

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 March 2024

**Public Authority:** Cabinet Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### Decision (including any steps ordered)

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1. The complainant requested information about the Government Equalities Office's consultation on conversion therapy. Ultimately, the Cabinet Office said that some of the information was exempt by virtue of section 35(1)(a) of FOIA (the exemption for the formulation or development of government policy). It also said it did not hold some of the requested information and that part of it was exempt under section 40(2) of FOIA (the exemption for personal information) in addition to being exempt under section 35(1)(a) of FOIA. The complainant advised he was not interested in securing any personal information so the Commissioner has not considered the Cabinet Office's reliance on section 40(2) any further.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 35(1)(a) of FOIA for all parts of the request where it was cited. He also finds, on the balance of probabilities, that no recorded information is held by the Cabinet Office for the remainder of the request.
3. No steps are required as a result of this notice.

#### Request and response

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4. On 3 November 2021, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I would like to register a formal Freedom of Information Request regarding the Government Equalities Office's [GEO] consultation

on conversion therapy. Please see the questions to be answered below.

1. How many organisations have GEO or GEO ministers (including the RT Honourable Liz Truss and Kemi Badenoch MP) or civil servants acting on behalf of GEO approached in person or via email regarding the proposals to ban conversion therapy:
  - a. how many such organisations were lobbying for the ban in its proposed format or for additional protections
  - b. how many such organisations were lobbying against or for changes to the ban
2. How many times have GEO or GEO ministers or civil servants met Core Issues Trust (and associated organisations) regarding the proposed ban on conversion therapies for LGBT+ people?
  - a. Please disclose the person(s) and their roles who were involved in such meetings
  - b. Please disclose the full nature of such meetings - notes and agendas should be unredacted
3. Have GEO or GEO ministers or civil servants provided any communications to staff, the ministers or MPs regarding Core Issues Trust providing a copy of the book "X- Out-Loud" given that a consultation is currently open regarding conversion therapy? If so, please provide unredacted copies of the communications

I have sought independent advice that the questions above are perfectly reasonable and should not lead to a restricted response."

5. Having notified the complainant that it would need more time to consider the public interest test, the Cabinet Office provided its substantive response on 2 February 2022:
  - For parts 1 and 2 of the request the Cabinet Office refused to provide the requested information citing section 35(1)(a) of FOIA (the exemption for the formulation or development of government policy) and said that the public interest favoured maintaining the exemption.
  - For part 3 of the request, the Cabinet Office cited section 35(1)(d) of FOIA (the exemption for the operation of any Ministerial office) and again maintained that public interest favoured maintaining this exemption.

6. The complainant requested an internal review on 2 February 2022.
7. Following its internal review the Cabinet Office provided an internal review, late, on 12 April 2022 in which it maintained its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 13 April 2022 to complain about the way his request for information had been handled. He objected to the Cabinet Office's reliance on sections 35(1)(a) and 35(1)(d) and also said he believed more information was held. However, at that point, the Cabinet Office had not stated that it did not hold any part of the requested information.
9. On 22 February 2024, the Cabinet Office provided its investigation response. It maintained that section 35(1)(a) applied to parts 1, 2, 2a, 2b and 2c of the request (although the Commissioner notes that there is no part 2c). Additionally, it partly revised its position as follows:

- For parts 1a and 1b of the request, the Cabinet Office no longer wished to rely on section 35(1)(a) of FOIA and instead said:

“On review, the Cabinet Office does not consider that it holds information in the form requested. Dialogue between each organisation and Cabinet Office regarding the proposals to ban conversion therapy was because the organisation was considered to have a relevant view on this policy area, but not specifically with reference to ‘lobbying’ activity with respect to conversion therapy by that organisation. As a result, the Cabinet Office holds information about those organisations consulted but this information does not include a specific statement about whether or not these organisations take part in lobbying activity for or against conversion therapy... Rather the Cabinet Office holds a record of those organisations consulted without specific reference to lobbying”.

- For parts 2a and 2b, it cited section 40(2) of FOIA (personal information) in addition to section 35(1)(a) of FOIA.
- For part 3, the Cabinet Office advised that it no longer wished to rely on section 35(1)(d) and now said that the information was not held. Specifically, it said:

“On review, we do not consider that this information is held by the Cabinet Office and so withdraw our reliance on Section 35(1)(d). This is because no communications were

provided by GEO or GEO Ministers to staff, Ministers or MPs regarding the book "X-Out-Loud". We have interpreted communications to mean proactive communications messages or documents sent to a group of individuals, whether civil servants, Ministers or MPs, to communicate the government's view on the book referenced in this question."

10. In this case, it was agreed with the Cabinet Office that the Commissioner would update the complainant about the public authority's partly revised position, which he did on 27 February 2024.
11. The complainant replied and said he accepts that the names of individuals, junior or otherwise, "should be granted a degree of privacy in discharging their duties. The information I have asked for could be revealed without damaging that while also ensuring appropriate public scrutiny and transparency of issues which matter to a significant group of the population". The Commissioner has therefore not considered the Cabinet Office's reliance on section 40(2) of FOIA any further (applied to parts 2a (names) and 2b (names and personal information within the meeting notes and agendas) of the request).
12. The complainant also submitted the following points, together with a referenced YouTube video, which have been considered by the Commissioner:

'All the way through this, the Cabinet Office and GEO have sought to deflect scrutiny of process, or provide transparency that they have sought [sic] to engage with all interested parties in this matter. Answers and exchanged [sic] have been deflectionary and evasive, including a changing narrative about what information is being held and asking the minister in charge of the consultation to "review the case". I can confirm there's no malice or ill intent in this request. I am seeking to provide transparency for the public so that there is confidence in government decision making.'
13. In this case, the Commissioner has considered whether the Cabinet Office was entitled to rely on section 35(1)(a) for part of the requested information and whether, on a balance of probabilities, the remaining information is not held.

## Reasons for decision

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### **Section 35 - formulation or development of government policy (applied to parts 1, 2, 2a and 2b of the request)**

14. The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
15. Section 35(1)(a) of FOIA states that:

"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".
16. The purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures that 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.
17. Section 35 is class-based, meaning that a public authority does not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and catch a wide range of information.
18. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

### **The complainant's view**

19. The complainant's view is set out in paragraph 12 of this notice. In addition, he told the Commissioner that the premise of his request is simple in that:
  - He wishes to know how many times the GEO (or ministers on its behalf or civil servants) met the organisation named. He argued that disclosing this information is neither sensitive nor disparaging to the policy making process.
  - He also wants to know the total number of organisations met in relation to the consultation, including the number for and against and the names of those organisations. He expressed his concern that:

"GEO is unwilling to disclose this information because it would prove that large organisations with an interest in the topic or those with a key role to play have been excluded. Disclosing the number of organisations met and their relative stances will provide confidence that a fair consultation was heard and that views on all sides were listened to. The government's statements and actions to date as well as disclosures from some organisations suggest they were blocked or not given the opportunity to take part because the government already held a specific view".

### **The Cabinet Office's view**

20. In its submissions to the Commissioner, in support of its view that section 35(1)(a) applies in this case, the Cabinet Office explained:

"We remain of the view that Section 35(1)(a) remains engaged with respect to the information held by Cabinet Office for questions 1, 2, 2(a), and 2(b) and 2(c) [there is no 2c]. This is because at the time of the request, November 2021, the government's consultation regarding conversion therapy remained a live policy area which had not been concluded (the consultation ran between October 2021 to February 2022). It cannot therefore be said that the government's position regarding conversion therapy at the time of the request was settled as consultations and the analysis of consultation responses are an integral part of the policy making process. It would not be reasonable to assert that a policy making process had concluded half way through a public consultation given the government's intention to use this consultation to inform its policy making with respect to conversion therapy."

### **The Commissioner's view**

21. The Cabinet Office has advised this matter is still a live area of government policy development and has provided further details 'in confidence', which the Commissioner has taken into account.
22. The Commissioner is satisfied that all of the withheld information relates to ongoing policy development and thus that section 35(1)(a) of FOIA is engaged.

### **Public interest test**

23. The Commissioner will next consider the associated public interest test.

**Public interest arguments in favour of disclosing the requested information**

24. The complainant submitted the following arguments in favour of disclosure:

"The information I have asked for could be revealed without damaging that [privacy of individuals and personal information] while also ensuring appropriate public scrutiny and transparency of issues which matter to a significant group of the population."

And "I am seeking to provide transparency for the public so that there is confidence in government decision making."

25. The Cabinet Office made the following submissions:

"As set out in our original response [to the complainant], there is a general public interest in favour of openness and transparency regarding the policy making process in contentious or sensitive areas such as conversion therapy. Release of this information may increase trust and understanding in how the government makes decisions in these types of policy areas and how it seeks to engage with stakeholders when understanding differing perspectives on a particular issue."

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

26. The Cabinet Office submitted the following arguments:

"As set out in the original FOI response there is a strong public interest that policymaking and its implementation are of the highest quality and informed by a full consideration of all the options. Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. Without this, the quality of debate underlying collective decision making would decline, leading to worse informed and poorer decision making.

Specifically, Ministers and officials need to be able to plan and manage stakeholder consultation within a safe space, with the ability to consult a wide range of organisations freely and without distraction. Disclosure of the number of the stakeholders consulted would likely have created a distraction and the resulting debate about who may have been consulted and whether this was too few or too many organisations would have meant individuals or organisations were less likely to focus on providing consultation responses to the open consultation, a core policy tool for the government.



Additionally, Cabinet Office officials advised all organisations they engaged with regarding conversion therapy that any information relating to readouts of meetings with the Cabinet Office would remain confidential with no information being shared publicly and also made it clear that details of organisations or names would not be published. It is not in the public interest to undermine these assurances by providing readouts or information about organisations the Cabinet Office met with during this policy making process as this would lead organisations to be less willing to engage with the government in the future.

Taking all of these factors into account, we continue to consider that the balance of public interest does not favour disclosure.”

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

27. There will always be some inherent public interest in withholding information that falls within a class that Parliament decided deserved special protection. However, the weight to be attributed to that public interest will vary depending on the sensitivity of the policy in question and the stage the policymaking process was at when the request was refused.
28. The Commissioner recognises that policy development needs some degree of freedom to enable the process to work effectively. The Cabinet Office considers that there is a strong public interest in protecting information where release would be likely to have a detrimental impact on the ongoing development of policy.
29. The requested information contains open and frank views from Ministers and officials which were shared on a confidential basis. Should this information be made public, it could deter stakeholders from similar future engagement with the Cabinet Office, which could negatively impact policy development by limiting the range of views that officials can consider. This could undermine the subsequent development of policies by weakening the ability of government to be fully informed.
30. The Commissioner has considered the withheld information and the arguments put forward by both parties. He accords some weight to the public interest in the accountability and transparency of public authorities and in this case, in the Government's approach to the consultation process associated with the proposals to ban conversion therapy.
31. However, the Commissioner accords more significant weight to the public interest in not disclosing confidential information regarding this matter and thereby potentially negatively impacting policy development around it.



32. Section 35(1)(a) is intended to ensure that the possibility of public exposure does not deter from full, timely and effective deliberation of policy formulation and development, including the exploration of all options. Releasing the information at the time the request was made, and any subsequent debate in the media, may have prevented or prejudiced the development of policy by causing undue distraction or hindered the consideration of all options. This would have not been in the public interest. Furthermore, the policy was and is still 'live'.
33. The Commissioner therefore finds that the public interest in maintaining the exemption at section 35(1)(a) of FOIA outweighs the public interest in disclosure at the time of the request.
34. It follows that he finds that the Cabinet Office was entitled to rely on section 35(1)(a) of FOIA to refuse parts 1, 2, 2a and 2b of this request.
35. The Commissioner will next consider the remainder of the request where the Cabinet Office's revised position is that no recorded information is held.

**Section 1 – general right of access (applied to parts 1a, 1b and 3 of the request)**

36. In this case, the Commissioner has considered whether, on the civil standard of the balance of probabilities, any recorded information is held in respect of the above parts of the request.
37. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA.
38. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
39. Section 1(1) of FOIA states that:
  - "Any person making a request for information to a public authority is entitled –
  - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him."

40. The Commissioner is mindful that when he receives a complaint alleging that a public authority has stated incorrectly that it does not hold any requested information for part of the request, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether more information is held.
41. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether any information is held and any other reasons offered by the public authority to explain why no further information is held. He will also consider any reason why it is inherently likely or unlikely that the requested information is not held. For clarity, the Commissioner is not expected to prove categorically whether any information is held; he is only required to make a judgement on whether information is held on the civil standard of proof of the balance of probabilities.
42. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the Cabinet Office holds any recorded information within the scope of these parts of the request. Accordingly, he asked the Cabinet Office to explain what enquiries it had made in order to reach the view that it did not hold any information.
43. The Cabinet Office explained its revised position as set out in paragraph 9 above. In summary the Cabinet Office has said it holds a record of those organisations consulted without specific reference to lobbying. In other words, it is not able to provide any numbers for those organisations lobbying for or against the proposals to ban conversion therapy because this information is not held.
44. In addition (and again at paragraph 9), the Cabinet Office has advised that 'no communications were provided by GEO or GEO Ministers to staff, Ministers or MPs regarding the book "X-Out-Loud"'.

## **Conclusion**

45. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed the information that a complainant believes it must hold, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs above, the Commissioner is required to make a finding on the balance of probabilities.
46. Having considered the explanation provided by the Cabinet Office, whilst taking account of the points raised by the complainant, the Commissioner is satisfied, on the civil standard of the balance of

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probabilities, that no recorded information within the scope of parts 1a, 1b and 3 of the request is held by the Cabinet Office.

## **Right of appeal**

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47. 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)

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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