

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2023

Public Authority: Department for Business, Energy and Industrial Strategy ("BEIS")

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information on correspondence between Nadhim Zahawi and David Cameron regarding Greensill Capital and its access to the Coronavirus Large Business Interruption Loan Scheme or any other Covid finance scheme.
2. The Commissioner's decision is that on the balance of probabilities BEIS does not hold information in the scope of the requests.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 April 2021, the complainant wrote to BEIS and requested information in the following terms:

"This is a Freedom of Information request for all correspondence between Nadhim Zahawi and David Cameron on the subject of Greensill capital and its access to the Coronavirus Large Business Interruption Loan Scheme or any other Covid finance scheme.

Specifically, please conduct a search of Nadhim Zahawi's personal phone, which is not exempt from disclosure under the FOIA if, as we understand, it was used to discuss government business. It should be noted that the Chancellor has already disclosed texts on precisely this subject."

And:

"This is a Freedom of Information request for all correspondence between Alok Sharma and David Cameron on the subject of Greensill capital and its access to the Coronavirus Large Business Interruption Loan Scheme or any other Covid finance scheme.

Specifically, please conduct a search of Alok Sharma's personal phone, which is not exempt from disclosure under the FOIA if, as we understand, it was used to discuss government business. It should be noted that the Chancellor has already disclosed texts on precisely this subject."

5. BEIS responded on 12 May 2021. It stated that following a search of its records it determined that no information in the scope of the request was held.
6. Following an internal review BEIS wrote to the complainant on 28 July 2021 upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 27 July 2021 to complain about the way their request for information had been handled. Following the outcome of the internal review, they explained:

"The department failed to release texts exchanged between Nadhim Zahawi and David Cameron despite my request for all correspondence exchanged between the pair on the subject of Greensill capital and its access to the Coronavirus Large Business Interruption Loan Scheme or any other Covid finance scheme. In its original response, the department said that 'it does not hold the information you have requested'.

However, evidence submitted to the Treasury select committee shows that there was indeed correspondence between Nadhim Zahawi and David Cameron on the subject of Greensill capital and its access to the Coronavirus Large Business Interruption Loan Scheme or any other Covid finance scheme. I refer you to the texts between Mr Zahawi and Mr Cameron on pages 24 and 25 [in the evidence submitted to the Committee].¹

¹ <https://committees.parliament.uk/committee/158/treasury-committee/news/156207/committee-publishes-correspondence-from-david-cameron-and-lex-greensill/>

Upon internal review, the department then said that the texts had been deleted. It said: 'It should be noted that deleted information, including informal communications not viewed at the time as requiring official record keeping, is not information now held by the Department.'

Urgent questions remain. When were the texts deleted? Were they deleted after I requested them under Freedom of Information laws? If so, that would constitute a criminal offence.

Furthermore, why were they considered as 'informal communications' not viewed as required for official record keeping? This was government business about Greensill's access to emergency coronavirus schemes, so why was it conducted on non-official channels? These texts clearly should never have been deleted as they were not 'informal communications'. What does this say about the department's record-keeping?"

8. The Commissioner considers the scope of his section 50 investigation to be the thoroughness and appropriateness of the searches undertaken by BEIS. The Commissioner will address the complainant's point regarding the deletion of any relevant material in "Other matters" at paragraph 27

Reasons for decision

Section 1 – General right of access to information

9. Section 1(1) of FOIA states:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to them."

10. In scenarios where there is some dispute between the amount of information a public authority says is held and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
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11. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).
12. The Commissioner will also consider any arguments put forward by the complainant as to why the information is likely to be held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps the public authority could be required to take if the complaint were upheld.
13. In this case the complainant's request for internal review explained why he expected the information in question to be held. The complainant pointed out that:

“Contrary to the department's assertion that "it does not hold the information you have requested", evidence submitted to the Treasury select committee shows that there was indeed correspondence between Nadhim Zahawi and David Cameron on the subject of Greensill capital and its access to the Coronavirus Large Business Interruption Loan Scheme or any other Covid finance scheme.”
14. The Commissioner asked BEIS to provide a full explanation of the searches conducted. It explained that in response to a previous FOI request searches were conducted of both Nadhim Zahawi's and the Secretary of State's mailboxes “as this was the most likely place where information relevant to the requests would have been sent.”² The searches returned no responses. However, having detected a fault with the Secretary of State's mailbox which resulted in not all archived records being found, IT staff conducted further searches and found no results using the search term [David.Cameron@...](#). Further search terms were used which showed emails between Nadhim Zahawi's private office and David Cameron's office but these did not concern the CLBILS, Greensill or any other Covid finance schemes.
15. At this time, ie the time of the previous request, Nadhim Zahawi's private office asked the Minister whether he had any messages on his private mobile phone from David Cameron. He replied that he did not.
16. Alok Sharma had left BEIS before the FOI requests were received. Private office colleagues contacted him at the time of the previous request and asked him to provide any records of contact with David Cameron held on his mobile device. He provided a “nil response”.

² The Commissioner notes that these searches concerned departmental email accounts.

17. The Commissioner asked BEIS whether any recorded information relevant to the scope of the requests had been deleted or destroyed. It explained:

"At the time of [the complainant's] original FOI requests we were not aware messages had passed between David Cameron and Nadhim Zahawi. Mr Zahawi's Senior Private Secretary had asked the Minister about communication with Mr Cameron regarding Greensill on 31 March 2021 in response to another similar FOI request from a different requester and the Minister had confirmed he had no messages. As the Minister had already been asked about this, this was carried over to the response provided to [the complainant].

BEIS was not aware that messages had passed between Mr Cameron and the Minister until these were published as part of the Treasury Select Committee (TSC) evidence session in May 2021, a copy of which [the complainant] attached to his request for Internal Review on 12 May 2021 (The final findings of the TSC were published in July 2021). This evidence suggested that in or around June 2020, Mr Cameron sent text messages to Mr Zahawi in connection with Government business and regarding a private lender, Greensill Capital for whom Mr Cameron was engaged as a private lobbyist.

At this point, Mr Zahawi's Senior Private Secretary followed up on this with Mr Zahawi who confirmed that he had been in contact with Mr Cameron. These communications were sent via WhatsApp to Mr Zahawi's private (not departmental) mobile phone. During this conversation, Mr Cameron had asked to have contact with Richard Sharp who was, at the time, a Special Adviser to the Chancellor. Mr Zahawi provided Mr Cameron with Mr Sharp's contact number. We are informed that Mr Zahawi did not take further action in relation to these conversations as he did not deem the matter to be relevant to his work as a Minister and did not consider the simple passing of an individual's contact details to be official Government business.

Mr Zahawi attempted to find the WhatsApp messages on his private phone and the messages were no longer there. It is our understanding that Mr Zahawi does not know how the WhatsApp messages from Mr Cameron came to be deleted from his mobile phone."

18. BEIS explained that Mr Zahawi did not judge these messages to be relevant to his work as a Minister.
19. BEIS confirmed that the messages referenced above in paragraph 17 were not forwarded to any official in BEIS so were not held at any time on BEIS systems.
20. The Commissioner asked BEIS to explain its records management policy with respect to the retention and deletion of records of the type

requested. BEIS explained that all of BEIS' records management policies and procedures apply to all records created across BEIS. It advised:

"WhatsApp messages which need to be kept as part of the official record are retained as part of our records management policies and procedures. All staff including Ministers are subject to the same policies. BEIS has specific guidance which informs users how to transfer records from WhatsApp onto SharePoint."

21. BEIS further explained its categorisation and allocation of retention periods to those categorisations as follows: administration 3 years retention; standard business use 7 years; extended business use 15 years; historical records 20 years or permanent preservation.
22. The Commissioner understands the complainant's expectations and concerns as set out above in paragraph 7. He accepts that if the Treasury select committee referenced by the complainant had not published the evidence of exchanges between Mr Cameron and others, including Mr Zahawi there would have been no transparency regarding such exchanges. The Commissioner notes the inconsistency explained by BEIS concerning Mr Zahawi's recollection of not having messages from Mr Cameron as at 31 March 2021, in response to a different request, and the evidence of exchanges provided by Mr Cameron to the select committee in May 2021.
23. The Commissioner is not convinced that Mr Zahawi, via WhatsApp, enabling Mr Cameron, a former Prime Minister, to contact the Chancellor's Special Advisor,³ as part of his lobbying on behalf of Greensill can be considered to be informal and not connected to official government business. The Commissioner notes that BEIS has policies in place for officially recording WhatsApp messages and thereby retaining that information. It is unfortunate that Mr Zahawi and Mr Sharma could provide only limited assistance to BEIS in responding to the requests in this case.
24. The Commissioner considers that BEIS conducted sufficient searches based on the information available to officials at the time. As such, in the specific circumstances of this case as detailed above he must conclude that on the balance of probabilities BEIS did not hold information in the scope of the request at the time they were received.

³ <https://committees.parliament.uk/publications/6416/documents/70205/default/>

See Question 5 response from Mr Cameron referencing previously provided messages.

Other matters

25. The Commissioner has considered the complainant's comments in paragraph 7 regarding their concern as to whether a criminal offence had been committed by BEIS in deleting information they had requested. He has, however, seen no evidence to indicate that information relevant to the request was deleted after the initial request was received. The concerns he has relate to the recognition of official information and the measures put in place to make sure this is properly recorded.
26. The Commissioner wishes to draw BEIS' attention to his guidance⁴ on information held in non-corporate communications channels which focusses on the importance of ensuring that official information on non-corporate communications channels is transferred onto official systems. He would highlight the need for BEIS to ensure that its Ministers and Special Advisers receive appropriate training on what information needs to be retained and what comprises official information in the context of an FOI request.
27. The Commissioner notes the current Cabinet Office guidance⁵, which he understands is shortly to be updated, on the use of personal communications which makes clear what the expectation is and the onus on the individuals concerned:

"Other forms of electronic communication may be used in the course of conducting Government business. Department's security policies will apply when generating and communicating information. The originator or recipient of a communication should consider whether the information contained in it is substantive discussions or decisions generated in the

⁴<https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/official-information-held-in-non-corporate-communications-channels/>

⁵ <https://www.gov.uk/government/publications/guidance-to-departments-on-private-email-use>

course of conducting Government business and, if so, take steps to ensure the relevant information is accessible.”

28. The Commissioner has set out below points from the Section 46 Code of Practice⁶ which he considers relevant and which he advises BEIS to consider:

“2.3.2. Authorities should keep information for as long as it has value; for example if:

- the authority needs it for reference or accountability purposes, to comply with regulatory requirements or to protect legal and other rights and interests. This is particularly important if the authority has a duty of care towards vulnerable groups;

2.3.5. Authorities should endeavour to hold information in an appropriate environment. Physical and digital information should be managed in a manner appropriate to the medium in order to preserve its value.

2.9.1. Authorities must assess their policies and procedures against the requirements of the Code at regular intervals and update them if necessary. Risks associated with non-compliance should be included in the authority’s framework for managing risk.”

28. The Commissioner recommends that BEIS undertakes a review to ensure it conforms with the Section 46 Code of Practice, and in particular the above sections. The review should also specifically focus on the retention and deletion of information held in non-corporate communications channels and consider the adequacy of training provided to officials.
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.

⁶ <https://www.gov.uk/government/publications/code-of-practice-on-the-management-of-records-issued-under-section-46-the-freedom-of-information-act-2000>

30. The complainant asked for an internal review of the outcome of his request on 12 May 2021. BEIS did not provide the results of its review, until 28 July 2021, 56 days later.

Right of appeal

31. 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

32. 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.

33. 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
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