

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2023

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information from the Cabinet Office about the results from a "happiness machine" used to survey staff at Number 10 Downing Street and the Cabinet Office. The Cabinet Office withheld the requested information citing section 36(2)(b)(ii) of FOIA (prejudice to effective conduct of public affairs – inhibit the free and frank exchange of views for the purposes of deliberation) as its basis for doing so.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 36(2)(b)(ii) to refuse to provide the requested information.
3. The Commissioner does not require the Cabinet Office to take any steps.

Request and response

4. On 1 November 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:

"In June this year it was reported that Happiness Machines had been installed in Number 10 Downing Street and the Cabinet Office. (...)

Please can you provide me with the results / summary of the Happiness Machine data to date. Please present the data split up by calendar day.”

5. The Cabinet Office responded on 30 December 2022. It withheld the requested information citing section 36(2)(b)(ii) of FOIA as its basis for doing so. It upheld this position at internal review.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

6. Section 36(2) of FOIA states:

“(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,

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

7. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
8. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring, but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against.
9. In this instance, the Cabinet Office has said that it is relying upon section 36(2)(b)(ii) as its basis for withholding the requested information. The Commissioner’s analysis will therefore consider whether disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation.

The withheld information -

10. For a period of time in 2022, feedback was captured from staff at 10 Downing Street, in response to the question, "how is work today?". Staff could select either a happy, neutral/okay or sad face. The feedback was collected on tablets placed around the offices of 10 Downing Street and via the staff intranet. Once a selection was made, the software provided an option for the staff member to give further feedback in text format. The initiative was discontinued in September 2022.
11. The withheld information consists of a spreadsheet comprising the number of happy/okay/sad responses on each date as well as how many responses were provided via the tablets and on the intranet for each date.
12. Although the staff could leave comments as well as a rating, at the time of the request, the comments were no longer held by the Cabinet Office. This is because the responses were not retained beyond the end of the initiative in September 2022. The Cabinet Office has stated that it only held the information about the ratings at the time of the request because these had been requested in an earlier FOI request (of which the comments were not in scope). Although the information about the ratings was held for the purposes of handling the previous FOI request, the Commissioner has assumed they were not disclosed in response to the previous request given the Cabinet Office's position regarding the prejudice that would be likely to result from disclosure in this case.
13. In its internal review response of 25 January 2023, the Cabinet Office referred to the withheld information including comments that had been made as part of the feedback. However, during the course of the Commissioner's investigation, the Cabinet Office clarified that this was incorrect and that the comments were not held at the time of the request, as they were not retained beyond the end of the initiative in September 2022.

The opinion of the qualified person

14. The Cabinet Office advised the Commissioner that the qualified person in this instance is Baroness Neville-Rolfe, Minister of State at the Cabinet Office.
15. The Commissioner is satisfied that, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
16. The view of the qualified person is that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

The Commissioner's view

17. When considering whether the exemption at section 36(2) is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
 - whether the prejudice or inhibition 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; and
 - the qualified person's knowledge of, or involvement in, the issue.
18. 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. The qualified person's opinion does not have to be the most or only reasonable opinion that could be held: it only has to be a reasonable opinion.
19. In this case, in order for the exemption to be engaged it must be a reasonable opinion that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner's guidance on section 36 of FOIA¹ states that the exchange of views must be as part of a process of deliberation, which it defines as, "the public authority's evaluation of competing arguments or considerations in order to make a decision".
20. In its submissions to the Commissioner, the Cabinet Office has stated that it considers that selecting the happy, neutral/okay or sad face constituted the expression of a free and frank view about that person's perception of their working day and that, "the purpose of such information was an inexact method to inform the deliberation of senior officials about staff concerns".
21. The Commissioner accepts that staff were expressing a view, which may well have been free and frank, but he finds the argument that these

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#free>

views were expressed as part of a process of deliberation (an evaluation of competing arguments or considerations in order to make a decision) to be weak. This is because the withheld information does not include any qualitative responses and the Cabinet Office itself argues that the results are of limited use as they are not statistically valid.

22. However, the question for the Commissioner to consider is not whether the views the withheld information relates to were expressed as part of a process of deliberation. The opinion in consideration is that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. In other words, the Commissioner must consider the effect disclosure would have on the free and frank exchange of views for the purposes of deliberation in the future. The Cabinet Office has also argued that disclosure of the information would undermine the introduction in the future of a similar system to gauge the attitudes of members of staff. Specifically, it has argued that if this information were made public then some members of staff would be more reticent about providing a negative response, if they believed the collective results may be made public. The Commissioner accepts this argument, in his view disclosure of the withheld information would be likely to inhibit some staff providing honest feedback (particularly if this is negative) in future surveys.
23. The Commissioner therefore considers that it was reasonable for the qualified person to conclude that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner's conclusion is, therefore, that the exemption provided by section 36(2)(b)(ii) is engaged.

Public interest test

24. Section 36 is a qualified exemption, which means that, even when the qualified person has given their opinion that the exemption is engaged, the public authority must still carry out a public interest test. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest test is separate from the qualified person's opinion.
25. The Commissioner's guidance explains that the qualified person's opinion will affect the consideration of the arguments for withholding the information, and appropriate weight should be given to their opinion that the prejudice or inhibition would, or would be likely to, occur. The weight attached to the qualified person's opinion will be greater if they have decided that disclosure 'would' prejudice or inhibit, rather than if they have concluded, as in this case, that disclosure 'would be likely' to prejudice or inhibit.

26. Notwithstanding this, the Information Tribunal in *Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC*² (EA/2006/0011 and EA/2006/0013, 8 January 2007) said at paragraph 92:

“However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur.”

27. The Cabinet Office argues that there is a public interest in retaining the ability of managers to introduce another system for the assessment of staff opinion in future without concern that its results will be warped by inhibitions on the part of members of staff. In addition it argues that disclosure of this information would have a chilling effect on the willingness and candour of staff to contribute to the ongoing Civil Service People Surveys. The Cabinet Office says that this would not be in the public interest, as it would undermine the ability of the Civil Service to address and improve the wellbeing of staff.

28. In addition, the Cabinet Office argues that there is not a strong interest in disclosure because “the public would not learn anything of use from the information”. It adds that the data was not statistically valid, the question could be answered multiple times in one day by a single member of staff, the data from the tablets was heavily reliant on where staff tended to work or pass, and on many days the number of responses was very low. It states that therefore, the results do not represent a reliable sample and, “we consider that no intelligent pattern can be deduced from the information and the public interest in it is practically nil”.

29. The Commissioner does not agree with the Cabinet Office’s assessment that there is almost no public interest in the disclosure of the withheld information. While the survey data may not be statistically valid, there is still a public interest in transparency regarding all aspects of the operation of 10 Downing Street as a workplace. The withheld information does provide some insight in to the views of staff despite the issues with the survey data outlined by the Cabinet Office.

² <https://informationrights.decisions.tribunals.gov.uk/Public/search.aspx>

30. Nevertheless, the Commissioner also considers that there is a significant public interest in maintaining the exemption in order to ensure that future exercises to gather staff feedback are not impeded by staff feeling reticent to provide honest feedback. It is undoubtedly in the public interest that 10 Downing Street is run as effectively as possible, and ensuring that staff feel able to provide honest feedback supports this aim.
31. While the Commissioner considers the severity, extent and frequency of the inhibiting effect of disclosure in this case to be relatively limited, in that it will only affect some staff and is likely to be limited to similar feedback mechanisms rather than affecting deliberations more broadly, he still considers the effect to be significant enough for the public interest in maintaining the exemption to outweigh that in disclosure.
32. The Commissioner's decision is therefore that the Cabinet Office is entitled to rely on section 36(2)(b)(ii) to refuse to provide the requested information.

Right of appeal

33. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

34. 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.
35. 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

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF