

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2016

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information about the handling of a previous request he made to the Cabinet Office. Initially, the Cabinet Office refused the requests as invalid but, after internal review, it provided some information in response to one of the requests. It sought to rely on section 42(2) (legal professional privilege) as a basis for refusing to confirm or deny whether information was held in respect of another of the requests. It also sought to rely on provisions of section 36 (prejudice to the effective conduct of public affairs) in relation to two of the other requests.
2. The Commissioner's decision is that the Cabinet Office should have refused to confirm or deny whether information was held in respect of one of the requests by virtue of section 40(5)(a) (personal data exemption) instead of section 42(2). However, it is entitled to rely on the provisions of section 36 that it has cited in respect of two of the requests. It is also entitled to rely on section 23(5) (security bodies) as a basis for refusing to confirm or deny whether it holds security bodies information in respect of those two requests.
3. No steps are required.

Request and response

4. On 28 April 2015, the complainant requested information of the following description:

**“GRANT OF HONOURS TO THE LATE SIR CYRIL SMITH MP –
APPLICATION UNDER THE FREEDOM OF INFORMATION ACT 2000**

I thank you for your email letter dated 27 April 2015 and enclosures regarding the above matter. I wish to know the following additional information.

1. What is the reason for the delay in relation to your letter dated 8 April 2015?
2. Did the Cabinet Office take any legal advice in relation to this disclosure regarding myself, and if so on what dates and from whom?
3. Did the Cabinet consult any other third party body in relation to this disclosure and if so on what dates and with which bodies or organisations?
4. If so, were any of the bodies or organisations law enforcement ones and if so which ones and what was the result?
5. (This is requested to be supplied in PDF format)
I make this application under section 8(1) of the Freedom of Information Act 2000.”
5. On 1 May 2015, the Cabinet Office responded. The Cabinet Office treated the above as separate requests and argued that they were not valid requests under the FOIA.
6. The complainant requested an internal review on 17 May 2015. The Cabinet Office sent him the outcome of its internal review on 14 July 2015. It revised its position as follows:

Request 1 – It explained that it had needed further time to consider the balance of the public interest in relation to the earlier request (section 10(3) refers). It set out detail of the timetable involved and asserted that it had complied with its timeliness obligations under the FOIA in this regard.
Request 2 – It argued that it was not obliged to provide a response to this request and cited section 42(2) as its basis for doing so. It was, in other words, refusing to confirm or deny whether it held any information within the scope of this request.
Request 3 and 4 – It argued that the requested information was exempt under sections 36(2)(b)(i) and (ii) and section 36(2)(c).
7. The Commissioner is satisfied that request 5 is a request for the format in which the requested information should be supplied, rather than a request for information in itself.

Scope of the case

8. The complainant contacted the Commissioner on 19 July 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the Cabinet Office is entitled to refuse to confirm or deny whether it holds information within the scope of Request 2 by virtue of section 42(2). He has also considered whether the Cabinet Office is entitled to withhold the information described in requests 3 and 4 by virtue of section 36. The complainant did not dispute the Cabinet Office's view that the request 5 was not a valid request for information.

Reasons for decision

Request 2

10. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny".
11. The Cabinet Office has sought to rely on section 42(2). It argues that it is not obliged to confirm or deny whether it has information within the scope of request 2 on the basis of this exemption.
12. The request is for information of the following description:
"2. Did the Cabinet Office take any legal advice in relation to this disclosure regarding myself, and if so on what dates and from whom?"
13. In the Commissioner's view, any information in the scope of this request would, if held, be the complainant's personal data. Personal data is information about a living individual which relates to them and which is biographically significant about them. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information about themselves. He considers that such information, if held, would be biographically significant about the complainant. In considering whether the information described in

request 2 would, if held, be the complainant's personal data, the Commissioner has also had regard for his own guidance.¹

14. In light of this, he therefore considers that section 40(5) is the most appropriate exemption to apply here rather than section 42(2). The Commissioner is the UK regulator of the Data Protection Act 1998 (DPA). It is therefore wholly appropriate that he should substitute section 40(5) for another exemption if he considers it necessary to ensure that an individual's personal data access request is correctly handled.

Section 40(5)(a) – personal data of the requester

15. Section 40(5)(a) provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(1) of the FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because individuals may request their personal data under a separate legislative access regime, namely the right of subject access under section 7 of the DPA.
16. There are a number of exemptions to the right of subject access under the DPA including, for example, a legal professional privilege exemption. One of the many differences between the right of subject access under DPA and the right of access to official information under FOIA is that organisations (called "data controllers" under DPA) are only obliged to provide information to which the individual is entitled; they are not obliged to say whether they have applied any exemptions or how these have been applied. The Commissioner can make an assessment as to whether a data controller has complied with its obligations under the DPA but, ultimately, an individual can apply to a court to enforce their right of subject access under DPA. Requesters do not have the right to do so under FOIA.
17. Section 40(1) is an absolute exemption, meaning that, if it applies, there is no requirement to go on to consider whether disclosure would nevertheless be in the public interest.

¹ https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

18. For reasons outlined above, the Commissioner has concluded that any information within the scope of request 2 would, if held, be the complainant's personal data. As such, the Cabinet Office is excluded from the duty to confirm or deny whether it is held by virtue of section 40(5)(a). The Commissioner has made general observations about this in the Other Matters section of this notice.
19. In the light of this conclusion, the Commissioner has not gone on to consider whether the Cabinet Office can also rely on section 42(2) as a basis for refusing to confirm or deny whether the information described in request 2 is held.

Requests 3 and 4

20. The Cabinet Office confirmed that it held information within the scope of requests 3 and 4 but sought to rely on section 36(2)(b)(i) and (ii) and section 36(2)(c) as its basis for not disclosing it.
21. 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.
22. 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.

23. The qualified person in this case is Matt Hancock MP, Minister for the Cabinet Office and Paymaster General.² The Minister's opinion was sought on 2 June 2015 and provided on 17 June 2015. 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. A copy of the submissions to the qualified person and the opinion itself were provided to the Commissioner.
24. 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 a reasonable one.
25. Regrettably, the Commissioner is unable to set out particular detail of the submissions on the face of this notice because to do so, would, in itself, disclose withheld information. As is clear from the wording of request 4, the information relates broadly to law enforcement matters.
26. 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 that these are applicable here. That said, the submission to the qualified person is less clear as to how disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs (section 36(2)(c) 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 free and frank exchange of views.
27. 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. That does not, however, mean that the opinion is unreasonable. 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 Cabinet Office revised its position at internal review and sought to rely on provisions of section 36 having sought the qualified person's opinion.

² <https://www.gov.uk/government/people/matthew-hancock>

28. The Cabinet Office did not specify whether it was seeking to argue that the prejudicial outcomes in question would arise or would be likely to arise. The Commissioner has therefore considered whether the lower level of prejudice (“would be likely to”) applies.
29. 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. The qualified person has provided a reasonable opinion as to the prejudicial outcomes that may arise following disclosure and these are the outcomes described in section 36(2).

Section 36 – Balance of public interest

30. The Commissioner has then gone on to consider whether the public interest in maintaining the exemptions outweighs 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 judgement in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC*³.
31. 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.

Public interest arguments in favour of disclosing the requested information

32. The Cabinet Office explained that, in its view, the main public interest in favour of disclosing this information centres around understanding “the

¹ EA/2006/0011; EA/2006/0013

extent of government-wide consultation on given issues". It said this was particularly important to provide reassurance that sensitive information is being handled effectively.

33. The complainant did not make specific arguments on this exemption. He was, however, sceptical in general terms as to the sensitivity of his requests. These requests had focussed on the delays he had experienced in the handling of his original request. He was seeking to understand what factors had given rise to that delay.
34. The Commissioner accepts that there is a public interest in understanding more about what factors gave rise to any delay in responding to a previous request. This is a source of frustration to many requesters and, where they are not updated or provided with an explanation as to the delay, this can increase scepticism as to the reasons for that delay. There is therefore a strong public interest in increasing the public's understanding of how the Cabinet Office handles sensitive requests – who it consults and how long that takes.

Public interest arguments in favour of maintaining the exemptions

35. The Cabinet Office identified a number of arguments in favour of maintaining the exemptions. Chief among these was the importance of protecting the "safe space" in which it could discuss sensitive matters. Again, it made specific reference to the withheld information which the Commissioner is unable to reproduce on the face of this notice without disclosing the content of the withheld information.
36. It said:

"Ministers and officials need to be able to consider carefully all the implications of particular options and undertake rigorous and candid assessments of the risks of disclosing information".

Balance of public interest

37. The Commissioner accepts that there is a strong public interest in protecting the space in which government discusses sensitive matters, particularly where they relate to law enforcement issues as was the case here. The prejudicial outcome is likely to be more severe in such cases.
38. In the Commissioner's view, the public interest in protecting this space carries greater weight than the public interest in disclosure in the circumstances of this case. While the Commissioner does not agree that law enforcement matters can never be the subject of public scrutiny or, indeed, disclosure under the FOIA, he has concluded that it would be

inappropriate in this case. The Commissioner regrets that he cannot put more detail of his deliberations regarding this case on the face of this notice.

39. On balance, therefore, 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.

Section 23(5)

40. During the course of the Commissioner's investigation, the Cabinet Office said that it also wished to rely on section 23(5). It argued that it was entitled to refuse to confirm or deny whether it had security bodies' information within the scope of the information described in requests 4 and 5.

41. Section 23(5) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

42. The bodies specified in subsection (3) are named UK security bodies.⁴

43. The fact that information about a security body is, or is not, caught by the description set out in a FOIA request can, of itself, reveal information about that security body. This type of information is caught by section 23 which is one of the few class-based absolute exemptions in FOIA.

44. When arguing that section 23 applies, it is sufficient to demonstrate that either a hypothetical confirmation or a hypothetical denial would engage the exemption. Also, it is not necessary to show that both potential responses would engage the exemption.

⁴ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

45. The Cabinet Office provided an explanation as to why section 23(5) applied. Unfortunately, the Commissioner is unable to set this out on the face of this notice because the explanation, of itself, contains sensitive information.
46. In light of the above, the Commissioner has therefore concluded that the Cabinet Office is also entitled to rely on section 23(5) in respect of requests 3 and 4.

Other matters

47. As noted above, the Commissioner has concluded that the Cabinet Office should have relied on section 40(5) in respect of request 2. The Commissioner expects the Cabinet Office to consider the same request under the information access provisions of the DPA. More information about the information access provisions of the DPA is available on the Commissioner's website: www.ico.org.uk.

Right of appeal

48. 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

49. 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.
50. 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

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