

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

### **Decision notice**

**Date:** 23 July 2015

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

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

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1. The complainant has requested information relating to Sir Jeremy Heywood's meetings with a number of newspapers. This information was described in five requests. The Cabinet Office initially refused under section 23 (security bodies) and section 35 (formulation/development of government policy) but amended its position with regard to section 35 at internal review. Instead it sought to rely on provisions of section 36 (effective conduct of public affairs). During the course of the Commissioner's investigation, it asserted that it did not hold the information described in the first of the five requests.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 23 and section 36 as a basis for withholding the requested information. He is also satisfied that the Cabinet Office does not hold the information described in the first of the five requests.
3. No steps are required.

#### **Request and response**

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4. On 5 June 2014, the complainant requested information of the following description from the Cabinet Office:

"I am emailing to request copies of all records held – including any minutes, meeting reports, emails or letters – in relation to the following external meetings between Sir Jeremy Heywood and

1. The Daily Mail – April 2013
2. The Independent – May 2013

3. The Guardian (Alan Rusbridger) – June 2013
  4. The Guardian – July 2013
  5. The Telegraph (Tony Gallagher) – October 2013”
5. For ease of future reference, the Commissioner will refer to these as separate requests; Request 1, Request 2, etc.
  6. On 2 July 2014 (after the complainant had chased a response), the Cabinet Office responded. It refused to provide the requested information. It cited section 35 and section 23 as its basis for doing so.
  7. The complainant requested an internal review on 7 August 2014. The Cabinet Office sent him the outcome of its internal review on 30 September 2014. It maintained its position in respect of section 35 and section 23 in relation to Request 3 and 4. It withdrew reliance on section 35 in relation to Requests 1, 2 and 5 and argued that it was now seeking to rely on section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) instead in respect of these 3 requests.

## **Scope of the case**

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8. The Commissioner wrote to the Cabinet Office on 12 November 2014 to ask for its full and final arguments in support of the exemptions it had cited and for a copy of the withheld information. The Commissioner asked for the Cabinet Office’s response by 9 December 2014. The Commissioner sent two letters on the same day to the Cabinet Office. The second letter followed clarification received from the complainant regarding parts 3 and 4 of the request. The Cabinet Office did not respond on time. After a further exchange of correspondence about this delay, the Commissioner served an Information Notice on Cabinet Office on 10 February 2015.
9. The Cabinet Office responded in two parts on 19 February 2015 and 26 February 2015. It provided more detail about its reliance on section 36 in relation to some of the information and about its reliance on section 23 and section 35 in relation to the remaining information. It also provided further clarification regarding its procedures on 9 June 2015 following a request from the Commissioner on 20 May 2015. It also confirmed that it did not, in fact, hold any information within the scope of the request in respect of the meeting with the Daily Mail referred to in the request.
10. The Commissioner has therefore considered whether the Cabinet Office is correct when it says it does not hold information in respect of Request 1. He has also considered whether the Cabinet Office is entitled to rely on section 36(2)(b)(i) and (ii) and section 36(2)(c) in relation to

Requests 2 and 5. Finally, he has considered whether the Cabinet Office is entitled to rely on section 23 for Requests 3 and 4. Only if section 23 fails in Requests 3 and 4, will the Commissioner look at the alternative exemption cited, namely section 35.

## **Reasons for decision**

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### **Is information within scope held in respect of Request 1**

11. When considering whether requested information is held, the Commissioner considers the matter to the civil standard, that is, on the balance of probabilities.
12. In this case, the Cabinet Office has asserted that it has searched its records and can find no information within the scope of the complainant's request regarding the meeting with the Daily Mail. The Commissioner notes that it did find information regarding the other meetings. The Commissioner asked the Cabinet Office to clarify this and is satisfied with the clarification given. In light of this additional clarification and considering the standard by which this question must be considered, the Commissioner is satisfied that the Cabinet Office does not hold any information within the scope of Request 1.

### **Section 36 – Prejudice to the effective conduct of public affairs**

13. The Cabinet Office applied exemptions within section 36 to the information described in Requests 2 and 5.
14. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

  - (2)(b) would, or would be likely to, inhibit-
    - i. the free and frank provision of advice, or
    - ii. the free and frank exchange of views for the purposes of deliberation, or
  - (2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
15. The Cabinet Office has applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to parts of the withheld information.

16. In determining whether the exemptions were correctly engaged by the Cabinet Office, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - Ascertain who was the qualified person or persons;
  - Establish that an opinion was given by the qualified person;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
17. The Cabinet Office explained that the qualified person at the time of the request was the then Minister for the Cabinet Office, Francis Maude MP. The Minister's opinion was sought on 5 September 2014 and provided on 11 September 2014. The qualified person's opinion was that section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA were applicable in this case. The Cabinet Office explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions to the qualified person and the opinion itself were provided to the Commissioner.
18. The qualified person upheld the view submitted to him that disclosure would "undermine the presumption of confidentiality upon which advice to the Cabinet Secretary depends". The giving of advice and briefings were a "vital part of the good running of government" and these would be different "in form and content" if they were prepared with an eye to future publication. The Cabinet Secretary would not be as well prepared for meetings where he/she represents the Government's view but also where he/she hears the views of other participants in the meeting, such as journalists. Thus, the administration would be deprived of an important source of information about how it is being perceived. It would also hamper presentation of the Government's actions in such a forum.
19. In reaching a decision about the opinion of the qualified person under section 36, the Commissioner does not seek to determine whether the opinion given is the only reasonable opinion that could be given. He simply seeks to conclude whether the opinion given is a reasonable one. In this case, the Commissioner considers the opinion of the qualified person is broadly a reasonable one.
20. The Commissioner is satisfied that the submission to the qualified person identifies prejudicial outcomes that are covered in section 36(2)(b)(i) & (ii) and section 36(2)(c) and that these are applicable

here. That said, the submission to the qualified person is less clear as to how disclosure would inhibit the free and frank exchange of views for the purposes of deliberation (section 36(2)(b)(ii) refers). The qualified person's opinion in this regard is therefore less clear. Its focus is more on the inhibition to the provision of advice and to the way in which disclosure would otherwise prejudice the effective conduct of public affairs.

21. The Commissioner recognises that the qualified person did not give this opinion until after the Cabinet Office received a request for an internal review of its original response. The purpose of the internal review is to rectify any errors in deliberation that may have arisen when the public authority gave its initial response. The delayed provision of the qualified person's opinion does not render the opinion itself unreasonable.
22. In light of the above, the Commissioner has decided that the exemptions at section 36(2)(b)(i) & (ii) and section 36(2)(c) are engaged. He has then gone on to consider whether the public interest in maintaining the exemptions outweigh the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)<sup>1</sup>.
23. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are competing public interest arguments which pull in different directions, and he gives due weight to the qualified person's reasonable opinion as to the prejudicial outcomes that would arise from disclosure.

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<sup>1</sup> EA/2006/0011; EA/2006/0013

## **Public interest arguments in favour of disclosing the requested information**

24. The Cabinet Office explained that, in its view, the main public interest in favour of disclosing this information centres around transparency as a method of increasing public trust. It also acknowledged a public interest in increasing the public's understanding of the work of Senior Civil Servants and, in particular, their dealings with journalists. It argued that this public interest factor was served to a certain extent by its proactive publication of details of Permanent Secretary meetings with external organisations (see Note 2).
25. The complainant made the following argument:

"Since the unfolding of the phone hacking scandal in 2011 and the subsequent Leveson Inquiry into the Ethics and Practices of the Press, there has been heightened public awareness and debate around issues relating to both press freedom and press accountability. Meetings between the cabinet secretary and editors of the national press are of intrinsic and acute public interest in relation to both of these concerns. In light of this, it would seem that disclosure of the information held is all the more vital to the public interest in this case."

## **Public interest arguments in favour of maintaining the exemptions**

26. The Cabinet Office identified a number of arguments in favour of maintaining the exemptions. It focussed on the importance of maintaining the usefulness of the forum whereby Permanent Secretaries can speak to journalists. It stressed the need for Permanent Secretaries to be properly briefed with advice that is freely and frankly given.
27. It emphasised the usefulness of candour and explained that this was beneficial for both parties to any discussion. It explained that it was important for the operation of government that discussions between senior government officials and senior journalists/newspaper executives remain confidential.

## **Balance of public interest**

28. The Commissioner accepts that the forum in which Permanent Secretaries can speak to senior journalists is an important one. In the Commissioner's view, confidential engagement with the media at a senior level is appropriate as an aspect of government.

29. As a general point the Commissioner agrees there is particular merit in protecting the environment in which senior government officials can speak to senior journalists. That said, the complainant has pointed to public disquiet about the relationship between government and media outlets. It could be argued that there is a public interest in understanding more about the nature of discussions between government and journalists. This public interest could be served by disclosure in this case. The Cabinet Office has argued that this public interest is already being served by quarterly disclosure of high level information about such meetings, i.e., when and with whom meetings are held.<sup>2</sup>
30. The Cabinet Office has argued that there is a strong public interest in ensuring that officials are properly briefed in advance of any meeting with senior journalists. The Commissioner agrees that this is reasonable although he considers that the public interest in protecting such information diminishes over time. In this case, the meetings were held relatively recently and, as such, there remains a public interest in withholding briefing material that is relatively current.
31. The Commissioner has some sympathy with the Cabinet Office's argument that were briefing materials prepared with a view to publication, it would change the nature of such materials and their usefulness. He remains, of the view, however, that the passage of time may well diminish any negative impact.
32. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the section 36 exemptions cited. Section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA were therefore correctly applied in this case.
33. In reaching this view, the Commissioner has given weight to the fact that the material was created relatively recently. He is less convinced in the public interest in maintaining section 36(2)(b)(ii) because its relevance is not as clear. The public interests in maintaining section

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<sup>2</sup> <https://www.gov.uk/government/publications/cabinet-office-permanent-secretaries-meetings-with-external-organisations-2013#history>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/193865/20130502\\_pus\\_meetings\\_external\\_orgs.csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193865/20130502_pus_meetings_external_orgs.csv/preview)

The Commissioner notes that both these examples appear to have been last updated in 2014.



36(2)(b)(i) and section 36(2)(c) are clearer. There is a strong public interest in ensuring the officials are properly briefed and there is a public interest in protecting the confidential environment in which senior officials can meet with journalists. There is a public interest in being transparent about the fact that such meetings are taking place. To this end, the Commissioner would urge the Cabinet Office to ensure that it keeps up-to-date the information it publishes about such meetings (see Note 2).

### **Section 23**

34. The Cabinet Office applied this to the information described in Requests 3 and 4.

35. Section 23 (1) states:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

36. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was *directly or indirectly supplied by, or relates to* any of the bodies listed at section 23(3). The Cabinet Office applied this exemption to other parts of the withheld information.

37. The complainant did not wholly dispute the use of section 23 but did comment in his request for internal review about the extent to which it had been applied. He said: "I accept the absolute exemption cited in respect of some of the information held which has been provided by, or relates to the security or intelligence services. However, my concern is primarily with information pertaining to the meetings themselves rather than any background or contextual information that may be subject to the absolute exemption".

38. The public authority provided the Commissioner with a letter from a very senior official in the Cabinet Office (SO) with the experience and authority to validate the provenance of the information. The SO assured the Commissioner that the information in question was either received from one of the bodies listed in section 23(3) or is directly related to them. The relevant body has been identified to the Commissioner.

39. The Commissioner has considered all the submissions of both parties. He accepts that in the circumstances of this case, the assurance provided by the SO with regards to the application of section 23(1) to Requests 3 and 4 is sufficient.



40. The Commissioner therefore finds that the information described in Requests 3 and 4 is exempt from disclosure on the basis of section 23(1) because it was supplied by, or relates to, one of the bodies listed in section 23(3).
41. Section 23(1) is an absolute exemption which means that there is no requirement to carry out a public interest test to determine whether or not the information withheld on that basis should have been disclosed in any event in the public interest.
42. Given his conclusion on the application of section 23, the Commissioner has not gone on to consider the application of section 35 in relation to the same information.

### **Other matters**

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43. The Commissioner is extremely disappointed that he needed to serve an Information Notice in order to obtain a response from the Cabinet Office in this case. He acknowledges that the Cabinet Office often has to deal with a range of internal and external stakeholders when preparing its responses. He also acknowledges that it often has to deal with requests for sensitive information. He accepts that this can give rise to unavoidable delays from time to time. For this reason, he asks the Cabinet Office at the start of any new case to keep him informed about likely delays and anticipated resolution times. Lack of meaningful communication with the Commissioner and his case officers about delay in the process is both unhelpful and fuels general concerns about timely compliance.

## Right of appeal

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44. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**