

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

### **Decision notice**

**Date:** 22 May 2023

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

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

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1. The complainant submitted a request to the Cabinet Office seeking drafts of the Commission on Race and Ethnic Disparities' report that was published in March 2021. The Cabinet Office withheld the requested information on the basis of sections 36(2)(b)(i), (ii) and (c) (effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the requested information is exempt from disclosure on the basis of these exemptions and that the public interest favours withholding the information.
3. The Commissioner does not require any steps to be taken.

#### **Request and response**

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4. The complainant submitted the following request to the Cabinet Office on 25 April 2021:  

'I wish to see full copies of all draft versions of the report produced [by the] Commission on Race and Ethnic Disparities which was published in March 2021.'
5. The Cabinet Office contacted the complainant on 24 May 2021 and confirmed that it held information falling within the scope of his request

but explained that it considered this to be exempt from disclosure on the basis of section 36 (effective conduct of public affairs) of FOIA and that it needed additional time to consider the balance of the public interest test.

6. The Cabinet Office provided him with a substantive response to his request on 20 June 2021. It explained that it had concluded that the public interest favoured withholding the information on the basis of sections 36(2)(a), 36(2)(b)(i) and (ii) of FOIA.
7. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this response.
8. The Cabinet Office informed him of the outcome of the internal review on 22 December 2021. The internal review explained that it had concluded that sections 36(2)(b)(ii) and s36(2)(c) applied to the requested information and that the public interest favoured maintaining these exemptions.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 30 December 2021 in order to complain about the Cabinet Office's refusal to provide him with the information falling within the scope of his request. During the course of the Commissioner's investigation, the Cabinet Office confirmed that in addition to the exemptions cited in the internal review it also sought to rely on section 36(2)(b)(i).

### **Reasons for decision**

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#### **Section 36 – effective conduct of public affairs**

10. The sections of 36 which the Cabinet Office are seeking to rely on are as follows:

(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.'

11. In determining whether these sections are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
  - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.
12. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
13. With regard to the process of seeking this opinion, the Cabinet Office sought the opinion of the Minister for State on 22 November 2021 with regard to whether sections 36(2)(b)(i), (ii) and (c) of FOIA were engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'. The Commissioner is therefore satisfied that the Minister of State was an appropriate qualified person.
14. The qualified person was provided with a rationale as to why the exemptions could apply and copies of the withheld information. The qualified person provided their opinion that the exemptions were engaged on 8 December 2021. Whilst the rationale as to why the

exemptions apply is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).

15. Turning to the substance of the opinion, the qualified person argued that section 36(2)(b)(i) applied because disclosing parts of the information would be likely to inhibit the future free and frank provision of advice. This was because Commissioners, external stakeholders and officials require a safe space to exchange views regarding sensitive information. Furthermore, officials require the space to express themselves openly, honestly and completely, or to explore extreme options when providing their advice or giving their views as part of the process for independent Commissions.
16. With regard to section 36(2)(b)(ii), the qualified person argued that this applied because disclosing the withheld information would be likely to inhibit future free and frank exchanges of views for the purposes of deliberation. It was noted that the draft versions of the report contain free and frank views for the purposes of concluding the report and the Commission's work. The qualified person argued that a safe space for this sort of work was fundamental to this work and would be for any other similar Commission, report or inquiry. It was also noted that the report was only published in March 2021, therefore the information related to its drafting was still sensitive.
17. With regard to section 36(2)(c), the qualified person argued that disclosure of the withheld information would be likely to prejudice both the substance and implementation of the work of the Commission. This would occur as a result of:
  - Discouraging officials and independent Commissioners from engaging candidly with such work through fear of premature disclosures of sensitive information. In turn this would result in less effective, informed and useful publications by the Cabinet Office.
  - Distracting the Commission with unfair scrutiny and questions related to the drafted information rather than providing it with the space to publish its report and continue with its work which was a matter of public importance.
  - By generally harming the drafting process for this and similar reports.

- Causing confusion about the Commission's published conclusions in contrast to what was discussed in the safe space of the drafting process.
18. The Commissioner is satisfied that the qualified person's opinion was a reasonable one to come to. With regards to sections 36(2)(b)(i) and (ii), the Commissioner accepts that it is rational to argue that disclosure of draft versions of a report into a sensitive and potentially contentious subject, particularly so soon after the final version was published, would be likely to impinge on the candour of future deliberations, and provision of advice, involved in the production of similar reports in the future. With regard to section 36(2)(c) the Commissioner also accepts that it is reasonable to argue that disclosure of the drafting material, so soon after the final report was published, risks undermining the Commission's ability to focus on the matters set out in the final report, not least because of the controversy which surrounded the publication of the report (further details of which are highlighted by the complainant's submissions in respect of the public interest test below, see paragraph 21).
19. Sections 36(2)(b)(i), (ii) and (c) are therefore engaged.

#### Public interest test

20. Section 36 is a qualified exemption and in line with the requirements of section 2 of 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.

#### Public interest arguments in favour of disclosing the information

21. The complainant argued that there was a clear public interest in the disclosure of the requested information given that the report was mired in controversy following its publication and many of the organisations and individuals consulted alleged that the Commission had ignored their testimonies.<sup>1</sup> The complainant argued that access to draft copies of the report would enlighten the public as to how certain conclusions in the report were arrived at and if any individuals/organisations were ignored.

#### Public interest arguments in favour of maintaining the exemption

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<sup>1</sup> <https://www.theguardian.com/world/2021/apr/12/bodies-credited-in-uk-race-review-distance-themselves-from-findings>

22. With regard to the public interest in favour of maintaining sections 36(2)(b)(i) and (ii) the Cabinet Office argued that there is a strong public interest that the investigative work for such reports is undertaken both efficiently and completely and reaches conclusions which are not impaired by full exposure of the process which led to them.
23. The Cabinet Office argued that such an outcome is only possible if those participating in the investigative and drafting processes have the confidence that their views and advice will not be precipitately disclosed into the public domain. Investigations similar to that carried out by the Commission will benefit from this encouragement of free expression and there is a clear public interest in future independent investigations being carried out successfully and unimpaired by any reticence on the part of participants.
24. In order to support this position, the Cabinet Office's submissions to the Commissioner highlighted differences between the draft versions of the report and the final published version. The Cabinet Office noted that the drafting process gave expression to the thoughts and views of those who were drafting the report. The Cabinet Office explained that the drafts show how Commissioners and officials considered at the time what should be contained in the report and what should not; how the parts of the report should be expressed, and what should and should be given prominence. The Cabinet Office emphasised that it is a vital component of the drafting process that its participants should have the freedom to give expression to their views and advice through their drafting of text. In its view premature disclosure of such drafts would make those contributing to similar work in the future wary about giving expression to contentious views and test opinions amongst colleagues. The effect would be to discourage free drafting and to put pressure on those drafting that what they write should be the 'right' or 'final' version with little scope for dissenting opinions. The Cabinet Office argued that this inhibiting effect on deliberation on future inquiries and reports would be firmly against the public interest.
25. The Cabinet Office's submissions to the Commissioner also highlighted annotations or comments on the drafts that could be seen as potentially contentious comments. The Cabinet Office emphasised that such annotations were made purely for internal consumption and if those making them knew they would be disclosed prematurely (ie so soon after the final version of the report was published) then, as with the drafting of the content of the report itself, they would have been more guarded or reticent in their comments.
26. With regard to the public interest in relation to section 36(2)(c), the Cabinet Office argued that there was a considerable public interest in ensuring that focus remains on the report's legacy and the challenges it

has thrown up rather than the means by which the report was concluded. The Cabinet Office suggested that the appropriate time for the latter is in the future, when the requested information and its subject has declined in sensitivity. A premature disclosure now would only serve to undermine the implementation of outcomes recommended in the report. The public interest is not in favour of that outcome.

27. In further support of this position the Cabinet Office noted that although the work of the Commission has concluded, the legacy of its report is still highly relevant to the objectives of the Government. The Government's response to the Commission - Inclusive Britain - was published in March 2022. It sets out a comprehensive race action plan comprising 74 cross-government actions, which the Equality Hub is responsible for delivering.<sup>2</sup> The Cabinet Office argued that disclosure of the requested information would subject officials to scrutiny about the drafting process which would distract them from the Government's objectives in relation to the report's findings and delivering the Inclusive Britain action plan. Officials would become preoccupied with contextualising and explaining matters such as the process of drafting the report, how its conclusions were reached and the extent to which certain views were taken into account.
28. The Cabinet Office argued that many conclusions and unhelpful comparisons would be drawn between the published conclusions of the report and the views which were expressed during the investigation and drafting stages. Questions would inevitably be raised about why certain recommendations had not been carried through to the final published version of the report and why other recommendations were preferred. It would encourage people to raise questions about the judgement and motive of the stakeholders and officials concerned and would lead to questions about the drafting process. This would have the potential to cause confusion about the findings of the report and would undermine its status, an outcome which was clearly against the public interest.
29. The Cabinet Office explained that to illustrate how sensitive the matters explored by the Commission were (and remain), it emphasised the vitriol with which the Commissioners were subjected to in the aftermath of the publication of the report in March 2021. The Minister for Equalities referred in the House of Commons to the 'appalling abuse' that the Commissioners were subjected to, together with racialised attacks and death threats.<sup>3</sup> The Times reported that the Chairman of the

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<sup>2</sup> <https://www.gov.uk/government/publications/inclusive-britain-action-plan-government-response-to-the-commission-on-race-and-ethnic-disparities>

<sup>3</sup> HC Deb, vol 692, col 868, 20 April 2021

Commission, Dr Tony Sewell, had been 'likened on social media to Goebbels, Hitler's propaganda chief, and the Ku Klux Klan.'<sup>4</sup> The Cabinet Office explained that it was concerned that the disclosure of the requested information at a time when the subject matter is still sensitive would give rise to the risk of a revival of such vitriol. In its view this would clearly be unwelcome and it considered it self-evident that the public interest is in favour of restrained and respectable public debate around these important matters that does not descend into personal abuse.

30. Finally, the Cabinet Office noted the decision notice of the Commissioner in his investigation of a request handled by the University of Bristol (reference IC-185925-Z1J4) issued on 1 November 2022. In that case, the Commissioner ordered the disclosure of drafts of its report 'The Colston Statue: What next?'.<sup>5</sup>
31. The Cabinet Office noted that the view of the Commissioner (at paragraph 22) in that case that, when considering 'chilling effect' arguments, it must take into account the timing of the request, whether the issue is still live and the content and sensitivity or the information in question.
32. In this instance, the request was submitted on 12 April 2021, thirteen days following the publication of the report. Therefore, at that point the Cabinet Office stressed that the issues at stake were still emphatically alive. Furthermore, the Government's response to the report (Inclusive Britain) is an ongoing piece of work. In addition, as set out above, the Cabinet Office argued that it had highlighted the sensitivity of the information subject to the request.
33. The Cabinet Office noted in his decision notice, the Commissioner found (at paragraph 24) that:  
  
'Whilst the University has expressed concerns about 'contentious' comments within the drafts the Commissioner has not been able to identify any particular example and, more importantly, the University has also not identified them. Furthermore, the matter is no longer live - both reports had been published at the time that the request was made and the draft copies do not differ substantially or add anything new into the public domain. Neither do the draft comments.'

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<sup>4</sup> The Times, 2 April 2021

<sup>5</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022473/ic-185925-z1j4.pdf>



34. In contrast, the Cabinet Office argued that it had demonstrated the contentiousness of the information contained in the drafts of the report and the currency of the issue at stake.

Balance of the public interest

35. 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.
36. The Commissioner agrees about there is a particular public interest in openness and transparency in respect of the process regarding the publication of such a significant report. The Commissioner is of this view for two reasons. Firstly, the findings of report link directly to the government's future actions in respect of Inclusive Britain, described as a 'raft of measures that translate the findings from the Commission's report into concrete action.'<sup>6</sup> Given the importance of the report's findings in informing future government actions, the Commissioner considers there to be a notable interest in allowing the public to understand how the report was produced.
37. Secondly, and arguably more significantly, the Commissioner is very conscious of the reaction and the controversy which greeted the report's publication. This includes, as the complainant cited, not simply criticisms about the findings of the report, but also the process by which it was produced. The Commissioner accepts that in view of such criticisms of there is a strong case to be made for disclosure of the draft versions of the report. Disclosure of this information would address questions of its production and provide a direct insight into how its findings and conclusions were ultimately reached. The public interest in disclosure of the withheld information should not therefore be underestimated.
38. However, the Commissioner also considers that the Cabinet Office have advanced clear and compelling public interest arguments in favour of maintaining the exemptions cited. In respect of sections 36(2)(b)(i) and (ii), the Commissioner accepts that at the time of the request coming so

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<sup>6</sup> <https://www.gov.uk/government/publications/inclusive-britain-action-plan-government-response-to-the-commission-on-race-and-ethnic-disparities/inclusive-britain-government-response-to-the-commission-on-race-and-ethnic-disparities>

soon after the publication of the final version of the report, those who contributed to it would not have expected their contributions to be made public. As suggested, in reaching this view the Commissioner has taken into account the timing of the request and its proximity to the publication of the request. However, the Commissioner has also reached this position given the sensitive (and potentially contentious) nature of the subject matter of the report, as well as the candid and free and frank nature of drafts and contributions to the drafting process.

39. With regard to the severity, extent and frequency of such harm, the Commissioner accepts that disclosure of information at the time of the request would present a very significant risk of prejudicing deliberations and the provision of advice during the production of reports in the future by similar commissions or inquiries. That is to say, those involved in such work could reasonably draw the impression from disclosure of information in response to this request that any candid contributions they make to similar projects on a similarly sensitive topic could also be (effectively) immediately disclosed once that work was complete. The Commissioner considers that such an outcome would present a real risk of harming the effectiveness of inquiries or commissions on a range of subjects, an outcome which would be firmly against the public interest.
40. In respect of section 36(2)(c), the Commissioner wishes to emphasise that he does not consider the fact that information may be misunderstood, or lead to confusion, to be a reason in and of itself to withhold information under FOIA. It is open to public authorities to disclose information and contextualise such potentially 'misleading' or 'confusing' disclosures. However, in this case given the reaction to the report's publication, and taking into account the content of some of the withheld information, the Commissioner accepts that providing such contextualisation, and in particular dealing with the likely commentary (and criticism) between the drafts and final version, would be genuinely distracting at the time of the request. The Commissioner notes that at this point the Commission was still involved in publicising its report.<sup>7</sup> Moreover, the Commissioner accepts that disclosure of the information at the time of the request could also have proved distracting from the government's follow up work to the publication of the report, work which resulted in the Inclusive Britain announcement in March 2022. The Commissioner considers such outcomes to be firmly against the public interest.

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<sup>7</sup> <https://www.gov.uk/government/speeches/speech-by-the-chair-of-the-commission-on-race-and-ethnic-disparities-dr-tony-sewell-cbe>

41. Furthermore, in addition to this argument, the Commissioner accepts that there is a genuine and real risk that disclosure of the information at the time of the request could have resulted in further vitriol and extreme reactions being directed at those involved in the report's production. The Commissioner accepts that such an outcome would also be against the public interest.
42. Taking the above into account, and albeit by a relatively narrow margin, the Commissioner has concluded that the public interest favours maintaining the exemptions and withholding the information.

### **Other matters**

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43. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.<sup>8</sup> The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.<sup>9</sup>
44. In this case the complainant asked for an internal review on 20 June 2021 but this was not completed until 22 December 2021. The Commissioner notes that the Cabinet Office did apologise for this delay in its internal review response but did not explain why this had occurred.

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<sup>8</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>9</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

## Right of appeal

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45. 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)

46. 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.
47. 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 .....**

**Jonathan Slee**  
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