

Spotlight on Corruption's Submission to the Public Administration and Constitutional Affairs Committee's Call for Evidence on the Cabinet Office Freedom of Information Clearing House

Organisation overview

Spotlight on Corruption is an anti-corruption charity (registration number 1185872) that works to end corruption within the UK and wherever the UK has influence.¹ Our vision is for a society where strong, transparent, and accountable institutions ensure that corruption is not tolerated. Our work includes monitoring court proceedings and producing research on the implementation and enforcement of the UK's anti-corruption laws.

Introduction

1. We welcome this call for evidence on the Cabinet Office Freedom of Information (FOI) Clearing House and transparency around the Clearing House and the Cabinet Office's compliance with the FOI Act (FOIA). The FOIA is essential for transparency and accountability and an important part of civil society's investigative toolkit. But the FOIA is only effective to the extent that public authorities comply with their statutory obligations, as well as the common law and guidance produced by the Information Commissioner's Office (ICO). Our experience reflects openDemocracy's findings that there has been a trend in greater secrecy across central government over the past five years, led by the Cabinet Office, Treasury, Foreign Office and Home Office.² Non-compliance undermines the value of the FOIA and has significant wider implications for trust in institutions, scrutiny of public authorities, checks on power and efforts to hold public authorities accountable.
2. As FOIA policy lead, the Cabinet Office should comply with its obligations and lead by example, but it has been one of the worst performing government departments. In 2019, the Cabinet Office granted 26% of requests and withheld 60%; the worst performing department on both metrics.³ In 2020, 23% of resolvable FOI requests to the Cabinet Office were granted in full, 11% had not been responded to when the data were gathered, 12% were partially withheld, and 54% were fully withheld; the highest proportion of fully withheld requests of any department.⁴ In 2020, the Cabinet Office was the second-worst performing department for the timeliness of its responses, with 69% meeting the 20-day deadline, 6% the permitted extension, and 25% late responses.⁵

¹ For more information, please visit our website <https://www.spotlightcorruption.org/>

² <https://cdn-prod.opendemocracy.net/media/documents/art-of-darkness-opendemocracy.pdf>

³ <https://cdn-prod.opendemocracy.net/media/documents/art-of-darkness-opendemocracy.pdf>

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981527/foi-statistics-2020-bulletin.pdf

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981527/foi-statistics-2020-bulletin.pdf

3. In a letter dated 18 March 2021 to the Director of Editorial Legal Services at the Guardian, Michael Gove MP emphasised the government’s commitment to transparency, noting its publication of, among other things: departmental spending over £25,000, ministerial meetings, and minutes of the Scientific Advisory Group for Emergencies (SAGE).⁶ But this mischaracterises the growing trend of reduced government transparency.⁷ In 2020, 41% of resolvable FOI requests were granted in full by government departments and other monitored bodies, the lowest figure since recording started in 2005.⁸ In January to November 2020, only 16% of departmental spending over £25,000 was published on time.⁹ In February 2021, the government was found to have acted unlawfully by failing to publish Covid contracts on time. Publication of the register of ministerial interests was significantly delayed, and the government only published SAGE minutes after facing legal action.
4. In its 2012 response to the Justice Committee’s post-legislative scrutiny of the FOIA, the then government acknowledged that the increased openness, transparency and accountability of public authorities resulting from the FOIA had significantly enhanced our democracy.¹⁰ The government’s efforts to keep the operations of the Cabinet Office Clearing House in the shadows, with its vague mandate and apparent responsibility for deflecting and obfuscating many categories of FOI requests, including those with significant public interest,¹¹ underlines the shift away from openness, transparency and democratic accountability.
5. This submission illustrates with case studies our experiences of the Cabinet Office’s non-compliance with some of its duties under the FOIA and our interactions with, and understanding of, the Clearing House.

Recommendations

- The Cabinet Office should be much more transparent about the role and operations of the Clearing House – beyond the limited information that it has already published – with a view to informing public understanding and enabling an assessment of whether the Clearing House is necessary and whether its remit should be limited. To that end, the Cabinet Office should publish detailed statistics about the FOI requests sent to the Clearing House and the impact of Clearing House involvement on FOIA compliance.
- The Cabinet Office should be fulfilling its role in ensuring compliance with the FOIA across government by proactively encouraging best practice and engaging with badly performing departments. At a minimum, the Cabinet Office should set a good example by complying with its own FOI-related obligations.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970833/CDL_letter_to_the_Guardian.pdf

⁷ <https://www.instituteforgovernment.org.uk/publication/whitehall-monitor-2021/transparency>

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981527/foi-statistics-2020-bulletin.pdf

⁹ <https://www.instituteforgovernment.org.uk/publication/whitehall-monitor-2021/transparency>

¹⁰ <https://www.gov.uk/government/publications/government-response-justice-committee-report-on-freedom-of-information-act--2>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970672/Cabinet_Office_FOI_Referral_Criteria_FINAL_.pdf

The Cabinet Office Clearing House

6. Despite some information published by the Cabinet Office in March 2021 following sustained pressure, the role and operations of the Clearing House remain largely unclear. The letter dated 18 March 2021 from Michael Gove MP provided some insights but did little to dispel serious concerns.¹² In our view, the Clearing House undermines the FOIA and has serious implications for public trust, transparency and accountability.

Case study: Clearing House round robin emails

7. On 7 December 2020, our researcher sent an FOI request to the Cabinet Office seeking clarification of how they store FOI requests sent to the Clearing House for the round robin daily list, how the data are used to compile the daily list, and whether they could provide the daily list/s with for a specified day, week, month or year. On 8 January 2021, the Cabinet Office confirmed that they held the requested information but that providing it would exceed the cost threshold under section 12 of the FOIA. Their response included selective information about the work of the Clearing House, so we have included the relevant sections in an Annex.
8. On 11 January 2021, our researcher requested the information which the Cabinet Office said it could provide with a refined request, including the FOI and EIR round robin list (with the ‘applicant’ column removed) for a specified day. The Cabinet Office did not respond to that refined request and, at the time of writing, some 8 months after the request was made, it has not provided the information. We note use of the word “requesters” in the Cabinet Office’s response (“*There may be a number of different reasons why requesters are shared with the Clearing House*”). In June 2021, following an accidental disclosure by the Department for International Trade, it was reported that the Clearing House categorised information according to the identity of requesters or their organisation.¹³ This reflects our experience, as noted in paragraph 11 of this submission.

Subject Access Request to the Cabinet Office

9. On 27 August 2021, our researcher submitted a Subject Access Request to the Cabinet Office, requesting in particular information about their handling of his FOI requests, and details of who they shared his personal data with, including the Clearing House. On 14 September 2021, the Cabinet Office supplied a 44-page schedule covering the period August 2016 to August 2021. A large number of emails had been sent between departments and the Clearing House. Some were ostensibly to check whether FOI requests were round robins. Others

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970833/CDL_letter_to_the_Guardian.pdf

¹³ <https://www.politico.eu/article/uk-trade-department-referred-to-information-watchdog-over-data-breach/>

involved departments contacting the Clearing House to request their comments on draft FOI responses, or to bring FOI requests to their attention. We have summarised parts of this schedule below.

- a. On 20 January 2020, the Attorney General’s Office sent a draft FOI request to the Clearing House, and on 21 January 2020 the Ministry of Defence did the same, in respect of FOI requests relating to government departments’ use of the Overseas Security and Justice Assistance Guidance.
 - b. On 5 February 2020, the Department for Education forwarded the Clearing House an FOI request about behavioural allegations against Dominic Cummings. On 13 March 2020, the Department forwarded the Clearing House a request for an internal review. The Cabinet Office sent the Clearing House an email in the same month entitled “*DFE Case for clearance*” so it appears to have been involved in the response.
 - c. On 1 June 2020, the Foreign and Commonwealth Office sent the Clearing House a request for correspondence relating to Dominic Raab, including any unofficial email accounts, noting that it “*may be an RR and will be of interest to yourselves ... I expect [Cabinet Office] will be interested in our reply.*”
 - d. On 21 May 2021, the Cabinet Office sent an email to the Clearing House seeking guidance for departments that may have received our FOI request for their bribery and corruption risk assessment template. On 15 June 2021, BEIS followed up and asked the Clearing House, “*Could you let me know if your team have any comments on the draft response above to an information request made by Mr Havenhand.*”
 - e. On 19 August 2021, following our request for various departments’ conflict of interest policies and guidance, the Cabinet Office sent an email to the Clearing House entitled, “*For clearance / discussion: RR FOI on conflict of interest policies*”. Some departments, including the Attorney General’s Office and the Department of Health and Social Care, sent their draft FOI responses to the Clearing House.
10. The name of our researcher, his email address, employer and occupation were included in numerous emails sent from government departments to the Clearing House. This undermines the core principle that the FOIA is supposed to be applicant-blind. We share the concerns raised by OpenDemocracy that sharing requesters’ names may constitute a failure to protect personal data in accordance with the Data Protection Act 2018 and General Data Protection Regulations.¹⁴ Consent was not given to share the personal data and there was no other lawful basis to process it; it was disproportionate and unnecessary for the performance of the task.

Repeated extensions of the deadline to balance the public interest

11. Section 10 of FOIA provides that a public authority must provide a response “*promptly and in any event not later than the twentieth working day following the date of receipt*”. Section 10(3) enables an authority to extend the 20-working day limit up to a ‘reasonable’ time in certain circumstances. The ICO’s guidance says that, “*an authority should normally take no more than an additional 20 working days to consider the public interest,*

¹⁴ <https://cdn-prod.opendemocracy.net/media/documents/art-of-darkness-opendemocracy.pdf>

meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional.” Such circumstances can include extreme pressures placed on the public authority by a major incident. The Covid pandemic is likely to have placed an additional burden on the Cabinet Office and other government departments. However, the Cabinet Office did not cite the pandemic as a reason for extensive delays in responding to requests, despite being given an opportunity to do so.

Case study: G4S’s corporate renewal and self-cleaning

12. On 20 January 2021, our researcher sent an FOI request to the Cabinet Office for information relating to a Deferred Prosecution Agreement (DPA) with G4S, including a programme of work that had been agreed with G4S in March 2019, recommendations from a Cabinet Office panel in July 2020, and other information about monitoring G4S’s corporate renewal and self-cleaning. Accordingly, this request concerned the government monitoring the conduct of one of the key suppliers of public services following a finding of unlawful conduct.
13. The Cabinet Office extended the response deadline multiple times to balance the public interest under section 43 of the FOIA without explaining why those extensions were exceptional. On 17 February it was extended to 18 March, on 18 March to 19 April, on 19 April to 18 May, and on 18 May to 16 June 2021. On 16 June, the Cabinet Office provided some of the requested information. Based on the ICO’s view that an internal review should be sought in respect of a delay before an ICO complaint can be pursued, we requested an internal review on 21 April, but the Cabinet Office refused to carry out that review while it was considering a response.
14. This request followed another FOI request that we made for the representations made by the government to the Serious Fraud Office in support of DPAs for both Serco and G4S. The Subject Access Request summarised above includes an email dated 11 February 2021, from the Cabinet Office FOI Casework team, which underlines that the FOI process is not applicant blind: *“The request is from George Havenhand of Spotlight on Corruption (who submitted the previous request regarding the Serco and G4S DPA and self-cleaning measures).”*

Case study: information about conflicts of interest

15. On 21 April 2021, our researcher sent an FOI request to the Cabinet Office for their conflict of interest and records management policies and related information, including details of the different policies or arrangements within management units for recording declarations of actual or potential conflicts of interest. Most government departments provided their conflicts of interest policies within the FOIA statutory deadline.
16. On 20 May 2021, the Cabinet Office extended the response deadline to 18 June so they could balance the public interest under section 35 of the FOIA. On 18 June, that deadline was extended to 19 July, into the realm of *“exceptional”* circumstances as described by the ICO. On 19 July, the deadline was extended to 17 August. On

17 August, it was extended to 15 September 2021. Some of the information was provided on 15 September, five months after it was requested. In our experience, extensions are usually issued on the last day of the deadline for a response and explanations are not provided. As a result of these delays, information loses its relevance and its value in informing public debate, thereby reducing transparency and accountability.

Case study: disciplinary action against Dominic Cummings

17. On 3 February 2020, our researcher sent an FOI request to the Cabinet Office for basic data about disciplinary actions against Dominic Cummings and the level of seniority to which these had been escalated, based on Decision Notice FS50854236 in respect of Dominic Raab. Mr Cummings had reportedly overseen a culture of bullying at both the Department for Education and the Cabinet Office, and those departments had settled employment claims which avoided the need for a tribunal. The lack of transparency and accountability had given rise to concerns about governance, public trust, staff welfare and the potential impact on public policy.
18. The Cabinet Office acknowledged the request on 4 February 2020 but then fell silent and did not respond to emails querying progress after the response deadline expired. An internal review was sought and a complaint submitted to the ICO, but the Cabinet Office did not respond. The ICO sent emails to the Cabinet Office seeking an update but on 26 May told us that they had not received a response. The 'what do they know' website shows the Cabinet Office was responding to other FOI requests in this period within the statutory deadline. As set out further below, our researcher's request for information about the handling of this request shows that it was being actively considered but the response appears to have been blocked.
19. On 16 June 2020, the ICO issued decision notice FS50915253, identifying that the Cabinet Office had breached section 10(1) of the FOIA and called for a substantive response within 35 calendar days. On 10 July 2020, over five months after the request had been made, the Cabinet Office said that they could neither confirm nor deny whether they hold the requested information. The initial response was upheld following an internal review. The resulting complaint that was submitted to the ICO over eight months ago – the second complaint submitted to the ICO in respect of this FOI request – has not yet been determined.

Case study: handling of the Dominic Cummings FOI request

20. On 29 May 2020, after the ICO had confirmed that the Cabinet Office also ignored their enquiries, our researcher sent an FOI request to the Cabinet Office for information relating to the above request, including about how it had been handled, the decision-making process, the job title of anyone notified / involved, copies of communications and documents, and any information from or in relation to Mr Cummings that informed or influenced the Cabinet Office's position. That request and follow up emails were also ignored.

21. On 16 November 2020, over five months after receiving the request, the Cabinet Office provided the requested information. The material shows that, by 17 February 2020, a document had been created by the Cabinet Office to respond to the originating FOI request (dated 3 February 2020) and a draft was awaiting clearance on 2 March – four months before the response was ultimately provided. Some of the emails are heavily redacted, with senior Cabinet Office staff copied in. An email dated 20 April from the FOI Casework team to unknown asked for an update because they needed to inform the ICO if Covid was hindering their ability to respond. A response from unknown suggested they go back to the ICO to say they will be able to issue a response and will aim to do so as quickly as possible. Another internal email dated 15 April 2020 said, *“have added this to the George Havenhand line in the log”*. An email dated 26 May 2020 from the FOI Casework team to unknown again asked for an update, noting that the ICO had again asked whether they have capacity to respond; but we understand that the Cabinet Office did not respond to the ICO throughout this period.
22. The response to the Subject Access Request included a Cabinet Office email dated 30 October 2020 in relation to this FOI request, which indicates that approval was sought, unsuccessfully, to invoke section 36 of the FOIA. The email says that our researcher had requested information about the handling of a request relating to Dominic Cummings, that he had chased for a response because the case was overdue and was likely to submit a formal complaint to the ICO, and the email was sent for the purposes of a *“Ministerial Submission”*.

Providing inadequate advice and assistance

23. Under section 16 of the FOIA, public authorities have a duty to provide advice and assistance to individuals making FOI requests. The ICO has published guidance about the circumstances in which public authorities should provide advice and assistance. In our view, the Cabinet Office does not fully comply with this duty.

Case study: conflict of interest declarations

24. On 16 September 2020, we asked for the number of conflict of interest declarations made by Cabinet Office employees March 2020 until the present day, and the number of conflict of interest declarations received from contractors. On 7 October 2020, the Cabinet Office responded that the information was not held. On 8 October 2020, we sent an FOI request to the Cabinet Office, noting that the Civil Service Code requires all Cabinet Office employees to disclose to their manager any conflicts of interest with their professional duties, and we asked where such information is held. On 5 November 2020, the Cabinet Office responded:

“Cabinet Office’s conflict of interest policy advises that Heads of Management Units (HMUs) are responsible for putting in place appropriate arrangements to record a declaration of actual/potential conflicts of interest, which should be captured using model declaration forms. Head of Management Units may choose

to use a variety of different means of recordkeeping, as long as they ensure the necessary information (that is, the information on the model declaration form) is available.”

25. On 21 April 2021, we asked the Cabinet Office for the number of conflict of interest declarations from Cabinet Office employees or contractors, broken down by year and Cabinet Office units. We asked them to forward our request to the HMUs and/or make reasonable enquiries with them or the suitable person in each unit, and to provide any relevant information from the central records system. On 17 May 2021, the Cabinet Office said it would exceed the cost threshold to provide the information and suggested narrowing the period. They also suggested relating the information to a context such a particular policy, region, event or initiative. Having initially said that the information is not held, the Cabinet Office then said that HMUs make their own arrangements but did not explain what that means, and then advised us to relate the information we sought to a particular issue. It is not unusual for government departments to take an opaque or limited approach to their duty to advise or assist, which creates another barrier in accessing information through the FOIA.

Annex

Part of an FOI response from the Cabinet Office dated 8 January 2021

“The reason that your request exceeds the cost limit is that the Clearing House processes a relatively large volume of requests each year as part of its role as an advice centre to coordinate complex requests across Whitehall. There may be a number of different reasons why requesters are shared with the Clearing House (for example, to confirm whether or not the request is a ‘round robin’ or to ask for advice on a particular policy issue).

As a result, not all requests shared with the Clearing House will receive advice or guidance and not every email received by the Clearing House will relate directly to an individual request. To obtain the information requested, we would need to locate the reference email for every individual FOI request shared with the Clearing House. For every request reference email, we would have to search for the department that sent the request, the date the request was received and the request deadline. The held information would have to be extracted and put into a separate document.

We estimate that this process would exceed the appropriate limit. If you wish, you may refine your request in order to bring the cost below the appropriate limit, such as by considering a shorter timeframe for your request. For example, we estimate that answering question 1 and providing the information described in 2a would not exceed the appropriate limit. We must also inform you that if you were to refine this request so that the appropriate limit is not exceeded, it may be subject to one or more of the exemptions contained in the Freedom of Information Act.

We can also advise that the he Clearing House was established in 2004 and has operated in different forms since the FOI Act came into force in January 2005 as an advice centre to coordinate complex requests across Whitehall. There is no stand-alone Clearing House team, but coordination functions are carried out by a number of staff members who have a range of wider responsibilities. This Government is fully committed to transparency, and ensuring all requests for Freedom of Information (FOI) are handled appropriately. All requests are considered in an applicant-blind manner, regardless of – for example - the occupation of the applicant. The Cabinet Office FOI process complies with relevant protections under the Data Protection Act 2018.”