

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

### **Decision notice**

**Date:** 15 February 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 a copy of a retained file, and related information, from the Cabinet Office. The Cabinet Office disclosed parts of the file. It withheld some information, citing sections 23(1) (Information supplied by, or relating to, bodies dealing with security matters) or 24(1) (National security) in the alternative, of FOIA. It refused to disclose the related information, citing sections 36(2)(b)(i), (ii) and (2)(c) (Prejudice to effective conduct of public affairs) and section 40 (Personal information) of FOIA.
2. The Commissioner's decision is that the Cabinet Office was entitled to apply sections 23(1) or 24(1) in the alternative, to withhold parts of the file. He also finds that sections 36(2)(b)(i) and (ii) were correctly applied to withhold the related information.
3. However, the Cabinet Office did not complete its deliberations on the balance of the public interest within a reasonable time, and therefore breached section 17(3) of FOIA.
4. The Commissioner requires no steps as a result of this decision.

## Background

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5. Government departments preparing records for transfer to The National Archives should conduct a sensitivity review of access to those records. The purpose of this review is to identify material that:
- should be 'retained' by the department under section 3(4) of the Public Records Act as the records are too sensitive for transfer to The National Archives; or
  - should be transferred to The National Archives as 'closed', as FOIA exemptions apply; or
  - can be transferred to The National Archives as 'open', as no FOIA exemptions apply.<sup>1</sup>

## Request and response

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6. On 30 December 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Please send me the following information:

1) a copy of all information held in the file with the reference PREM 49/1946

2) a copy of all information held (including records of discussions) relating to whether this file should be passed to the National Archives and/or made open.

According to the National Archives, this file has been retained by the Cabinet Office. See

<https://discovery.nationalarchives.gov.uk/details/r/C17970201>."

7. The Cabinet Office replied on 31 January 2023. It confirmed that it held information falling in scope, but said it needed further time to consider public interest arguments.
8. The Cabinet Office responded to the request on 1 June 2023. It refused to disclose the information, citing the following exemptions:

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<sup>1</sup> <https://cdn.nationalarchives.gov.uk/documents/information-management/access-at-transfer-sensitivity-review-overview.pdf>

- sections 23(1) or 24(1) in the alternative;
  - sections 36(2)(b)(i), (ii) and (2)(c); and
  - section 40(2).
9. On 5 June 2023, the complainant requested an internal review. Although the Cabinet Office confirmed that it was conducting an internal review, by the date of his complaint to the Commissioner, the review had not been completed.
10. However, during the Commissioner's investigation, the Cabinet Office revised its position on the first part of the request. It disclosed to the complainant a redacted copy of file PREM 49/1946, with some information withheld under sections 23 or 24 in the alternative. It maintained its position regarding the second part of the request.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 11 September 2023 to complain about the way his request for information had been handled.
12. He disagreed with the exemptions cited by the Cabinet Office to withhold information. He was also concerned about the length of time it took to provide a response to the request, and the delay in providing an internal review.
13. The analysis below considers the Cabinet Office's citing of sections 23(1) or 24(1) in the alternative, sections 36(2)(b)(i), (ii) and (2)(c) and section 40(2) to withhold information.
14. The Commissioner has also considered the delays in the response and the conduct of the internal review.
15. The Commissioner has viewed the withheld information.

### **Reasons for decision**

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#### **Section 23(1) (Information supplied by, or relating to, bodies dealing with security matters)**

#### **Section 24(1) (National security)**

16. These exemptions have been cited 'in the alternative' to withhold some information in file PREM 49/1946 (The term 'in the alternative' is explained in paragraphs 22 and 23, below.)

17. Section 23(1) of FOIA provides an exemption which states that:

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)”.

18. To successfully engage the exemption at section 23(1), a public authority only needs to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3)<sup>2</sup>.

19. Section 24(1) of FOIA states that:

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security”.

20. FOIA does not define the term ‘national security’. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords’ observations as follows:

- ‘national security’ means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK; and,
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom’s national security.

21. In this context, the Commissioner interprets ‘required for the purposes of’ to mean ‘reasonably necessary’. Although there has to be a real

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<sup>2</sup> <https://www.legislation.gov.uk/ukpga/2000/36/section/23>

possibility that disclosure of the requested information would undermine national security, the impact does not need to be direct or immediate.

22. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same information. On that point, the Commissioner's guidance on the interaction between sections 23 and 24<sup>3</sup> says:

"The fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem, if a public authority does not want to reveal whether a section 23 security body is involved in an issue. If it could only cite section 24(1) in its refusal notice, this would disclose that no section 23 body was involved. Conversely, if only section 23(1) was cited, this would clearly reveal the involvement of a security body. To overcome this problem the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice."

23. As the Commissioner's guidance explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information. The Upper Tribunal has issued a binding ruling, confirming this practice.
24. The Commissioner has viewed the withheld information. Based on this, and the submissions provided to him by the Cabinet Office during his investigation, the Commissioner is satisfied that the withheld information either falls within the scope of the exemption provided by section 23(1) of FOIA or it falls within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1), then the public interest favours maintaining the exemption.
25. The Commissioner's decision is therefore that the Cabinet Office was entitled to rely on sections 23(1) or 24(1) in the alternative, to withhold information in respect of the first part of the request (ie parts of file PREM 49/1946).

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1196/how\\_sections\\_23\\_and\\_24\\_interact\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf)

26. The Commissioner cannot elaborate further on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of the two exemptions is actually engaged.

### **Section 36 - Prejudice to the effective conduct of public affairs**

27. The Cabinet Office is relying on sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA to withhold information on its review of whether to retain file PREM 49/1946. The exemptions are claimed on the basis that prejudice or inhibition "would be likely to" occur if information about the review was disclosed.
28. The Commissioner will first consider the application of sections 36(2)(b)(i) and (ii) of FOIA. Information will be exempt under these sections if its disclosure would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
29. The Commissioner's guidance on section 36<sup>4</sup> explains that these exemptions may apply if disclosure could inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation.
30. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of future decision-making. The exemptions are concerned with the processes that may be inhibited, rather than with what is in the withheld information. The issue is whether disclosure could, in future, inhibit the processes of advising and exchanging views.
31. In this case, the Cabinet Office is concerned about the chilling effect that disclosure of the information would be likely to have on future deliberations over whether files should be retained.
32. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a 'qualified person'. In his request for an internal review, the complainant queried whether a qualified person had been consulted on the application of the exemptions.
33. The Cabinet Office provided evidence to the Commissioner that it sought the opinion of a qualified person (a government minister, and, therefore,

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<sup>4</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

an appropriate qualified person within the definition at section 36(5)(a) of FOIA) on 28 April 2023. Its submission provided a rationale for the application of the cited exemptions, as well as arguments against their engagement. The qualified person agreed that the exemptions were engaged on 25 May 2023 and the Cabinet Office responded to the request on 1 June 2023. The Commissioner is satisfied that this was an appropriate process to follow (and it is in line with the approach taken by other central government departments).

34. The Commissioner has gone on to consider whether the qualified person's opinion that the exemptions were engaged, was 'reasonable'. He does not need to agree with the opinion in order for the exemptions to be engaged. He need only satisfy himself that the qualified person's opinion is an opinion that a reasonable person could hold, in the circumstances.
35. The Cabinet Office's submission to the qualified person advised that the information relates to the process of determining whether the file should be retained. The withheld information refers to information in the file (which, as set out above, it considered exempt under sections 23 or 24 in the alternative) and reveals how particular arguments for withholding information have been weighed.
36. The submission drew attention to frank commentary on, and assessments of, the grounds for retaining the file. It noted that disclosure would be likely to inhibit officials in future, as it would make them aware that their reviewing and advisory comments could be put into the public domain. Concerns about disclosure would make them less likely to be frank in their explanation of why records should be closed or retained. This would be likely to inhibit their advice and deliberations in future, slow the process of decision-making and make it less effective.
37. Having viewed the submission put to the qualified person, the Commissioner is satisfied that it was reasonable for them to reach the view that disclosing the information would be likely to inhibit the free and frank exchange of views for the purposes of providing advice and for deliberation. Officials need to be able to undertake rigorous and candid assessments of records being considered for transfer to the National Archives, or for retention, and to have free and frank discussions about the possible implications of releasing the information in those records. Such work must be conducted in circumstances where an official can be explicit about the reasons why a file should or should not be retained, without moderating their expressed views because of concerns about disclosure. The prospect of disclosure would be likely to undermine the ability of officials to communicate candidly and effectively their thoughts and recommendations as to whether a file should be retained, and to provide advice on the matter. This would be likely to hamper the decision-making process regarding access to historic



records. It could also lead to the inappropriate disclosure of records which ought to be retained, and vice versa. This would not be conducive to the effective conduct of public affairs.

38. The Commissioner is therefore satisfied that sections 36(2)(b)(i) and (ii) of FOIA are engaged in this case.

### **Public interest test**

39. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although sections 36(2)(b)(i) and (ii) are engaged, the withheld information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

40. The Cabinet Office acknowledged the public interest in it being open and transparent regarding the process of determining whether records should be made public or closed. It also recognised that disclosure would aid public confidence that decisions on these matters were thoroughly considered and supported by sound reasoning.
41. The complainant has not offered any arguments as to why the public interest favours disclosure, beyond stating that he believes it does.

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

42. The Cabinet Office considered that there is a very strong public interest in the process for considering whether historical records should be transferred to The National Archives, or retained, to be as robust as possible. It is important that the process is not undermined, so that it facilitates appropriate decisions being taken as to whether sensitive records should be publicly accessible or protected.

### **The Commissioner's decision**

43. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the need for transparency and openness on the part of public authorities when they make decisions about the accessibility, or otherwise, of official information. Disclosure in this case would inform the public about what had been considered in the review of whether to retain file PREM 49/1946.
44. However, the Commissioner considers that the opinion of a government minister (that disclosure would be likely to cause harm to decision-



making processes) carries considerable weight when balancing the public interest in this case. They had the requisite knowledge of the decision-making process, the information and the likely consequences of any disclosure.

45. He has also considered the timing of the request. He notes that deliberations over whether to retain file PREM 49/1946 took place only a few months before the request was made, and were therefore very recent. The Commissioner has seen nothing that would suggest the sensitivity of the file had diminished in the intervening months, or that deliberations over whether to retain it would have reached a different decision, had they been made at the time of the request.
46. Finally, the Commissioner has considered the severity and extent of the envisioned prejudice or inhibition. In carrying out this exercise, appropriate weight must be afforded to the public interest in avoiding harm to decision making processes. There is a clear public interest in officials having the freedom to explore the implications of disclosing, or restricting public access to, sensitive records. To support this, it is important that discussions can be had, and effective advice provided, without undue public scrutiny. Disclosing information would be likely to have a detrimental, chilling effect on the exchange of views, and subsequently the quality of any advice that may be provided. Consequently, the effectiveness of deliberations and decision making would be likely to be harmed. Poor decision making may result in decisions overly favouring restricting public access to information, or in disclosures of sensitive information which ought to not be disclosed. Clearly, neither of these outcomes serve the public interest.
47. The Commissioner considers the public interest in good decision-making by the Cabinet Office to be a compelling argument in favour of maintaining the exemptions. While he acknowledges that the public interest in openness and transparency would be served by the disclosure of the information, on balance, he finds the public interest in protecting the Cabinet Office's access to unfiltered and frank advice, and ability to exchange open and honest views, on matters of sensitive file retention, to be the stronger argument.
48. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemptions. His decision is that the Cabinet Office was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the second part of the request.
49. In light of this decision, he has not gone on to consider the Cabinet Office's citing of section 36(2)(c) or section 40 of FOIA.

## Procedural matters

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### Time taken to consider public interest and respond to request

50. Section 10(1) of FOIA states that on receipt of a request for information a public authority must respond promptly, and within 20 working days.
51. However, where a qualified exemption is being considered, under section 17(3) a public authority can have a 'reasonable' extension of time to consider whether the balance of the public interest favours maintaining the exemption or disclosing the information. While FOIA does not define what might constitute a 'reasonable' extension of time, the Commissioner considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days<sup>5</sup>.
52. While the Cabinet Office did tell the complainant it needed further time to consider the public interest test, in all, it took 103 working days to provide its response to the request.
53. The Commissioner considers that the Cabinet Office breached section 17(3) of FOIA as it did not complete its deliberations on the public interest test within a reasonable time.
54. The Commissioner has made a record of this breach for monitoring purposes.

### Other matters

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55. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the section 45 Code of Practice on request handling sets out, in general terms, the procedure that should be followed. The Code states that internal reviews should provide a fair and thorough review of procedures and decisions taken, and pay particular attention to concerns raised by the applicant. They should be conducted promptly and within reasonable timescales.

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<sup>5</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

56. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
57. Although the Cabinet Office invited the complainant to request an internal review, and it told him it was in the process of conducting one, it had failed to provide the outcome by the time of his complaint to the Commissioner, three months later.
58. The Commissioner therefore finds the Cabinet Office did not conform with the section 45 Code of Practice in this regard.
59. The Commissioner would remind the Cabinet Office of the opportunity an internal review presents for a reconsideration of matters, as it may enable a requester's concerns to be resolved without the need for a complaint being made to the ICO.

## Right of appeal

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60. 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)

61. 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.

62. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
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