ico. Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2017

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

Decision (including any steps ordered)

1. The complainant submitted a request ('a meta-request') to the Cabinet Office for all of the information it held in relation to how it handled a previous request he had submitted seeking information held on the cloud based platform Slack. The Cabinet Office sought to withhold the information falling within the scope of this meta-request on the basis of the following sections of FOIA: 21 (information reasonably accessible to the applicant); 36(2)(b)(i), (ii) and (c) (effective conduct of public affairs); and 40(2) (personal data). The Commissioner has concluded that section 21 has been applied correctly and that the names and contact details of junior staff are exempt from disclosure on the basis of section 40(2). However, the Commissioner has concluded that although sections 36(2)(b)(i), (ii) and (c) are engaged the public interest in maintaining the exemptions does not outweigh the public interest in the disclosure of the withheld information.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Provide the complainant with a copy of the information falling within the scope of his request. In doing so the Cabinet Office can redact the names and contact details of junior staff and, if it wishes to do so, the parts of the information to which section 21 has been applied.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 1 August 2016:

   'This is a Freedom of Information Act request. Could you please provide the full history/all information held from the ukgovernmentdigital.slack.com Slack.

   This should include messages in both public and private channels, private messages, files shared, archived channels and message edit & deletion logs etc. As you will be aware, this can be achieved through a 'compliance export' https://get.slack.help/hc/enus/articles/204897248.

   I am happy for personal data of non-senior persons to be redacted where needed and you will be aware that redaction time will not count towards the cost limit. As this Slack is used across Government departments - I would ask each user to be listed alongside their relevant department and, where possible, job role, including where their name has been redacted.

   I would request any redactions be individually annotated or listed with reasons for them. Please let me know if there are any issues, such as any apparent errors or lack of clarity that could make the request difficult to respond to, if you are considering applying any exemptions under the act and wish to discuss or would require the request to be refined for cost purposes.'

5. The Cabinet Office provided the complainant with a response to his request on 20 September 2016. The Cabinet Office explained that no information falling within the scope of the request was held for the purposes of FOIA.[1]

6. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this request. When asking for

[1] The Cabinet Office's handling of this request is the subject of a separate complaint to the Commissioner, case reference FS50667128.

this internal review, the complainant also submitted a 'meta-request' which read as follows:

> *'Separately to the IR, could you please process a new request in the form of a 'meta request' for all information held relating to this request/reply (e.g.internal & external correspondence, minutes, logs, memos and advice etc).'*

7. Which he subsequently clarified in the following terms:

> *'Oh and just to clarify regarding the meta request, obviously I'd appreciate it if this search for information and correspondence includes slack, other instant messages, texts, notes of calls/conversations and personal emails where relevant for the purposes of clarity.'*

8. The Cabinet Office contacted the complainant on 18 October 2016 and explained that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of section 36 of FOIA and it needed additional time to consider the balance of the public interest test. The Cabinet Office sent a further public interest extension letter on 15 November 2016.

9. The Cabinet Office provided the complainant with a substantive response to his request on 1 February 2017. The response explained that some of the information was exempt from disclosure on the basis of section 21 of FOIA on the basis that the correspondence in respect of the original request was already available to him. The response explained that the remaining information was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of FOIA and that the public interest favoured maintaining these exemptions. The Cabinet Office explained that some of this information also attracted the exemption contained at section 40(2) of FOIA.

10. The complainant contacted the Cabinet Office on 9 February 2017 and asked it to conduct an internal review of this refusal.

11. The Cabinet Office informed the complainant of the outcome of the internal review on 5 May 2017. The Cabinet Office concluded that the various exemptions cited in its refusal notice had been properly applied. However, the Cabinet Office explained that the initial refusal under section 36 was based on an opinion of the qualified person in relation to similar information. The Cabinet Office also explained that when considering this case afresh for internal review, and for the avoidance of any doubt, it had submitted the specific information in this case to the qualified person who had confirmed that section 36 was correctly applied.

Scope of the case

12. The complainant originally contacted the Commissioner on 8 March 2017 prior to the Cabinet Office completing its internal review. The complainant asked the Commissioner to take on a complaint about the Cabinet Office's refusal of the meta-request without the internal review being completed on the basis of the delays in completing the public interest test considerations. The Commissioner agreed to do so.

13. Following the completion of the internal review response, the complainant confirmed that he was remained dissatisfied with the Cabinet Office's handling of his request, in particular its decision to withhold information he had requested.

Reasons for decision

Section 21 – information reasonably accessible to the applicant

14. Section 21(1) of FOIA provides an exemption for information which is reasonably accessible to the requester. The Cabinet Office sought to rely on this exemption in relation to the parts of the information in the scope of the request which consisted of correspondence between itself and the complainant. The Commissioner is satisfied that section 21 would clearly apply to correspondence which the complainant was a party to.

Section 36 – effective conduct of public affairs

15. The Cabinet Office argued that the remaining parts of the withheld information was exempt from disclosure on the basis of sections 36(2)(b)(i), (ii) and (c) of FOIA. These sections state that:

> *'(2) 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…*
>
> *(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*
>
> *(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'*

16. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion

was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

17. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

18. As the above chronology of the request suggests, the Cabinet Office cited section 36 in the refusal notice on the basis of an opinion of the qualified person in relation to similar information rather than the specific information which was the subject of the request. However, prior to the internal review being issued, albeit after the Commissioner had received a complaint about this request, the Cabinet Office sought – and received – the opinion of a qualified person in relation to the specific information falling within the scope of this request.

19. The complainant has argued that such procedural failings, including the fact that the Cabinet Office only sought the 'real' qualified person's opinion *after* the Commissioner had taken on the complaint, means that its use of section 36 was invalid.

20. The Commissioner would agree that the use of previous opinion in order to refuse information falling within the scope of meta-request is, to say the least, an unconventional approach to applying section 36. However, the Commissioner takes the view that flaws in the initial process of gaining the qualified person's opinion can be corrected at the internal review stage. Furthermore, in the Commissioner's view public authorities have the right to raise section 36 exemptions for the first time at internal review or during her investigation, albeit in each case

they are still required to obtain the reasonable opinion of the qualified person.

21. Therefore, the Commissioner does not believe that the Cabinet Office's delays in seeking an opinion from the qualified person in relation to the specific information which is the focus of this request fundamentally undermines its reliance on section 36.

22. Turning to the reasonable opinion itself, the qualified person (in the second opinion) argued that disclosure of the advice given by officials and records of their deliberations in the course of the exchanging views would be likely to inhibit the provision of such advice and exchange of views in respect of discussions about how to handle FOI requests in the future. This is because disclosure would make officials more reticent in providing advice or recording opinions if they thought this would be disclosed. In turn this would risk the substance and implementation of that advice and the written record of the same.

23. In respect of the opinion given by the qualified person and the exemptions contained at section 36(2)(b), the Commissioner accepts that it is reasonable to argue that disclosure of the material could potentially lead to a chilling effect on officials' contributions to discussions about how to handle FOI requests in the future. Sections 36(2)(b)(i) and (ii) are therefore engaged.

24. In respect of section 36(2)(c) in the Commissioner's view the fact that section 36(2)(c) uses the phrase 'otherwise prejudice' means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b). It would appear to the Commissioner that the chilling effect envisaged would in the qualified person's opinion have the further prejudicial effect of undermining both the substance and implementation of the advice in addition to the written record of that advice. The Commissioner accepts that this is not an unreasonable to position to take and therefore she accepts that section 36(2)(c) is also engaged.

Public interest test

25. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining either of the exemptions cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

26. The Cabinet Office explained that it will often release so called meta-data concerning requests where it would not impinge on the capacity of officials to properly investigate and discuss any proposed response. However, the Cabinet Office explained that where it had been necessary to discuss alternative approaches or conduct further investigations in relation to a request it would prejudice the safe space for decision making if such information was routinely disclosed. The Cabinet Office emphasised that it was against the public interest for its decision making processes in respect of processing FOI requests to be undermined.

Public interest arguments in favour of disclosing the information

27. The complainant questioned the extent to which disclosure of the withheld information would actually result in the prejudice which the Cabinet Office envisaged. In support of this position the complainant emphasised that meta-requests are a known feature of FOIA so public authorities dealing with requests are already aware of them, along with subject access powers under the Data Protection Act, and so disclosure of the withheld information was be unlikely to really inhibit or free and frank discussions.

28. In any event, the complainant argued that the public interest clearly favoured disclosure of the withheld information and case law on this subject matter supported his view. He specifically referred to the case Home Office and Ministry of Justice (MoJ) v ICO (EA/2008/0062) which was considered by the Information Rights Tribunal (and then by the High Court on appeal). The complainant argued that in the circumstances of his particular case there were a number of specific factors, beyond the generic public interest in disclosure, which supported his position. The complainant argued that disclosure of the information would show how a request is dealt with when that request involves information held using new technology which some suspect is being used to skirt records and transparency laws. He argued that there is a public interest in knowing how the Cabinet Office deals with requests referred to its 'clearing house' because of perceived sensitivity or profile. Finally, the complainant argued that there was a public interest in knowing how the Cabinet Office formed its arguments and whether correct procedures were followed specifically given its early insistence that no information in scope was held for FOIA purposes at

all, and given the delays in his original request being processed, whether their procedures are adequate.

Balance of the public interest arguments

29. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.

30. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

31. In the circumstances of this request the complainant submitted this request in the same email in which he asked for an internal review to be conducted into his original request. As a result, the Commissioner would accept that the Cabinet Office's internal discussions in relation to the original request were effectively live and ongoing at the point that the meta-request was submitted. The Commissioner therefore accepts that the chilling effect arguments could potentially carry some notable weight, depending of course on the actual content of the withheld information. In respect of this, Commissioner accepts that some, albeit by no means all, of these emails could be correctly described as a reasonably free and frank discussion of the issues associated with the original request. Consequently, the Commissioner accepts that the chilling effect arguments do attract some weight and the resultant further impact on the prejudice envisaged in respect of section 36(2)(c) should not be underestimated.

32. With regard to attributing weight to the public interest arguments in favour of disclosing the withheld information, the Commissioner believes that there is an inherent public interest in public authorities being transparent about their decision making processes. Consequently, she

accepts that there is a public interest in the disclosure of information which would demonstrate how public authorities consider and reach decisions in respect of FOI requests. Moreover, the Commissioner firmly agrees with the comments of the Tribunal in the above case, EA/2008/0062, that there is a strong public interest in knowing that public authorities deal with requests properly and lawfully and do not discriminate against requesters or between requesters. In terms of the specific circumstances of this case the Commissioner recognises that the original request sought information about a novel issue, namely the use of new technology such as Slack and the accessibility of information contained on it under FOIA. Given the novel nature of this subject matter the Commissioner agrees with the complainant that there is a heightened public interest in understanding how the Cabinet Office initially considered the original request. Furthermore, the Commissioner is also persuaded by the complainant's point that as the Cabinet Office subsequently amended its position and accepted that some of the information on Slack was held, this public interest attracts further weight.

33. Noting the significance of the weight to be given the factors on both sides, on balance, and by a relatively narrow margin the Commissioner has concluded that the public interest favours disclosing the information that has been withheld on the basis of sections 36(2)(b)(i) and (ii) and 36(2)(c).

Section 40(2) – personal data

34. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

35. Personal data is defined in section (1)(a) of the DPA as:

> '*.........data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.*'

36. The Cabinet Office withheld the names of junior staff and their contact details. The Commissioner accepts that such information constitutes personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

37. The Cabinet Office argued that disclosure of such information would breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

> *(a) at least one of the conditions in Schedule 2 is met, and*
>
> *(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

38. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
    - what the public authority may have told them about what would happen to their personal data;
    - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
    - the nature or content of the information itself;
    - the circumstances in which the personal data was obtained;
    - any particular circumstances of the case, eg established custom or practice within the public authority; and
    - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

39. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.

40. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

41. The Cabinet Office explained that it had a clear policy that the names of junior officials and their contact details would not be released under FOIA and therefore the individuals in question had a reasonable expectation that their names and contact details would not be released into the public domain.

42. The Commissioner is satisfied that the junior officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names and contact details being redacted from any disclosures made under FOIA and thus the disclosure of their names would be unfair and breach the first data protection principle. This information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Other matters

43. The complainant also raised concerns with the Commissioner about the Cabinet Office's delays in completing the internal review. FOIA does not provide for a statutory time limit within which such reviews must be completed. These matters are, however, addressed in the Code of Practice, issued under section 45 of FOIA and in the Commissioner's guidance. In the Commissioner's view most internal reviews should be completed within 20 working days or 40 working days in complex cases.

44. In the circumstances of this case the complainant requested an internal review on 9 February 2017. The Cabinet Office informed him of the outcome of the internal review on 5 May 2017. It therefore took the Cabinet Office 59 working days to complete its internal review. The Commissioner considers this to be an excessive period of time.

45. In making this comment the Commissioner would note that she had already had cause to comment in the decision notice which she issued in respect of the original request, FS50667128, on the time it took the

Cabinet Office to conduct its internal review. In that case the internal review took 93 days to complete.

46. Furthermore, when investigating this meta-request complaint the Cabinet Office took 70 working days to respond to the Commissioner's initial letter on this case and then only after the Commissioner has been served an Information Notice on the Cabinet Office under section 51 of FOIA.

47. The Commissioner's wishes to emphasise that the Cabinet Office's delays in conducting these internal reviews, and indeed its delays in engaging with the Commissioner's investigation, whilst not representing statutory breaches of the legislation are clearly against the spirit and intention of FOIA.

ico. Information Commissioner's Office

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 ....

Steve Wood
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