Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **9 November 2018**

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

Decision (including any steps ordered)

1. The complainant requested copies of social media analyses pursuant to the Prime Minister's visit to the US in January 2017 shortly following the inauguration of President Trump. Relying on sections 27(4) and 36(3) FOIA, the public authority neither confirmed nor denied holding the requested information.

2. The Commissioner's decision is that the public authority was not entitled to rely on sections 27(4) and 36(3) FOIA. The Commissioner has also found the public authority in breach of the procedural requirement in section 10(1) FOIA.

3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.

   - Issue a response to the request in compliance with section 1(1)(a) FOIA, and,

   - If the requested information is held, either disclose it or issue a refusal notice pursuant to section 17 FOIA.

4. 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 30 January 2017, the complainant wrote to the public authority and submitted a request for information in the following terms:

   "Please provide copies of all analysis/analyses of tweets by @Number10gov during and relating to the Prime Minister's recent trip to the US to meet the president. This could include but is not limited to work looking at how many times particular tweets were retweeted.

   Please also provide copies of all analysis/work on social media impact of the Prime Minister's words/speeches during her visit to the US. For example: Work looking at how many mentions the PM was getting following a particular speech/press conference in the US."

6. The public authority provided its response on 20 June 2017. Relying on sections 36(3) and 27(4) FOIA, it neither confirmed nor denied whether it held any information within the scope of the request.

7. The complainant requested an internal review of the public authority's decision on 20 June 2017.

8. The public authority wrote to the complainant on 12 March 2018 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

9. The complainant contacted the Commissioner on 15 March 2018 to complain about the public authority's handling of his request, specifically the decision to rely on sections 27(4) and 36(3).

10. For the avoidance of doubt, nothing in this decision notice should be construed as confirming or denying that the public authority holds the requested information.

Reasons for decision

The duty in section 1(1)(a) FOIA

11. Under section 1(1)(a) FOIA, any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. This requirement to inform an applicant

whether information matching their request is held by the public authority is commonly referred to as the duty to confirm or deny.

12. Part II of the FOIA however contains a number of exclusions from the duty to confirm or deny. Sections 27(4) and 36(3) are two of those exclusions.

Section 36(3)

13. The Commissioner has first considered whether the public authority was entitled to rely on this exclusion from the duty in section 1(1)(a).

14. The relevant part of section 36 states[1]:

"Prejudice to effective conduct of public affairs.

(1) This section applies to—

(a) information which is held by a government department and is not exempt information by virtue of section 35……

(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.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2)."

15. As can be seen from the wording in section 36(3), the exclusion from the duty to confirm or deny can only be engaged on the basis of the

[1] The full text of the exemption can be found here: http://www.legislation.gov.uk/ukpga/2000/36/section/36

reasonable opinion of a qualified person. The qualified person who issued the opinion following the request was the former Minister for the Cabinet Office, Ben Gummer. The Commissioner is satisfied that at the time his opinion was issued in March 2017, Mr Gummer was a qualified person pursuant to section 36(5)(a) FOIA.[2]

Public authority's submissions

16. The qualified person is of the opinion that compliance with section 1(1)(a) would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation and would prejudice the effective conduct of public affairs.

17. In the qualified person's opinion, it is necessary to neither confirm nor deny whether the public authority holds any information within the scope of the request to avoid revealing information about what topics are being considered by the communications team as suitable for detailed analysis. He submitted that issuing a response in compliance with section 1(1)(a) would enable requestors to submit multiple requests and as a result deduce the topics subject to analysis which in turn would prevent government from free and frank analysis of the media landscape.

18. The public authority elaborated in its submission to the Commissioner. In applying section 36(3), it took into account the reason that analysis of social media engagement of the type requested is conducted. According to the public authority, it is important that Ministers are able to adopt an effective communications strategy and are able to identify what messaging is being well received, or not being well received at all. This, it explained, would only be possible in a prejudice-free environment and cannot be done authentically if those engaging with Cabinet Office messaging are well aware in advance of the particular focus of the government's media monitoring strategy including the topics.

19. Furthermore, it is highly likely that if such topics were revealed then lobbying strategies would be adapted as a result to the detriment of the government having a truly informed understanding of the media landscape.

[2] Section 36(5)(a) states that a qualified person in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

20. In addition, revealing whether or not a particular topic was the focus of media monitoring analysis would necessarily result in a wider but less detailed focus of analysis in order not to imply certain priorities. This would be more costly and less useful than current analysis.

21. The public authority also considered whether there was a public interest in complying with the duty to confirm or deny and concluded that there was no particular public benefit to the revelation that such monitoring was or was not undertaken. It submitted that a significant time period might militate against the prejudice from complying with section 1(1)(a). However, that was not case here given the short time period between the Prime Minister's visit and the date of the request.

Complainant's submissions

22. The complainant's submissions are reproduced below.

"It is clear from other foi responses that the Cabinet Office does carry out such analysis.

For example, the following link refers to social media analysis undertaken at the Cabinet Office in relation to a speech given by David Cameron about the Hillsborough Independent Panel's report in 2012. The analysis was obtained by me from what was then known as ACPO (now the NPCC). I don't have a copy of the information now but am happy to state it existed and was released to me under the FOIA. It formed the basis of the following news story: https://www.dailystar.co.uk/news/latest-news/281782/David-Cameron-s-Hillsborough-speech-Twitter-reaction-monitored

There is a compelling public interest in transparency surrounding the spending of public money on analysis of social media output on behalf of the Prime Minister. Transparency is capable of informing the public exactly what its money is being spent on and allows them to determine whether or not this is appropriate.

It is paramount, especially during times of austerity, to ensure public money is not being wasted on PR and managing image and that analysis of social media is proportionate.

The compelling public interest is furthered by the fact that this was the PM's first visit to meet Donald Trump and her speeches were of national significance in light of fears about the "special relationship".

Transparency can only improve public confidence and, unlike the US which is open about such analysis, the UK currently looks defensive and as if it has something to hide."

Commissioner's analysis

23. In determining whether the exclusion is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one. 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 unreasonable 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.

24. The Commissioner has been guided on the interpretation of the phrase 'would prejudice' or 'would be likely to prejudice' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.

25. With regard to likely to prejudice, the Information Tribunal in John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005) confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

26. With regard to the alternative limb of 'would prejudice', the Tribunal in Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030) commented that "clearly this second limb of the test places a stronger evidential burden on the public authority to discharge", and the occurrence of the prejudice claimed "is more probable than not".

27. The Commissioner is therefore prepared to accept as reasonable the qualified person's opinion that confirming or denying whether the public authority holds the information requested would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

28. The Commissioner however does not consider reasonable the opinion that compliance with section 1(1)(a) would more probable than not inhibit the free and frank exchange of views for the purposes of deliberation. She does not consider that the public authority has

successfully discharged the burden of proof necessary to meet this higher threshold with respect to the likelihood of prejudice.

29. Similarly, the Commissioner does not consider reasonable the opinion that compliance with section 1(1)(a) would more probable than not prejudice the effective conduct of public affairs.

30. The Commissioner considers that prejudice to the effective conduct of public affairs could refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives. In McIntyre v Information Commissioner and the Ministry of Defence (EA/2007/0068), the Tribunal commented that: "this….exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure."

31. Reference is made by officials in the submission to the qualified person to "damage" that compliance with section 1(1)(a) would do to the ability of the communications team to investigate and analyse how government's messaging is being received by the public. However, this assertion is neither supported by specific evidence nor elaborated upon. On the basis of that submission alone it is unclear how the qualified person was able to form the opinion that the likelihood of prejudice was more probable than not.

32. The Commissioner has also considered the supporting submissions provided by the public authority in support of that opinion. The request relates to an event (ie Prime Minister's visit to meet the newly elected President of the US) that had already taken place at the time of the request.[3] Therefore, it is unclear what the public authority means when it says an effective communications strategy cannot be done authentically "if those engaging with Cabinet Office messaging are well aware in advance of the particular focus of the government's media monitoring strategy including the topics." The focus of the request is not on future media monitoring analysis as the public authority appears to be suggesting.

[3] The Prime Minister visited the White House on January 27 2017, three days before the request was submitted.

33. The assertion that revealing whether or not a particular topic was the focus of media monitoring analysis "would necessarily result in wider but less detailed focus of analysis" has not been backed up by evidence either. To reiterate, the higher threshold of prejudice places a stronger evidential burden on a public authority. No demonstrable evidence has been presented to support the view that complying with section 1(1)(a) in response to the request in this case would result in the outcome envisaged. The public are shrewd enough to know that the government is likely to prioritise certain topics and events over others in its media monitoring.

34. The Commissioner has therefore concluded that the public authority was entitled to engage the exclusion at section 36(3) on the basis that it was reasonable for the qualified person to hold the opinion that compliance with section 1(1)(a) would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

Balance of the public interest

35. The exclusion at section 36(3) is subject to the public interest test set out in section 2(1)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exclusion outweighs the public interest in complying with section 1(1)(a).

36. If the Commissioner finds that the qualified person's opinion was reasonable, she will then consider the weight of that opinion in 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.

37. In this case the Commissioner has accepted as reasonable the qualified person's opinion that compliance with section 1(1)(a) would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

38. The question therefore is how severe and frequent the inhibition from a free and frank analysis of the media landscape is going to be should the public authority comply with the duty to confirm or deny whether it holds the requested information.

39. The Commissioner considers that the chilling effect on free and frank media analysis is going to be limited and certainly not significant enough to affect the thoroughness with which officials conduct such analysis.

Officials are unlikely to be affected by compliance with section 1(1)(a) in this case to the extent that their analysis of the media landscape of topics relevant and potentially relevant to government policies would become less thorough as a result. The Commissioner has accepted as reasonable the opinion that compliance with the duty to confirm or deny in response to the request would pose a real and significant risk of inhibition to free and frank media analysis. However, in the circumstances, she does not consider that the chilling effect on free and frank media analysis would be severe and frequent enough to justify maintaining the exclusion in the public interest.

40. Although the Commissioner considers that in the interest of transparency the public should know whether media analysis has been conducted including social media analysis of visits between the Prime Minister and Heads of other governments, she accepts that the public interest in complying with section 1(1)(a) is not significant given the limited value of this information. Having said that, she is not persuaded that there is a stronger public interest in maintaining the exclusion. Moreover, the general public interest in openness and transparency in government should not be underestimated.

Section 27(4)

41. The Commissioner next considered whether the public authority was entitled to rely on this exclusion from the duty in section 1(1)(a).

42. The relevant part of section 27 states[4]:

"International relations.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

[4] The full text of the exemption can be found here: http://www.legislation.gov.uk/ukpga/2000/36/section/27

(4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1),……"

Public authority's submissions

43. The public authority has relied on this exclusion on the basis that compliance with section 1(1)(a) would be likely to prejudice relations with the US or harm British interests abroad. Merely confirming that media analysis of the Prime Minister's visit to the US had been undertaken may harm international relations or British interests abroad. The public authority provided the following hypothetical scenario in support: if it was shown that no media monitoring was undertaken for the Prime Minister's visit to China but this had been done for her trip to the US or vice versa, then this could be taken to imply that the government is less concerned with the UK's relations with China than with the US. This would prejudice international relations to little benefit to the public interest.

44. The public authority accepted that it had in the past confirmed that analyses do indeed take place in regards to social media. However, the exclusions had been applied specifically to the request in this case which relates to media analysis of the Prime Minister's visit to the US.

45. With respect to where the balance of the public interest lies, the public authority argued that absent any specific supervening factor beyond the general interest in transparency it would be inappropriate to reveal a particular topic was being monitored when balanced against the likelihood of prejudice to the UK's interests and relationship with the US.

Commissioner's analysis

46. The question the Commissioner has to consider is whether confirming or denying whether the public authority undertook analysis/analyses of social media pursuant to the Prime Minister's visit to the White House in January 2017 would pose a real and significant risk to relations between the UK and the US, between the UK and any other State, and to the UK's interests abroad.

47. The Commissioner shares the Information Tribunal's view in Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040) that in the context of international relations, "prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary."

48. The Commissioner is not persuaded that revealing whether or not the government undertook media analysis of the Prime Minister's recent visit to the White House would pose a real and significant risk to relations between the UK and the US. As an established democracy and open society itself, the US would be well aware that social media analysis by the government pursuant to events of significance such as a visit by the Prime Minister to the US shortly after President Trump's inauguration may or may not have happened. The Commissioner cannot envisage how revealing whether such media analysis did take place could pose a real and significant risk to what some have described as an unparalleled relationship between two countries.

49. With respect to the likelihood of prejudice to relations between the UK and other countries, the Commissioner is also not persuaded that there is a real and significant risk that compliance with section 1(1)(a) would make relations more difficult or even call for a diplomatic response. Such an outcome would be more likely in the context of ongoing discussions on specific issues between the UK and a particular country/countries but it is difficult to see how, generally speaking, the fact that a major event between the UK and another country was subject to media analysis and similar analysis was not conducted pursuant to a major event with a different country would in and of itself pose a significant risk to international relations. There will be various reasons for conducting such media analysis, and it is reasonable to assume that other countries will take this into account rather than jump to conclusions.

50. For the same reason as set out above, the Commissioner is not persuaded that there would be a real and significant risk to the UK's interests abroad.

51. In light of her conclusions, the Commissioner finds that the public authority was not entitled to rely on section 27(4).

Procedural matters

52. A public authority is required by virtue of section 10(1) FOIA to respond to an applicant's request for information promptly and in any event no later than 20 working days following receipt of the request.

53. The request was submitted on 30 January 2017. The public authority provided its response on 20 June 2017 exceeding the statutory time limit by 98 working days. The Commissioner therefore finds the public authority in breach of its obligation under section 10(1).

Other Matters

53. Although there is no statutory time limit to complete internal reviews, the Commissioner expects most internal reviews to take no longer than 20 working days and in exceptional circumstances 40 working days.

54. The public authority took 186 working days to complete its internal review. In total it took the public authority 284 working days to conclude its handling of the request.

55. Needless to say, the Commissioner is extremely concerned at the length of time taken to complete the internal review and the request more generally.

Right of appeal

56. 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

57. 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.

58. 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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