

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

### **Decision notice**

**Date:** 16 January 2023

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

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

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1. The complainant has requested information on meetings held between ministers and McDonald's Restaurants Ltd.
2. The Commissioner's decision is that the Cabinet Office cannot rely on FOIA section 35(1)(a) – formulation and development of government policy, to withhold the requested information as the public interest favours disclosure. He does not consider that FOIA section 35(1)(d) – operation of any Ministerial office, was correctly engaged by the Cabinet Office. However, the Commissioner considers that FOIA section 41(1) – information provided in confidence was appropriately applied to two bullet points redacted on the readout of 20 March 2020 and also to the majority of the readout of 2 July 2020, excluding the first three sections set out in the confidential annex.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information contained in the annex to this decision notice.
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 of FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 10 December 2020 the complainant wrote to the Cabinet Office and requested information in the following terms:

"I am writing to you under the Freedom of Information Act 2000 to request information regarding the minutes of meetings held between ministers and McDonald's Restaurants Ltd. and/or its subsidiaries. I request the disclosure of the minutes of a meeting reported in the HM Treasury's transparency data releases on ministers meetings, a 'business leaders call (with PM)' on 20th March 2020. ... In addition, I request the minutes of any subsequent meetings (between march and the present) where McDonald's (or representatives) and Cabinet Office Ministers were present."

6. The Cabinet Office responded on 15 January 2021 advising that it needed further time to consider FOIA section 35 exemption – Formulation of government policy. On 10 February 2021 the Cabinet Office issued a further response stating the date of two meetings and advising that no further information was held.
7. Following a request for internal review on 10 April 2021 the Cabinet Office provided its review on 11 June 2021 confirming that an agenda and readout for each of the two meetings was held. It disclosed the two agendas and the readout of 20 March 2020 with redactions for section 41- Information provided in confidence. The Cabinet Office also withheld a readout of the meeting of 2 July 2020 in reliance of the exemptions at FOIA sections 35(1)(a) and (d) – Formulation of government policy and section 41(1).

## Scope of the case

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8. The complainant contacted the Commissioner on 8 September 2021 to complain about the way their request for information had been handled. They explained their concerns due to the Cabinet Office's changes in position, whether it had, at the time of the internal review, thoroughly searched for any information in the scope of their request. They also explained:

"There shouldn't be an expectation of confidentiality when there's a freedom of information act in place. It would make the act worthless if lobbyists and the lobbied can just agree to expect confidentiality and therefore withdraw themselves from its provisions. - Previous judgements have been very sceptical of so called 'chilling effects' of disclosure around policy developments."

9. The Commissioner considers the scope of his investigation is the application of FOIA section 41(1), sections 35(1)(a) and (d) to the withheld information.

## **Reasons for decision**

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10. Section 1 of FOIA covers the general right of access to information. In this case the complainant expressed concern regarding the Cabinet Office's searches for information. In order to address this the Commissioner asked the Cabinet Office to explain its searches.
11. It advised the Commissioner that searches were undertaken of the records held by the PM Private Office Support Team (PMPOST) and the No10 Business team. The initial search located information in relation to the telephone call of 20 March 2020 referenced in the request.
12. It explained:

"When the request was received on 10 December 2020, the time period stated in the request for the March meeting was sufficiently far back that the Prime Minister's Office (PMO) could not rely on live email records at the time - so a simple Outlook search would not suffice. To find the requested information held at the time of the request, the PMO:

  - searched the Prime Minister's Office's formal, official records as managed by PMPOST.
  - searched the correspondence database managed by the Direct Communications Unit. This would encompass external correspondence with Members of Parliament, members of the public, and (relevant to this case) businesses etc.
  - asked the No.10 Business Team in the Prime Minister's Office to check any locally managed records, including hard copy records that may include printed content that was once contained in an electronic communication, held in relation to their team's work."
13. These searches identified the agenda and readout for the call on 20 March 2020 and a meeting of 2 July 2020 at which a representative of McDonalds was present.
14. The Commissioner agrees with the Cabinet Office that given these searches identified the meeting of 2 July 2020 at which a representative of McDonalds was present, it is reasonable to conclude that the searches conducted would have confirmed the existence of any other meetings in the scope of the request.

**Section 41(1) – Information provided in confidence**

15. Section 41 states:

"Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

16. In order for this exemption to be engaged both parts (a) and (b) must be met. Part (a) requires that the requested information must have been given to the public authority by another person. In this context the term 'person' means 'legal person', an individual, company, another public authority or any other type of legal entity.

**Was the information obtained from any other person?**

16. The Cabinet Office explained that the readout of the call of 20 March 2020 was redacted in reliance of section 41(1) and gave its view that the exemption applied to "all the withheld information". All the withheld information comprises the redactions to the 20 March 2020 readout and the complete readout of the meeting of 2 July 2020.

17. The Commissioner understands that the Cabinet Office considers that the information was provided in confidence to the Prime Minister's Office. This suggests that any remarks from the Prime Minister or his secretaries of state contained in the readout comprise information from third parties. The Commissioner does not accept this premise.

18. The Commissioner considers that the information reflecting the comments of the companies attending the meeting comprises information from other persons.

19. The Commissioner is satisfied that the withheld information, excluding the first three sections of the readout of 2 July 2020, meets the requirement of section 41(1)(a).

**Would disclosure constitute an actionable breach of confidence?**

20. For section 41 to apply, the public authority must also be able to demonstrate that disclosure of the information could lead to an actionable breach of confidence. This means that not only must disclosure lead to a breach of a duty of confidence, but it must also be an actionable breach.

21. The test for a breach of confidence was first set out in the High Court case of *Coco v A N Clark (Engineers) Limited* [1968] FSR 415. The Court considered that, in order to bring an action for a breach of confidence, three elements would need to be established:

- the information must have the necessary quality of confidence,
- it must have been imparted in circumstances importing an obligation of confidence, and
- there must have been an unauthorised use of the information to the detriment of the confider.

22. Information will have the necessary quality of confidence if it is more than trivial, and is not otherwise accessible.

23. The Cabinet Office explained:

“The meeting of 2 July 2020 was conducted with an expectation of confidence on all parties. Attendees provided the Prime Minister, the Secretary of State for Business, Energy and Industrial Strategy, and the Secretary of State for Health and Social Care with candid feedback on the challenges posed by the Covid-19 pandemic, and on their recovery from the initial period of restrictions.”

24. It added:

“It is important to the participants that the information they provided is kept confidential. By being given assurances, information can be provided by participants without the concern that the information they provide will be subject to close scrutiny in the public sphere.

We contend that the information within the scope of the request is evidently more than trivial. It is also not otherwise accessible to those who did not take part in the roundtable.”

25. Regarding the second bullet point of paragraph 21, the Cabinet Office explained:

“The information was communicated in circumstances importing an obligation of confidence. The roundtable took place to assist the Prime Minister and Ministers in understanding different views on how to unlock the economy while keeping the public safe. The participants have a legitimate expectation that the information they provided will be held in confidence. They reasonably expect that the information they provided is not placed in the public domain.”

26. The third point of the test concerns detriment to the confider by an unauthorised disclosure. In consideration of the third criterion, the Cabinet Office explained:

"We are confident that there would be detriment to the participants who provided their candid views in the roundtable if that information were to be disclosed. In this context, detriment need only be to the extent that an individual is shown the information that the person to whom the duty is owed would not want to be seen. The participants would have no reasonable expectation of this, and disclosure would be a breach of their confidence."

27. The Commissioner accepts that the requested information is not trivial nor is it accessible. The Commissioner's guidance<sup>1</sup> explains that the information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential. The Cabinet Office has stated at paragraph 24 above the importance of confidentiality to the participants of the call of 20 March 2020 and the meeting of 2 July 2020. The Commissioner has seen the information and accepts this premise.
28. Turning to the second criterion of the test, the Commissioner considers that calls and meetings with the Prime Minister and Secretaries of State to discuss significant matters regarding the economy and safety of the public carry an implicit expectation of confidentiality. He is therefore satisfied that the information was provided in circumstances importing an obligation of confidence.
29. In considering the third criterion the Commissioner notes that although Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 included consideration of the 'detriment' test, it left open the question of whether detriment to the confider is a necessary prerequisite in every breach of confidence case. In this case the Cabinet Office states that it is confident that there would be detriment to the participants. The Commissioner is not so certain, however, he is persuaded to accept that the participants would have had no expectation of disclosure of their views.
30. The final element for engaging section 41 is whether an action for breach of confidence is likely to succeed. Section 41 is an absolute

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

exemption and therefore not subject to the conventional public interest test under section 2 of the FOIA. However, a public authority must carry out a test to determine whether it would have a public interest defence for the breach of confidence. Case law on the common law of confidence suggests that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence.

31. Therefore the Commissioner has considered whether there would be a public interest defence available if the Cabinet Office disclosed the withheld information.
32. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. However, he is also aware of the public interest in transparency and disclosure of confidential information where there is an overriding public interest which provides a defence to an action for breach of confidentiality.
33. Consequently the Commissioner must now consider whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
34. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure (in respect of any defence in that regard) outweighs the public interest in maintaining the confidence.
35. The Cabinet Office acknowledged that there is a public interest defence to an action for breach of confidence. However, it went on to explain that it is satisfied that it could not rely on a defence that an overriding public interest justified breaching its duty of confidence. It stated:  
  
"We note that the courts have presumed in favour of maintaining confidences and that this can only be superseded by an overriding public interest in disclosure, such as the revelation of iniquity, fraud or a necessity to protect the public from harm. Although other public interest factors may justify a breach of confidence, those referred to are the conventional public interests which have been accepted as defences by the courts. The information within scope does not reveal any of those things."
36. The complainant argued that there is a strong public interest in disclosing information about those seeking to lobby or influence government policy.

37. The Cabinet Office explained its view that the withheld information does not show any evidence that the participants were seeking to lobby the Government or to influence government policy. The Commissioner has considered the withheld information and agrees that there is no specific evidence of participants attempting to influence policy.
38. The Cabinet Office determined that the public interest in justifying a breach of confidence is insufficient to override the presumption in favour of maintaining confidences.
39. In the Commissioner's view, disclosure of the information, which he considers to be confidential, would provide some insight into the views and actions of the contributing participant companies. However, given the strength of the public interest in maintaining confidences, and taking into account the specific circumstances of this case, the Commissioner is not persuaded that there is a public interest defence to the disclosure of the information pertaining to the companies attending the call and the meeting, should the Cabinet Office be subject to such an action for breach of confidence. He therefore concludes that the public interest in maintaining confidentiality should prevail.
40. The Commissioner's decision is that the withheld information, excluding that identified in paragraph 19, is exempt in reliance of section 41(1). As the Commissioner has decided that first three sections of the readout of 2 July 2020 do not meet the requirement of section 41(1)(a) he will go on to consider the Cabinet Office's application of sections 35(1)(a) and (d) to the same information.

### **Section 35 – Formulation of government policy**

41. Section 35(1) states:

"(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to:

(a) the formulation or development of government policy.

(d) the operation of any Ministerial private office."

42. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.

### **Section 35(1)(a)**

43. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent



disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance<sup>2</sup> advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

44. The Cabinet Office explained that the withheld information relates to government policy, that being the Government's response to the coronavirus pandemic in the UK. It maintains that all the individual responses (for example, lockdown, testing, vaccine rollout and booster vaccinations) are part of this ongoing policy to control the virus and form part of a single, continual Government response to the coronavirus pandemic that had developed since COVID-19 cases began to appear in the UK.
45. Furthermore it explained that the UK population has at various times since March 2020 been subject to restrictions as a result of the COVID-19 virus and the policy of controlling the virus was still being developed at the time of the request. It considers that there is no particular point at which it could be said that the policy making process had concluded by the time of the request.
46. The Cabinet Office cited the following as evidence of this on-going policy making:
  - 11 May 2020 the Prime Minister made a statement to Parliament on the next steps.
  - 30 May 2020 the Secretary of State for Digital, Culture, Media and Sport made an announcement on resuming sport 'behind closed doors'.
  - 31 October 2020 the Prime Minister announced new national restrictions.
  - 4 January 2021 the Prime Minister announced a national lockdown
47. In its view there is a clear relationship between the content of the information withheld and the protection of the formulation and development of policy.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

48. The Commissioner is satisfied that the withheld information relates to government policy for the reasons above, and on that basis he has concluded that section 35(1)(a) was correctly engaged.

**Public interest test**

49. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
50. In requesting an internal review the complainant provided the following view:

"a) The information relates to the exchange of factual information which may have influenced policy decisions about occupational safety and public health in the operation of the hospitality sector during the COVID-19 pandemic with a clear and widespread impact on public health and welfare.

b) The information is also connected to unusually large fiscal support for the hospitality sector which McDonald's benefitted from. There is a public interest in scrutinising the content of discussions between the company and government to reassure the public that no undue influence was present.

Withholding the minutes of these meetings under Section 35 in order to protect the policymaking process is not credibly in the Public Interest where the major policy decisions these meetings refer to have long since been taken and implemented and been superseded by subsequent decisions. A public interest in favour of disclosure exists to enable scrutiny of the relationship between business and government in the initial policy making cycles of the pandemic."

51. The Cabinet Office acknowledged the public interest in openness and that the decisions taken by ministers "may have a significant impact on the lives of citizens." It acknowledged that there is a public interest in how the government manages the development of policy, in this case around the re-opening of businesses in summer 2020 during the pandemic. It added that there is a wider public interest in the public being well-informed about the preparations for the "Enjoy Summer Safely" initiative.

52. The Cabinet Office went on to explain its view on maintaining the exemption:

"While the public interest in maintaining the exemption in section 35(1)(a) may diminish over time, at the time of the request the

pandemic was not over and the requested information was relatively recent. There was a need for the safe space within which to make properly considered policy decisions taking into account the views of major UK businesses representing a range of sectors.

The Cabinet Office considers that there is a strong public interest in maintaining the sovereignty of the process of policy formulation. Government ministers are rightly answerable for the decisions they take, not for the options they consider or the other influences on the policy formulation process. Disclosure of the requested information would be likely to invite judgements about whether the preparations for summer 2020 reopening were sufficient. We consider that the withheld information that relates to the ongoing policy relating to the pandemic is in the safe space protected by section 35(1)(a), and the integrity of the policy-making process contributes to effective decision-making."

53. The Cabinet Office concluded that the public interest lies in favour of maintaining the exemption in order to protect the policy process. It could see:

"no clear, compelling and specific justification that outweighs the obvious interest in protecting the safe space within which ministers are briefed on matters relating to policy under development, particularly where disclosure would be to damage the safe space."

### **Balance of the public interest**

54. The Commissioner has considered the arguments advanced by both parties in order to reach his conclusion. He understands the complainant's view that the protection of the policymaking process carries less importance than the public being informed on the discussions taking place and the content of contributions which may have influenced policy decisions about occupational safety and public health in the operation of the hospitality sector during the COVID-19 pandemic.
55. The Commissioner also understands the complainant's view that the content of the discussions related to the summer of 2020, as indicated by the title of the roundtable "Enjoy Summer Safely" and therefore the policy formulation and development would have been implemented by the time of their request on 10 December 2020.
56. The Commissioner explained in paragraph 43 his view on the application of section 35(1)(a) and the importance of a safe space to consider policy options. He accepts that at the time of the request the pandemic was not over and therefore the Government's over-arching policy on handling the pandemic continued to develop.

57. Notwithstanding this the Commissioner considers that the public interest in understanding the Government's handling of the pandemic and the policy formulation and development to achieve that, including the input from third parties, carries a very significant weight. Scrutiny of consultations relating to policy concerning the health and safety of the population has paramount importance.
58. He does not consider that disclosure would undermine the Government's right to determine how to formulate and develop policy relating to exiting the pandemic. He considers the Cabinet Office's view in paragraph 52 to weigh in favour of the public interest in disclosure:
- "Disclosure of the requested information would be likely to invite judgements about whether the preparations for summer 2020 reopening were sufficient."
59. The Commissioner believes that disclosure would serve the public interest by providing information on the Government's considerations before it announced policy that affected the UK population including significant numbers of vulnerable people. There has been significant debate around the merits and impact of policy concerning the hospitality sector. He does not accept that disclosure would have been likely to have a detrimental impact on the development of policies relating to exiting the pandemic, including how and when to engage with major business sectors. His deliberations have taken into account the unprecedented circumstances of the world pandemic and the public interest in understanding decisions taken by government in response to those circumstances. He has concluded that in the circumstances of this case the public interest favours disclosure of the information.

**Section 35(1)(d)**

60. 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."
61. The Commissioner's guidance also confirms that this exemption is rarely used. However, the Commissioner considers that the purpose of section 35(1)(d) is to ensure that ministerial business is managed effectively and efficiently.
62. The guidance states:

"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.

The upshot of this is that this 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.

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."

63. The Cabinet Office 's view is that section 35(1)(d) applies to the readout of the roundtable of 2 July 2020 because it was created by the Prime Minister's private office. It explained:

"The readout was prepared by officials, such readouts forming part of how the office is run. They are evidence of the support provided to the Prime Minister. As such, the information relates to the routine administrative and management processes that are required to ensure the Prime Minister can carry out their duties effectively and efficiently. Readouts are an important management process."

64. Although the readout was produced by a member of the private office the readout itself is not in any way about the operation of the private office. The focus of the readout is ministerial business, i.e. the Prime Minister and Secretaries of States' meeting with the hospitality sector rather than the administrative support required for that meeting to take place. The Commissioner does not consider the readout to be evidence of support to the Prime Minister.
65. On this basis the Commissioner does not consider that section 35(1)(d) FOIA was correctly engaged by the Cabinet Office. As the Commissioner does not consider the exemption is engaged, it is not necessary to go on to consider the public interest test. The information withheld under this exemption should therefore be disclosed.

## Right of appeal

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

67. 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.

68. 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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**