

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 requested copies of correspondence between Boris Johnson and Christopher Pincher, relating to Christopher Pincher's resignation as Deputy Chief Whip.
2. The Commissioner's decision is that, on the balance of probabilities, the Cabinet Office did not hold any information falling within the scope of the request.
3. The Commissioner does not require the Cabinet Office to take any steps.

Request and response

4. On 1 July 2022, the complainant wrote to the Cabinet Office and requested the following information:

"Please provide a copy of all correspondence between Boris Johnson and Christopher Pincher relating to Christopher Pincher's resignation as deputy chief whip.

Please provide information from 25th June 2022 to the date of this request."
5. The Cabinet Office responded on 2 August 2022 and confirmed that it did not hold the information.
6. On 8 August 2022 the complainant made a request to the Cabinet Office for an internal review, which the Cabinet Office provided on 22 September 2022 and where it maintained its position that it did not hold any information falling within the scope of the request.

Scope of the case

7. The complainant contacted the Commissioner on 26 September 2022 to complain about the way their request for information had been handled.
8. The complainant believes that it was highly likely that the Cabinet Office held the requested information.
9. The Commissioner has considered whether, on the balance of probabilities, the Cabinet Office holds or has held at the time the request was made, recorded information within scope of the complainant's request and whether it has complied with section 1(1) of FOIA.

Reasons for decision

Section 1 of FOIA – Information held / not held

10. Section 1 of FOIA states that:

'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 him.'
11. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
 12. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-Tier Tribunal decisions, and the civil standard of proof based on the balance of probabilities, must decide whether the public authority holds any information which falls within the scope of the request (or was held at the time the request was made).
 13. In this case the complainant contended that the Cabinet Office held information within the scope of their request. The grounds for the complainant holding this position are twofold:
 - The Cabinet Office has only referred to "official information" as information falling within the scope of the FOIA.
 - The complainant considers that the Cabinet Office has previously stated that the requested information is held.

Official Information

14. The Cabinet Office has explained that the role of a Government whip is a Parliamentary one which is also typically a Ministerial one by virtue of the office holder being appointed to roles at HM Treasury and the Royal Household. Some Ministerial communications will relate to Government matters and be official information; some shall be political and personal communications, which shall fall outside the scope of the FOIA. In this case, the Cabinet Office has argued, the requested information would relate to political and personal communications and would not form part of the official record.
15. The Commissioner has previously addressed the Cabinet Office's rationale for deciding what information should form part of an official

record, that is, information which relates to its public functions and which is, therefore, subject to the FOIA¹.

16. In explaining its approach to communications conducted via private communication channels (such as via text messages) the Cabinet Office confirmed its usual adherence to the Code of Practice on Management of Records under section 46 , in particular paragraph 2.7.3, which states:

"Authorities should ensure that staff are aware that there is no need to keep ephemeral material, and this may be destroyed on a routine basis. For example, by deleting trivial emails and messages after they have been read and discouraging staff from keeping multiple or personal copies of documents."²

17. The Cabinet Office also referred to its own policy on 'Messaging Applications and Web Services', which states:

"(...) staff are required to ensure that any important conversations (such as those that need to remain part of the official record) are saved."

18. The Cabinet Office confirmed that this is also consistent with the retention and disposal policy of the Prime Minister's Office (PMO). This allows the capture of pertinent information and ensure that trivial information is not retained. It then explained further that when information is to be preserved, then the PMO does this in accordance with the guidance of the Cabinet Office and The National Archives, as well as the Public Records Act 1958. Therefore, to identify any relevant information within the scope of the request, officials would need to carry out a search of the PMO's records, which, as explained by the Cabinet Office previously, has been carried out in this case.
19. The Cabinet Office has explicitly confirmed to the Commissioner that the PMO does not hold a record of any correspondence between Boris Johnson and Mr Pincher during the relevant period.

¹ See this decision notice: <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024576/ic-185135-c6s3.pdf>

² <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

Evidence from the complainant

20. The complainant directed the Commissioner to a report in the Daily Mirror paper which states (in relation to the resignation of Christopher Pincher):

"The PM's official spokesman has previously confirmed the pair exchanged text messages the day Mr Pincher resigned, but declined to "get into details of those specific messages."³

21. The Commissioner put the complainant's evidence to the Cabinet Office and it confirmed that it was apparent from searches carried out by the PMO that such messages were not put on the official record and nor would there be an expectation that they should have been logged on the public record. The Cabinet Office explained that the content of those messages, being on this subject, were not regarded as official information, as they would have been a personal and/or party political communication.

The Commissioner's conclusions

22. Based on the evidence available in this case, the Commissioner is satisfied that on the balance of probabilities, the Cabinet Office does not and did not, at the time the request was made, hold recorded information within the scope of the request.
23. This is because the explanation provided by the Cabinet Office regarding steps taken to identify the relevant information, suggests that the searches conducted were sufficiently targeted and reasonable and would have located the requested information, should it have existed on the records.
24. The Commissioner is also satisfied with the Cabinet Office's distinction between "official communications" and information that does not form part of this record. The Commissioner understands that communications related to official business but conducted using private communication channels, is required and is expected to be transferred, by those using such media, for preservation to official records in accordance with the relevant policies and procedures and thus becoming official communication.

³ <https://www.mirror.co.uk/news/politics/downing-street-refuses-release-bombshell-27639697>

25. It would appear likely that, if they were ever held, the messages referred to by the complainant and the Daily Mirror may have been deleted as they were considered to be personal/political, and not information subject to be recorded as part of the public record. There is no evidence to counter this, and no record of the deletion of a text would be likely to have been made if the information was considered personal/political, as there appears to be no requirement to record this for this type of information.
26. The Commissioner recognises why the complainant might believe that information falling within the scope of the request is held. However, based on the Cabinet Office's explanation of its systems for identifying and recording official communications and the specific searches carried out in this case, the Commissioner does not consider there to be sufficient evidence to support the probability of the existence of the information requested by the complainant.
27. Based on the evidence available in this case, the Commissioner is satisfied that on the balance of probabilities, the Cabinet Office does not and did not, at the time the request was made, hold recorded information within the scope of the request.

Right of appeal

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

Website: 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF