

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 April 2023

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

Decision (including any steps ordered)

1. The complainant has requested communication between former Prime Minister Rt Hon Boris Johnson MP and Lord Brownlow of Shurlock Row regarding the refurbishment of the Prime Minister's Downing Street Residence. The Cabinet Office maintained that it did not hold the requested information.
2. The Commissioner's decision is that the Cabinet Office does not hold the requested information. The Commissioner does not require any steps to be taken.

Request and response

3. On 1 June 2021 the complainant submitted the following request to the Cabinet Office:

This is a Freedom of Information request for all correspondence between Boris Johnson and Lord Brownlow of Shurlock Row in the period 01/01/2020 to 01/06/2021.

This includes any texts or Whatsapp messages exchanged between the pair.

If, for some reason, there were so many messages exchanged in this period that it would breach the cost limit, please narrow the search to correspondence exchanged between the pair between 01/10/2020 and 01/03/2021.

Please also provide details of any calls or meetings between the pair in the period 01/01/2020 to 01/06/2021. This includes the date of the call or meeting, a list of attendees, and a brief summary of what it was about.

As with the above, if for some reason, there were so many meetings/calls in this period that it would breach the cost limit, please narrow the search to correspondence exchanged between the pair between 01/10/2020 and 01/03/2021.

4. The Cabinet Office responded to the complainant on 29 June 2021. It refused the request on the basis that compliance would exceed the appropriate limit at section 12 of the Act.
5. On 5 July 2021 the complainant submitted a refined request to the Cabinet Office:

"This is a Freedom of Information request for all correspondence between Boris Johnson and Lord Brownlow of Shurlock Row in the period 01/06/2020 to 01/06/2021 on the subject of the renovation of the Prime Minister's Downing Street flat.

This includes any texts or Whatsapp messages exchanged between the pair on the subject."

6. The Cabinet Office responded to the request on 4 August 2021. It stated that

"Searches of our records have not identified information in relation to your refined request".

7. On 9 December 2021 the Electoral Commission published a report of its investigation into transactions relating to works at 11 Downing Street.¹

¹ <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-enforcement-work/investigations/report-investigation-conservative-and-unionist-party-recording-and-reporting-payments>

Scope of the case

8. The complainant contacted the Commissioner on 10 December 2021 regarding his request. The complainant referred the Commissioner to the following extract of the Electoral Commission report:

"29 November 2020: the Prime Minister messaged Lord Brownlow via WhatsApp asking him to authorise further, at that stage unspecified, refurbishment works on the residence. Lord Brownlow agreed to do so, and also explained that the proposed trust had not yet been set up but that he knew where the funding was coming from."

9. In light of this, the complainant asked the Commissioner to investigate whether the Cabinet Office had responded appropriately to his request of 5 July 2021.
10. The Commissioner used his discretion to accept the complaint as eligible for investigation in the absence of an internal review. This is because of the time that had elapsed since the Cabinet Office refused the request.
11. In addition, the Commissioner does not consider there to have been undue delay in the particular circumstances of this case because the complainant submitted his complaint following publication of the Electoral Commission report. Given the Electoral Commission's findings the Commissioner does not consider it unreasonable for the complainant to have sought to challenge the Cabinet Office's response. The Commissioner is also mindful that the complainant's previous request had been refused on cost grounds before the Cabinet Office stated that it did not in fact hold the requested information. The Commissioner was of the opinion that, by the time of the complainant's request, the Cabinet Office had had sufficient opportunity to reconsider its position.
12. The Cabinet Office advised the complainant that it had conducted searches but had not identified relevant information. It clarified its position during the course of the Commissioner's investigation to confirm its view that it did not hold the requested information because of the status of the Downing Street flat. The Commissioner appreciates that public authorities may conduct searches for information before concluding that they would not in fact hold such information for the purposes of FOIA. This is not strictly necessary but may be good practice if the status of the requested information is not clear.

13. In any event, the Commissioner understands that the Cabinet Office is of the view that it does not hold recorded information relevant to the request. In order to make a decision in this case the Commissioner therefore investigated how the Cabinet Office interpreted the request, and how it is satisfied that it does not hold any recorded information relevant to the request.
14. The Commissioner has also had regard to correspondence published by the Cabinet Office on 6 January 2022, comprising an exchange between the Prime Minister and the Independent Adviser on Ministers' Interests, Lord Geidt.² This correspondence includes disclosure of the WhatsApp messages between the Prime Minister and Lord Brownlow on 29 November 2020 (described by Lord Geidt as the "Missing Exchange") referred to in the Electoral Commission report.
15. The letter from Lord Geidt to the Prime Minister dated 17 December 2021³ sets out the following:

"...in April 2021, in light of a well-publicised security breach, you implemented security advice relating to a mobile device. The effect was that historic messages, potentially including the Missing Exchange, were no longer available to search. Later, in June, after my report had been published, the device was again accessed for another purpose."

16. The letter further sets out:

"In particular I note that Lord Brownlow offered to furnish the Cabinet Office with all the material (which would include the Missing Exchange) that he would be providing to the Electoral Commission. This offer was not accepted by the Cabinet Office, thus having the effect of excluding the Missing Exchange from the documentary record that was provided to me."

² <https://www.gov.uk/government/publications/advice-from-the-independent-adviser-on-ministers-interests-december-2021>

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044951/lord-geidt-to-prime-minister-17-december-2021.pdf

Reasons for decision

Section 1: duty to respond to requests

Section 3: information held by or on behalf of a public authority

17. Section 1 of FOIA states that public authorities are required to disclose information in response to a request, unless an exemption or exclusion applies. If a public authority does not hold recorded information that would answer a request, the Commissioner cannot require the authority to take any further action as long as that has been confirmed to the requestor.
18. Section 3(2) of FOIA states that information is held by a public authority if:
- “(a) it is held by the authority, otherwise than on behalf of another person, or
 - (b) it is held by another person on behalf of the authority.”
19. The Commissioner has also had regard to relevant case law, in particular the test set out by the Court of Appeal in *Department of Health v Information Commissioner* [2017] EWCA Civ 374.⁴ The Court of Appeal commented that
- “...there must be an appropriate connection between the information and the Department, so that it can properly be said that that the information is held by the Department.” [54]

Status of the Downing Street flat

20. The Cabinet Office confirmed to the Commissioner that the freehold of the Downing Street estate is legally held in the name of the Secretary of State for Levelling Up, Housing and Communities (LUHC). Whilst the Government Property Agency is responsible for paying business rates, the occupier of the Downing Street flat is personally liable for council tax.
21. The Cabinet Office explained that Downing Street has been the official residence of the Prime Minister since 1735. It referred the Commissioner to explanatory information contained within a

⁴ <https://www.bailii.org/ew/cases/EWCA/Civ/2017/374.html>

Parliamentary Question answered in April 2021.⁵ This confirmed that the Government is legally required to maintain the Downing Street buildings owing to their listed status, but that Prime Ministers have received an annual allowance of public funding of up to £30,000 towards furnishing their Downing Street residence.

22. In light of the above the Cabinet Office maintained that the Downing Street flat was considered a private rather than public dwelling. Consequently it interpreted the complainant's request of 5 July 2021 as focussing on correspondence relating to "private arrangements made in regard to the renovation of a private dwelling". The Cabinet Office distinguished this from information that it held which related to works undertaken from public funds through the annual allowance.
23. With reference to the Court of Appeal case set out at paragraph 19 above, the Cabinet Office asserted that there was no "appropriate connection" between the requested information and the Cabinet Office in this case. Therefore the Cabinet Office maintained that it did not hold the requested information within the meaning of section 3(2) of FOIA.

The Commissioner's findings

24. The Commissioner wishes to record that the Cabinet Office has engaged fully with his officers in this case. This has included the provision of detailed submissions in respect of enquiries made of the Cabinet Office. The Commissioner has included as much detail as possible in this decision notice but notes that some information was provided in confidence, for security and other reasons. Therefore the Commissioner has not reproduced all of the Cabinet Office's representations.
25. In considering this case the Commissioner has been mindful of the wording of the request of 5 July 2021 which is the subject of this decision notice. The request was for all correspondence between Mr Johnson and Lord Brownlow, during a specified period, on the subject of the renovation of the Downing Street flat. The Commissioner is of the opinion that the request is clearly focused and limited in scope. It does not, for example, extend to all information held by the Cabinet Office relating to the renovation.

⁵ <https://questions-statements.parliament.uk/written-questions/detail/2021-03-12/HL14191>

26. The Commissioner understands that the Downing Street flat is legally held in the name of the Secretary of State for LUHC. However, in the Commissioner's opinion it does not necessarily follow that all information relating to the Downing Street flat is held on behalf of the Cabinet Office, or indeed the Secretary of State.
27. The Commissioner accepts that the Cabinet Office is responsible for administering the public money spent on maintenance and renovations relating to the listed status of the Downing Street properties. He also accepts that this responsibility does not extend to personal expenditure on the part of the Prime Minister, even if it relates to renovations or furnishing of the Downing Street flat.
28. In light of the above the Commissioner concludes that the Cabinet Office was entitled to deny that it held the requested information, since it would not be caught by section 3(2) of FOIA.
29. The Commissioner has also considered whether, if he were to uphold the complaint, he could require the Cabinet Office to take any further steps.
30. The Commissioner is mindful that the correspondence with Lord Geidt referred to at paragraph 14 above indicates that messages were exchanged between the Prime Minister and Lord Brownlow. He observes that these messages were made available by Lord Brownlow rather than the Prime Minister. Notwithstanding the Commissioner's finding in respect of section 3(2) of FOIA, the Commissioner has seen no evidence to indicate that the Cabinet Office itself physically held the requested information, namely communication of the description specified in the request, at the time of the request.
31. In light of the above the Commissioner finds that the Cabinet Office does not hold the requested information in this case. Therefore he concludes that the Cabinet Office could not be required to take any further action in respect of the request of 5 July 2021.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF