

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 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 information which related to possible processes that might be followed or actions to be undertaken were the Prime Minister to lose his seat in the December 2019 general election. The Cabinet Office confirmed that it held information falling within the scope of the request but refused to disclose it on the basis of section 36(2)(b)(ii) (effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 36(2)(b)(ii) of FOIA and that in all the circumstances of the request the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request for information to the Cabinet Office on 7 January 2020:

'I am sending this request under the Freedom of Information Act to ask for the following information: Copies of all documents prepared or modified between 29 Oct 2019 and 12 December 2019 which related to

possible processes that might be followed or actions to be undertaken were the Prime Minister to lose his seat in the recent general election.'

5. The Cabinet Office issued its response on 3 August 2020, following a decision notice issued by the Commissioner on 16 June 2020 ordering the Cabinet Office to respond to the request.¹ The Cabinet Office explained that it considered the information held within the scope of the request to be exempt from disclosure on the basis of the exemption at section 36(2)(b)(ii) (effective conduct of public affairs) of FOIA.
6. The complainant contacted the Cabinet Office on 4 August 2020 and argued that in his view the public interest favoured disclosure of the information and asked it to conduct an internal review.
7. The Cabinet Office informed him of the outcome of the review on 11 September 2020. The review upheld the original decision to withhold the information held within the scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 22 September 2020 to complain about the Cabinet Office's handling of his request. He disputed its decision to withhold the requested information and was also dissatisfied with its delay in responding to the request.
9. As the previous decision notice issued by the Commissioner in relation to this request has already found the Cabinet Office in breach of section 10(1) for not responding to the request within 20 working days, this decision notice does not consider its delays in responding to the request.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617893/fs50917051.pdf>

Reasons for decision

Section 36 - prejudice to the effective conduct of public affairs

10. The Cabinet Office's position is that the withheld information is exempt from disclosure on the basis of section 36(2)(b)(ii) of FOIA. This 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...

...(ii) the free and frank exchange of views for the purposes of deliberation'

11. In determining whether section 36(2)(b)(ii) is 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.

12. 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.

13. With regard to the process of seeking this opinion, the Cabinet Office sought the opinion of the qualified person, namely a Cabinet Office Minister on 29 July 2020, with regard to whether section 36(2)(b)(ii) of FOIA was engaged. The qualified person was provided with a rationale as to why the exemption could apply and copies of the withheld information. The qualified person provided their opinion that section 36(2)(b)(ii) was engaged on 3 August 2020. Whilst the rationale as to why the exemption applies is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
14. Turning to the substance of the opinion, parts of the recommendation to the qualified person (to which, as explained above, the latter agreed) refer to the contents of withheld information itself. As a result the Commissioner cannot detail all aspects of the qualified person's opinion in this decision notice. However, in summary, the qualified person concluded that disclosure of policy discussions about this constitutional issue would be likely to have a chilling effect on future discussions around this, or similarly constitutionally novel scenarios. That chilling effect would be to the detriment of the quality of advice that officials are able to provide.
15. Having considered the content of the withheld information and taking into account the more detailed aspects of the qualified person's opinion, the Commissioner is satisfied that this was a reasonable opinion to come to. Section 36(2)(b)(ii) is therefore engaged.

Public interest test

16. 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

17. In support of his view that the public interest favoured disclosure of the withheld information the complainant made the following submissions:
18. He did not accept that release of this specific material would do any damage to the public interest. This was because the issues discussed were not a matter of live government policy. In light of this he argued that there was no reason why disclosure would inhibit or otherwise cause any difficulties for anyone who has to consider a similar possibility arising at some point in the future.

19. The complainant argued that there are important constitutional and democratic principles at issue in relation to this matter which concern extremely significant aspects of government processes, were the relevant situation to arise where the Prime Minister lost their seat at a General Election. The complainant argued that the electorate is entitled to know the processes and rules that would be followed or considered in a democracy on such a crucial matter. He emphasised that this is an absolutely central part of a democratic society and that it is necessary for public information and understanding as well as proper transparency and accountability.
20. The complainant argued that disclosure would also enable constitutional experts to take part in helpful, informed discussion on the implications and options. The complainant suggested that given the rarity of the underlying event at the heart of his request, this useful process will not take place without disclosure of the material requested.

Public interest arguments in favour of maintaining the exemption

21. The Cabinet Office disputed the complainant's view that this was not a live issue. In support of this point, the Cabinet Office argued that the UK's constitution is not codified in one document and therefore precedent is a significant part of the policy consideration when an issue is live. The Cabinet Office explained that in its view constitutional matters are always live, as they relate to how the country is governed. In particular, the subject of what steps would be taken in the event of a Prime Minister losing his or her Parliamentary seat is one that, in theory, arises at every general election, even if it is not a subject which is not under discussion at the present moment. On the Cabinet Office's view the subject will therefore inevitably arise again and therefore it is not true to say that this is not a live issue.
22. The Cabinet Office disagreed with the complainant's position that disclosure of the information would not inhibit those who have to consider constitutional issues arising from a Prime Minister losing their Parliament seat in the future. In support of its position, the Cabinet Office argued that it is vital that policy officials are able to communicate with one and another in an atmosphere which is conducive to free and frank expressions of opinion. It emphasised that this is an intrinsic part of the policy making process, especially at such early stages of deliberations. The Cabinet Office argued that the routine disclosure of information that contained the exchange of views on constitutional matters would discourage policy officials from being forthright in expressing opinions, including freely expressing differences of opinion and exploring all possible scenarios in a 'safe space'.
23. The Cabinet Office argued that an official self-censoring themselves out of concern for the public reaction could deny the Government of an idea

that would otherwise have solved a problem or shone a light towards a better way of doing things. It argued that there is a public interest in officials being encouraged to express themselves freely so that such positive outcomes might be reached. In the circumstances of this case the Cabinet Office noted that as the withheld information showed, a number of issues were raised by officials and subject to debate.

24. The Cabinet Office accepted the complainant's position that the subject of what steps would be taken in the event of the Prime Minister losing their Parliamentary seat at a general election is an important constitutional matter. It emphasised that given the uncodified nature of the UK's constitution, and that these questions are contested, it is even more important that officials are given a safe space to discuss these issues freely and frankly.
25. Therefore, the Cabinet Office explained that the significance of this issue formed a key part of its considerations as to whether the public interest was in favour of, or against, disclosure of the information. The Cabinet Office explained that its view was that the very importance of the subject counts in favour of withholding the information from disclosure. In reaching this finding the Cabinet Office emphasised that the deliberations contained within the information concerned a matter of considerable constitutional significance and could therefore be held to be distinct from those deliberations which inform more routine advice which is put to a Minister.
26. Furthermore, the Cabinet Office argued that there is a strong public interest in officials being able to express themselves openly without the concern that their views and ideas will be prematurely disclosed. It argued that officials must be able to express disagreement with one another without tempering their voices out of concern that those disagreements would come to light. The Cabinet Office argued that if officials have the confidence to express disagreement with one another about a matter under consideration it better serves to reach the correct outcome because ideas will have been more thoroughly tested. Similarly, officials should feel that they have the freedom to advance devil's advocacy in order to provide rigorous testing to a range of ideas to ensure that they pursue the best possible course. The Cabinet Office reiterated that this is precisely the kind of deliberation that is supposed to be protected by section 36(2)(b)(ii) of FOIA.
27. The Cabinet Office argued that the disclosure of the information would undermine the ability of officials (including the Cabinet Secretary who would ultimately provide advice on this issue) in future to fully consider the scenario and the implications of any particular course of action. The Cabinet Office argued that will be necessary for them to do so in a timely fashion and particularly in view of any circumstances that may prevail at the time. In its view a premature disclosure of the information

would narrow the field of discretion available to officials and would therefore be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

28. The Cabinet Office also provided the Commissioner with additional public interest submissions which he has not replicated in the decision notice as they refer to the content of the withheld information itself.

Balance of the public interest arguments

29. 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.
30. In respect of whether the issue was a live one, the Commissioner accepts that at the point the request was submitted the general election of December 2019 had taken place and thus the situation envisaged in the request would not, in practical terms at least, be applicable until the next general election. The Commissioner is also, as a general rule, reluctant to accept that the decision making / policy making is an open ended process with no specific end point. However, in the circumstances of this case the Commissioner accepts the Cabinet Office's characterisation of the issue as a live one to the extent that this issue is one that could arise again at the next general election, and moreover he accepts that the issues considered in the withheld information would once again be central to any such discussions.
31. Furthermore, the Commissioner agrees with the Cabinet Office that it needs a safe space to debate such significant constitutional issues away from external comment and examination. The Commissioner accepts that the premature disclosure of information on this topic would be very likely to result in significant external comment to the detriment of the decision making process. The content of the withheld information, which reflects the free and frank exchange of views, also supports the need for such a safe space.
32. In relation to the chilling effect arguments, the Commissioner also accepts that disclosure of the specific information that has been withheld would risk undermining the candour of future discussions. Again, this in light of the free and frank nature of the discussions and the significance of the matters under consideration. Furthermore, in the Commissioner's view the timing of the request, so soon after the withheld information was created, adds further credence to the chilling effect arguments.

That is to say, if officials knew that candid exchanges on the topic of such a sensitive and high profile matter would be disclosed only a matter of weeks after taking place, then in the future the nature of such discussions would very likely to be altered. The Commissioner accepts that such an outcome would be firmly against the public interest for the reasons set out by the Cabinet Office.

33. Taken together these factors, along with the Cabinet Office's submissions which the Commissioner cannot include in this notice but which he considers to be compelling, his view is that significant weight should be attributed to the public interest in maintaining the exemption.
34. With regard to the attributing weight to the public interest in favour of disclosing the information, the Commissioner accepts that this is a key constitutional issue in which there is genuine public interest. In light of this there is a public interest in disclosure of information about officials' considerations on this issue. Disclosure of the information could also, as the complainant suggests, lead to a wider debate which could potentially in turn inform officials' decision making on this issue. As a result the Commissioner accepts that the public interest in the disclosure of the information on this issue should not be underestimated. However, having had the benefit of considering the content of the withheld information, and taking into account its context, the Commissioner is of the view that the extent to which disclosure of the information would meet this public interest is, to some extent, limited.
35. In contrast, and for the reasons discussed above, the Commissioner considers there to be a very significant public interest in maintaining the exemption, and on balance, in his view this is greater than the public interest in disclosing the information.
36. In reaching this conclusion the Commissioner wishes to emphasise that even if he had found that the policy and decision making, as the complainant suggests, was no longer live then in his view the chilling effect arguments would still attract significant weight, sufficiently so to mean that the public interest would still favour maintaining the exemption. This is because, in the Commissioner's view, there would still be real and very genuine risk of a chilling on future decision making (ie if one assumed that the current decision making is concluded) because of the content of the information, the age of the information at the time of the request, and the significance and sensitivity of the matters under discussion. In other words, in the Commissioner's view, disclosure of the information poses a genuine risk of undermining the candour of any similar future discussions which would take place during/prior to the next general election, regardless as to whether one considers the matter to be (at the time of the request) an ongoing one or not.

Right of appeal

37. 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

38. 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.

39. 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