

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 September 2024

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

Decision (including any steps ordered)

1. The complainant has requested information from the Cabinet Office relating to access to legal funding for Boris Johnson's participation in the Covid-19 Inquiry. The Cabinet Office refused the request citing sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c)¹ as well as sections 41(1)², 42³ and 43(2)⁴ of FOIA.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on sections 36(2)(b)(i) and (ii) and section 36(2)(c) to refuse the request.
3. However, in the time taken to respond to the request, the Cabinet Office breached section 17 of FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 4 June 2023 the complainant made the following request for information under FOIA:

¹ Prejudice to the effective conduct of public affairs

² Information provided in confidence

³ Legal professional privilege

⁴ Prejudice to commercial interests

'This request relates to your letter warning Boris Johnson about access to legal funding for participation in the covid inquiry. Details of this letter are reported here:

<https://www.theguardian.com/politics/2023/jun/03/boris-johnson-is-told-legal-advice-funding-would-stop-if-he-hinders-covid-inquiry>

Please provide, in an electronic format:

1. A full copy of the letter.
2. A copy of any recorded information you hold relating to the decision to send the letter.
3. A copy of any earlier letters to, or agreements with, Johnson setting out conditions or agreements for access to legal funding for participation in the covid inquiry.

Should you be considering any FOIA exemptions, you will of course take account of the overwhelming public interest in this matter, and the fact that most of the letter has already been published by the media.'

6. The Cabinet Office responded on 5 June 2023 and provided a reference number. It stated it aimed to provide a response within 20 working days and at the latest by 30 June 2023.
7. On 30 June 2023 the Cabinet Office advised the complainant that the requested information was exempt under section 31(1)(g) of FOIA (prejudice to specified purposes). The Cabinet Office did not specify the purpose in question or explain how the exemption was engaged but advised that extra time was needed in order to consider the public interest test.
8. On 31 July 2023 the Cabinet Office advised that it required further time to consider the public interest in connection with the exemption at section 31(1)(g).
9. On 21 August 2023 the Cabinet Office advised that it required further time to consider the public interest. It cited the exemption at section 43 of FOIA (prejudice to commercial interests) but did not explain how the exemption was engaged. Nor did the Cabinet Office clarify whether it was still seeking to rely on section 31(1)(g) as claimed up until that point.

10. On 22 August 2023 the Cabinet Office further revised its position. It explicitly confirmed that it held the requested information but stated that it was exempt from disclosure under the exemptions at sections 36(2)(b)(i), (ii) and (c) (prejudice to the effective conduct of public affairs), 41(1) (information provided in confidence), 42 (legal professional privilege) and 43(2) of FOIA. The Cabinet Office provided no explanation of its changed position but did explain how it considered that the newly-claimed exemptions were engaged.
11. The complainant requested an internal review on 23 August 2023.
12. The Cabinet Office provided the outcome of that internal review on 12 October 2023 in which it maintained its position as set out on 22 August 2023.

Scope of the case

13. The complainant contacted the Commissioner on 18 October 2023 to complain about the way their request for information had been handled.
14. Following that, the Commissioner considered that the scope of his investigation was to determine if the Cabinet Office has correctly applied the exemptions claimed and, if so, whether the public interest favours maintaining those exemptions or disclosing the information.
15. During the course of his investigation, the Commissioner has had sight of the withheld information.

Reasons for decision

16. Section 36(2) of FOIA states that:

“(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.”

17. In deciding whether section 36(2) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. 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.
18. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. 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 not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
19. The Commissioner has inspected the section 36 submission to the qualified person and their associated opinion. The qualified person in this case was Baroness Neville Rolfe, Minister of State for the Cabinet Office.
20. The Cabinet Office submission to the qualified person advised that disclosure of the withheld information would have a “chilling effect” on officials as the issue of legal funding is high profile and one that requires frank advice on an issue which is likely to draw considerable public attention. There would be a negative impact on how open and honest officials would be when providing advice and deliberation on such matters if there was a possibility of that advice being disclosed publicly.
21. In its submissions to the Commissioner regarding the application of sections 36(2)(b)(i) and (ii) the Cabinet Office argued that the advice and deliberation concerned a sensitive subject which was widely perceived as controversial. The advice and deliberations were provided and exchanged in time-pressurised circumstances, which added to the complexity of the situation.
22. The Cabinet Office went on to say that certain positions were reached based on deliberation between officials and the provision of advice from junior up to more senior officials. This was possible because they were able to discuss such matters with the presumption of confidentiality. Disclosure of the information would be likely to have the inhibiting effect on advice and deliberation as described above.

23. In its submissions to the Commissioner regarding the application of section 36(2)(c) the Cabinet Office explained that the withheld information discusses in detail the terms and conditions under which the Cabinet Office was prepared to provide Mr Johnson with legal funding. The disclosure of this information could lead to undue pressure being placed on Government to accept similar terms in the future.
24. The Cabinet Office also argued that the timing of the request was relevant. The matter was a 'live' issue at that time and the terms and conditions of the legal funding agreement had not yet been finalised. This meant that if the information were to be released to the public at large, it "may restrict the latitude the Government had for agreeing such terms (even if appropriate in the circumstances) owing to the possibility of public criticism." The Cabinet Office also argued that the disclosure of the withheld information:

"...would have the impact of diverting official resources from routine duties to the handling of follow-up enquiries about - and unwarranted scrutiny which would be shed on - the subject."
25. Having had sight of the withheld information, the Commissioner does not consider that it is unreasonable for the qualified person to reach the conclusions described by the Cabinet Office. The Commissioner is generally sceptical of the likelihood of civil servants being inhibited, given that they are public officials and as such, accountable for their actions. However the Commissioner considers that the specific circumstances of this case make it somewhat exceptional.
26. The Commissioner accepts that the withheld information reflects discussion and deliberation on the part of Cabinet Office officials in what was a novel and complex situation. He is persuaded that the qualified person's opinion relating to inhibition in this regard should not be entirely dismissed.
27. Similarly, the Commissioner notes that the withheld information includes details of the Cabinet Office's position regarding the provision of legal funding to Mr Johnson in various circumstances and scenarios. At the time of the request, ie June 2023, the Cabinet Office had not received a formal acceptance from Mr Johnson of the terms and conditions relating to legal funding. The Commissioner also accepts that the disclosure of this information into the public domain would have been likely to result in a large number of follow-up enquiries, which would have distracted official resources from routine duties.
28. The Commissioner notes that the qualified person's opinion in some parts suggests that the inhibition and prejudice "could" occur, rather than that it would or would be likely to occur. In other parts the

qualified person has concluded that this “would” occur, ie being more likely than not. In the specific circumstances of this case and having examined the withheld information in the context of the submission provided to the qualified person, the Commissioner finds that the qualified person’s opinion is reasonable in respect of the threshold for the lower level of inhibition or prejudice in the exemptions. That is, that disclosure of the information would be likely to cause the inhibition and prejudice identified in respect of the specified limbs of section 36, though this inhibition and prejudice is not necessarily more likely than not.

29. Consequently the Commissioner finds sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) are engaged in respect of the withheld information. Since these are qualified exemptions, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the above exemptions outweighs the public interest in disclosing the information. Although each limb of section 36 is technically a separate exemption, the Commissioner considers it appropriate in the circumstances of this case to collate the Cabinet Office’s arguments as set out below.

Public interest arguments in favour of disclosing the withheld information

30. The Cabinet Office recognised that there is a public interest in transparency as to how and why public money is used. It said that:

“...disclosure would enable the public to see the manner in which the Government uses public funds and that there is a public interest in accountability to allow the public to determine if such decisions are of ultimate benefit to the public or not.”

31. In their complaint to the Commissioner the complainant argued that a large proportion of the “letter” has already been released to the public. The complainant considers that there is an overwhelming public interest in this matter, therefore the remainder of the requested information ought to be disclosed to the public.

Public interest arguments in favour of maintaining the exemptions under section 36(2)(b)(i) and (ii) and section 36(2)(c)

32. The Cabinet Office referred to the inhibition and prejudice identified above, and set out that it would not be in the public interest for advice and deliberations to be less substantially stated for fear of disclosure. Nor would it be in the public interest for decisions to be made with reference to less than full information, since such decisions were likely to be poorer as a result.

33. The Cabinet Office maintained that it would not be in the public interest for the Government to have less latitude in the negotiating of terms and conditions for the funding of legal fees. It set out that it is in the public interest that the Government be protected from the detrimental consequences of disclosure so as not to use more public funding than is necessary.
34. The Cabinet Office further argued that, given that the subject matter was still a 'live' issue, the impact of diverting official resources from routine duties to the handling of follow-up enquiries would not be in the public interest. The Cabinet Office suggested that disclosure would cause "unwarranted scrutiny" which would not be in the public interest.

Balance of the public interest arguments

35. The Commissioner is mindful that the exemptions at section 36 of FOIA are engaged on the basis of the qualified person's opinion. Accordingly the Commissioner will take account of the weight of that opinion in applying the public interest test. In addition, the Commissioner is himself also satisfied that the identified prejudice or inhibition would be likely to occur if the information were to be disclosed into the public domain. This adds to the weight afforded to the qualified person's opinion as part of the public interest balance.
36. The Commissioner considers that there is a significant public interest in the subject of Mr Johnson receiving funding from the public purse for the purposes of the UK Covid-19 Inquiry. Providing legal funding in such circumstances involves the expenditure of public money, which will generally mean there is a legitimate public interest in disclosure of information relating to how it is spent. However, this also means that there is a public interest in ensuring that decision making in relation to these matters is effective, and in avoiding action that is likely to make decision making more difficult.
37. The Commissioner is also mindful of the need of wider transparency and public understanding in relation to the government's handling of the Covid-19 pandemic and subsequent Inquiry. Given that Covid-19 had such a widespread, significant effect on the lives of millions of people, there is a considerable public interest in such matters. However, this does not mean that all information relating to Covid-19 which would serve this interest should be disclosed into the public domain.
38. The Commissioner notes the complainant's argument that much of the requested information has been put into the public domain already, and that the remainder ought to be disclosed. However the Commissioner is mindful that the media report referred to in the request related to information that had apparently been leaked to another media source.

39. The Commissioner considers it important to distinguish this from information that is put into the public domain through official channels. The Commissioner is not aware of the specific requested information having been made public by the Cabinet Office, albeit that the Cabinet Office has commented on various media articles. For this reason the Commissioner is not persuaded that information made available to the media in such circumstances should in itself mean that the Cabinet Office is required to disclose information into the public domain.
40. The Commissioner has also carefully considered the extent to which disclosure of the withheld information in this case would serve the public interest. He accepts that it would more fully inform the public about discussions between the Government and Mr Johnson as to the latter's interaction with the Inquiry. The Commissioner acknowledges that this subject has been controversial for various reasons. However the Commissioner is not persuaded that the specific withheld information in this case would necessarily inform the public as to how the Government, or indeed Mr Johnson as the former Prime Minister, took decisions regarding Covid-19. Rather, it relates to a much more narrow issue of legal representation, which the Commissioner considers less compelling in the context of understanding the Government's handling of Covid-19.
41. The Commissioner further considers the timing of the request to be a relevant factor in the balance of the public interest. The media article referred to by the complainant in his request reported that Mr Johnson had been:

"...at the centre of a row as ministers launched a high court bid to challenge the inquiry's demand for his unredacted WhatsApp messages and contemporaneous notebooks."
42. It also reported that Mr Johnson had provided the Covid-19 Inquiry with WhatsApp correspondence. Therefore the Commissioner acknowledges that the request was made when the issue was still very much 'live' and attracting a lot of media attention. Alongside this understandable media interest, there was pressure for the Cabinet Office to make an urgent decision, which in the Commissioner's opinion adds weight to the public interest in protecting the Cabinet Office's ability to make decisions which are well-considered and properly informed.
43. Furthermore the Commissioner attaches weight to the Cabinet Office's argument regarding the need to protect its position in respect of future requests for legal funding. Although the specific circumstances of this case are unique, the Commissioner recognises the possibility of similar scenarios arising in respect of future public inquiries. In essence the Cabinet Office has argued that it should be able to protect its position

with regard to agreeing legal funding for individuals, and the Commissioner considers this to be a significant public interest argument, given that such funding would be paid from the public purse.

44. In conclusion, the Commissioner acknowledges that the public interest in openness and transparency would be served if the information was disclosed. Furthermore, he has afforded a high degree of weight to this in determining the strength of the public interest in disclosure, both in general terms and in relation to the specific circumstances of the matter under consideration in this case.
45. However, having regard to the content of the information in question, and all the circumstances of the case, he finds that the public interest in maintaining each of the exemptions at section 36(2)(b)(i) and (ii), and section 36(2)(c), is sufficiently strong to outweigh the public interest in disclosure in respect of each of these exemptions. As no part of the information was not withheld under section 36, the Commissioner has therefore not gone on to consider the other exemptions relied on by the Cabinet Office.

Procedural matters

46. Section 17(1) of FOIA states that a public authority relying on an exemption must issue a refusal notice, citing that exemption, within the 20 working day time for compliance. The refusal notice must usually explain how the exemption is engaged. Section 17(3) further provides that if a public authority is relying on a qualified exemption, it may have a 'reasonable' extension of time to consider the balance of the public interest.
47. In this case the Cabinet Office cited the exemption at section 31(1)(g) in its refusal notices of 30 June 2023 and 31 July 2023. It subsequently cited section 43(2) on 21 August 2023, and ultimately claimed reliance on sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 41(1), 42 and 43(2) in its substantive refusal notice of 22 August 2023.
48. The Commissioner's published guidance⁵ sets out his view that it is reasonable to extend the time for compliance by up to a further 20 working days to consider the public interest. This would allow a public authority 40 working days in total, unless there are exceptional circumstances which necessitate longer. It should be emphasised that

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/time-limits-for-compliance-under-the-freedom-of-information-act-section-10/#whatarethe2>

the decision as to engaging the exemption must be taken and communicated to the requester within the normal 20 working days

49. Given the above chronology the Commissioner finds that the Cabinet Office failed to comply with section 17(1) of FOIA in relation to the timing of its response to the request.

Other matters

50. 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 sets out, in general terms, the procedure that should be followed. The Code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
51. In this case, and reflecting on that position, the Commissioner is of the view that it is reasonable to have expected the Cabinet Office to provide the outcome of its internal review within a shorter timescale. In reaching this view, the Commissioner is mindful that the Cabinet Office had already taken nearly three months to provide its substantive refusal notice, during which time it had reconsidered its position and revised its response.

Right of appeal

52. 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

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF