

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2022

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking copies of the 'FOI and EIR round robin list' issued by the Clearing House for 20 June 2019 to 20 August 2019 and 20 June 2020 to 13 July 2020 (the latter date being the date of the request). The complainant explained that she did not want to be provided with the names of the requesters. The Cabinet Office provided the complainant with copies of the lists but redacted the information contained in the 'advice' column on the basis that all of it was exempt under sections 36(2)(b)(i) and (ii) (effective conduct of public affairs) and that parts of it were also exempt under sections 23(1) (security bodies), 24(1) (national security) and 40(2) (personal data) of FOIA. During the course of the Commissioner's investigation the Cabinet Office disclosed (due to the passage of time) the majority of the advice contained in the 2019 lists.
2. The Commissioner's decision is that although sections 36(2)(i) and (ii), are engaged the public interest favours disclosure of all of the information contained in advice columns for both the remaining 2019 lists and the 2020 lists. The Commissioner has also concluded that section 24(1) does not apply to any of this information. However, the Commissioner has concluded that small portions of the information are exempt from disclosure on the basis of sections 23(1) or 40(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Provide the complainant with copies of the 2020 lists falling in the scope of her request with the information contained in the advice column unredacted.
 - Provide the complainant with copies of any 2019 lists that contain information in the advice column which was not disclosed by the Cabinet Office in April 2022. Such lists should be disclosed with the information in the advice column unredacted.
 - In making the above disclosures the Cabinet Office can redact the information highlighted on the versions of the lists provided to the Commissioner on the basis of section 23(1) and the names and emails address of civil servants on the basis of section 40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the Cabinet Office on 13 July 2020:

'This is a request for information under the Freedom of Information Act. I would like to request the following information:

1) From 20th June 2019 to 20th August 2019, please provide me with copies of the FOI and EIR round robin list, save the names of the applicants on the list which should be redacted.

2) From 20th June 2020 to the day this request is processed, please provide me with copies of the FOI and EIR round robin list, save the names of the applicants on the list which should be redacted.

I would like to remind the Cabinet Office that in Decision Notice FS50841228, the ICO ruled that the Cabinet Office has to release past round robin lists.' ¹

¹ Decision notice FS50841228 concerned a request submitted to the Cabinet Office on 20 August 2018 seeking a copy of the round robin List for 20 June 2018 to the date of the request. The Cabinet Office withheld the lists on the basis of section 36(2)(b)(i) and (ii). The

6. The Cabinet Office contacted the complainant on 11 August 2020 and confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of section 36 of FOIA and needed further time to consider the balance of the public interest test.
7. The Cabinet Office issued similar public interest extension letters on 8 September, 6 October and 3 November 2020.
8. It then provided the complainant with a substantive response to her request on 26 November 2020. The Cabinet Office provided her with redacted copies of the round robin lists which fell within the scope of her request. The Cabinet Office explained that the names of the requesters were exempt from disclosure on the basis of section 40(2) of FOIA. The Cabinet Office also explained that it was appealing part of the decision notice FS50841228 and, pending the outcome of that appeal, it was withholding information contained in the 'Advice' column of the round robins lists under sections 36(2)(b)(i) and (ii) of FOIA. The Cabinet Office concluded that the balance of the public interest favoured maintaining these exemptions.
9. The complainant contacted the Cabinet Office on 13 January 2021 and asked it to conduct an internal review of this decision. The Cabinet Office acknowledged receipt of the internal review request on 14 January 2021.
10. The Cabinet Office did not complete its internal review.
11. However, on 22 April 2022 the Cabinet Office made an additional partial disclosure to the complainant. This included the disclosure of the majority of the information contained in the 'advice' column for the 2019 lists. The Cabinet Office still sought to withhold all of the information contained in the 'advice' column for the 2020 lists. The Cabinet Office explained that all of the information it was still withholding from the advice columns (ie both the remaining limited redactions from the 2019 lists and all of the advice in the 2020 lists) was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of FOIA. The Cabinet Office explained that that some of the remaining withheld information, again in both 2019 and 2020 lists, was also exempt from disclosure on the basis

Commissioner found that the exemptions were engaged but concluded that the public interest favoured disclosure of the information. <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618028/fs50841228.pdf>

of sections 23(1) (security bodies), 24(1) (national security) and 40(2) (personal data).²

Scope of the case

12. The complainant contacted the Commissioner on 24 April 2021 in order to complain about the Cabinet Office's refusal to provide her with the information contained in the advice columns in both the 2019 and 2020 lists. She was also dissatisfied with the Cabinet Office's failure to complete an internal review.
13. In light of the Cabinet Office's disclosure of information in April 2022, this decision notice only considers whether the remaining information contained in the advice columns from the 2019 and 2020 lists is exempt from disclosure.
14. It is important to note that the Commissioner's role is limited to considering the application of the exemptions as they applied at the statutory time for compliance under FOIA, which in most cases is 20 working days.³ In this case the Cabinet Office extended the time it took to consider the balance of the public interest test as it is allowed to do under section 17(3) of FOIA. However, that section provides that any such extension should be a reasonable one which in the Commissioner's view means that any such considerations should be completed within 40 working days unless there are exceptional reasons to take longer.
15. Although the Cabinet Office did not issue a substantive response to the request until 26 November 2020 in the Commissioner's view it should have completed its public interest considerations in this case within 40 working dates of the request, ie by 7 September 2020. This is therefore the date for the purposes of this decision notice that the Commissioner has considered the application of the exemptions.

² The Cabinet Office confirmed to the Commissioner that it maintained its position that at the time of the request **all** of the information from the advice columns was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and the public interest favoured maintaining those exemptions. The Cabinet Office made it clear that it was only as a result of the passage of time that led it to disclose the information it did in April 2022.

³ Upper Tribunal decision in *Montague v Information Commissioner and Department for International Trade* [2022] UKUT 104 (AAC)

16. In respect of the complainant's concerns about the lack of an internal review, as there is no statutory requirement for a public authority to complete an internal review within a set time period, this issue is considered in the Other Matters section of this decision notice.

Reasons for decision

Section 23 – security bodies

17. Section 23(1) of FOIA states:

'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 needs only to demonstrate one of the following:
- That the information was supplied by any of the named security bodies, either directly or indirectly
 - That the information relates to any of the named security bodies
19. The relevant security bodies are listed at section 23(3).⁴
20. If the requested information falls within either of the above classes, it is absolutely exempt from disclosure under FOIA. There is no requirement on the public authority to demonstrate that disclosure of the requested information would result in harm. The exemption is not subject to the public interest test.
21. The Cabinet Office explained that some of the information for both the 2019 and 2020 lists consists of advice provided by the National Cyber Security Centre (NCSC). The NCSC is part of the Government Communications Headquarters (GCHQ) listed under section 23(3)(c) of FOIA.
22. Having examined the information in question, and on the basis of the Cabinet Office's submissions to him, the Commissioner is satisfied that such information is exempt from disclosure by virtue of section 23(1) of FOIA.

⁴ <https://www.legislation.gov.uk/ukpga/2000/36/section/23>

Section 24 – national security

23. The Cabinet Office argued that small parts of the advice contained in both the 2019 and 2020 lists was exempt from disclosure on the basis of section 24(1) of FOIA. This 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'.

24. 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.

25. Furthermore, in this context the Commissioner interprets 'required for the purpose of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.

26. The Cabinet Office's submissions to the Commissioner to support its reliance on section 24(1) of FOIA made direct reference to the information which it was seeking to withhold on the basis of this exemption. Having considered these submissions, the Commissioner is not persuaded that withholding the information redacted on the basis of section 24(1) is reasonably necessary for the purposes of national security. He has elaborated on his reasons for this finding in a

confidential annex, a copy of which will be provided to the Cabinet Office only.

Section 36 – effective conduct of public affairs

27. The Cabinet Office's position is that all of the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of FOIA.

28. These state 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'

29. In determining whether sections 36(2)(b)(i) and (ii) are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice 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, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

30. Further, 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. 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 only not reasonable if it is an opinion that no reasonable person in the qualified person's position

could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

31. With regard to the process of seeking this opinion, the Cabinet Office sought the opinion of the qualified person, namely the Minister for the Constitution and Devolution on 21 September 2020. The Minister provided their opinion that both exemptions were engaged on 23 September 2020. However, the Cabinet Office explained that following the First-tier Tribunal judgement of EA/2020/0240, it was noted that the submission previously provided to the qualified person for the request which is the focus of this complaint contained a small inaccuracy in regards to the description of the round robin list by conflating other reasons for government departments to refer cases to the FOI Clearing House. The Cabinet Office explained that the First-tier Tribunal picked up this error in the case EA/2020/0240 where the same error was present in the background section of another section 36 submission.⁵
32. The Cabinet Office explained that it did not consider this error to affect the substance of the previous qualified opinion for this case. This was because the proposition related to the principle of advice provision, and therefore was not affected by whether that advice was being given in respect of round robin cases or sensitive cases. However, in order to ensure best practice regarding the handling of this FOI request a fresh section 36 opinion was sought on 12 July 2021, with the previous error highlighted and corrected. An opinion was provided in a meeting on 29 July 2021 by the Minister for the Constitution and Devolution and the Chancellor of the Duchy of Lancaster confirming the application of sections 36(2)(b)(i) and (ii) for the advice columns of the lists based on the submission of 12 July 2021.
33. Although the Cabinet Office sought a further opinion from the qualified person in this case the Commissioner is satisfied that it is was entitled to do so, and that this does not undermine its application of section 36. (Albeit the Commissioner notes the Cabinet Office's position that the error identified by the Tribunal did not affect the substance of the original opinion.) This is on the basis that public authorities have the right to raise an exemption, including section 36, during the course of the Commissioner's investigation of a complaint. Whilst the Cabinet

⁵ The Tribunal case EA/2020/0240 concerned the Cabinet Office's appeal against decision notice FS50841228 which is referred to at paragraph 8 of this notice.
<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2848/Cabinet%20Office%20EA.2020.0240%20Open%20Decision.pdf>

Office did not seek to raise section 36 for the first time during the Commissioner's investigation, by the same logic it follows that public authorities are also entitled to seek a further opinion from the qualified person, and seek to rely on it, during the course of the Commissioner's investigation should they wish.

34. Before considering the substance of the qualified person's opinion, the Commissioner has set out some of the background to the Clearing House provided to him by the Cabinet Office. It explained that through the Clearing House function it coordinates complex FOI requests across Whitehall and plays a vital role in ensuring compliance with FOIA across Government, while also making sure sensitive information, including that related to national security, is handled appropriately.
35. Areas which can lead to a referral may include where the information sought relates to national security matters, the Royal Household, significant live policy development and/or implementation issues and, of most relevance to this case, 'round robins' (i.e. those requests made to more than one department that have repeat characteristics).⁶
36. As the time of the request the round robin list was issued almost daily (it is now issued twice weekly). It lists FOI requests received by departments that have 'repeat request characteristics'. The department in receipt of such a request refers it to the Cabinet Office's Clearing House function. Once a request is added to the list, other government departments who receive the same request also notify the Clearing House function.
37. The Round Robin list comprises a reference number, the date the Cabinet Office Clearing House function was first made aware of the request, the name of the applicant, the text of the request, a record of the departments that have notified receipt, the deadline for the response, and advice on the approach to take. Departments, as distinct public authorities under FOIA, are ultimately responsible for how they respond. The intention of the round robin list is to ensure that government departments are aware of any cross-government issues arising from round robin requests, to enable consistency of approach across departments.

⁶ The Cabinet Office referred the Commissioner to the full list of referral criteria at the following link, however it should be noted that this information was only published in March 2021, ie after the complainant's request of 13 July 2020

<https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information>

38. The Cabinet Office explained that as the round robin list is updated regularly, the information and advice it contains is often changed to take account of evolving policy positions and advice. The advice that appears on the list is necessarily concise and void of wider context, as the list itself is only an aide memoire to departments. The guidance itself is designed to be high level and concise in most cases. Wider discussions which take place between the Cabinet Office and departments about the approach to take in particular requests, and departments are free to disagree and argue why a different approach is more appropriate. The Cabinet Office explained that such exchanges are an important part of the process but these are not present in the high level advice in the round robin list.
39. The qualified person argued that the information contained in the advice columns is devoid of the subtleties and context of these other discussions, and disclosure of the information would be likely to lead to the Cabinet Office taking steps to mitigate the risk of the advice being perceived as 'broad brush' because it appears not to take into account the circumstances of a particular case. The qualified person argued that providing the advice in a format fit for publication would slow the process down and likely change the content of the advice itself. Disclosure would therefore be likely to inhibit the free and frank exchange of views for the purposes of deliberating and agreeing the advice, and the free and frank provision of that advice.
40. Furthermore, the qualified person argued that the ongoing interest in the advice section of the round robin lists meant that officials drafting the advice now word this with a view that it may ultimately become public rather than being able to express advice in frank terms which is often the most rapid and effective way of ensuring that advice is clear and consistent for departments. The qualified person argued that withholding the advice would guard against this further erosion of 'safe space' in which officials can draft frank and comprehensive advice where required in the Round Robin list.
41. With regard to the content of the advice contained on the lists the Commissioner's position remains the same as set out in decision notice FS50841228, namely that the nature of the advice is largely as one would expect in relation to departments handling identical requests, including those on sensitive subject matter requests. However, the Commissioner accepts that it is not unreasonable to conclude that there is a real and significant risk that officials would be less candid in the future when offering similar advice if the advice they have previously provided was disclosed. The Commissioner also accepts that it is not unreasonable to argue that officials may amend the content of the advice so that it appears to be less broad brush in light of concerns about how such advice could be perceived if disclosed. In both scenarios

– ie a change in candour in the advice and an alteration as to how the advice is presented – could lead to prejudice to either the free and frank provision of advice and/or the free and frank exchange of views for the purposes of deliberation.

42. Sections 36(2)(b)(i) and (ii) are therefore engaged.

Public interest test

43. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

44. The complainant did not provide specific arguments in respect of this complaint, but in respect of her previous complaint to the Commissioner (ie FS50841228) which considered an early version of the lists, her position was as follows:

45. She explained that she has concerns about how the FOI round robin list operates and how and why applicants end up on the list. More specifically, she says her concerns mainly relate to the 'applicant blind' principle and what categories of applicants are likely to end up on the list.

46. The complainant is also concerned that the Cabinet Office is dictating to other government departments how they should respond to requests and the public deserves to know and understand how and why they are doing this.

47. She considers that disclosing the withheld information would enable the public to see how the public authority treats FOI requests and scrutinise their processes.

Public interest arguments in favour of maintaining the exemptions

48. The Cabinet Office argued that at the time of the request the request the round robin lists were either 11-13 months old (in relation to the 2019 list) or were 'live' matters of advice for the 2020 lists. The Cabinet Office explained that as a result the cases listed would have either have been under active consideration or might well have been the subject of internal reviews or complaints to the Commissioner. The Cabinet Office argued that 'safe space' doctrine is therefore strongly engaged, particularly for the 2020 lists.

49. The Cabinet Office argued that the value of the lists lies in their ability to quickly note and disseminate developing thinking about a particular topic, including information or views fed into the Cabinet Office by other departments such as information on national security matters. The Cabinet Office argued that in order for this utility to be maintained, those who contribute to the lists need to be able to do so swiftly and candidly without having to pause to consider whether their advice might tend to confirm or deny whether information is held, or might give away the substance of information that might ultimately be withheld, or might contain other sensitive information. The Cabinet Office argued that this is a fundamentally different exercise from drafting the responses to the FOIA requests themselves. In its view conscientious civil servants seeing material of this sensitive nature disclosed about such fresh or reasonably recent cases, would feel deterred from noting advice on the list in the candid, but short and provisional form that is required if the lists are to have value. The Cabinet Office argued that this risk comfortably outweighs the marginal gain in transparency that disclosure of the limited advice in the remaining information would yield.

Balance of the public interest arguments

50. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
51. With regard to attributing weight to the public interest arguments in favour of maintaining the exemption, the Commissioner accepts that disclosure of the withheld information would be likely to have some impact on the way in which officials draft advice for inclusion on the lists. This is as a result of the need to reduce the candour of advice and/or ensure that the information is presented in a different way given the focus on the advice provided by the clearing house. This change to the candour of the advice is particularly the case in respect of the information from the 2020 lists which the Commissioner accepts was still live at the time of the requests.
52. However, the Commissioner has some reservations as to how severe such prejudice would actually be. As noted above, in his view the information contained on the advice columns is of the nature and content that one would expect to be included in such lists. Therefore, whilst he accepts that some changes to the way the advice is provided are likely, in his view the extent of such likely changes should not be

overestimated. Consequently, the Commissioner is not persuaded that the detrimental prejudicial effects of any such changes would be that significant.

53. Turning to the public interest arguments in favour of disclosing the withheld information, in the Commissioner's view there is a strong public interest in the disclosure of advice the Cabinet Office has provided to departments on handling requests. As noted in the decision notice FS50841228, disclosure of the advice would, amongst other things, assist the public in assessing whether requests have been included on the list in line with the Clearing House criteria, whether Clearing House is dictating to departments how to respond to FOI requests or offering advice in an expected manner.
54. Furthermore, in attributing weight to the public interest test arguments it is important to remember that the Commissioner's role is to consider the balance of the public interest at the time for statutory compliance of the request, which for the reasons set out in paragraph 15 he considers to be 7 September 2020. Although in March 2021 the Cabinet Office published guidance about how the Clearing House operated, this information was not available at the time of the request. In respect of this development the Commissioner is conscious of the findings in the Tribunal in EA/2020/0240, which was considering a request dating from August 2018 for round robins lists from the previous two months. In relation to how the absence of information about the Clearing House was factored into its conclusion that the public interest lay in the disclosure of the majority of the information withheld in the advice column the Tribunal found that:

'The issue for the tribunal is whether this material should have been disclosed to [the requester]...ie at the time of the internal review in July 2019 (given the unconscionable delays in handling the request, she would have been entitled to receive the material in September 2018), long before the publication of general information about Clearing House. Given all the circumstances then prevailing – a lack of accurate publicly available information about the constitutionally significant role in co-ordinating FOI responses there is real weight in the public interest in disclosure'.

55. The Commissioner considers the Tribunal's comments regarding the lack of transparency to be equally applicable to the circumstances of this case given that the request which is the subject of this complaint was submitted prior to the publication of the information about the Clearing House in March 2021. In light of this in the Commissioner's view there is a particular public interest in the disclosure of the information in the scope of this request. Furthermore, given that in his view disclosure of the information only risks a limited inhibition in the provision of advice

and the functioning of the Clearing House, the Commissioner has concluded that the public interest favours disclosure of the withheld information.

Section 40 – personal data

56. The Cabinet Office withheld a very small and limited amount of information under section 40(2) which consisted of the names and contact details of junior civil servants.
57. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
58. In this case the relevant condition is contained in section 40(3A)(a)⁷. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
59. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
60. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

61. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual'.

62. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
63. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

⁷ As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

64. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
65. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information withheld on the basis of section 40(2) relates to and identifies the civil servants concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
66. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
67. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

68. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

69. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
70. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

71. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'⁸.

⁸ Article 6(1) goes on to state that:-

72. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
73. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

74. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
75. The reasons set out previously in this decision notice the Commissioner considers there to be a legitimate interest in the disclosure of

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

information the operation of the Clearing House and how it advises departments on FOI requests.

Is disclosure necessary?

76. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
77. In the Commissioner's view it is not sustainable to argue that disclosure of the personal data the Cabinet Office is seeking to withhold is necessary; disclosure of such information would not add to the public's understanding of how the Clearing House operations in any notable way.
78. Given this finding the Commissioner has concluded that disclosure of the names and email addresses of the civil servants would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of such information would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

Other matters

79. The complainant raised concerns over the Cabinet Office's failure to complete an internal review. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that section 45 Code of Practice⁹ explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.¹⁰
80. The Cabinet Office acknowledged that it failed to complete the internal review within this timeframe or indeed to complete the internal review at all. The Cabinet Office explained that between August 2021 and

⁹ [Freedom of Information Code of Practice - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/101422/freedom_of_information_code_of_practice.pdf)

¹⁰ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

February 2022 its FOI Team was leading on a short-term recovery project to generally clear a large number of outstanding internal reviews in the department, which in part had built up due to and during the Covid-19 pandemic. The Cabinet Office explained that it reduced this number by more than half over the period, but unfortunately some reviews remained outstanding, including the one in this case.

Right of appeal

81. 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

82. 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.
83. 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

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