

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 July 2023

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

Decision (including any steps ordered)

1. The complainant has requested briefing materials prepared in response to an Urgent Question in Parliament. The Cabinet Office ("CO") refused to provide it citing section 36 (prejudice to the effective conduct of public affairs) as its basis for doing so. It upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 36 as its basis for refusing the request.
3. The Commissioner does not require further steps.

Request and response

4. On 11 January 2022, the complainant requested information of the following description:

"Please disclose an electronic copy of all briefing materials which were supplied to the Paymaster General in relation to the Urgent Question asked today (11 January) in the House of Commons."

5. On 8 February 2022 CO wrote to them to say it was considering the balance of public interest in respect of section 36 and needed to extend its time for response in accordance with section 10(3).
6. It told them it had a deadline for response to them of 8 March 2022. On 8 March 2022, it wrote to them again to explain that it needed to extend this deadline to 6 April 2022.
7. They contacted the Commissioner about this on 9 March 2022 having advised CO of their intention to do so. The Commissioner wrote to CO about this and it provided a response on 21 March 2022.
8. It refused to provide the information and sought to rely on section 36(2)(b)(i) of the Freedom of Information Act because, in the opinion of its qualified person, its disclosure would be likely to inhibit the free and frank provision of advice.
9. The complainant requested an internal review on 22 March 2022 on three grounds: timeliness of initial response; insufficient refusal notice because it did not name the qualified person or how they reached their view; and incorrect assessment of the public interest test.
10. CO responded on 21 April 2022. It apologised for the delay but did not appear to explain any mitigating circumstances for that delay. It upheld its use of section 36.

Scope of the case

11. The complainant contacted the Commissioner on 23 April 2022 having previously contacted him regarding the CO's delayed initial response.
12. The Commissioner considers that the scope of his investigation is to determine whether CO is entitled to rely on section 36 as its basis for refusing to provide the requested information. The Commissioner will also consider whether CO was permitted to extend its time for initial response in order to consider the balance of the public interest.

Reasons for decision

Background

13. On 11 January 2022, Rt Hon Angela Rayner MP tabled the following Urgent Question:

14. "To ask the Prime Minister if he will make a statement on reports of an event held in the Downing Street Garden on 20 May 2020".¹

Section 36(2)(b)(i) – Inhibition of free and frank advice

15. Section 36(2)(b)(i) of FOIA allows a public authority to withhold information whose disclosure would, or would be likely to, inhibit the free and frank provision of advice.
16. For a government department, the exemption will be engaged if, in the reasonable opinion of a minister of the Crown, disclosure would, or would be likely to, have these effects.
17. CO provided the Commissioner with a copy of a submission it had prepared for one of its ministers dated 31 January 2022, setting out the arguments both for and against engaging the exemption. It also provided a copy of an email, dated 16 February 2022, confirming that Lord True, the then Minister of State for the Cabinet Office had issued an opinion and what that opinion was. The Commissioner is satisfied that Lord True was entitled to provide such an opinion.
18. The Minister was asked to consider whether:
- "Releasing the briefing would be likely to decrease officials' ability to formulate similar briefings for ministers at pace in the future. They might spend time considering presentational aspects, leading to less comprehensive advice. Disclosing this information would, or would likely to, cause officials to be more reticent in expressing their advice. This would, in turn, risk both the substance and usefulness of that advice and the written record of it."
19. He was also asked to bear in mind that "The briefing material is of recent provenance, and was written at pace and with no expectation that it would become public."
20. The submission included the withheld information and specific reference to the detail of it. The Minister was also asked to consider the opposite position whereby "disclosure of the information would not give rise to any prejudicial effect and, as a result, officials would not be constrained from the free and frank provision of advice".
21. The opinion given on 22 February 2022 is as follows:

¹ <https://whatson.parliament.uk/event/cal37162>

"Having considered the submission dated 15 February 2022, it is my reasonable opinion that disclosure of the information in scope [this is then specified] would be likely to inhibit the free and frank provision of advice (section 36(2)(b)(i)). It is important that officials are able to advise ministers in a safe space. This enables the provision of free and frank advice. Disclosure would be likely to adversely affect the quality of the advice given in future".

22. It is not for the Commissioner to substitute his own opinion for that of Lord True. He does not need to share Lord True's opinion for it to be reasonable – providing that it identifies the applicable interest and is neither irrational nor absurd.
23. CO provided the Commissioner with a copy of the withheld information. Having considered the opinion in conjunction with the information, he accepts that it is neither irrational nor absurd to hold the view that its disclosure would be likely to lead to the consequences as described.
24. The Commissioner is therefore satisfied that section 36(b)(i) is engaged in relation to all the withheld information.
25. By virtue of section 2, section 36 is subject to a balance of public interest test. This means that CO can only maintain the exemption cited if the public interest in doing so outweighs the public interest in disclosure.

Public interest test

The complainant's arguments

26. The complainant argued that CO's public interest assessment was generic and did "not consider the public interest in the actual material I requested". They drew attention to the Urgent Question referred to in the request and said that it was "the focus of particularly intense and concerted public interest".
27. They observed that:

"the Cabinet Office appears to consider that the public interest in disclosure is solely about 'understanding how the Government responds to Urgent Questions'. This suggests that the Cabinet Office would seek to apply the exemption regardless of which Urgent Question the request related to. However, the public interest in the disclosure of the actual information I requested is not limited to a generic enhancement of public understanding in how the Government responds to Urgent Questions in general; rather, it is about a particular Urgent Question of the most intense, and ongoing, public interest. The Cabinet Office's

failure to address the actual Urgent Question to which my request related is reversible error”.

28. For obvious reasons, the complainant did not set out any argument in favour of maintaining the exemption, nor did the Commissioner expect them to.

Cabinet Office's argument

29. CO set out the following arguments in favour of disclosure.

- There is a public interest in citizens being confident that advice is given on the basis of the best available information.
- There is a public interest in transparency so as to allow public scrutiny of the manner in which the Government responds to Urgent Questions in Parliament.
- There is a public interest in knowing the nature of the advice provided to HM Paymaster General.

30. CO set out the following arguments in favour of maintaining the exemption.

- In order to be valuable to ministers and senior officials, advice must be free from any inhibitions that might preclude provision and recording of honest advice and expression of views and opinions.
- Disclosure of this information would be likely to be detrimental to the way in which officials provide advice in future, leading to a dilution of the advice and the written record of it.
- There is a strong public interest that the Minister responding to the Urgent Question was able to receive free and frank advice from senior officials in this specific case. We do not see any 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 articulated his response to Parliament in responding to the Urgent Question.

31. It then set out detail of the withheld information and drew attention to the fact that the statement made in response to the request was a matter of public record in Hansard – the record of the UK Parliament.

32. It explained the importance of being able to provide a full briefing to the Minister responding to an urgent question and the risk of inadequate briefing in future if officials were circumspect about the potential disclosure of that advice.

33. In summary, it argued 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".
34. It added that: "Releasing the briefing would be likely to decrease officials' ability to formulate similar briefings for ministers at pace in the future. They might spend time considering presentational aspects, leading to less comprehensive advice. Disclosing this information would, or would likely to, cause officials to be more reticent in expressing their advice. This would, in turn, risk both the substance and usefulness of that advice and the written record of it."
35. Finally, it said that "The briefing material was of recent provenance at the time of the request, and was written at pace and with no expectation that it would become public".

The Commissioner's decision

36. The Commissioner considers that the public interest in disclosure is strong. There is a clear public interest in understanding more about what briefings were given to government ministers about matters of such national importance. At the time of the request and subsequently, there has been considerable public discussion about whether or not (and if so, to what extent), elected representatives, their advisers and government officials were breaking rules limiting social interaction during the Covid-19 pandemic lockdown. As is widely known, this has been the matter of police investigation as well as an internal investigation.
37. There is a public interest in knowing the extent to which officials may or may have not known about the (now confirmed) contraventions and what briefings they were giving to ministers who were answering questions in parliament about these matters. Disclosure in this case would clearly serve that public interest.
38. The Commissioner has considered the points raised by CO in favour of maintaining the exemption and has concluded, by a narrow margin, that they carry greater weight. In reaching this view, when assessing those points in the circumstances of this case he has given particular weight to the fact that the information was, at the time of the request, recently created. However, the Commissioner may have reached a different view had the information been older at the time of the request given the strong public interest in disclosure.

39. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.

Procedural matters

40. A public authority relying on an exemption to withhold information is usually required to provide the requester with a refusal notice specifying any exemptions that are being relied upon. This should usually be done within 20 working days.
41. However, when an exemption involves a public interest test, the public authority can delay issuing its substantive refusal notice if it needs additional time to consider the balance of the public interest. The legislation says that this can be delayed "until such time as is reasonable in the circumstances", however the Code of Practice under section 45 of FOIA² states that best practice is for such an extension to generally be no longer than an additional 20 working days.
42. In this case CO took 50 working days to issue its substantive refusal notice (though it did provide holding responses).
43. The Commissioner also notes that CO wrote to the complainant on 8 February 2022 to say that it needed further time to consider the balance of public interest in respect of section 36. However, it was not in a position to make such a statement in accordance with FOIA given that it had not received the QP's opinion by that date.
44. Given that section 36 cannot be engaged until a minister has provided an opinion, CO could not have been in a position to formally notify the complainant that it was considering the balance of the public interest prior to that date. The Commissioner therefore finds that the public authority breached section 17 of FOIA in this aspect of its response.

Right of appeal

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

Website: 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

Alexander Ganotis
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