

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

### **Decision notice**

**Date:** 6 July 2021

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

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

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1. The complainant requested information on any advice provided to the Prime Minister on the use of public money to fund the "Getting ready for Brexit" media campaign<sup>1</sup> following the passing of the Benn Act<sup>2</sup>.
2. The Commissioner's decision is that the Cabinet Office, on the balance of probabilities, does not hold any information within the scope of the request.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

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<sup>1</sup> To prepare for the UK's departure from the EU the Government launched the "Get ready for Brexit" media campaign to the public on 1st September 2019.

<https://www.gov.uk/government/news/get-ready-for-brexit-campaign-launched>

<sup>2</sup> A Bill to make further provision in connection with the period for negotiations for withdrawing from the European Union which resulted in:

<https://www.legislation.gov.uk/ukpga/2019/26/section/2/enacted>

## Request and response

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4. On 7 October 2019 the complainant wrote to the Cabinet Office and requested information in the following terms:

“Please may I have a copy of any advice to the Prime Minister of [sic] Cabinet on whether it was appropriate to use taxpayer funds for the ‘getting ready for Brexit’ media campaign following the passing of the Benn Act?”
5. The Cabinet Office responded on 29 October 2019. It provided a refusal notice in reliance of section 35(1)(a) – Formulation of government policy.
6. The complainant requested an internal review on 29 October 2019 and at the same time made an additional request:

“Did the appropriate accounting officer request a ministerial direction and, if so, was it written and please may it be published?”
7. Following an internal review the Cabinet Office wrote to the complainant on 2 April 2020 upholding the initial response and referring the complainant to the generic GOV.UK website in response to his additional request, as follows:

“Ministerial directions are published as a matter of course on Gov.uk.”
8. The Commissioner noted that on visiting the GOV.uk website, as directed by the Cabinet Office in its internal review, she was unable to find any relevant information on a Ministerial direction in this matter.
9. During the course of the Commissioner’s investigation the Cabinet Office confirmed to her and the complainant:

“In regards to the supplementary question we can confirm that there was no Ministerial direction for this specific campaign and that no ministerial direction was requested.”
10. The Commissioner notes that the Cabinet Office failed to make clear that no information is held in respect of this point until during the course of her investigation.

## Scope of the case

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11. The complainant contacted the Commissioner on 12 May 2020 to complain about the way his first request for information had been handled. The complainant explained:

“As you may recall, the Government spent money on the Get Ready for Brexit suggesting that the UK would leave on 31 October 2019 irrespective of the contents of the Benn Act. Eventually, the Government did act in line with the Benn Act and sort an extension. The Cabinet Office has refused to disclose the information and is relying upon 35(1)(a) of the FOI Act. Given that it was legally impossible for the UK to leave on 31 October 2019, it strikes me as a significant waste of money to spend money on such a campaign at that time. The public interest would be served by disclosing whether the Prime Minister acted against advice and he should be politically accountable for that choice.”

12. The Commissioner initially considered the scope of her investigation to be whether the Cabinet Office had appropriately applied the section 35(1)(a) exemption to withhold the requested information. However, in providing its submission to the Commissioner, the Cabinet Office concluded that, in fact, it did not hold the requested information and therefore had applied the exemption in error.
13. The Cabinet Office advised the complainant of this change of position on 12 January 2021. It apologised for its previously inaccurate responses.
14. The Commissioner notes that a public authority may, at any time during her investigation, change its response or change the exemptions on which it has relied, or include additional exemptions. Notwithstanding this, the Commissioner is surprised that a public authority could rely on an exemption to withhold information, uphold that reliance at internal review and then only later determine that no information is held.
15. The Cabinet Office explained to the Commissioner that at the time of the request, and the time of the internal review, it considered that there was a possibility that the requested information may be held within a specific set of documents which it was unable to access at that time. Following from this possibility it appears that the Cabinet Office responses of 29 October 2019 and 2 April 2020 assumed that if material within the scope of the request was held it would be exempt under section 35, the formulation and development of government policy. As section 35 is a qualified exemption, the Cabinet Office further assumed that the balance of the public interest favoured maintaining the exemption.

16. Consequently, the Commissioner has investigated the Cabinet Office's final determination that no information is held in the scope of the request.

## **Reasons for decision**

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

17. Section 1(1)(a) of FOIA 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 specified in the request and, if so, to have that information communicated to them.
18. Where there is a dispute between the information located by a public authority and the information the complainant believes should be held, the Commissioner follows the lead of a number of First-Tier Tribunal decisions in applying the civil standard of the balance of probabilities.
19. The complainant contacted the Commissioner on 16 February 2021, following the Cabinet Office's revised response, explaining his scepticism regarding the finding.
20. The Cabinet Office confirmed to the Commissioner that, in providing its submission to her, searches had been conducted of the documents which were previously inaccessible and no information in scope was contained within them.
21. The Cabinet Office explained that digital and paper searches had been undertaken by the policy teams who would have been most likely to have seen and to have had input into any advice to the Prime Minister regarding the funding of the campaign following the European Union (Withdrawal) (No. 2) Act 2019. The teams being the EU transition team and the public information campaign team.
22. In addition, the office of the Executive Director of Government Communication has been consulted and has confirmed that it too does not hold any information in the scope of the request. Furthermore the Commissioner is advised that the official records of the Prime Minister's Office for the relevant time period have also been searched, and again no information in scope was located.
23. The Cabinet Office explained that it had also searched a set of paper files within its Ministerial Private Office records. Although it was thought extremely unlikely that specific information in the scope of the request would be held in this set of papers, it was nevertheless deemed appropriate to search for any mention of the requested advice in any notes of the meetings recorded there. The Cabinet Office confirmed that

this additional search of paper files identified no information in scope, or any reference to information that would be in the scope of the request.

24. In the circumstances of this case the Commissioner understands the complainant's scepticism when receiving the Cabinet Office response of 12 January 2021. The Commissioner notes the Cabinet Office's apology to the complainant. She considers that it is not satisfactory for responses to be provided to the complainant without appropriate searches being correctly conducted. At the very least, a full reconsideration of the handling of a request should be undertaken in the internal review.
25. Notwithstanding this, the Cabinet Office has confirmed that thorough and appropriate searches have now been conducted and those searches failed to locate any information within the scope of the request. The Commissioner is satisfied with the nature of the searches conducted which, she considers would have located any information in scope which is currently held.
26. As the searches for the requested information were conducted more than a calendar year after the time of the request the Commissioner asked the Cabinet Office to confirm whether any information would have been held at the time of the request which was subsequently destroyed prior to the searches undertaken.
27. The Cabinet Office advised the Commissioner that the policy teams who had conducted the searches checked and confirmed that if the information had been held at the time of the request it would not have been deleted before the searches were conducted. It confirmed that no information in scope of the request is either held by the Cabinet Office, or been deleted in the interim period between the request and the actual searches.
28. Consequently the Commissioner's decision is that on the balance of probabilities no information within the scope of the request is held.

## **Other matters**

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29. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
30. The complainant asked for an internal review of the outcome of his request on 29 October 2019. The Cabinet Office did not provide the results of its review until 2 April 2020, over five calendar months later. The Commissioner notes that this request for internal review predates any impact or delay resulting from the COVID-19 pandemic.
31. The Cabinet Office did not apologise or offer any explanation for this delay. Despite the delay, as already noted, the review was perfunctory and did not conform to the section 45 code which states:

"The internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act.
32. The Commissioner considers that a period of five calendar months to conduct the internal review is excessive and not in accordance with the section 45 code. She considers this to be an unsatisfactory period of time.

## Right of appeal

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33. 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)

34. 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.
35. 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 .....**

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