

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2023

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

Decision (including any steps ordered)

1. The complainant has requested that the Cabinet Office provide copies of documents containing their personal data. The Cabinet Office had already provided the complainant's personal data itself under the Data Protection Act 2018 (the DPA). It provided some information to the complainant under FOIA and relied on section 36(2) (prejudice to the effective conduct of public affairs) and section 40(2) to withhold the remainder.
2. The Commissioner's decision is that the exemptions at section 36(2)(b)(ii) and (ii) are engaged in respect of the withheld information. However he finds that the public interest in maintaining these exemptions does not outweigh the public interest in disclosure. The Commissioner finds that the exemption at section 36(2)(c) is not engaged. The Commissioner finds that the Cabinet Office does not hold any further information falling within the scope of the request. The Commissioner also finds that the Cabinet Office failed to comply with section 17(1) of FOIA in that it issued its refusal notice outside the statutory time for compliance.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant, with the exception of information withheld under section 40(2) of 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 of FOIA and may be dealt with as a contempt of court.

Request and response

5. On 12 May 2021 the complainant wrote to the Cabinet Office and requested the following information:

'Please provide me with copies of all personal information held about me by and within the Cabinet Office, in particular from 18/12/2018 to date.

Please provide me with copies of any and all electronic and written correspondence and communication and FOI round-robin lists referring to me, in particular from 18/12/2018 to date.

Please provide me with copies of any and all electronic and written correspondence to, or from, the Cabinet Office referring to me or to any of my FOI requests, in particular from 18/12/2018 to date.

Please provide me in particular with copies of any and all electronic and written correspondence to, or from, the Cabinet Office referring to me or any FOI requests received from email addresses from which I have sent email addresses during my career: (email addresses provided)'

6. The Cabinet Office treated the request as a subject access request (SAR) under the Data Protection Act 2018 (the DPA) and the UK General Data Protection Regulation (UK GDPR).¹ It provided a response on 9 July 2021. In the response the Cabinet Office provided the complainant with his personal information extracted from a number of documents. It did not provide copies of the documents themselves.

7. On 9 July the complainant wrote to the Cabinet Office as follows:

'This response however contains a list and brief description of what the Cabinet Office holds whereas I asked for copies and any and all electronic or written correspondence. Can you please provide copies of the emails described here please to fulfil my original request?'

8. On 13 July 2021 the Cabinet Office responded and said:

'Under GDPR your right of access does not entitle you to receive full copies of original documents – only your personal information contained in those documents. We would have to process your

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/right-of-access/>

request for that information under the Freedom of Information Act 2000. Do you wish for us to proceed with your request on that basis?'

9. On 13 July 2021 the complainant confirmed that they would like the request processed under FOIA.
10. On 9 September 2021 the Cabinet Office wrote to the complainant and advised:

'I can confirm that the Cabinet Office holds information relevant to your request but I must advise you that I must extend the time limit for responding to your request. It is occasionally necessary to extend the 20 working day time limit for issuing a response.

Information you have requested is exempt under Section 36 of the Act, which relates to information that would bring prejudice to the effective conduct of public affairs. Section 36 is subject to a public interest test and the Cabinet Office has not yet reached a decision on whether the balance of the public interest favours disclosure of this information.

By virtue of section 10(3), when public authorities have to consider the balance of the public interest in relation to a request, they do not have to comply with the request until such time as is reasonable in the circumstances. Owing to the need to consider, in all the circumstances of the case, where the balance of the public interest lies in relation to your request, we will not be able to respond to your request in full within 20 working days. I hope to let you have a response by 07/10/2021. If I can reply before that date, I shall do so. If I need more time to consider the balance of the public interest, I shall write again to let you know.'

11. On 16 September 2021 the Cabinet Office provided its response. In the response the Cabinet Office stated that the information requested was held and the majority had been provided in the response to the SAR under the DPA.
12. It further stated that some information (ie information which the Cabinet Office did not consider to be the complainant's personal data) had been withheld under the exemptions at sections 36(2)(b)(i) and (ii), section 36(2)(c) (prejudice to the effective conduct of public affairs) and section 40(2) (third party personal data) of FOIA.
13. On 4 October 2021 the complainant requested an internal review.

14. On 8 November 2021 the Cabinet Office provided a response to the internal review in which it maintained its original position.

Scope of the case

15. The complainant contacted the Commissioner on 5 October 2021 and 16 November 2021 to complain about the way his requests for information had been handled. In respect of the SAR response the complainant was dissatisfied that the Cabinet Office had extracted his personal information from documents. He argued that the Cabinet Office ought to have provided him with copies of the actual documents.
16. The Commissioner has dealt with the complainant's data protection complaint separately because complaints about the handling of an individual's personal data fall outside the scope of this decision notice. Therefore the scope of the Commissioner's decision in respect of the FOIA complaint is limited to the requested information that does not comprise the complainant's personal data.
17. In respect of the FOIA response the complainant disagreed with the Cabinet Office's application of sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA. He was also concerned that the Cabinet Office may have failed to identify all of the information falling within the scope of his request.
18. The complainant confirmed to the Commissioner that he did not seek to challenge the Cabinet Office's reliance on the exemption at section 40(2). He agreed that third party personal information could be redacted.
19. Accordingly, the scope of the Commissioner's investigation is to determine whether the Cabinet Office holds any further information that falls within the scope of the FOIA request. In respect of the withheld information, the Commissioner has considered whether the Cabinet Office was entitled to rely on the exemptions at section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) of FOIA.

Reasons for decision

Does the Cabinet Office hold any further information relevant to the request?

20. As set out above, the complainant expressed concern that the Cabinet Office had failed to identify all of the information falling within the scope of his request.

21. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly he will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps he could require the public authority to take if the complaint were upheld.
22. In this case the complainant felt that the time period specified in his request suggested that further information may be held by the Cabinet Office.
23. The Cabinet Office interpreted this part of the complaint as an attempt to challenge the previous disclosure of information to the complainant in response to his SAR. The Cabinet Office therefore considered that it did not fall to be investigated as part of a complaint under FOIA.
24. The Commissioner is mindful that the complainant's request under FOIA arose from a SAR. The information requested under FOIA comprises documents containing the complainant's personal data, or referring to the complainant, with the complainant's personal data redacted. The information that falls within the scope of the FOIA request does so simply by virtue of the fact that it was held alongside information relating to the complainant. The Commissioner can confirm that he has inspected all of the information in an unredacted format.
25. The Commissioner further observes that the complainant has received his own personal data to the extent that he is entitled to access it under the DPA. He has also received the majority of the information contained in the documents which is not his personal data. The Commissioner agrees with the Cabinet Office that it is not his role to investigate whether the Cabinet Office correctly identified all of the documents containing the complainant's personal data, since this would fall under the complaints handling provisions of the DPA. The Cabinet Office has identified the documents as relevant to the SAR, and the complainant has requested those specific documents under FOIA.
26. For the reasons set out above the Commissioner is satisfied that the Cabinet Office does not hold further information relevant to the FOIA request.

Section 36: prejudice to the effective conduct of public affairs

27. Section 36(2) of FOIA provides that information is exempt if in the reasonable opinion of a qualified person (QP), disclosure of the information:
- (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 otherwise be likely to prejudice, the effective conduct of public affairs.
28. Section 36(5) sets out who may act as the QP in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the QP.²
29. The Commissioner has published guidance on section 36³ which explains that the QP's opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.
30. The Cabinet Office confirmed that the QP in this case was the then Minister of State for the Constitution and Devolution, the Rt Hon Chloe Smith MP. It provided the Commissioner with copies of its submissions to the QP, which included copies of the requested information. It also included a copy of the opinion provided by the QP.
31. The Commissioner is satisfied that the Minister of State for the Constitution and Devolution is authorised as the QP under section 36(5) of FOIA and that they gave their opinion that the exemptions were engaged.
32. In order to engage a prejudice based exemption such as section 36, there must be the likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met:

² Defined at section 8(1) of the Ministers of the Crown Act 1975 as "the holder of an office in [His] Majesty's Government in the United Kingdom".

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

- first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
 - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
33. In this case the submission provided to the QP advised that disclosure of the requested information would be likely to impact on "safe space" and would be likely to dissuade officials from providing thorough, free and frank advice to ministers. It also advised that disclosure would have a "chilling effect" on future meetings.
34. The submission explained that Press Office colleagues require the space to be able to express their views candidly and in this case it is evident that officials contributing in this correspondence have assumed their discussions were taking place in a "safe space" with the expectation this would not be shared. Equally the submission stated that the requested information is considered to be internal correspondence and as such carries an expectation of confidentiality.
35. The complainant argued to the Commissioner that the exemptions were not engaged, because the Cabinet Office had only provided generic arguments that did not explain its reasoning. The complainant suggested that the claim of prejudice was speculative and remote.
36. The Commissioner accepts that it was reasonable for the QP to consider that there was a need to protect the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The Commissioner also accepts that it is reasonable to argue that officials in the press office should have a "safe space" to speak candidly, and specifically in this case, discuss the relative merits of interview requests submitted by various journalists, with the expectation it would not be released. He considers it reasonable for officials to expect that such internal correspondence would not be disclosed into the public domain. If officials did not believe their correspondence would be protected from public scrutiny, it is reasonable to assume that they may be less candid in future, which would be likely

to have a chilling effect on the quality of discussion and decision making.

37. Therefore the Commissioner accepts that the exemptions at section 36(2)(b)(i) and section 36(2)(b)(ii) are engaged with respect to the withheld information. The Commissioner is not entirely persuaded that the Cabinet Office has met the threshold for the higher likelihood of prejudice, ie that prejudice would be more likely than not. He is however prepared to accept that section 36(2)(b)(i) and section 36(2)(b)(ii) are engaged on the lower level of prejudice, ie that prejudice would be likely to occur, but is not necessarily more likely than not.
38. The Commissioner is mindful that section 36(2)(c) may only be engaged to the extent that the public authority is able to describe a prejudicial effect that does not fall under the other subsections of section 36. In the Commissioner's opinion the arguments put forward by the Cabinet Office in respect of section 36(2)(c) relate instead to sections 36(2)(b)(i) and section 36(2)(b)(ii). Accordingly the Commissioner is not satisfied that section 36(2)(c) is engaged in respect of the withheld information.
39. Section 36(2)(b)(i) and section 36(2)(b)(ii) provide qualified exemptions. The fact that anticipated prejudice has been identified and accepted is not in itself conclusive evidence that information should be withheld. Rather, the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.
40. The Cabinet Office provided the Commissioner with combined arguments in respect of section 36(2)(b)(i) and section 36(2)(b)(ii).

Public interest in maintaining the exemptions

41. The Cabinet Office set out that Ministers and officials need to be able to think through all the implications of particular options. They need to be able to undertake rigorous and candid assessments of the risks involved in certain considerations being released. The Cabinet Office argued that disclosure of the withheld information would adversely affect that the ability of officials to discuss options freely and frankly.
42. The Cabinet Office also argued that disclosure would have a prejudicial effect on relationships between the Cabinet office and external parties such as other government departments. It set out that future correspondence in similar situations would be written with more circumspection, making such advice, opinion or discussion less frank and less useful.

Public interest in disclosure

43. The Cabinet Office argued that there is a public interest in the public being confident that decisions are taken on the basis of the best available information. There is a general public interest in a better understanding of how Government deliberates issues, exchanges views and formulates advice. Having a better understanding of this leads to increased trust in Government and better engagement of the public with the policy making process.
44. In this respect the Cabinet Office acknowledged that the public interest in correspondence on queries from the Press would be especially relevant as the Press reports on Government decisions and actions.
45. The complainant pointed out that his request was for information relating to the way the Cabinet Office had discussed press queries that he had sent to other government departments. He pointed out that the Cabinet Office had been criticised for operating a "Clearing House" which played a role in handling FOIA requests that had been submitted to other government departments by journalists.
46. The complainant argued that disclosure of the requested information would assist the public in understanding how the Cabinet Office came to be involved in press queries to other departments. He also argued that it would inform the public as to the nature of the Cabinet Office's involvement.

Balance of the public interest

47. Section 36(2)(b)(i) and section 36(2)(b)(ii) provide qualified exemptions. The fact that prejudice has been identified and accepted is not in itself conclusive evidence that information should be withheld. Rather, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.
48. The Commissioner accepts that there is a legitimate public interest in disclosure of the withheld information. He is mindful that the Public Administration and Constitutional Affairs Committee held an inquiry into the Clearing House in 2021, albeit that its report was not published until April 2022.⁴ The Commissioner accepts that there was significant public debate around the Clearing House at the time of the complainant's request, and disclosure of the requested information would go towards informing this debate.

⁴ <https://publications.parliament.uk/pa/cm5802/cmselect/cmpubadm/505/report.html>

49. The Commissioner also accepts that there is a legitimate public interest in maintaining the exemptions at section 36(2)(b)(i) and section 36(2)(b)(ii). However, having inspected the withheld information, he does not consider that the Cabinet Office has provided sufficiently robust public interest arguments to outweigh the public interest in disclosure. The Cabinet Office provided generic arguments, but did not explain in sufficient detail how those arguments should be considered persuasive with regard to the withheld information itself.
50. As with any case, the Commissioner can only make his decision on the basis of the information provided to him. It is therefore essential that a public authority provide detailed and specific arguments in support of any decision to refuse a request, otherwise the Commissioner is more likely to order the disclosure of information. This includes details of the public interest test in respect of any exemptions claimed.
51. For the reasons set out above, although he does not dismiss the Cabinet Office's arguments entirely, the Commissioner cannot attach significant weight to them in this case. Consequently the Commissioner is not persuaded that the Cabinet Office has demonstrated that the public interest in maintaining the exemptions actually outweighs the public interest in disclosure.
52. Therefore the Commissioner finds that the requested information ought to have been disclosed in response to the request, with the exception of the third party personal data, which the complainant has agreed may be redacted.

Procedural matters

Section 17(1): refusal notice

53. Section 17(1) of FOIA provides that a public authority wishing to refuse any part of a request must issue a refusal notice within the 20 day statutory time for compliance. That refusal notice must cite any exemptions relied on, and explain how they apply.
54. In this case the complainant wrote to the Cabinet Office on 9 July 2021 to request copies of the documents that contained information relevant to his SAR. The Cabinet Office issued a refusal notice on 9 September 2021. This was clearly outside the 20 day statutory time for compliance; therefore the Commissioner finds that the Cabinet Office failed to comply with section 17(1) of FOIA.

Right of appeal

55. 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

56. 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.

57. 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

**Sarah O’Cathain
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