

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2017

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

Decision (including any steps ordered)

1. The complainant has requested correspondence about potential changes to the regulations that govern London's private hire trade. The Cabinet Office denied holding information within the scope of this request.
2. The Commissioner's decision is that Cabinet Office complied with its obligations under section 1 of the FOIA when it denied holding the requested information.
3. No steps are required.

Request and response

4. The complainant made a request to the Cabinet Office on 29 February 2016 for information of the following description:

"Dear Prime Minister's Office,

Please publish all correspondence since the 1st January 2015 between: (1) the Mayor of London's office, and (2) any official from Transport for London, and the Special Adviser Daniel Korski relating to Transport for London's consideration of potential changes to the regulations that govern London's private hire trade."

5. On 3 March 2016, the Cabinet Office responded. It denied holding information within the scope of the request.

6. During the same period, the complainant had made an additional request to Transport for London ("TfL"), that is, for the "other half" of the correspondence. This yielded a different response whereby TfL confirmed holding the requested information and supplied it (withholding some personal data under section 40 of the FOIA).

Scope of the case

7. The complainant contacted the Commissioner on 29 March 2017 to raise concerns about the way his request for information had been handled. Specifically, he was concerned about the apparent contradiction between the Cabinet Office's response and TfL's response which indicated that information within the scope of the request was recently created and still held by TfL. He was concerned as to why the Cabinet Office said it did not hold this information.
8. In the circumstances of the case, the Commissioner has looked at whether the Cabinet Office is correct when it says it did not hold the requested information at the time of the request. She has done so without requiring the complainant to first seek an internal review of the Cabinet Office's initial response and despite the passage of time between the date of the request and the date of the complaint. The Commissioner notes that the latest email in the requested correspondence in question (as evidenced by the TfL disclosure and dated 20 October 2015) was created only four months prior to the request (16 February 2016). Superficially, it seems unusual that while TfL still held the correspondence at the time of a broadly similar request, the Cabinet Office claims that it did not.

Reasons for decision

9. Section 1(1) provides 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 of the description specified in the request, and
if that is the case, to have that information communicated to him."

10. Given that TfL still held one half of the requested correspondence, it was clear that, at one point, it was held also by the Cabinet Office – it was either generated by or sent to the Cabinet Office. The Commissioner sought to establish why it was not held by the Cabinet Office at the time

of the request. She also sought to establish whether the Cabinet Office conducted adequate searches for it at the time of the request.

11. The Commissioner asked the Cabinet Office about where it had searched at the time of the request and what search terms it had used. She also asked why it considered its search parameters at the time of the request were most likely to yield conclusive results. She also asked for details of the Cabinet Office's document retention and destruction policy at the time of the request for information of a similar nature. The Cabinet Office explained that had directly asked the relevant individual to search their electronic and paper files for any information held within the scope of the request.
12. The Cabinet Office sent the Commissioner a copy of its formal policies on the retention and destruction of official documents. In short, this required trivial information to be destroyed within 3 months of it being created – emails being automatically destroyed unless actively retained. It is also incumbent upon the person who holds any non-trivial information to ensure that they are retained by the department in question as an official record.
13. Quoting from its 2013 guidance (a copy of which it supplied to the Commissioner), it said:
"Departments should adhere to the Lord Chancellor's Code of Practice on the management of records and departmental records management procedures found at <http://www.nationalarchives.gov.uk/information-management/projects-andwork/recordsmanagement-code.htm>.
Departmental Records officers can advise further on the requirements for maintaining public records. The responsibility for deciding whether emails should be retained rests with the originator and recipient. 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. Multiple copies of the same record should be avoided as they burden record stores. 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."¹
14. The information still held by TfL (which was drawn to the Commissioner's attention by the complainant) appeared to fall within the description of trivial information - emailed arrangements for meetings: logistics, etc. The dates of these meetings appeared to predate the request by over 3 months. Given that the information was deemed

¹ "Guidance to Departments on the use of private email"

trivial by the Cabinet Office, the Commissioner accepts it is reasonable to conclude that it was destroyed in accordance with the strict three month policy referred to above.

15. The Cabinet Office explained that when it received the request it asked Daniel Korski (as his was the most likely location for any relevant information) to search as follows: "You should check e-files/paper files and emails to see whether you hold any information that falls within the scope of the request".
16. It also conducted further detailed searches following the Commissioner's enquiries and did not find any information within the scope of the request. It said it used a wide number of search terms including eg "Uber", "Private-hire", "private hire", "regulation".
17. The Commissioner went back to the Cabinet Office to ask about whether there had been any attachments (such as minutes or other documents) to the exchanged emails. Such information is less likely to be trivial and, if created, could have been retained in accordance with its policies on information retention and deletion.
18. The Commissioner also asked the Cabinet Office about a meeting in December 2015² which Mr Korski may or may not have attended. Had he done so, it may have generated trivial and non-trivial information in advance of it taking place and subsequently. Given the Cabinet Office's 3 month deletion policy for trivial information, the date of the meeting (December 2015) and the date of the request (February 2016), there was a possibility that the Cabinet Office would have held relevant information (including trivial information) at the time of the request.
19. In respect of both queries (email attachments and information about the December 2015 meeting) the Cabinet Office reiterated the searches it had undertaken and said that had it held such information, it would have been found and considered for disclosure under FOIA.
20. When considering disputes under section 1 of the FOIA as to whether requested information is held, the Commissioner considers the matter to the civil standard. This means that she considers whether, on the balance of probabilities, requested information is held.
21. The Commissioner acknowledges that information with the scope of the request was, at some point, held by the Cabinet Office. TfL continued to

² The Commissioner became aware of this meeting during investigations on another case

hold the other half of the requested correspondence when a request was made to it. However, given the Cabinet Office's clear three month deletion policy for trivial information, she considers it entirely explicable that it no longer held the information at the time of the request (notwithstanding information within the scope of the request about the December 2015 meeting which this notice will address shortly). The Cabinet Office and TfL are not required under FOIA to have the same information retention policy. As evidenced by this case, they clearly do not have the same policy.

22. The Commissioner has concluded that any non-trivial information within the scope of the request would have been retained by the Cabinet Office as an official record in accordance with its policies and would have been found in the subsequent searches conducted at the time of the investigation into this matter. She is satisfied that the Cabinet Office undertook sufficiently detailed searches for information within scope of the request which had been retained but which may have been overlooked at the time of the request.
23. The Commissioner accepts that there is a slim possibility that trivial information about the December 2015 meeting might have been held at the time of the request but not identified by the Cabinet Office in its searches. However, this is nothing more substantive than a slim possibility. In any event, it cannot safely be concluded that non-trivial information within the scope of the request has been overlooked or otherwise inappropriately handled in respect of this request.
24. The Commissioner has concluded that, on the balance of probabilities, no information within the scope of the request was held at the time of the request.

Other matters

25. A decision notice under section 50 of the FOIA can only look at a public authority's compliance with Part I of the FOIA in respect of a specific request. It cannot address, for example, records management issues which are caught by other parts of the FOIA (such as the Code of Practice on record keeping referred to in section 46 which is in Part III of the FOIA). As a general observation, the Commissioner would encourage all public authorities to regularly review their policies and procedures on how they record information, how they retain or delete information and how they handle information requests.

26. The general subject of the request was a matter of public interest. The Commissioner observes the Cabinet Office could hold other information outside the scope of this request on the subject of the regulations that govern London's private hire trade. That said, the Commissioner suggests there would have been a reasonable expectation that some information, at least regarding the 16 December 2015 meeting, would have been held. This therefore raises questions about records management.

27. Whilst she acknowledges this is just one example, the Commissioner will liaise with the National Archives (TNA) to consider whether any further steps should be taken to consider the records management issues arising from this case, in line with the section 46 Code of Practice and the MoU between the Commissioner and the Keeper of Public Records. The Commissioner also acknowledges that the Cabinet Office has been subject to an Information Management Assessment by TNA in 2013 and a progress review in 2015³.

³ <http://www.nationalarchives.gov.uk/information-management/manage-information/ima/ima-reports-action-plans/>

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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.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

Steve Wood
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF