

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

### **Decision notice**

**Date:** 9 January 2023

**Public Authority:** Cabinet Office

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

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

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1. The complainant has requested from the Cabinet Office ("CO") copies of evidence sent to the Minister for the Constitution regarding delivery of political campaign leaflets during the pandemic prior to a specific date. A letter had been sent to political parties on that date. CO initially confirmed holding information within the scope of the request but refused to provide it (citing section 35 – formulation/development of government policy) as its basis for doing so. It revised this position at internal review, albeit after considerable delay. It said that the information it first thought to be in the scope of the request was not. It asserted that it did not hold any information within the scope of the request.
2. The Commissioner's decision is that the Cabinet Office does not hold any information within the scope of the request.
3. No steps are required.

#### **Request and response**

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4. On 29 January 2021, the complainant requested information of the following description:  
"1. Did the Minister for the Constitution receive any evidence from  
(A) NHS England,  
(B) The Department of Health and Social Care and

(C) The Chief Scientific and Medical Officers prior to issuing her letter to political parties on 22 January 202[1]<sup>1</sup> concerning the delivering of political campaign leaflets during the current phase of the coronavirus pandemic? (YES/NO)

2. Copies of written evidence sent to the Minister for the Constitution prior to her letter of 22 January pertaining to the safety of delivering political leaflets in the context of the coronavirus pandemic from:

(A) NHS England,

(B) The Department of Health and Social Care

(C) The Chief Scientific and Medical Officers and

(D) Others including members of political parties.

3. Copies of any written evidence which the Minister for the Constitution received prior to issuing her letter of 22 January which confirms that there is a greater risk created by the delivery of political leaflets by volunteers compared to delivery which is paid for by political parties from

(A) NHS England

(B) The Department of Health and Social Care

(C) The Chief Scientific and Medical Officers and

(D) Others including members of political parties.

I would be grateful if you could provide answers to as many of the requests as possible."

5. On 27 April 2021, CO responded. It refused to provide the information it said it held that was within the scope of the request. It cited the following exemption as its basis for doing so - section 35 (formulation/development of government policy).

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<sup>1</sup> The complainant had, as a typographical error, written " bb2020"

6. The complainant requested an internal review on 20 May 2021. CO sent the complainant the outcome of its internal review on 11 October 2021 following the Commissioner's intervention.
7. It revised its position and stated that it did not hold information within the scope of the request. It said that:

"the decision to update the Government's guidance on door-to-door campaigning and leafleting was made in consultation with the Department of Health and Social Care and the COVID-19 Task Force within the Cabinet Office and this was done to remove any ambiguity for all parties. The Minister for the Constitution and Devolution then wrote to political parties on 22 January [2021] to clarify the position".

### **Scope of the case**

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8. The complainant contacted the Commissioner on 20 October 2021 (having previously been in contact about delayed responses from CO) to complain about the way their request for information had been handled. They were sceptical about CO's revised position given that it had initially sought to rely on an exemption as its basis for withholding information.
9. The Commissioner has considered whether CO holds:
  1. Any evidence sent to the Minister for the Constitution prior to 22 January 2021 from the three parties named in the first request that is about the delivery of political campaign leaflets.
  2. Any evidence sent to the Minister prior to 22 January 2021 from the four parties named in the second request that is about the safety of party volunteers delivering political leaflets.
  3. Any evidence sent to the Minister prior to 22 January 2021 from the four parties named in the third request which confirms that there is a greater risk of spreading coronavirus if party volunteers deliver political leaflets.

### **Reasons for decision**

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10. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.

11. The complainant commented: "This case suggests that the Government has misled people over the nature and sources of advice it received about making significant changes to the conduct of election campaigns in the run up to major elections in May 2021. These changes of course favoured the governing party."
12. The Commissioner has sought to determine whether, on the balance of probabilities, CO holds the requested information. The Commissioner considers such matters to the civil standard and not to the criminal standard of "beyond all reasonable doubt".
13. The Commissioner asked CO a series of questions about its position that it does not hold the requested information. These included standard investigation questions which he has already published online<sup>2</sup>. However, he also asked it to explain why it had first claimed to hold the requested information and had applied an exemption to it.
14. CO explained that the letter of 22 January 2021 (referred to in the request) was sent out to clarify the impact of lockdown restrictions on doorstep campaigning.<sup>3</sup> It asserted that it "was not issued to set out new restrictions or regulations in the light of new evidence or any new health, scientific or medical advice".
15. It added:

"The letter was also published on Gov.uk to ensure the information was widely shared and freely available. A significant precursor to the letter being sent followed a query from the police who had been approached by a political party to ask whether political activity, such as leafletting or canvassing, was permissible under the regulations in place at the time. Consequently, civil servants from the Home Office, Cabinet Office and Department of Health and Social Care considered this point in order [sic] advice could be given to ensure different police forces did not interpret the regulations differently. This work and the consideration given to it by Government departments did not require the gathering or consideration of the type of 'evidence' sought by the requester. The intention and objective of the work was to simply clarify the impacts of the restrictions. Therefore, the Minister of State for the Constitution and

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<sup>2</sup> [Key Questions for Public Authorities – Freedom of Information Act 2000 | ICO](#)

<sup>3</sup> [MCD letter to members of the Parliamentary Parties Panel.pdf \(publishing.service.gov.uk\)](#)

Devolution did not receive such 'evidence' for the purposes of writing to the Members of the Parliamentary Parties Panel on 22 January, which is the clear topic of interest from the requester. On 26 February 2021, the Government published further guidance<sup>4</sup> outlining how political campaigning would be permitted ahead of the May elections, in a COVID-Secure way, and how limited door to door campaigning would be permitted."

16. It acknowledged that both the letter and the guidance had "led to a significant number of [Parliamentary Questions] and correspondence questioning the decision"
17. The Commissioner asked CO to explain what it understood the word "evidence" to mean. He said to CO: "For example, if any of the named parties sent a letter to the Cabinet Office about leafleting during the pandemic, the Commissioner considers that this is likely to constitute 'evidence'".
18. It explained the following:
  - "Relevant 'evidence' within the context of the overall FOI request - i.e. 'Evidence' provided before, and used for the considered drafting of, the 22 January letter.
  - Relevant 'evidence' within the contexts of the three questions from the requester provided before, and used for the considered drafting of, the 22 January letter. Those three questions covering:
    - o ...concerning the delivering of political campaign leaflets during the current phase of the coronavirus pandemic
    - o ... pertaining to the safety of delivering political leaflets in the context of the coronavirus pandemic...
    - o ...which confirms that there is a greater risk created by the delivery of political leaflets by volunteers, compared to delivery by which is paid for by political parties...
  - Information and/or proof that has been "formed on the basis of any health, scientific or medical advice" provided before, and used for the considered drafting of, the 22 January letter. In particular, the

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<sup>4</sup> [The Government's approach to elections and referendums during COVID-19 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/the-governments-approach-to-elections-and-referendums-during-covid-19)

complainant's request for an internal review on 20 May 2021 makes the following points:

- It must be in the public interest in a democracy to know whether or not policy with regard to outlawing a specific aspect of election campaigning is formed on the basis of any health, scientific or medical advice or is just made for the advantage of the governing party?
  - If the Minister's letter of January 22nd had been preceded by advice from the relevant health, medical and scientific experts then it would have been in the public interest to say so and there may have been greater adherence to the policy. Such advice could, and should, have been published. Questions in Parliament asking about the distinction should not have been blocked.
  - But if it was not based on such advice, and based on a request to undermine the activities of opposition parties, then this would most serious [sic] and in the public interest and the [sic] would demonstrate why Parliament legislated for Freedom of Information. The public need protection from abuse of the democratic processes."
19. CO stressed that the request was based on the incorrect premise that there had been new advice and/or new evidence which had prompted the letter. It acknowledged that its initial response did not explain this and "in fact confused matters by saying information is held".
20. The Commissioner would observe that by initially confirming that it held information within the scope of the request, it was wholly reasonable for the complainant to assume that information was held. It was also understandable for the complainant to be sceptical about its subsequent denial that it held any information. The Commissioner is disappointed that CO did not address the request with sufficient rigour from the outset in order to establish its position. He recognises that it used the internal review process as it should be used, namely to revisit its original response. However the delay in providing that internal review only added to the complainant's scepticism about CO's position. See Other Matters for additional remarks.
21. CO described the information it previously thought to be within the scope of the request. It said it was "an email chain between various civil servants from the Home Office, Cabinet Office and Department of Health and Social Care. On a further inspection of the information at the Internal Review stage, it was determined, in light of the specific request,

that the information was not in scope. This information was an exchange between civil servants attempting to clarify existing rules around what was and was not permitted under existing COVID regulations with no reference to 'evidence' of the nature described by the requester. The email chain was also not provided to the Minister for the letter of the 22 January. Whilst the email chain was broadly related to the letter from the Minister, it was clearly not in scope of the specific request. The department accepts that an error was made when initially responding to the complainant, and the subsequent confusion this caused could have been avoided if the request for information was more thoroughly concluded."

22. The Commissioner accepts that the email exchange described would not fall within the definition of 'evidence' and is satisfied that it falls outside the scope of the request.
23. As for the searches CO conducted to establish whether it held the requested information, the Commissioner is satisfied that they were sufficiently thorough and meaningful. It explained to the Commissioner that the search terms used included "leaflet" and "leafletting", "campaigning" and "door to door campaigning". It conducted these searches electronically among the records of the relevant policy team who had now moved to the Department for Levelling Up, Housing and Communities including the relevant Deputy Director. It also searched the correspondence sent to the former Minister for the Constitution and Devolution using relevant search terms for the specific period with no results.
24. It also asserted that it never held the information in question and therefore it had not been previously held but deleted as the Commissioner had queried.

## **Conclusion**

25. In light of the above, the Commissioner is satisfied, on the balance of probabilities, that CO does not hold the requested information.

## **Other matters**

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26. The Commissioner expects public authorities to conduct internal reviews within 20 working days – 40 working days in exceptional circumstances.

This accords with paragraph 5.4 and 5.5 of the section 45 Code of Practice.<sup>5</sup>

27. CO did not do so and not only failed to meet the Commissioner's request handling standards but also compounded the understandable scepticism of the complainant.

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<sup>5</sup> [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)



## Right of appeal

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28. 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)

29. 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.
30. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**