

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 December 2022

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested all correspondence and communications, between the Cabinet Office and the Commissioner, during the period 1 January 2019 to 1 May 2019, which refer to the Commissioner's '*Outsourcing Oversight?*' report. The Cabinet Office withheld the majority of the requested information under section 36(2)(b)(i)(ii) and (c)(prejudice to the effective conduct of public affairs) with a separate and very small part of the information held being exempt under section 35(1)(d)(operation of a ministerial private office).
2. The Commissioner's decision is that the Cabinet Office failed to correctly apply section 36(2)(c) to the relevant information but that the same information is exempt under section 36(2)(b)(i) and (ii). The Commissioner considers that the balance of the public interest favours maintaining section 36(2)(b) to the withheld information. The Commissioner has also found that the Cabinet Office correctly applied section 35(1)(d) to the relevant information, and that the balance of the public interest favours maintaining the exemption to the small amount of information.
3. The Commissioner has found that the Cabinet Office breached section 10(1) of the FOIA in that they failed to provide a valid response to the request within the statutory time frame of 20 working days.

4. The Commissioner does not require the Cabinet Office to take any steps in this matter.

Background

5. The ICO '*Outsourcing Oversight? The case for reforming access to information law*' report¹ was laid before Parliament on 28 January 2019. The report called for an update to the FOIA and the EIR to include organisations providing a public function. The main aim of the report was to make an evidence-based case to extend the reach of FOIA and EIR to enable greater transparency and accountability in modern public services, which in turn improves services.

Request and response

6. On 12 March 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

I would like to make a request under the Freedom of Information Act. The request relates to the following letter sent by Chloe Smith in April 2019: [Letter to ICO from MfC.pdf \(parliament.uk\)](#).

I would like to request the following information:

- (1) *From 1st January 2019 to 1st May 2019, please provide all external correspondence and communications between Chloe Smith and the Information Commissioner's Office (ICO). I would expect this to include correspondence and communications that refer to the ICO's report, 'Outsourcing Oversight?' The case for reforming access to information law'.*
 - (2) *From 1st January 2019 to 1st May 2019, please provide all internal correspondence and communications held by Chloe Smith that mentions the Information Commissioner's Office (ICO). I would expect this to include correspondence and communications that refer to the ICO's report, 'Outsourcing Oversight?' The case for reforming access to information law''.*
7. The Cabinet Office did not provide a substantive response to the request until 1 September 2020, almost six months later. In their response the

¹ [outsourcing oversight \(ico.org.uk\)](https://ico.org.uk/outsourcing-oversight)

Cabinet Office apologised for the delay and confirmed that they held the information requested. The Cabinet Office advised that 'some' of the information which the complainant had requested was exempt under section 35(1)(d)(information relating to the operation of any Ministerial private office) and section 36(2)(b)(i)(ii) and (2)(c)(prejudice to the effective conduct of public affairs). The response stated that *'this is because either the information requested relates to the operation of a Ministerial private office, or because, in the opinion of a qualified person, its disclosure would, or would be likely to, prejudice the effective conduct of public affairs'*.

8. In regard to the public interest test which both exemptions carry, the Cabinet Office stated that they appreciated that there *'is a general public interest in disclosure of public information', and recognised that 'openness in government may increase public trust in and engagement with the government'*. The Cabinet Office acknowledged that the information *'might deepen public understanding and therefore lead to more informed public consideration of the Government's handling of the Freedom of Information Act and the processes therein'*.
9. However, weighed against the above public interests in disclosure were the *'strong public interest in preserving a 'safe space', not only for the private office to focus on managing the Minister's work efficiently without external interference and distraction, but also to allow the free and frank provision of advice and exchange of views'*. The Cabinet Office contended that Ministers and senior officials must be able to discuss candidly and openly, receive free and frank advice from departmental colleagues and colleagues across government, and fully understand the possible implications. The Cabinet Office contended that if discussions were routinely made public, there was a risk that Ministers and senior officials may feel inhibited from being frank, candid and completely honest. Consequently, the Cabinet Office contended, the quality of debate underlying collective decision making would decline, leading to poorer decision making. The response stated that *'the Minister must also have confidence that, in proffering advice, the adviser has not been inhibited by extraneous concerns. These necessarily include the concern that the advice will be exposed prematurely to public scrutiny or comment'*.
10. Taking into account all of the circumstances of the case, the Cabinet Office concluded that the balance of the public interest favoured withholding the requested information.
11. The Cabinet Office also advised that 'some' of the information was being withheld under section 40(2)(third party personal data) and that 'some' of the information which the complainant had requested, 'specifically the letter to which you provided a link in your request' was exempt from

disclosure under section 21(1)(information reasonably accessible to the applicant by other means).

12. The complainant requested an internal review of the decision on 8 September 2020.
13. The Cabinet Office provided the internal review on 14 October 2020. The review was very brief and cursory, simply confirming that the exemptions had been properly applied, and the balance of the public interest had been fully considered for the reasons set out in their substantive response of 1 September 2020.

Scope of the case

14. The complainant contacted the Commissioner on 13 November 2020 to complain about the way her request for information had been handled.
15. The complainant's complaint concerned the application of sections 35(1)(d) and 36(2)(b)(i)(ii) and (c) only.
16. During the Commissioner's investigation the complainant helpfully narrowed the scope of her complaint to those parts of the withheld information which referenced or related to the Commissioner's 'Outsourcing Oversight?' report only.
17. The Commissioner has had sight of the withheld information, which comprises approximately 110 pages, with around 66 pages falling within the targeted narrowed scope provided by the complainant. Of these 66 pages, the Commissioner considers that approximately 20 pages concern information which reference or relate to the aforementioned report in some detail.
18. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office were correct to withhold the information within scope of the request which references or relates to the Commissioner's 'Outsourcing Oversight?' report under sections 35(1)(d) and 36(2)(b) and (c) of the FOIA.

Reasons for decision

19. Section 35(1)(d) covers information relating to the operation of ministerial private offices.
20. The Commissioner's guidance on this exemption explains that:

'All government ministers have their own private offices comprising a small team of civil servants. They form the bridge between the minister and their department. The private office's role is to regulate and streamline the ministerial workload and allow the minister to concentrate on attending meetings, reading documents, weighing facts and advice, and making policy decisions'.

21. Section 35(5) defines 'ministerial private office':

'Ministerial private office' means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister, or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government'.

22. The Commissioner's guidance explains that:

'The exemption covers information which 'relates to' the operation of the private office. This is generally interpreted broadly. However, this does not mean that all information with any link to a ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a ministerial private office, which itself is defined as providing administrative support. In other words, it covers information about administrative support to a minister.

23. Therefore, the exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about ministerial priorities and similar issues.

24. The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling ministerial papers or prioritising issues, travel expenses, information about staffing, the minister's diary, and any purely internal documents or discussions which have not been circulated outside the private office.

25. In FS50165511, the Commissioner considered emails discussing the ministerial response to a parliamentary question about polygamy and benefits. He accepted that two emails engaged section 35(1)(d), as they could be classified as a routine discussion relating to procedural issues. One was a brief routine email simply confirming the minister's view on the latest draft. The second was a routine procedural email requesting a background note on a particular topic. However, the Commissioner found that the exemption was not engaged for four other emails. These contained substantive discussion of the underlying issues, rather than relating to administrative matters.

26. The only part of the withheld information which falls within the narrowed scope of the complainant's request and which has been withheld under section 35(1)(d) is a two sentence paragraph. Having had sight of this information, the Commissioner is satisfied that the information is exempt under section 35(1)(d) as it is administrative in nature and does not contain substantive discussion of the relevant issue.
27. Section 35(1)(d) is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

28. In submissions to the Commissioner, the Cabinet Office acknowledged that there is a general public interest in knowing how Ministerial private offices operate, and disclosure might build public confidence in how ministers are supported and how ministerial decisions and requests for advice are communicated to the department.

Public interest arguments in favour of maintaining the exemption

29. In submissions to the Commissioner the Cabinet Office advised that '*the key public interest argument against disclosure relates to preserving a 'safe space' for the private office to focus on managing the Minister's work efficiently*'. The Cabinet Office contended that Ministerial private offices must be free to provide their minister with all available facts and information to ensure that ministerial business is managed effectively and efficiently. Disclosure of the information would be likely to lead to external interference and distraction, particularly on 'live' issues, and this would be an unnecessary distraction with the efficient running of the private office. The Cabinet Office submitted that this could lead to a minister not being fully prepared or informed about decisions they are being asked to make, and would not provide for the effective support that ministers expect and rely on.

Balance of the public interest arguments

30. The Commissioner accepts that significant weight should be given to safe space arguments. In this instance the importance of providing a safe space for a private office to focus on managing a minister's work efficiently without external interference and distraction. There is also a public interest in the protection of officials, since public accountability for decisions should remain with ministers and should not fall on civil servants providing administrative support.
31. Another important factor is the timing and age of the information. At the time of the request the information was just under one year old and so relatively recent. As the Commissioner examines later in this notice,

the information concerned a matter which could, at the time of the request, be considered to be live and ongoing and therefore its disclosure could harm or prejudice ongoing processes.

32. Having had sight of the small amount of information exempt under section 35(1)(d), the Commissioner is satisfied that its public interest value and weight, in terms of the transparency and accountability that it would bring to the government's response to the Commissioner's 'Outsourcing Oversight?' report, is minimal. The Commissioner considers that this public interest is outweighed by the public interest in providing the Minister's office with a safe space to manage her work diary and commitments.

Section 36(2)(b)(i)(ii) and (c)

33. Section 36(2) states 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'.

34. In deciding whether section 36(2) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.
35. 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 matter. 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 not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
36. In submissions to the Commissioner the Cabinet Office provided a copy of the reasonable opinion given by the qualified person, Chloe Smith,

the then Minister of State for the Constitution and Devolution on 26 August 2020. The Cabinet Office also provided the submissions for the qualified person's consideration which were provided to Ms Smith on 25 August 2020. The Minister's reasonable opinion was that the exemption was engaged as disclosure of the information in scope of the request would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, and would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

37. It should be noted that the complainant's subsequent narrowed scope of her request does not affect the application of section 36(2) to the relevant information (i.e. the focused information is covered by the exemption).
38. Having considered the content of the withheld information and taking into account the qualified person's reasonable opinion, the Commissioner is satisfied that sections 36(2)(b)(i)(ii) are engaged to the withheld information. In respect to the prejudice threshold, the Commissioner considers that disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. However, in order for section 36(2)(c) to apply, the prejudice claimed must be different to that claimed under section 36(2)(b)(i.e. must 'otherwise prejudice').
39. In her reasonable opinion the Minister stated that, '*disclosure of this information would be likely to inhibit the effective conduct of public affairs in future because the free and unfettered flow of communication between ministers and officials would be likely to diminish. This would be detrimental to the decision-making process in future, as disclosure of the information would, or would be likely to discourage officials from recording discussions about similar matters in future, leading to the risk that decisions might be taken on the basis of advice that was not as frank and candid as it could be*'. The Commissioner considers that the prejudice identified here, what is commonly termed the 'chilling effect', is one which is already caught by the provisions of sections 36(2)(b)(i) and (ii). Consequently, the Commissioner does not consider that section 36(2)(c) is engaged in this matter.
40. Section 36 is a qualified exemption and in accordance with the requirements of section 2 of the FOIA, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.
41. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he 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 he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.

42. It is important to be clear that the exemptions contained in Section 36 focus on the processes that may be inhibited, rather than what is in the withheld information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.

The position of the Cabinet Office

43. In submissions to the Commissioner, the Cabinet Office acknowledged the general public interest in disclosure of public information and they recognised that openness in government may increase public trust in and engagement with the government. It might deepen public understanding and therefore lead to more informed public consideration of the government's handling of FOIA and the processes therein.
44. Specifically, the Cabinet Office stated that disclosure of information relating to the Commissioner's '*Outsourcing Oversight?*' report '*would reassure the public that the government is committed to greater transparency, particularly in relation to contracts with private sector organisations, and would maintain public faith in the Act as a progressive piece of legislation*'.
45. However, in favour of withholding the information, the Cabinet Office contended that there is a strong public interest that ministers and senior officials are able to exchange views openly and that ministers are able to receive free and frank advice from officials, including such issues as '*the potential development*' of the FOIA. The Cabinet Office asserted that '*there is no compelling public interest in this case that overrides the very strong public interest in maintaining the confidentiality of this information, especially given that the Minister has provided an articulation of her considerations in responding publicly to the Commissioner's report*²'.

² In Ms Smith's published letter of 24 April 2019 to Commissioner Denham

46. In order to be valuable to ministers and senior officials, the Cabinet Office stated that advice must be free from any inhibitions that might preclude provision and recording of honest advice and expression of views and opinions. The Cabinet Office contended that disclosure of the withheld information would be likely to be detrimental to the way in which officials provide advice in future on FOIA related issues, leading to a dilution of the advice and the written record of it.
47. The Cabinet Office further contended that there is a strong public interest in ministers and officials being able to discuss the provision of advice *'without fear that early thinking would be disclosed'*.
48. The Cabinet Office advised the Commissioner that they did not accept that the complainant's interest *'in the department's internal deliberation of a report of this nature is necessarily equivalent to a broader public interest, however strongly asserted by the complainant'*. In considering all the factors in the case, the Cabinet Office maintained that they considered that the public interest would be better served by withholding the requested information to preserve the 'safe space' in which free and frank advice and exchange of views can be provided in this policy area.

The position of the complainant

49. In submissions to the Commissioner, the complainant contended as follows:

'Firstly, the letter issued by the Cabinet Office (Ms Smith's letter of 24 April 2019 to then Commissioner Denham) indicates that the government is not going to extend the Act anytime soon – and will not debate the matter further – therefore releasing the information sought will not have an impact on future collective decision making over the FOI Act, or lead to poorer decision making.

Secondly, it is very much in the public interest to examine how the Cabinet Office reacted internally to the important report released by the ICO, and how it digested the findings contained in the report. It is essential to understand to what extent the Cabinet Office deliberated over the ICO's recommendations, and the time it dedicated in engaging with the ICO's recommendations – a release of the information sought would help the public understand this. The letter issued by the Cabinet Office contained just seven paragraphs on why there will not be a greater use of existing power under Section 5 of FOIA'.

Thirdly, there is a significant public interest in the extension of the FOIA to cover private contractors delivering public services. As Ms Denham has said, the Grenfell Tower Fire and the collapse of the outsourcer Carillion have underscored the need for freedom of information laws to be extended to all public service suppliers. "Our infrastructure is built

by private contractors with public money. Our leisure centres and prisons are often run by private companies. Social housing services are delivered by housing associations, and charities run safeguarding services for children”, said Ms Denham. “Except in some complicated scenarios, none of these organisations is subject to scrutiny under information laws. So none is accountable to the public”.

50. The complainant also contended that there is now even more public interest in an extension of the FOIA, with COVID-19 related contracts having been awarded to private contractors without going to tender, and without being published. The complainant referenced a number of newspaper articles, including The Financial Times reporting how the Government awarded £10bn worth of contracts related to the coronavirus crisis to private companies since March 2020, mostly without a competitive tender³. The complainant also cited an article published in The Guardian on 9 November 2020⁴, which reported that the government had *‘failed to publish any information about £4bn of Covid-related contracts awarded to private companies, in what appears to be a continuing breach of UK law’*.

Balance of the public interest arguments

51. The Commissioner acknowledges the entirely legitimate and important public interest arguments which the complainant has advanced concerning the public interest in transparency and accountability surrounding the Government’s awarding of COVID-19 related contracts to private contractors, and the aforementioned reporting of these in the press and media. However, as the Upper Tribunal recently confirmed in *Montague v The Information Commissioner and The Department of Trade* (UA – 2020 – 000324 & UA-2020-000325)[13 April 2022], the time for judging the competing public interests in a request is at the date of the public authority’s decision on the request under Part 1 of the FOIA and prior to any internal review of the initial decision.
52. Consequently, as the articles cited by the complainant post-date (albeit not by a significant amount of time) the Cabinet Office request response of 1 September 2020, the Commissioner cannot take such arguments into account when assessing the public interest balance in this case.

³ [£10bn Covid contracts without competitive tender come under scrutiny | Financial Times \(ft.com\)](#)

⁴ [UK government fails to publish details of £4bn Covid contracts with private firms | Coronavirus | The Guardian](#)

53. The then Commissioner, Ms Elizabeth Denham CBE, wrote in the report:

'When I was appointed Commissioner in 2016, I raised the prospect of extending FOIA to contractors delivering public services. Following the collapse of Carillion last year, I submitted evidence to the Public Administration and Constitutional Affairs Committee (PACAC) and was clear that FOIA should be extended. After the Grenfell Tower tragedy in 2017, I also highlighted my concerns about access to information about fire safety and the fact that housing associations are not always covered by information access law.

These events have sharpened my resolve to improve transparency and accountability. I want the evidence-based case made in this report to promote an urgent and constructive dialogue that will result in the strengthening of our access to information laws. This reflects one of the key priorities of our draft information rights strategy 'Openness by Design'. Urgent action is required because progress has been too slow. It is now time to act. This report sets out solutions that can extend the law to make it fit for the modern age. I am committed to working with Government and Parliament to achieve this report's vision of more accountable public services, regardless of how they are delivered'.

54. On 24 April 2019, Chloe Smith, then Minister of State for the Constitution and Devolution, wrote to Commissioner Denham, responding to the 'Outsourcing Oversight?' report. This letter was placed in the public domain⁵. Ms Smith observed that *'the report has attracted considerable interest, as have the recommendations you have made'*. The Minister advised that the Government, *'accepts that as more public services are contracted out to the private sector, it is important that they are delivered in a transparent way, to ensure accountability to the user and to taxpayers'*.
55. Advising that the Government had considered how best to balance the competing interests of transparency and burdens, Ms Smith stated that, *'we recognise the importance in how public money is spent, but we are concerned about a disproportionate burden, because we do not want to discourage smaller organisations from serving the public'*. The letter advised that the Government, *'did not think it was necessary for changes to be made to the wording of the EIRs with regard to information held on behalf of public authorities by private contractors'*.
56. In addition, whilst recognising the concerns raised by the report in regards to proactive disclosure provisions, the Minister stated that the

⁵ [Letter to ICO from MfC.pdf \(parliament.uk\)](#)

Government *'do not agree that a comprehensive review of those provisions is necessary at this time'*, contending that a further large scale review would cover much the same ground as the Commissioner's existing reports, and others by the Institute for Government and the National Audit Office.

57. The two and a half page letter ended by stating that:

'The Government is committed to the principles of transparency and openness across the public sector and to supporting the effective operation of the Freedom of Information Act'.

58. The 'Outsourcing Oversight?' report comprised 174 pages and made a detailed and evidence-based case for the urgent need to strengthen access to information laws so as to extend the reach of FOIA and EIR and enable greater transparency and accountability in modern public services. As the complainant has noted, the above letter of response from the Government *'contained just seven paragraphs on why there will not be a greater use of existing power under section 5 of FOIA'*⁶. Given the brevity of the Government response to the report, the Commissioner considers that there is, as the complainant has contended, a legitimate and significant public interest in seeing to what extent the Government considered and deliberated over the report's recommendations.

59. The 'Outsourcing Oversight?' report addressed an issue of ever increasing importance and concern – i.e. the ability of information access legislation to keep pace with the changing organisation and delivery of public services.

60. In its 2020 report, *'Art of Darkness: How the government is undermining Freedom of Information'*⁷, openDemocracy noted that, *'over the past two decades, the government has massively increased its use of private contractors to deliver public services. Today, public procurement is worth £284 billion – roughly a third of all public spending. Private contractors have run hospitals, railways and prisons for many years. Today, they also deliver major government policies. The complex supply chains that support them span businesses and voluntary organisations of all shapes and sizes'*.

⁶ Under which section the Secretary of State or the Minister for the Cabinet Office can, by order, designate bodies as public authorities.

⁷ [art-of-darkness-opendemocracy.pdf \(cdn-opendemocracy-production.s3-website-eu-west-1.amazonaws.com\)](https://cdn.opendemocracy-production.s3-website-eu-west-1.amazonaws.com/art-of-darkness-opendemocracy.pdf)

61. OpenDemocracy noted that the FOIA was passed at a time when public services were generally delivered by public bodies, but that had since changed. It noted that *'the scope of the law is now shrinking as more and more government business is outsourced. FOI can no longer deliver its core aims – of increasing the transparency and accountability of government – without reaching into public services now delivered by other means'*.
62. As the complainant noted, at the time of her request, a number of high profile events, such as the Grenfell Tower fire and the collapse of Carillion, had thrown into sharp relief the urgent and pressing need for access to information legislation to be extended to all public service suppliers.
63. Given the above reality, the Commissioner firmly disagrees with and does not accept the suggestion made by the Cabinet Office that there is no broader public interest in the withheld information beyond the interest shown by the complainant. Indeed, the Cabinet Office's assertion in this respect is contradicted by the recognition of the Minister, in her written response to the report, that both the report and its recommendations, had *'attracted considerable interest'*.
64. Having had sight of the withheld information, the Commissioner considers that its disclosure would provide informative and interesting insight and understanding into the Government's thinking and response to the recommendations made by Commissioner Denham in the report. This being the case, the withheld information carries a significant and substantial public interest weight and value in transparency and accountability which cannot be understated.
65. However, the Commissioner acknowledges the Cabinet Office contention that the Minister *'provided an articulation of her considerations in responding publicly to the Commissioner's report'*. Whilst that public articulation was not particularly detailed or evidence-based, Ms Smith's letter to Commissioner Denham of 24 April 2019 did provide some insight and information as to the Government's response to the report. Perhaps most notably, the Minister stated:

'Orders under section 5 of FOIA require secondary legislation to be brought forward. As I set out to the House of Parliament on the debate on 6 March, when considering legislation, there are significant concerns about the potential impact of more regulation on SMEs, the voluntary sector and social enterprises'.
66. Whilst it is arguable as to how much weight should be afforded to such concerns, given the huge and national public issue which the Commissioner's report aimed to address, the Commissioner recognises and accepts that aspects of Ms Smith's letter did provide some

transparency and accountability of the Government's decision not to extend the FOIA to private contractors/companies delivering public services.

67. In addition, whilst the Commissioner acknowledges and accepts the complainant's point that Ms Smith's letter indicated that the Government is not planning on extending the FOIA anytime soon, he does not agree that it therefore necessarily follows that disclosure of the withheld information could *'not have an impact on future collective decision making over the FOI Act, or lead to poorer decision making'*. The Minister's letter noted that a number of the Commissioner's recommendations would require legislation *'and so will require careful and detailed consideration by the Government'*. This would imply, or at least suggest, that the Government could or would be looking further into the recommendations made by the 'Outsourcing Oversight?' report, beyond the extent of the letter of 24 April 2019.
68. Even if that were not the case, the Commissioner considers that the issues and concerns raised in the 'Outsourcing Oversight?' report are very much live and ongoing, with the issue of contracting out of public services to private contractors and companies (and the concomitant transparency and accountability deficit) remaining an ever expanding concern.
69. The Commissioner considers that this means that any information held by the Cabinet Office which would shed light and understanding on the Government's consideration and deliberations about the report and its recommendations, carries a strong and legitimate public interest in disclosure. However, the Commissioner also considers that such information also carries a strong public interest in protecting and preserving a legitimate safe space for the Government to discuss and consider the issues highlighted by the report, and the legal and legislative implications of the recommendations made.
70. The Commissioner recognises and entirely accepts the strong and well established public interest in protecting and preserving the safe space for ministers and senior officials to exchange views openly, and for ministers to receive free and frank advice from officials (specifically in this case about the potential development of the FOIA). The Commissioner considers, as noted above, that the Cabinet Office has, (surprisingly, given the Minister's comments in her published letter to Commissioner Denham) markedly undervalued the public interest which the specific information in this case carries. However, he considers that disclosure of the relevant withheld information, less than a year (at the time of the complainant's request in March 2020) after the Government's published response to the 'Outsourcing Oversight?' report, would be likely to be detrimental to the process by which officials provide advice in future, particularly in respect to FOIA related issues.

71. The Commissioner considers that this is a case in which the respective public interest factors are finely balanced. Had the Government not published a response to the 'Outsourcing Oversight?' report, the Commissioner would have had little hesitation in finding, given the importance and scope of the underlying issues, that the public interest balance lay in favour of disclosure of the withheld information. As it is, however, at the time of the request the Government had published a response to the report, and whilst this could not be considered to be detailed or thorough, the Commissioner recognises and accepts that it did provide some measure of transparency and accountability for the Government's response.
72. Ultimately, it is the published Government response of 24 April 2019, coupled with the recent provenance of the withheld information at the time of the request, and the likelihood of government having to consider the issues raised by the report at a later date not that far in the future (thus imbuing the information with an element of residual sensitivity and confidentiality) which has led the Commissioner to determine, by a narrow margin, that the public interest balance in this case favours maintaining section 36(2)(b) to the withheld information.

Procedural matters

73. Section 1(1) of the FOIA states that:

'Any person making a request for information to a public authority is entitled -

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him'.

74. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *'not later than the twentieth working day following the date of receipt'*.
75. In this case the complainant made her request to the Cabinet Office on 12 March 2020 but did not receive a substantive response until 1 September 2020, almost six months later. The Commissioner is mindful that the Cabinet Office received this request during the emerging COVID-19 pandemic crisis, which placed considerable pressures and challenges upon public authorities, especially central government departments. Some delay in responding to the request would not therefore have been unreasonable or unexpected. However, even taking such extraordinary extraneous factors into account, a delay of almost six months in providing the substantive response was manifestly unreasonable and a serious breach of section 10 of the FOIA.

Right of appeal

76. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

77. 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.

78. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**