

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested the total number of digital and/or written messages, broken down by platform (e.g. email, WhatsApp, Twitter etc) sent by Dominic Cummings on 7 September 2020 in his capacity as Chief (Special) Adviser to Prime Minister Boris Johnson. The Cabinet Office confirmed that they did not hold the information requested, a position which was upheld at internal review and maintained in submissions to the Commissioner.
2. The Commissioner's decision is that the Cabinet Office failed to carry out checks and searches for the requested information at the time of the request, and based on the information available to him at the time of his investigation, the Commissioner considers, on the balance of probabilities, that the Cabinet Office will have held the information requested at the time of the request.
3. Unfortunately, Mr Cummings' subsequent departure from the Government, and the passage of time since the request, means that the information requested will no longer be held by the Cabinet Office. Consequently, there are no steps which the Commissioner can now order to ensure that the Cabinet Office complies with the legislation in respect of the request.

Request and response

4. On 26 September 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'I am writing to submit a Freedom of Information request. As you may have seen from my past requests, I am very concerned that there is little to no digital recording being captured regarding Mr Cummings' Cabinet Office correspondence. My concern is this: if his emails and his mobile phone messages are not being properly captured, then how are we to know how he influences the matters of the day? How is democracy able to operate if he is shunted into the shadows?

As such, can I ask – then – how many digital and/or written messages did Mr Cummings send on the 7 September 2020 in his capacity as the Prime Minister's Special Advisor?

Can you please let me know:

- 1. The number of total messages*
- 2. The platforms on which such messages were sent, broken down by numbers (i.e. email, WhatsApp, SMS text, letter, Snapchat, Zoom DMs, Twitter DMs etc).*
- 3. Whether he used private or state-given platforms (emails, mobile phones etc) for such correspondence – again broken down by numbers and platforms.*

This might seem a little onerous as a request, but until we know the ways in which your special advisors correspond, we cannot demand such correspondence is both recorded for posterity and scrutinised for accountability. Thank you in advance'.

5. The Cabinet Office responded on 23 October 2020 and stated that 'we do not hold the information that you have requested'. The Cabinet Office advised that, 'outside the terms of the Act, it might prove helpful to explain that it is not the case that every message, whether electronic or otherwise, by any member of staff, needs to be kept'. The Cabinet Office advised that the use of email etc follows the Lord Chancellor's Code of Practice on the management of records issued under section 46 of the FOIA, and prevailing ICO guidance.
6. The Cabinet Office advised that, 'where it is the case that a particular item is identified as being required to be kept, it is transferred into our official records. These records are organised by broad subject area, and not, for example, by sender or recipient'.
7. The complainant requested an internal review on 24 October 2020 and stated that he believed that the Cabinet Office's 'inability to answer this

FOI or your refusal to' was not in step with the spirit or the letter of the FOIA.

8. The complainant drew attention to the (then) ICO guidance to public authorities, which stated that:

'Before you decide that you don't hold any recorded information you should make sure that you have carried out adequate and properly directed searches and that you have convincing reasons for concluding that no recorded information is held'.

9. The complainant advised the Cabinet Office that they had not given him a convincing reason as to why they do not record the official output of the Prime Minister's most senior adviser and he stated that he did not accept that the Cabinet Office were unable to find out if Mr Cummings had sent any messages on the date in question (7 September 2020).
10. The complainant contended that *'if you can only find a few emails that he sent on that day, you can still inform me of how many messages he sent that you are able to find'*. He advised the Cabinet Office that he did not accept that they had undertaken adequate and properly directed searches and that they had convincing reasons for concluding that no recorded information was available. The complainant noted that sent emails, for instance, can be searched for under any normal IT system, especially recent emails.
11. The complainant contended that *'to claim that you have no records of any messages sent by a senior civil servant in Her Majesty's Government is, frankly, either unsettling or untrue'*. If the former then the complainant contended that the Cabinet Office was not adhering to the FOIA, which specifies recorded information as including *'printed documents, computer files, letters, emails, photographs and sound or video recordings'* and which covers *'any recorded information that is held by a public authority'*.
12. The complainant contested the Cabinet Office's statement that they organised their records by broad subject area and not, for example, by sender or recipient. He contended that *'this should not be how you organise your records'*. The complainant referenced (then) ICO guidance which stated that, *'requests are sometimes made for less obvious sources of recorded information such as the author and date of drafting found in the properties of a document (sometimes called meta-data). This information is recorded so is covered by the Act and you must consider it for release in the normal way'*.
13. The Cabinet Office provided the complainant with their internal review on 22 February 2021. They apologised for the four month delay in providing the review but gave no explanation for the same.

14. The Cabinet Office advised that the original handling of the request had been carefully reviewed and they had concluded that the complainant had been *'correctly informed that such a list is not held by the Cabinet Office'*.
15. The Cabinet Office advised that it might be helpful if they explained that the Prime Minister's Office *'manages its records in line with prevailing legislation and guidance'*. They advised that it is not the case that all emails, mobile phone messages etc must be retained, and that *'in general terms'*, a record need only be retained *'if it is needed for substantive discussions or decisions in the course of conducting official business'*.
16. The Cabinet Office advised that those records which need to be retained are transferred into the official records, which are organised by broad subject matter. They advised that *'ephemeral or trivial'* emails need not be retained, even if generated in the course of conducting Government business, and should be deleted on a routine basis. The review therefore concluded that the original response that the Cabinet Office did not hold any information within scope of the request was upheld.
17. The Cabinet Office advised the complainant that he might wish to submit a new, more specific request. For example, a request which was restricted to communications sent by Mr Cummings in relation to a specific policy, topic or announcement. The Cabinet Office advised that such a request would allow for a targeted search of their official records. However, the Cabinet Office noted that even if the complainant were to submit a refined request and that information were to be held, it may be subject to one or more of the exemptions within the FOIA.

Scope of the case

18. The complainant contacted the Commissioner on 23 February 2021 to complain about the way his request for information had been handled.
19. In his complaint to the Commissioner, the complainant stated his belief that:

'WhatsApp by government is a common practise and none more so than by Special Advisors. I believe that such WhatsApp or other encrypted software prevents scrutiny of correspondence and reduces public servant accountability. I think that the Cabinet Office is unable to access Mr Cummings' WhatsApp account and the outcome is a refusal – not because it does not fall under the purview of the FOI Act, but because Mr Cummings is refusing to cooperate, and in so doing is in breach of the Act on a personal basis. I believe that the Information Commissioner should make clear guidelines on encrypted software and

the use of platforms like WhatsApp and Signal to ensure that government does not correspond in the shadows'.

20. During the course of the Commissioner's investigation, the complainant provided the Commissioner with a copy of a response which he had received from a similar request to the Ministry of Defence (MOD) which he stated '*might show that the Cabinet Office's refusal to let me know what communication platforms are used by their SPADs is not an argument used by other ministries'.*
21. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office were correct to state that they held no information within scope of the complainant's request.

Reasons for decision

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

22. Section 1(1) of the 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 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.
23. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-Tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
24. In the circumstances of this case, the Commissioner will determine whether, on the balance of probabilities, the Cabinet Office holds (or held at the time of the request) recorded information that falls within the scope of the request.

The Cabinet Office's position

25. In submissions to the Commissioner the Cabinet Office stated that, '*for the avoidance of doubt, the Cabinet Office did not and does not hold **a recorded figure** (Commissioner's emboldening) of the overall number of messages sent by Mr Cummings on this date by platform'.*
26. The Cabinet Office noted that this was not, for example, '*a request for the number of messages concerning official business sent by Mr Cummings that were then transferred into our official records, and*

where our records could be interrogated in relation to recorded information that we held. Instead, it is a demand that we provide a tally of every message, however ephemeral, that Mr Cummings sent on that day, which in any way pertained to his role as the Prime Minister's Special Adviser'.

27. The Cabinet Office stated that they were *'not obliged to undertake searches for information which it knows it did not hold. Furthermore, the Act provides a qualified right of access to recorded information. It does not require that we create information for the purpose of answering a request'.*
28. The Cabinet Office confirmed that the Prime Minister's Office (PMO) manages its records in line with prevailing legislation and guidance, and that there is no expectation or requirement that every communication that is sent or received by an individual should be captured for the purposes of the department's official records. *'This is not, and never has been the case. Instead, the expectation is that information that needs to be kept is retained, and other information is disposed of'.*
29. The Cabinet Office explained that:

'The retention and disposal policy is designed to ensure that trivial information is not retained and that pertinent information is captured in official records. When it is decided that information should be retained for the official record, the PMO does so in accordance with Cabinet Office guidance, The National Archives guidance and the Public Records Act 1958'.
30. The Cabinet Office stated that they do not specifically record whether official messages sent by any person are sent via official or personal devices.
31. Asked by the Commissioner if they had contacted Mr Cummings and asked whether he held any relevant information pertaining to the request, the Cabinet Office confirmed that Mr Cummings was not contacted and asked if he held any relevant information. The Commissioner would note that this shows that the response provided by the Cabinet Office to the complainant's request was not, contrary to the complainant's suspicion, attributable to obstruction or a refusal to cooperate by Mr Cummings.
32. The Cabinet Office advised the Commissioner that *'it was known, without the necessity of resorting to searches, that **a figure** (Commissioner's emboldening) for the number of messages sent by Mr Cummings on a certain date was not held. There is simply no reason for such a figure, entirely devoid as this would be of any context, to be compiled by the Cabinet Office'.*

Commissioner's decision

33. It is apparent from the Cabinet Office responses to both the complainant and the Commissioner, that they interpreted the complainant's request to be a request for a 'list' or 'figure' of the total number of messages sent by Dominic Cummings (in his position as Chief Adviser to Prime Minister Johnson) on 7 September 2020.
34. The Cabinet Office have been clear that they did not, and do not, hold a recorded figure of the overall number of messages sent by Mr Cummings on this date, by platform. The Commissioner accepts that this was (and is) the case. Given that some of the messages sent by Mr Cummings (or indeed any other government official) on any given date might be ephemeral or not related to official government business, the Commissioner recognises and accepts that there would be no business need to hold such numerical information.
35. However, the complainant did not ask for a 'list' or 'figure' of the number of messages sent by Mr Cummings on 7 September 2020 (i.e. a standalone list or figure held by the Cabinet Office). The complainant asked for the number of total messages, broken down by platform, sent by Mr Cummings 'in his capacity as the Prime Minister's Special Advisor'. That information did not have to be contained in a separate list or total figure in order to be held by the Cabinet Office for the purposes of the FOIA.
36. The complainant submitted his request on 26 September 2020. At that time Mr Cummings was still in post as Chief Adviser to Prime Minister Johnson. Had Mr Cummings sent any messages on 7 September 2020, either by official email account or private email account(s) and other platforms (e.g. WhatsApp), then it is highly likely, given that this date preceded the date of the request by less than three weeks, that any such messages would still have been retained.
37. In IC-40467-C7K2 (31 March 2022) which also concerned a request for information concerning messages sent by Mr Cummings, the Cabinet Office confirmed to the Commissioner in submissions as follows:

'The record management policy on the handling of emails etc within the Prime Minister's Office was introduced in 2004. Under this policy a limit of 3 months was introduced on the No 10 IT system before emails were automatically deleted. There has been no change in that policy. The policy was introduced on the basis that e-mail systems etc should not be used for storing public records for which established systems are in place. It is incumbent upon the person who holds any non-trivial information, including attachments within emails, to ensure that they are retained as an official record.'

38. Therefore, in respect of any emails sent by Mr Cummings via his official email address on 7 September 2020, these would not have been automatically deleted at the time of the complainant's request on 26 September 2020.
39. The Commissioner recognises and accepts that the responsibility for ensuring that important and non-trivial information about official government business contained in private email accounts or other personal devices or platforms is safely and securely retained lies very much upon the account(s) holder, but that is separate to the factual issue as to whether, at the time of the request, the Cabinet Office held recorded and relevant information within the scope of the request.
40. At the time of the request, the ICO's guidance on official information held in private email accounts¹ confirmed that FOIA applies to official information held in private email accounts (and other media formats) when held on behalf of the public authority.
41. It is important to note that the ICO has since issued new and updated guidance on Official Information Held in Non-Corporate Communications². The new guidance reflects the emergence of new technology since the FOIA came into force and the practical realities of how some working within public authorities have, at times, communicated. However, the Commissioner does not consider that it would be fair or reasonable to assess the Cabinet Office response to the request with reference to guidance which post-dated the same. Consequently, the Commissioner's decision in this case has been made with reference to the aforementioned ICO guidance which was in place and well established at the time of the request (the Guidance).
42. The Guidance stated that, *'it may be necessary to request relevant individuals to search private email accounts in particular cases. The occasions when this will be necessary are expected to be rare'*. However, at the time of issuing the previous Guidance the Commissioner could not have envisaged the extent to which some aspects of official government business would be conducted through non-official channels (e.g. private email accounts and WhatsApp), in the intervening years. Consequently, the occasions on which such searches of private email accounts would be necessary, were (and are) not as rare as originally envisaged.

¹ [official information held in private email accounts.pdf \(ico.org.uk\)](https://ico.org.uk/official-information-held-in-private-email-accounts)

² [Official information held in non-corporate communications channels | ICO](https://ico.org.uk/official-information-held-in-non-corporate-communications-channels)

43. The Guidance stated that, *'where a public authority has decided that a relevant individual's personal email account may include information which falls within the scope of the request **and which is not held elsewhere on the public authority's own system** (Commissioner's emboldening), it will need to ask that individual to search their account for any relevant information'*.
44. The Commissioner notes that it is in the public domain (largely through Mr Cummings publishing his private WhatsApp messages) that Mr Cummings had a practice of discussing official government business (most notably the Government's response to and management of the Covid-19 pandemic) through his private WhatsApp account(s).
45. On 24 April 2021, The Independent reported that former Whitehall insiders had said that the arrival in No.10 of the Prime Minister and his (then) Chief Adviser, Mr Cummings, *'brought a new, more secretive style to Downing Street'*³. One former insider was quoted as saying that:
- 'The starkest immediate difference to working life when the Cummings team came in was that so much was no longer on email but on your phone. Things were done in a much more cryptic way. There was an effort to make sure that conversations weren't traceable as much as possible, unless there was a deliberate reason to make them traceable. Where they were quite clever was that if there was something they were OK with being leaked, that would go on email'*.
46. The Independent reported that one former insider speculated that this aversion to email *'was driven by an incident in 2011 when Michael Gove was forced to release messages sent on his wife's email account under the Freedom of Information Act because they related to government business. A ruling at the time that all government information, even if transmitted by text message, private email or Twitter, is covered by the Act, appeared to have convinced Mr Cummings – an adviser to the then education secretary – that alternative means of communication were needed that would not be liable to discovery by future inquiries'*.
47. Though the Commissioner is mindful that they post-date the complainant's request, the publication by Mr Cummings in July 2021 of what appear to be his own private WhatsApp messages which discussed the Government's handling of the pandemic, tend to corroborate the

³ [Cummings ushered in secretive Whatsapp-encrypted 'boys club' style to government communications, say former Whitehall insiders | The Independent](#)

information reported by The Independent, in that they appear to show that Mr Cummings was in the habit of using such private communication channels to conduct official government business, and had done so since his arrival in Downing Street as the Prime Minister's Chief Adviser in July 2019. The Commissioner considers that the Cabinet Office should therefore have been reasonably aware of Mr Cummings' practice by the time of the complainant's request in September 2020.

48. Whilst it is reasonable to expect that information concerning government business will be recorded on government record systems, it does not necessarily follow that it will therefore be reasonable for a public authority to carry out checks and searches of such government record systems **only**, in response to an FOI request. The complexity and speed of government business in the technological age is such that other non-corporate communication channels might quite conceivably be utilised to conduct official government business, as Mr Cummings' high profile published WhatsApp messages have shown.
49. In this case the Cabinet Office confirmed that they carried out **no** checks and searches to see if they held the information requested by the complainant, their position being that they *'are not obliged to undertake searches for information which it knows it did not hold'*. The Cabinet Office's assurance that they did not hold the information requested appears (as noted above) to be based on their erroneous understanding that the complainant was seeking a 'list' or 'figure' for the number of messages sent by Mr Cummings on 7 September 2020 and that the Cabinet Office would not hold such a list or other self-contained standalone document stating the number of messages sent.
50. However, this fundamentally misunderstands the position as regards information held by a public authority under the FOIA. The request was for the number of messages sent by Mr Cummings on 7 September 2020 in his capacity as the Prime Minister's Special Advisor. That is to say, any messages which concerned or related to official government business. Any such messages sent by Mr Cummings on that date would be information 'held' on behalf of the Cabinet Office for the purposes of the FOIA.
51. The Commissioner's Guidance made clear that *'where a public authority has decided that a relevant individual's personal email account may include information that falls within the scope of the request and which is not held elsewhere on the public authority's own system, it will need to ask that individual to search their account for any relevant information'*. Had the Cabinet Office notified Mr Cummings of the complainant's request, Mr Cummings would have been able to tell them how many messages he sent (and via what email account(s) or other platforms) on 7 September 2020 in his capacity as Chief Adviser to Prime Minister Johnson. This is especially because the date of the

request was very close in time to the scope of the request (7 September 2020).

52. The Commissioner considers that it should have been quickly apparent to the Cabinet Office that in order to process this request appropriately (and relatively quickly) they needed to ask Mr Cummings to check his email account(s) and other communication platforms and confirm the total number of messages, broken down by platform, which he sent on 7 September 2020 in his Chief Adviser capacity. The Commissioner considers that it was wholly unreasonable and unacceptable for the Cabinet Office to fail to make such enquiries of Mr Cummings and to confirm that no information was held without carrying out any checks or searches beforehand.
53. The response of the Cabinet Office to the complainant's request can be contrasted with that of the Ministry of Defence (MOD) to a very similar request by the complainant.
54. On 13 October 2020, the complainant submitted a request to the MOD to ask *'how many digital and/or written messages did the MOD SPADs (special advisers) send on the 7 September 2020 in their capacity as Special Advisors to the MOD'*. As in the present case, the complainant specified that he was seeking:
- '1. The number of total messages.*
 - 2. The platforms on which such messages were sent, broken down by numbers (i.e. email, WhatsApp, SMS text, letter, Snapchat, Zoom DMs, Twitter DMs etc).*
 - 3. Whether they used private or state-given platforms (emails, mobile phones etc) for such correspondence – again broken down by numbers and platforms'.*
55. The MOD responded to the complainant's request on 29 March 2021, confirming that following a search for the information requested, they could confirm that all the information in scope of his request was held.
56. The MOD confirmed that on 7 September 2020, there were 34 messages sent by Special Advisers for the MOD, and that the platform used was Microsoft Outlook using devices issued by the MOD. The MOD advised the complainant that:
- 'Under Section 16 of the Act (Advice and Assistance) you may find it helpful to note the 34 messages were sent out in their capacity as Special Advisers (SPADS) for the Ministry of Defence. The SPADS did not send out any work-related messages using other platforms on the 7th of September 2020'.*

57. The MOD response did not specify the nature of the searches which had been undertaken but the Commissioner considers that it is very unlikely that the information requested by the complainant was already held by the MOD in a list or other standalone document. What is far more likely, is that, in accordance with ICO guidance, the MOD made enquires of the relevant SPADS and asked them to confirm (through checks and searches of their devices) how many messages they had sent, and on which platform(s). This was the correct and appropriate way of responding to the request. It is disappointing and a matter of some concern that the Cabinet Office did not follow a similar approach in respect of the present request, but instead stated that no relevant information was held.
58. As Mr Cummings departed his Government role in November 2020, the Commissioner unfortunately cannot now order any steps for the Cabinet Office to take to ensure that appropriate checks and searches are made of Mr Cummings' email account(s) and communication platforms. However, the Commissioner notes that the date specified in the complainant's request (7 September 2020) would have been a particularly busy one for the Government, with the Financial Times breaking the news that the UK was planning new legislation that would override key parts of the Brexit withdrawal agreement relating to the Northern Ireland protocol. That move caused a crisis in the talks with the European Commission immediately launching legal action. The EU said that the attempt to override the Brexit treaty was not only an infringement of international law but one that threatened the Northern Ireland peace process.
59. In that context, and given his senior and influential role within Government at the time, the Commissioner considers that it is highly likely that Mr Cummings will have sent at least some messages via email, text or other platform on 7 September 2020, in his capacity as Chief Adviser to the Prime Minister. The Commissioner is strengthened in that view by the fact that on the same date, 34 messages were sent by Special Advisers at the MOD.
60. Based on the above information the Commissioner considers, on the balance of probabilities, that at the time of the complainant's request on 26 September 2020, the Cabinet Office will have held relevant information within scope of the complainant's request. That is to say, enquiries of Mr Cummings (and Mr Cummings' subsequent checks and searches of his email accounts and message platforms) would have elicited the number of messages which he sent on 7 September 2020 in his capacity as the Prime Minister's Chief (Special) Adviser.
61. The Cabinet Office were therefore technically in breach of Section 1(1) of the FOIA. However, for the reasons explained in paragraph 3 above,

there are unfortunately no rectification steps which the Commissioner can order in this case.

Other matters

62. The Commissioner would impress upon the Cabinet Office the importance, when considering a request for information about communications/messages sent by named individuals in their official capacity(ies), of contacting the individual(s) and asking them to carry out appropriate checks and searches to establish whether relevant information is held.
63. Although internal reviews are not subject to statutory time limits, the Commissioner's well established guidance is very clear in that he expects public authorities to complete most internal reviews within 20 working days, with a maximum of 40 working days in exceptional cases.
64. In this case the complainant requested an internal review on 24 October 2020 but the review was not provided by the Cabinet Office until 22 February 2021. The Commissioner recognises and appreciates that this period coincided with the Covid-19 pandemic, and the resources and efficiencies of public authorities were inevitably restricted and adversely impacted as a result. The Commissioner made due allowance for this extraordinary situation and recognised that some measure of delays in the usual FOI processes were inevitable and unavoidable.

Right of appeal

65. 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

66. 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.

67. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF