet Office needs to comply with section 1(1)(a) by confirming that the information is held) **and** then either disclose the information, or issue a refusal notice citing a reason to withhold the information.
4. The Cabinet Office must take these steps within 35 calendar days of the date of this decision. 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.

## Request and response

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5. On 25 January 2018, the complainant wrote to the Cabinet Office and requested information in the following terms:

*"1. HOW MANY MINISTERIAL MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT RECEIVE FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

*2. PLEASE PROVIDE A BREAKDOWN OF HOW MANY COMPLAINTS WERE MADE AGAINST EACH NAMED MINISTER FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

*3. HOW MANY MINISTERIAL MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT INVESTIGATE FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

*4. HOW MANY MINISTERIAL [sic] MISCONDUCT COMPLAINTS DID THE UK GOVERNMENT UPHOLD FOR EACH OF THE FOLLOWING YEARS 2012, 2013, 2014, 2015, 2016 & 2017?"*

6. On 19 February 2018, the Cabinet Office responded and stated that the information is not held centrally.
7. On 20 February 2018, the complainant wrote to the Cabinet Office and expressed his dissatisfaction at the response. The complainant stated that all ministerial misconduct complaints are sent to the Cabinet Office for investigation.
8. On 20 February 2018, the Cabinet Office requested confirmation of whether the complainant was seeking information about allegations of breaches of the Ministerial Code and provided a link to the code of conduct<sup>1</sup>. The Cabinet office also stated *"Please note that the Cabinet Office does not track all complaints made against Ministers. These will generally be held at departmental level"*.
9. On 21 February 2018, the complainant responded and asserted *"A Ministerial Misconduct complaint always relates to a Breach of the*

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/672633/2018-01-08\\_MINISTERIAL\\_CODE\\_JANUARY\\_2018\\_FINAL\\_3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_MINISTERIAL_CODE_JANUARY_2018_FINAL_3.pdf)

*Ministerial Code of Conduct which is always investigated by the Cabinet Office...".*

10. Following the Commissioner's intervention, the Cabinet Office issued an internal review on 2 May 2018. The Cabinet Office upheld its original decision and again stated that the information is not held centrally.

## **Scope of the case**

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11. The complainant wrote to the Commissioner on 9 May 2018 to complain about the way his request for information was handled.
12. Having reviewed the correspondence between the complainant and the Cabinet Office, the Commissioner considers that it is clear that the focus of the request is complaints involving breaches of the Ministerial Code of Conduct. The Cabinet Office requested clarification of whether the complainant was referring to breaches of the code following his request for internal review. When the complainant provided this confirmation, the Cabinet Office did not treat this as a fresh request and issued an internal review, following the Commissioner's intervention. The Commissioner therefore considers that the Cabinet Office accepted this as the correct interpretation of the request.
13. The Commissioner considers the focus of her investigation is to determine whether the Cabinet Office holds information falling within the scope of the complainant's request.

## **Reasons for decision**

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### **Section 1(1): General right of access to information**

14. Section 1(1) of the Act states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that may apply. A public authority is not obliged under the Act to create new information in order to answer a request.
15. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner following the lead of a number of First-Tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.

16. In the circumstances of this case, the Commissioner will determine whether, on the balance of probabilities, the Cabinet Office holds recorded information that falls within the scope of the request.

### **The Cabinet Office's position**

17. The Cabinet Office explained that it does not automatically track complaints made against individual ministers of alleged ministerial misconduct as these are generally dealt with and resolved at departmental level.
18. The Cabinet Office confirmed that it does deal with complaints about breaches to the Ministerial Code but it does not compile and collate statistics on such cases.
19. The Cabinet Office stated that the request is for very specific statistical data, broken down by various categories.
20. The Cabinet Office stated:

*"While it might be possible to trawl individual case files and compile such figures, such compiled figures do not currently exist and the Cabinet Office, under the terms of the Freedom of Information Act, is not required to create new information in order to service a request."*

21. The Cabinet office further explained that it was "unnecessary" to carry out any level of searches for this very specific information. It explained that the team responsible for dealing with such complaints were "entirely confident" that such data does not exist and has never been compiled in the format requested by the complainant.

### **The Commissioner's decision**

22. The Commissioner has reviewed the Ministerial Code of Conduct and she notes that it states the following at paragraph 1.4:

*"If there is an allegation about a breach of the Code, and the Prime Minister, having consulted with the Cabinet Secretary feels that it warrants investigation, she will refer the matter to the independent advisor on Minister's interests".*

23. Paragraph 1.6 of the Code also states:

*"...ministers only remain in office for so long as they retain the confidence of the Prime Minister. She is the ultimate judge of the standards of behaviour expected of a minister and the appropriate consequences of a breach of those standards."*

24. The Commissioner has also reviewed the Independent Advisor on Ministers' Interests' annual reports<sup>2</sup> for the time period specified and it appears that the then Prime Minister referred a complaint to the Independent Advisor in 2012. It is therefore logical that at least one complaint has been lodged with the Cabinet Office in the specified time period.
25. This information, coupled with the Cabinet Office's own submission statement that it could refer to the individual files to collate the information, leads the Commissioner to the conclusion that information relevant to the request is held.
26. The Commissioner must, therefore, consider whether collating information into the requested categories would constitute creation of information.
27. The Commissioner considers this case has similarities with the Tribunal decision *Michael Leo Johnson v the Information Commissioner and the Ministry of Justice (EA/2006/0085; 13 July 2007)*<sup>3</sup>. In the Tribunal case, the applicant sought the number of claims that were struck out by each of the Queen's Bench Masters for the years 2001, 2002, 2003 and 2004.
28. The Ministry of Justice (MOJ) had not collated the information in this format at the time of the request and the question of whether the information was held focussed on the contents of the MOJ's manual records. In particular, the Tribunal considered whether the work needed to identify, retrieve and then manipulate the raw data constituted the creation of new information.
29. The MOJ argued that there was a need to exercise some judgement as to what files recorded a strike out and that once this raw data had been

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<sup>2</sup> <https://www.gov.uk/government/publications/independent-adviser-on-ministers-interests-2011-to-2015-report>

<https://www.gov.uk/government/publications/independent-adviser-on-ministers-interests-2016-report>

<https://www.gov.uk/government/publications/independent-adviser-on-ministers-interests-2017-report>

<sup>3</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

extracted it had to be further manipulated, ie the strike outs had to be allocated to the different Masters and then added up to give a total for each Master. The MOJ argued that, as the Cabinet Office has in this case, this was the creation of new information.

30. The Tribunal found that the judgement required to identify the struck out cases was not difficult and that the need to perform some simple mathematical calculations did not involve the creation of new information. The Tribunal therefore found that the information was held.
31. The Commissioner considers that it is well established that information which requires collation from various sources does not constitute the creation of new information. She is concerned at the Cabinet Office's apparent lack of understanding of the basic principles of determining whether information is held for the purposes of the Act.
32. The Commissioner has issued guidance<sup>4</sup> regarding this issue and she strongly recommends that the Cabinet Office reviews this guidance and ensures that it responds to future requests in accordance with this well-established position.
33. The Commissioner's decision is that, on the balance of probabilities, the Cabinet Office does hold information falling within the scope of the request. This because she does not consider the collation of information needed to answer the request, would in the circumstances of this case, constitute the creation of new information.
34. The Commissioner requires the Cabinet Office to issue a fresh response to the request that does not deny the information is held (ie comply with section 1(1)(a) by confirming that the information is held) **and** then either disclose the information or issue a refusal notice citing a reason to withhold the information.

## Other matters

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35. In its submission to the Commissioner, the Cabinet Office commented that the complainant had not specifically requested an internal review but it had provided one at the Commissioner's request.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1169/determining\\_whether\\_information\\_is\\_held\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf)

36. The Section 45 Code of Practice in place at the time<sup>5</sup> (a revised version of the Code was issued by the Cabinet Office on 4 July 2018<sup>6</sup>), states at paragraph 38:
37. *"Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint, as should any written communication from a person who considers that the authority is not complying with its publication scheme. These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application."*
38. Having reviewed the complainant's correspondence with the Cabinet Office, it is evident that he is seeking to challenge the outcome of the original decision as he considers that information is held.
39. The Commissioner is disappointed that the Cabinet Office has not recognised a clear request for internal review, particularly in light of its current obligation to provide guidance in the form of the section 45 Code of Practice and Governmental Freedom of Information Policy.
40. The Commissioner expects the Cabinet Office to take the appropriate steps required to improve its handling of requests and set an example of best practice.
41. In light of the length of time since the request was made, should the complainant be dissatisfied with the Cabinet Office's fresh response, she will accept a complaint without an internal review of the Cabinet Office's subsequent position.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## Right of appeal

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42. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

43. 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.
44. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**